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Democracy and European Justice and Home Affairs Policies under the shadow of September 11

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Abstract

European Justice and Home Affairs (JHA) integration can be characterised with reference to a number of interrelated phenomena, none of which is peculiar to the EU but all of which are defined by its unusual structure and policy-making framework: ‘securitisation’ describes the way in which security concerns have been privileged in policy-making, often to the detriment of competing social, economic and foreign policy goals; ‘Europeanisation’ describes the progressive treatment of JHA issues at a European level; ‘Externalisation’ is the process of the blurring of distinctions between policy areas which might formerly have been classified as almost exclusively ‘internal’ or ‘external’ to the state. A fourth trend concerns the way in which democracy and human rights have been both subverted and promoted in efforts to safeguard the EU’s security.

The end of the Cold War and the 2001 attacks on New York and Washington D.C. have had a formative effect upon all of these traits. Only by examining the interactions between them does it become possible to understand the current form of the EU’s JHA activities. These activities are often criticised for their unsuitability to the full range of socioeconomic and external challenges faced by the EU, and indeed to the very security challenges which many are specifically designed to meet. Moreover, they are considered undemocratic both in the way they are drawn up and in their effect.

The cumulative effect of these developments is apparent in an overview of the EU’s emerging asylum regime. This paper analyses the asylum measures adopted by the European Council and the Council of Ministers since the Treaty of Amsterdam, asking whether the post-Cold War/September 11 EU is capable of drawing up a well-rounded asylum policy in a democratic manner.

1. The Construction of a European Security Threat: Tracing the Security Continuum

1.1. The laboratories of Justice and Home Affairs policy-making

Students of European JHA cooperation, notably Didier Bigo (1994), have identified a 'security continuum' in policy-making, which conceives of various problems with a transnational dimension- cross-border criminal activity, uncontrolled immigration, terrorism, the presence of non-nationals in the member states - as part of the same security threat. The reduction of complicated and varied problems to the status of security threats means that such issues are not treated in their full complexity, but are rather dealt with in a short-termist and often reactive fashion. Root causes of problems go unaddressed; challenging social problems are written off as matters of security. Moreover, multidimensional issues that were previously handled by a range of policy-makers from different national ministries have increasingly fallen within the almost exclusive remit of JHA actors. A creeping logic of 'securitisation' has thus informed the ways in which related policy areas are drawn up.

These developments can be ascribed both to the 'laboratories' and 'driving factors' (Monar 2001) of European JHA cooperation: the predominantly inter- and transgovernmental policy-making fora (or 'laboratories') in which JHA cooperation has taken place have typically been characterised by the weakness of those democratic mechanisms that counter the development of overweeningly restrictive security policies at the national level. Some commentators go so far as to attribute 'securitisation' to a purposeful exploitation of the weakness of democratic mechanisms in European policy-making fora on the part of a core group of European interior ministry officials.

The 'policy-venue-shopping' thesis (Baumgartner/Jones 1993), according to which competing policy-makers seek out the venues most congenial to the realisation of their preferences, has been extended to European JHA policy-making (Guiraudon 2000). It posits that securitisation has been driven in large part by interior ministers and their officials exploiting the weakness of democratic mechanisms in European and EU policy-making fora in order to sideline impediments to their agenda. They have used the imperative of safeguarding internal security as a trump card in their dealings with other actors. Rival sections of the national executive have therefore been consciously marginalised as interior ministries have used JHA cooperation as a means to dominate or colonise policy areas.

The development of European asylum policy apparently presents the clearest example of this. At the national level, attempts to restrict access to asylum might be thwarted by judiciaries, international norms, UNHCR and pro-migrant NGOs, all of which exert only limited influence in transgovernmental fora and at the European level. National legislatures which might harbour expansive ideas about the rights of foreigners, and could certainly damage the efficiency of policy-making, are limited in their influence. The core band of interior ministers and their officials, who have driven asylum policy cooperation since the establishment of the TREVI and Schengen frameworks, have however been keen to maintain the trans- and intergovernmental character of asylum policy-making, cushioning themselves from supranational interference.

The tendency towards securitisation in JHA policies which arises in the policy-making laboratories has proved to be a self-sustaining phenomenon in many respects. Critics identify, for example, the 'virtualism' of efforts to combat illegal immigration: they suggest that measures taken against illegal immigration often criminalise further categories of immigrant, thus creating higher levels of illegal immigration (Samers 2004) In this way, the construction of a security threat becomes a useful tool for policy-makers with expansive institutional

ambitions. Although this observation seemingly ignores the fact that such measures can have a downward effect on the levels of unwanted immigrants coming to the EU, it does accurately suggest that once the securitisation of a policy area has begun it is often difficult to reverse. This may render the European JHA policy-making set-up ill-suited to dealing with new circumstances, to which a reactive security-based approach would ideally prove only a small part of the response.

Although European cooperation has facilitated the ‘two-level games’ played by interior ministers, it has not let them have it all their own way. The necessarily dynamic nature of European integration increasingly challenges the dominance of interior ministers in JHA policy-making. The coupling of JHA cooperation with the mainstream process of European integration has given the EU’s supranational actors a larger degree of oversight of, and input into, JHA: modes of European cooperation formerly occurred in transgovernmental fora on the fringes of mainstream European integration. Particularly since the late 1990s, these modes of policy-making have come to resemble more closely the ‘community method’, whereby the supranational actors enjoy more influence and inter-state activity is less consensual. National ministries that were sidelined in the TREVI and Schengen fora of the 1970s and 1980s are now better positioned to assert themselves in JHA policy-making within the Council framework. Since the Amsterdam Treaty (1997) legal professionals like judges and prosecutors have also gained an important role in the EU’s JHA activities. ‘Communitarisation’ may therefore prove incompatible with securitisation.

Similarly, the increasing communitarisation of JHA policy-making has increased the possibilities for cooperation between different policy areas at the European level. It has been recognised that greater interaction between policy areas may either entail the introduction of marginalised social, economic and foreign policy concerns into securitised JHA policies, or, conversely, the securitisation of other policy areas (Kostakopoulou 2000). Given the way in which distinctions between internal and external security have blurred, changes to the EU’s external capacity are of particular relevance to the development of its internal security policies. The end of the Cold War and the attacks on New York bookend a period of considerable institutional change within the EC/EU, empowering and restricting the actions of European JHA policy-makers in different ways.

The policy-venue-shopping thesis nevertheless regards the ‘institutional creep’ of national interior ministries as a prime driving factor behind European JHA cooperation- particularly in matters of asylum policy- and the construction of a European security concept. The laboratory itself is thus viewed as the motor behind JHA cooperation. Yet this analysis risks missing the relevance of those driving factors which arise outside the transgovernmental JHA policy-making laboratories. Some of these factors have a strong transnational dimension and lend themselves to treatment by states acting in concert. Others have affected all the member states in a similar way and have led to an overlap of national geopolitical agenda- as Realists would point out. Neo-functionalists and some Liberals would also argue that JHA integration can be driven by ‘spillover’ from activities in other areas of European integration, or from the actions of the supranational institutions. A combination of these factors taken together helps to explain why the response to (common) security challenges has often been to intensify cooperation between member states, rather than to withdraw from it.

1.2. Dealing with the driving factors of JHA activity: constructing the security threat

High profile events with negative security implications, rather than lower profile, longer term trends, have often triggered the most fundamental changes in the kinds of initiative adopted via JHA cooperation. This is because “the characteristic of security discourse at the highest

political level is to take one issue, dramatise it, and make it the most important threat confronting our societies“ (Anderson & Apap 2002:6). Given the nature of the European JHA laboratories, it is unsurprising that the prime effect of such events has been to spur on reactive securitarian activity, and to marginalise opponents of securitisation. Yet if these high profile driving factors also happen to reflect longer term, underlying changes in the nature of European security, new sets of actors may be empowered in policy-making and the JHA agenda thoroughly reordered. In the past quarter century this has been the case on two notable occasions- the end of the Cold War, as symbolised by the collapse of the Berlin Wall, and the attacks on New York in 2001.

The fall of the Berlin Wall and the attacks of September 11 were followed by a typical acceleration in security policy-making at the European level. Although supranational opponents to securitisation had gained a greater role in JHA policy-making, that acceleration was more marked in 2001 than in 1989: compared with the profile of European JHA policy-making at the end of the Cold War, EU JHA initiatives at the time of the 2001 attacks were relatively high-key. This meant that there was now a greater expectation that responses to security threats would be drawn up at the European level. The speed with which measures were adopted came at the expense of their comprehensiveness. For example, the definition of terrorism which was adopted shortly after the attacks “does not have the force of a legislative act. It serves a [sic] guideline and will be translated into legislation, if it is at all, by the actions of the member States“ (Anderson and Apap 2002:7).

Although the two events spurred on European JHA cooperation, in the short term at least they reinforced the trans- and intergovernmental, rather than the supranational, elements of policy-making. Certainly, the immediate response to the 2001 attacks was to smooth the passage of those security-related measures which had been awaiting adoption for some time, and there was even a certain movement – repeated after the 2004 Madrid bombing – to set up new European level bodies operating outside the Council machinery. However, the perceived need to act quickly in the face of the renewed security threat saw member states increase activity outside the formal procedures of the EU. Democratisation had apparently come at the expense of efficiency. The 2001 attacks allowed interior ministry officials to sideline rival actors by citing their greater legitimacy in dealing with security affairs.

The progressive communitarisation of JHA activities that occurred between 1989 and 2001 did not, therefore, fundamentally shift policy-makers’ short-term response to September 11 away from securitisation. The supranational actors are not immune to the forces which drive securitisation: whilst the European Parliament is for example somewhat removed from national electorates, it remains subject to electoral pressure to provide security, even at the expense of other priorities. Under the increased public scrutiny that followed the 2001 attacks, the supranational actors –which still enjoyed at best a precarious place in JHA policy-making, as well as lacking popular legitimacy- could do little to resist. Indeed, adhering to the securitarian agenda may have appeared as a means to win popular, or ‘output oriented’, legitimacy for themselves. Moreover, the supranational actors may have their own reasons - independent of their quest for legitimacy - for pursuing securitisation. The Commission has on occasions supported highly restrictive measures if it feels that European integration will be thereby furthered (Geddes 2000). Yet it is difficult to discern the effect of communitarisation on the long-term responses to such events. As the immediacy of events recedes, it may be that supranational actors are better placed to influence developments and increase their role in JHA policy-making.

Although they presented the member states with common challenges and led to a partial overlap of national agenda, the collapse of the Eastern Bloc and the 2001 attacks also affected the member states differentially. Just as the geography of the EU made certain states – particularly those with long Eastern borders - more vulnerable to the security threats associated with the end of the Cold War, the cultural nature of the attacks on New York appeared to place a different set of member states - like those with a large immigrant population - at risk.

Generally speaking, following a high profile event, those states that can show themselves to be most at risk are best placed to strengthen their position in policy-making. If the nature of the EU's security is understood to have changed, it is they who are able to perform a prime role in the construction of a 'new European security'. This kind of asymmetry has had a definitive effect on a policy area which retains a strong intergovernmental flavour. For example, European JHA policy since the fall of the Wall has been in part defined not only by Germany's geographical proximity to new security threats but also by the changes to German European policy which accompanied reunification (see for example Baumann et al. 2005). The fact that, by stressing the threat posed to the member state they represent, national policy-makers can strengthen their bargaining position means that the adopted remedy often bears little relation to the original problem. International and institutional competition are definitive in the construction of the security threat. However, with the growing communitarisation of JHA activity, this characteristic of policy-making may fade.

The fall of the Berlin Wall and the attacks on New York and Washington heralded or highlighted a long term shift in the nature of the EC/EU's security. This in turn required and empowered policy-makers to reorder the JHA agenda and, in particular, the security continuum. Following the end of the Cold War, European policy-makers had to come to terms with the security implications of a greater cross-border mobility at the EU's external boundaries. Issues of immigration, cross-border crime and terrorism were already on the agenda thanks to the growing free movement between EC member states; they now needed to be rethought and reprioritised. Similarly, following the attacks on New York, these same issues were again reordered. Whereas immigration and asylum had been prime issues following the collapse of the Berlin Wall, now terrorism rose up the JHA agenda, and asylum and immigration were increasingly treated as potential elements of a broader terrorist threat.

The reordering of the security agenda consisted not just of rethinking the importance attached to various elements which already fell within the scope of European JHA activity, but also of complementing these with newer elements which had now gained salience. In constructing their response to the perceived security threats at the beginning of the 1990s and the 21st Century, European JHA policy-makers succeeded in substantially extending their range of competencies, usually at the expense of other actors. This has notably been the case in asylum and immigration policy, which in some states was formerly dominated by economic, social and foreign ministries but which following the end of the Cold War was increasingly dealt with by interior ministers at the European level.

Yet this institutional creep has not always occurred against the wishes of other actors. They too have found that recourse to the security agenda is conducive to their own aims. After September 11, for example, security-motivated efforts to clamp down on the tax havens which apparently permit terrorist organisations to safeguard their funds chimed with initiatives undertaken by national finance ministries. The latter have become increasingly hostile to the fiscal competition from tax havens, especially in light of the constraints imposed by the

Growth and Stability Pact. Again, some supranational actors may also be keen to see this kind of institutional creep where it furthers European integration.

Thus the processes of the europeanisation and securitisation of JHA policies remain closely related, despite the growing influence of supranational and previously marginalised national actors in policy-making. The security continuum is multidimensional and has been extended in multiple directions. Anderson and Apap (2002: 6) predicted that following the 2001 attacks “security policies will be conceived, elaborated and analysed as a continuum, stretching from street level and activities which were formally thought to belong to ordinary criminality (such as the clandestine transfer of funds), to macro-strategic balances when punitive action is envisaged against states.” The police, intelligence and immigration bodies, and the armed forces would be enlisted to deal with challenges perceived to belong together. In other words, the distinction between internal and external security would be eroded.

2. European JHA and the new International Relations

2.1. Externalising internal security

The end of the Cold War and, to a lesser extent, the 2001 attacks changed the nature of international relations. This is of importance not just for the kinds of internal security threat faced by the EC/EU, but also for its range of responses. This observation is by no means self-evident. As Pastore (2001:1) points out,

in Machiavelli’s vision, internal and external threats to the power embodied by the Prince were clearly distinct. Internally, the ruler should fear conspiracy; externally, he should dread aggression by foreign powers. The Florentine also acknowledged interdependencies between these two fundamental categories of political risks: as a matter of fact, external peace would foster internal stability, and vice versa. But policy-making in the two fields was based on different sets of tools and responded to (at least partly) different logics.

Not only did the end of the Cold War and the 2001 attacks redefine international relations, they also blurred the distinction between internal and external security.

Pastore attributes this blurring to the twin processes of europeanisation and ‘externalisation’. In discussing europeanisation, Pastore stresses the way in which the security implications of the EC’s own efforts at free movement were dealt with by policy-makers. The process of externalisation is closely linked to this, and describes the way that the external dimension of internal security threats has been highlighted by policy-makers. Thanks in part to the policy-making set-up at the European level, the external dimension of internal security threats has gained an importance quite out of proportion to the danger it poses.

Prior to the end of the Cold War, the aim of removing border controls within the EC had created a pressure on member states to cooperate more thoroughly on matters of immigration and asylum. Those member states with stricter national border controls saw it as imperative to ensure that third-country immigrants could not enter the territory of the EC and legitimately travel to a state where they were unwelcome. Similarly, the aim of removing internal controls made the quality of anti-crime and terrorist activity in one state of potential relevance to all states. Some internal security threats – present or future – were seen to have their roots in other member states.

The end of the Cold War removed many of the barriers to free movement at the EC's external borders, as well as disrupting the forces of order in the EC's Eastern neighbours. The transnational nature of the new security threats, and the way in which they interacted with the EC's own aspirations for free movement, meant that the roots of internal security problems could now be located outside the EC/EU. European JHA cooperation had developed in order to meet threats with a cross-border element. Given the way in which they had been empowered by this cooperation, it is unsurprising that national interior ministries chose to lay particular emphasis on these new cross-border threats.

The nature of external security also altered, taking on a number of characteristics associated with internal security: the likelihood of being subject to a conventional military attack by another state diminished; however some of the former Eastern bloc's military technology passed into private hands and the risk of being attacked by non-state actors was deemed to have grown. The collapse of the Eastern bloc meant that many of the European external security and intelligence forces, which enjoyed large budgets during the Cold War, now sought a means to justify the same levels of spending and activity. They fixed their attention on non-state actors. More fundamentally, Western states had lost an important external enemy- a potentially destabilising development, since the modern nation-state is on some level 'held together by continuous communication of the threats it faces' (Cebeci 2004: 2) The generalised threat of the illegal immigrant, cross-border criminal or terrorist replaced state-actors as the prime external enemy.

The 2001 attacks shifted the focus from extra-EU immigration to terrorism. They made the generalised threat a more concrete one. The terrorist threat now had a name and an attendant organisation. Moreover, the link between internal and external security was further cemented: the internal security implications arising from a state's foreign policy were increasingly clear. Moreover, members of the resident immigrant population could be members of an external terrorist organisation. In the international environment, the *direct* threat from other states was still perceived to be lower than that from non-state actors. Non-state actors remained, therefore, a main focus of internal and external security efforts.

The bridging of the gap between internal and external security means that the nature of a state's external relations also defines its capacity to tackle potential internal security risks at their external source. In the post-Cold War era international relations have been defined by the existence of a sole superpower. They have been marked by a greater tendency towards intervention in other states by dominant Western countries, especially the superpower, and an emphasis on multilateralism, in part to contain that interventionism. Whereas this kind of interventionism was formerly discouraged on each side by the existence of a rival superpower, the dread consequences of uninvited activity in other states fell away with the Soviet Union. Since the end of the Cold War it has become possible to talk of an emerging post-Westphalian world order.

The considerable barrier to free movement and scientific exchange which was lifted with the collapse of the Eastern bloc facilitated developments in transport and communication, such that localised problems in distant states could be seen to have security implications for the superpower and other dominant states. The 2001 attacks have reinforced this by highlighting the transnational terrorist threat and further legitimising intervention in other states for reasons of internal security. Indeed, this and the recession of the threat of conventional military attack have arguably made intervention on grounds of internal security appear more legitimate than for more traditional external security reasons.

Interventionism has also been justified with reference to the discourse of humanitarianism- a development bound up with the Cold War and its end. There is no consensus about the place of humanitarianism in international relations. Some, like Francis Fukuyama (1992) argue that all states are eventually obliged to observe human rights –both in their internal and external policies- because this represents the highest form of legitimisation for a government. Realists view this as naive, positing that human rights are a Western construct, utilised to justify underlying geopolitical/security aims in dealings with less dominant states (for more detail see Forsythe 2000).

The EU's response to the external dimension of internal security is defined by the limits of its external capacity. The EU's military capacity falls far short of its economic clout- the so-called 'capability-expectations gap' (Hill 1988). It cannot be considered a power on a par with the US; yet it does enjoy a considerable external capacity. Its economic power acts as a means to sanction or further states. Some consensus has also been achieved between the member states, and with its allies, on the EU's role as a civilian power performing humanitarian and crisis management tasks (see Wivel 2005).

From a Fukuyaman perspective, it is natural that the EU - which lacks in legitimacy - should have adopted a strongly humanitarian foreign policy. However, if Realists are correct in their supposition that humanitarianism is simply a blind for the promotion of narrower security goals, then the development of the EU as a civilian power has manifest implications for the externalisation of internal security. The bodies responsible for maintaining internal order are, after all, frequently involved in external civilian actions. Significantly, many modern security threats – from unwanted immigration to terrorism – can be shown to have roots in the non-humanitarian treatment of individuals by other states.

Internal security actors are not, of course, the only ones with a stake in the EU's external policy; however, the pillar system developed at Maastricht (1992) acted as a block to cooperation between the Union's external and internal policy actors. Following the partial communitarisation of JHA at Amsterdam, the 1999 Tampere Council called for cooperation between JHA and other spheres. Yet despite high profile efforts on the part of the European Council, cooperation between national Interior Ministries and Foreign Ministries remains limited. Post-Amsterdam, Interior Ministries have, for example, succeeded in repulsing Foreign Ministries' influence over First Pillar JHA issues by ensuring that these issues are coordinated within the Council framework by the new Strategic Committee on Immigration, Frontiers and Asylum rather than Coreper (Peers 2000).

This inter-institutional competition has proved particularly intractable because, as the two security fields have merged, previously unimportant differences in the underlying principles promoted by internal and external security actors have gained salience. There is, for example, disagreement about the utility of the traditional interstate framework in efforts to combat the new transnational security threats posed by non-state actors. External policy actors are accustomed to operating within this framework, and are likely to take into account the full range of relations with another state. They prefer conventional interstate diplomatic, economic and military tools even when dealing with non-state actors. Conversely, internal security actors have considerable experience of dealing with non-state actors, however they may take a more sceptical attitude to traditional interstate means of dealing with them.

2.2. Internal and external democracy in European integration

Nowhere is this clash of precepts more obvious than in the EU's promotion of democracy. As Anderson and Apap (2002) note, external security is based in part on an inclusive dynamic whereby third states are drawn into a network of democratic values. The founding conception of European integration as a means of overcoming conflict, the dynamic of enlargement, as well as the Union's underdeveloped military capacity and its subsequent attempts to create a multilateral *lingua franca*, encourage this inclusive promotion of democratic values.

Of course, the degree to which these democratic values can be considered inclusive for non-Western states is questionable, as is the EU's commitment to them when competing security priorities appear jeopardised (Economist 2005). Nevertheless, particularly since the Copenhagen criteria were drawn up following the end of the Cold War, the conditionality of third states' adherence to democratic values has become a central tenet of the EU's external relations. The attacks of September 11 further politicised these democratic values. Even though the attack on these and other 'Western' values had come from non-state actors, much of the EU's response referred to a traditional conception of national relations, identifying the root of the problem in the non-democratic practices of other states.

Whilst the end of the Cold War and the attacks of September 11 have reinforced the EU's readiness to promote democracy as a means to safeguard its external security, the two events appear to have had the opposite effect upon its efforts to secure internal security. The secretive world of internal security policy-making is scarcely open to democratic input or scrutiny. Inter- and transgovernmental security policy-makers have used the end of the Cold War and the 2001 attacks to strengthen their position *vis a vis* national and supranational parliaments and courts. Moreover, there appears to be a fundamental tension between the provision of internal security and the full range of democratic values espoused by the EU and the member states. For security policy-makers, the broad aim of safeguarding a democratic EU may come at the cost of various individual democratic rights and norms. Both in their elaboration and form EU JHA policies lack democratic credentials.

This is not to deny that democratic mechanisms and actors have grown in stature in EU JHA policy-making, or that this may be in part due to the long term effects of the end of the Cold War and the 2001 attacks: the clear disjuncture between the EU's own practices and the democratic standards expected of other states since the end of the Cold War has been cited as reason to democratise the JHA sector. The acceleration in JHA cooperation that followed the two events has also led to a longer term pressure for democratisation, as the immediacy of events receded but the level of cooperation did not. Nevertheless, the reassertion of democratic actors does not necessarily imply a commensurate reinforcement of democratic norms. The European Parliament finds itself under considerable pressure to take a 'realistic' attitude towards the protection of human rights in JHA policies. In his recent meetings with MEPs, the British Home Secretary Charles Clarke made clear that the responsibility which accompanies greater influence over JHA involves adopting this realistic attitude. Moreover, democratic input may be at odds with democratic rights and norms, with security policy-makers claiming to respond to the will of the majority by compromising various categories of human right.

Whereas the EC/EU laid ever greater emphasis on other states' adherence to democratic values in the post-Cold War era, its own internal security policies have often treated such values as unsuited to the post-Cold War world. They were drawn up in a world where the movement of persons was rather restricted. The EU is particularly open to charges of double standards where its internal and external security fields meet. The intense inclusiveness and

requirements of democratic conditionality involved in the enlargement process clearly contrast with the demands that accession states adopt the EU's exclusive, internal security policies. The EU has also adapted to the new challenges posed to its own democratic commitments by drafting third states into its internal security initiatives. This is a logical response to the transnational developments which pre-1989 democratic mechanisms were not apparently drawn up to deal with. Yet in some cases, the EU has recruited third states to help it circumvent its own democratic commitments.

3. European asylum policy after the Cold War and September 11

3.1. Policy-making in the changing asylum context

Having examined the dynamics of europeanisation, securitisation, externalisation and democratisation, the question remains of whether the post-Cold War/ September 11 EU is capable of drawing up rounded JHA policies that meet the full range of challenges facing it. Asylum provides a ready example of a policy area with a broad range of implications for European security, society, economy, external relations and democracy. Moreover, the context within which asylum policies are formulated has changed considerably since 1989 and again since 2001.

The cessation of the Cold War removed a considerable barrier to the movement of persons. The restrictions on European states' capacity to control the entrance and exit of third-country-nationals arising from the normative asylum framework were potentially damaging to their very legitimacy. Further, the end of the war weakened the geopolitical and symbolic grounds for maintaining a right of asylum. When establishing what form a well-rounded asylum policy should take, perhaps the most fundamental issues to address would therefore concern the question of whether the EU should offer access to asylum at all; whether it should instead develop a radically new approach to the abuse of human rights in third countries, and attempt a reclassification of the forms of migration to which it is subject. In short, should the EU's asylum policy continue to respect the relevant provisions contained in the Geneva Convention and other national and international texts? Some member states openly advocate the revision of a framework which they view as unsuited to post-Cold War mobility and post-September 11 terrorist threats. However, if the EU were to develop – within this normative framework - a means of reducing the numbers of applicants for asylum, and of mitigating the terrorist threat and negative internal effects of asylum, this would surely be preferable to its revising the framework and backing away from its humanitarian commitments.

The international asylum system drawn up before 1989 was based on the recognition that, although states were limited in their capacity to intervene actively in other states, they had a duty to act in the face of external human rights abuses. National asylum systems reflected the disjuncture between a relatively modern understanding of the 'international community' and the nation-state's responsibility in it, and a more traditional conception of the state's capacity to meet that responsibility. The result was a policy area marked by its reactivity to external events. The high mobility of individuals in the post-Cold War era made this reactivity particularly problematic. However, the greater recourse to external interventionism that characterises this era also offers a chance to deal pro-actively with the causes of migration – including human rights abuses – and terrorism at their source. In this context, asylum policies aimed at lowering the numbers claiming asylum enjoy new opportunities proactively to neutralise the root causes of migration flows. Viewed in this way, the end of the Cold War presented a potentially fatal challenge to the normative asylum framework, but simultaneously offered a means to – at least partially - meet that challenge.

The solution to the challenge to the normative asylum framework lies primarily in dealing proactively and curatively with the external causes and the internal negative effects of migration. Where migration flows persist, despite efforts to tackle root causes, the numbers of applicants for asylum can be reduced in those member states, where they are deemed too high, by sharing the burden of hosting asylum-seekers between other members of the EU as well as those third countries with the necessary resources. Many of the precepts of securitisation, particularly those that have encouraged distinctions between member state nationals and certain non-nationals, must be rolled back.

Securitarian policies alone would prove inept in these efforts, largely because of their reactive, as opposed to curative, approach and their narrow frame of reference. Moreover, the securitarian agenda fails to take advantage of the EU's novel capacity to repackage asylum policy so that the framework of democratic rights is reconciled with a democratically expressed desire for the more comprehensive control of access to asylum. The EU has tools at its disposal that are not necessarily available to member states operating alone or in other international organisations. The EU's external capacity, for example, may permit it to address the root-causes of forced migration more effectively than member states acting alone. Policy harmonisation is a prime means of 'soft' burden-sharing (Thielemann 2005). European cooperation can also be instrumental in engendering a sense of solidarity between states so that those receiving fewer asylum-applicants are persuaded to take more. The EU may spread best practice between states, so that applicants are dealt with swiftly and effectively. Further, these tools could be instrumental in breaking the securitarian basis of asylum policy, using the EU's post-national traits and the low-key nature of its policy-venues to blur distinctions between citizens and non-citizens.

Within the framework of their obligations and the possibilities offered by European integration, the member states must come to terms with a number of competing priorities in their asylum policy. The security risks attached to asylum after September 11 are in large part connected with the problem that potentially dangerous foreign nationals claiming asylum can enter the territory of the EU and take advantage of certain rights and liberties. Yet the full range of security implications arising from asylum are rather broader. For example, the attacks of September 11 highlighted the EU's need to integrate – or at least not to alienate – resident foreigners. Unless the EU is capable of removing asylum as a means for third-country-nationals to remain on its territory (for example by externally processing asylum-seekers), it must find a social and economic space for asylum-seekers and refugees. There is thus a necessity to facilitate the exclusion of asylum-seekers who exploit the rights afforded them, and one to integrate - if temporarily - genuine asylum-seekers and those who cannot be removed. These dynamics of inclusion and exclusion should ideally be complementary.

The EU must also seek to place security concerns within a broader hierarchy of priorities, taking account of social, economic, external and democratic aims. This will help it to strike a sensible balance between the inclusion and exclusion of asylum-seekers on grounds of security, and more generally. It may also unravel some of the effects of having placed security concerns consistently at the top of the asylum policy agenda at the European level.

There are persuasive social and economic grounds for formulating a generous asylum policy. Prime amongst these is the so-called 'demographic deficit' which threatens European economies and welfare systems. Immigration is by no means an ideal solution to these problems, and asylum-seekers are perhaps even less desirable than voluntary immigrants as a means to plug the demographic gap. Asylum policy as a normative construct is not reactive to the vagaries of host states' social and economic requirements, meaning that it is difficult to

select the kinds of asylum-seeker that will come to the EU. Nevertheless, at the very least, the EU should streamline demographic concerns and ideas about how to redress the labour shortages in certain low-paid or highly qualified sectors into its treatment of asylum-seekers. Policy-makers must judge the extent to which the socio-economic benefits accruing from the respect of asylum-seekers' family unity, and their activity in national economies are outweighed by the costs to security.

The socioeconomic grounds for strictly controlling access to asylum are also persuasive. The cohesion of European societies may be disrupted by poorly controlled migration. This threat may arise from immigrants' temporary or even illegal position in the EU. This, and immigrants' perceived effect upon wages and labour markets, help explain hostility towards immigrants on the part of sections of the member states' societies. However, measured control, rather than reactive restriction, of inward migration flows provides a more suitable response to these socioeconomic pressures. Indeed reactive restriction of migration flows, which have already begun, may worsen the problem, driving immigrants – voluntary or forced – into travelling illegally, excluding them once they are in the host society, and failing to take advantage of the potential social and economic benefits they offer. The official demonisation of unwanted immigrants, and restrictions imposed upon their fulfilling useful functions, may fuel racism.

Just as policy-makers must juggle security concerns with socioeconomic ones, so too must the EU's broader foreign policy be taken into account. The potential clash between reactive, securitarian policy goals and the external promotion of human rights and democracy was outlined above. As in other areas of JHA, asylum policy-making at the European level has been characterised both by a lack of democratic input and a desire to circumvent the strictures of human rights obligations. There is a similar tension between those elements of external policy that envisage the liberalisation of barriers to international trade, and interior ministers' efforts to limit freedom of movement into the EU. Rather than using external policy to coerce third states into sharing the burden of asylum and to act as defensive barriers against unwanted immigration, JHA policy-makers will find greater synergies with the EU's mainstream external policy if they concentrate on building the capacity of third countries to deal with asylum-seekers, and proactively treat the root causes of migration.

The policy-venue-shopping thesis indicates that the processes by which policies are drawn up are also of importance. It argues that the weakness of democratic mechanisms at the European level has been exploited in order to restrict access to asylum. Given the growing calls for the restriction of asylum particularly since the end of the Cold War, European cooperation has thus permitted national governments to ease the tension some have faced between the expressed will of the electorate and the normative protection of the democratic values and rights enjoyed by non-nationals. However, with the increased integration in this area, the EU's democratic mechanisms have been increasingly asserted in policy-making. The reassertion of democratic mechanisms in European asylum integration underlines the imperative of repackaging asylum policy. Previously excluded from asylum policy-making and its 'new realities', and somewhat removed from the electoral pressures faced by member states governments, the EU's resurgent supranational actors may impose a more severe form of democracy than that circumvented by interior ministers at the national level.

3.2. The europeanisation of asylum policy

The europeanisation of JHA has coloured the development of those elements of European integration with a potential to extend the rights of *all* those in the member states. Distinctions made between third-country-nationals and migrant citizens of the member states have

rendered more distant the prospect of social or economic membership of the EU grounded on anything other than national citizenship. Whilst certain rights have recently been extended to long-term resident third-country-nationals, asylum-seekers are still conceived of as 'uncontrolled migrants'. Europeanisation has thus facilitated the securitisation of asylum policies.

Yet improvements made to the status of third-country-nationals reflect the dynamic nature of European integration, the assertion of democratic values at the European level as well as of supranational actors in policy-making. The EU's post-national traits may facilitate a blurring between nationals and non-nationals, something which could prove key to the member states' capacity to draw up an asylum policy suited to the post-Cold War era. The resurgence of the supranational actors alongside supranational democratic mechanisms may also herald a shift away from the securitarian approach to asylum, which often entails a reactive attempt to circumvent human rights obligations.

The 'grand theories' of European integration would ascribe different significance to the ending of the Cold War and the 2001 attacks in their explanations of asylum policy integration.

- For Realists, these events are of central importance in explaining developments in an area of vital national politics. This school would highlight the – by no means permanent – overlap of member states' geopolitical priorities and asylum preferences arising from the two events. In order to take advantage of the benefits of collective action on these areas of overlap, states have empowered supranational actors and drawn up common rules of which they remain the masters.
- For Neo-functionalists, who draw on Liberal thinking, these events have been of less importance, except insofar as they have presented supranational actors with the opportunity to perform the political entrepreneurship that drives integration, or where they have interacted with pre-existing endogenous European developments such as efforts towards free movement. The 'asylum crises' following the end of the Cold War have also provided a catalyst for 'social learning' amongst national policy-makers at the European level (Geddes 2003). Primarily, though, the EC/EU's asylum activities derive from 'spillover' from initial economic integration, and in particular the free movement of workers.
- Though not a 'grand theory', the policy-venue-shopping thesis would also downplay the significance of these events, except where national interior ministers exploited them in order to reinforce their own position in policy-making. It points out that European asylum cooperation began before the convergence of national asylum preferences from 1989 and outside the mainstream of European integration. It cites interior ministries' search for policy-venues in which to assert themselves and their security agenda as the impetus behind cooperation. The (limited) communitarisation of asylum policy can be explained with reference to inter-institutional competition, and in particular the fact that actors other than national interior ministers have drawn up the policy-making framework (Guiraudon 2000).
- Scholars building on the precepts of historical institutionalism (Pierson 1996) might cite path dependencies arising from institutional configurations drawn up before the end of the Cold War and 2001 attacks changed member states' asylum preferences. Following the two events, member states would be obliged to reconfigure institutional frameworks, but taking account of the ways in which previous structures had changed modes of policy-making and expectations.

In reality, it appears that more than one of these dynamics alone has been instrumental, and at times dominant, in the europeanisation of asylum policies, and that greater synthesis is required between the theories. Europeanisation has spanned transgovernmental cooperation on the very limits of the EC's institutional machinery, as well as a growing communitarisation after the Treaty of Amsterdam. Yet communitarisation is by no means complete, and the position of the EU's supranational actors remains in many ways precarious.

When transgovernmental internal security cooperation between Western European states was formalised within the TREVI framework from the mid-1970s, the meetings between government officials often dealt with sensitive material, were geographically removed from national parliaments and courts, and attracted little publicity. They covered most areas of JHA with a transnational dimension, increasingly including aspects of migration which had traditionally been handled by different ministries, and involved a number of policy areas and empowerments of the EC system. Attempts to restrict immigration, particularly after the oil crisis, saw a rise in irregular immigration and reinforced migration's profile as a security issue.

Since the 1980s, the free movement of persons in Europe and the definition of a European citizenship have been central themes of political discourse. However, practice has often been far removed from these vocal political objectives (Edelman, 1991). Pre-emptive security measures, aimed at combating the potential problems of free movement appeared to outweigh concrete moves towards its realisation. The Schengen Agreements of 1985 and 1990 were signed between a growing band of EC states with the aim of preparing 'compensatory' measures for the fuller realisation of the principles of free movement as laid out in the then EC Treaties. The control of asylum and immigration was conceived as a prerequisite for the free movement of persons. In this way, the freedoms of member states nationals could only be extended if those of third-country-nationals were strictly controlled.

Due to British, Danish and Irish reservations (De Ruyt 1987; Gazzo 1985) the Single European Act (SEA) excluded freedom of movement from the then Article 100a, which provided for qualified majority voting (QMV) in the Council and the co-operation procedure with the European Parliament. Instead, the member states annexed a political declaration to the SEA, confirming the intergovernmental character of policy-making aimed at the free movement of persons. The SEA left matters regarding „the entry, movement and residence of nationals of third countries” as well as those on „the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques” (SEA, Declaration 2 annexed to the Final Act) to inter-state co-operation outside the legal and institutional framework of the then European Communities.

The cessation of the Cold War removed a barrier to the movement of persons between East and West Europe, interacting with the negative externalities of European integration and efforts towards free movement. For the member state governments it became increasingly apparent that their lowest-common-denominator trans- and intergovernmental approach to asylum was unsatisfactory; they initiated a shift towards supranationalisation in order to counter the problems of this kind of collective action. Moreover, asylum rose up the electoral agenda, reducing resistance to the pooling of national sovereignty for both governments and electorates (Hix 1999: 318-329).

Post-Cold War international relations also widened the scope for the member states to intervene in third countries and to tackle the root causes of forced and voluntary migration. However, a lack of cooperation between external policy, and internal security, actors meant

that such efforts were seldom proactive. Instead, JHA initiatives focused on developing a system of 'remote control': third states, particularly those on the EC's Eastern and Southern borders, and non-state actors like airlines were enlisted in the EC's battle against unwanted immigration.

The decision at Maastricht to couple JHA cooperation more directly to mainstream European integration marked an opportunity to extend to JHA the powers enjoyed by the European Parliament and Court under the EC Treaty, as well as to enhance free movement within the EC. As it happened, only the Belgian and Dutch governments pushed for JHA to be brought under the EC Treaty. Instead, the European Parliament (EP) and European Court of Justice (ECJ) remained broadly excluded.

Maastricht's Title VI confirmed the trend which had developed over the previous decade, whereby 'soft' issues like asylum and immigration policy were fused with 'hard' issues like law enforcement. Asylum was increasingly threaded to other forms of 'uncontrolled' migration, and thenceforth to broader security issues. The extension of this security continuum threatened to set out of kilter the delicate balance between security and liberty that democratic mechanisms are designed to maintain. By contrast, infra-EU migration, particularly that involving member state nationals residing elsewhere in the EU for work purposes, continued in large part to be treated as an economic and social, rather than a security matter.

The coupling of JHA cooperation with mainstream European integration has empowered actors other than interior ministers and their officials to construct the framework for asylum policy-making. It is possible to exaggerate the degree to which interior ministers have been unwilling parties to the resulting reassertion of democratic mechanisms, but the policy-making framework constructed since Amsterdam has not always appeared the most congenial environment for the realisation of their agenda.

Supranational democratisation was driven on by the European Parliament, which explicitly drew attention to the disjuncture between the EU's expectations for other states' standards of democracy and its own practices. It also pointed out that national parliaments had been sidelined in the development of European JHA cooperation, but few new channels of democratic input had been innovated (Monar 1995). The Commission, meanwhile, developed its capacity and expertise in JHA policies even though its official role in them was exceedingly limited. It created a new division in its Secretariat-General and extended a JHA portfolio to one of its Commissioners. Both actors regarded an increase in their roles in JHA policy-making as a priority for the 1996 IGC.

Compared with Maastricht, Amsterdam reflected a more 'liberal' attitude amongst member state governments as illustrated not just by the (in reality much qualified) Article 62 EC Treaty, which specified that the principle of the free movement of persons would apply to third-country-nationals. By bringing asylum matters under the First Pillar, Article 63 (1) and (2) raised the expectations of those who judge European Commission texts „more generous” than those of certain governments influenced by extreme right political parties (Austria, Denmark, France, Italy, Germany).

The Amsterdam Treaty introduced the European Parliament as a fully-fledged consultative body within the new Title covering the „Area of Freedom, Security and Justice“. Whilst until May 2004 the EP was only consulted, Article 63 allowed the Council to introduce the co-decision procedure after the end of this transitional period. However, the move towards the

application of the co-decision procedure remained subject to a unanimous decision of the Council. This unanimity reserve was put into the Treaty during the last days of the Amsterdam IGC on the insistence of the German government.

The changes to JHA elaborated during the 2000 Nice IGC indicate the ambivalence of member state governments to move essential parts of a policy field of vital national importance towards supranational rules and institutions while maintaining national reserves and optional vetoes (Wessels 2001). As regards all measures on asylum and refugees (Articles 63(1)(a), (b), (c) and (d) and 62(2)(a) EC Treaty), co-decision is only to apply after the Council has unanimously adopted a legal act laying down the common rules and principles governing these matters.

By contrast, the construction of an area of freedom, security and justice was given new impetus by the conclusions of the 1999 Tampere European Council. The Tampere Programme was adopted following discussion with the EP's President and alongside a summit meeting organised by the NGO European Council on Refugees and Exiles (ECRE). It had input from national legislatures, particularly the Finnish Parliament (ECRE 2000:43) and bore the imprints of a comparatively open process of deliberation. The Tampere 'milestones' reaffirm the centrality of democracy and the rule of law in the Union's values, and ensure that freedoms are not reserved to citizens of the Union alone. Although access to these freedoms is to be strictly regulated, the controls are to be set at the external borders of the EU rather than within society.

Setting out the aim of creating a common European asylum system, the Tampere Programme elaborates a set of 'first-wave measures' to be adopted by May 2004. In this, the EU was „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.” The strict control of access to the freedoms of the Union was therefore understood as compatible with continued access to asylum (ECRE 2000:81).

The 2001 attacks served in the short term to strengthen the trans- and intergovernmental actors involved in day-to-day JHA policy-making. However, this pattern has not been reflected in efforts to formally reconfigure the overall institutional framework of asylum policy-making. The supranational actors have grown in stature. This is partly because the actors involved in these efforts are different from those that dominated day-to-day policy-making. This was particularly the case thanks to the novel means by which the Constitutional Treaty was drawn up. It may also be put down to path dependency from previous institutional change. Expectations about the form that institutional change should take arose from the Treaty of Amsterdam's clause allowing the Council to shift to co-decision from mid-2004. This clause was elaborated before the 2001 attacks altered member states' asylum preferences.

The Hague Programme, which was drawn up some three years after the 2001 attacks and shortly after the Madrid bombings (Podolski 2004), „reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe” (European Council 2004:12). The Constitutional Treaty would extend qualified majority voting and co-decision between Council and Parliament to the Title IV measures concerned with the free movement of persons. It removes the anomalous rules restricting the European Court of Justice's jurisdiction over asylum policy, and upgrades the quality of human rights protection in the EU, enhancing the idea of the EU as a Community of (democratic) values. The Constitutional

Treaty builds on the Tampere aims by calling for a ‘Common Asylum System’ to be constructed. Irish, British and Danish opt-outs remain unchanged though.

Against this background, the Commission and JHA Council elaborated the Hague Programme for the further development of the area of freedom, security and justice. The Hague Programme clearly shifts the policy-making framework further from intergovernmentalism and introduces a greater degree of supranational democracy. The final wording adopted to announce these changes suggests that they were not as comprehensive as some member states had wished. An earlier version stated that „full account” had been taken of the EP’s more expansive views of institutional change; now simple „account” is taken (Peers 2004a).

Nevertheless, the programme’s substance features a widening of the European Parliament’s co-decision rights in the EU’s Asylum and Migration policy framework. According to the Hague Programme, the Council shall „adopt a decision based on Article 67(2) EC Treaty immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Article 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration” (European Council 2004: 13). For legal voluntary immigration, the veto was retained at Germany’s behest and the EP will still only be consulted in this area of decision-making. Since the QMV decision was dealt with last of all, Germany was able to threaten to block the whole Programme unless its wishes were respected.

The scope of the European Court’s jurisdiction over JHA has not been expanded, and some NGOs suggest that a legal case could be brought against the Council for failure to act in this regard (Peers 2004b). By referring to the area of freedom, security and justice here as “relatively new” (European Council 2004:36), the member states signal their awareness of this incongruity in a Programme which seeks to “strengthen justice”, and excuse it as a temporary phenomenon.

3.3. The continued securitisation of asylum policy after September 11

Despite the policy-making structure elaborated at Amsterdam and beyond, after September 11 the twin processes of democratisation and supranationalisation appear to have faltered in everyday policy-making. The securitarian agenda has reasserted itself in asylum policy-making. Evidence of this is found in the ‘first-wave’ legislation adopted under the Tampere Programme. Yet it is also evident in the measures delineated by the Hague Programme and adopted by the European Council, which set out the Union’s JHA agenda for the next five years.

The concept of ‘pull-factors’ rests on the idea that the way migrants are treated within the host-country may encourage or deter the arrival of unwanted migrants. With the heightening of the terrorist threat, the risk of being viewed as a ‘soft touch’ for immigrants –and thus for potential terrorists - became particularly undesirable. States’ desire to combat pull-factors within society undermined the Tampere Programme’s aim to confine immigration control to the border. Compared to the provisions in place outside the EU’s south, the resulting first-wave initiatives set relatively low standards for the social rights of asylum-seekers in the member states. This reduced ‘pull factors’ and simultaneously restricted asylum-seekers’ social contact, so as to make eventual removal more straightforward.

Similarly, in the reception directive, Germany was active in introducing restrictions on the freedom of movement of asylum-seekers even within the national territory, reflecting a national asylum system in which the *Länder* play a prime role, and despite resistance from the

French and Swedes. This suggests a continued imbalance in the relationships between freedom and security, citizen and non-citizen, and is hardly in the spirit of the Tampere Programme. Even in a security context where the societal integration of immigrants had gained particular salience, policy-makers' priority was to facilitate the removal of failed asylum-seekers, rather than to integrate potentially successful ones.

Asylum-seekers' access to the labour market was treated not as a means to alleviate some of the welfare, demographic or labour market pressures which led to the elaboration of the Lisbon agenda, but rather as an undesirable point of contact between forced and voluntary migration, whereby voluntary immigrants pose as asylum-seekers in order to gain access to the labour market. This line of thinking has persisted, then, since the end of the Cold War. The Commission proposed that the reception directive grant access to the labour market within six months of an application being made. This was acceptable to Portugal, Sweden and Greece, which offer access to the labour market to avoid overburdening their social welfare systems. Yet for Spain, Ireland, France, Britain and Germany it was unacceptable. The UK pushed for a clause ensuring that asylum-seekers could be obliged to contribute to the costs of their care, so as not to overburden its system. Those member states which could show themselves most at risk from the security threat of unwanted immigration won out, and the deadline for access to employment was extended from six to 12 months.

Table 1: The first wave measures

Temporary Protection Directive	Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx	The directive's adoption in mid-2001 might have affected the nature of subsequent measures: member states may be persuaded to countenance 'day-to-day' burden-sharing to ensure that future mass-influxes are dealt with in concert (Thielemann 2005); this instrument assured future solidarity before measures dealing with day-to-day burden-sharing had been drawn up.
Dublin II	Council Regulation 343/2003 laying down the criteria and mechanisms for determining the member state responsible for examining an asylum application	Maintains the principle of the controversial Dublin Convention so that, broadly speaking, the state through which an applicant gains access to the EU is responsible for the asylum claim. Political agreement was reached in December 2002.
Reception Directive	Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers	Negotiations ran from May 2001 to January 2003. They were reopened following initial political agreement in April 2002.
Qualification Directive	Council Directive 2004/83/EC on minimum standards for the qualification of refugees	Defines those in need of protection and sets out their rights. Its passage was delayed by the concurrent passage of the German Immigration Law. Agreement occurred nine months after the June 2003 date set down by the Seville European Council.

Procedures Directive	Council Directive 2004/83/EC on minimum standards on procedures for granting and withdrawing refugee status	An initial Commission proposal was negotiated during 2001 but ended in deadlock. By April 2004, the Council had agreed a general approach on the renegotiated directive, pending agreement on a legally binding list of 'safe-third-countries'. This was not achieved, so that the list will be discussed after the shift to QMV. This may allow a majority of member states to sideline opponents of the list. Political agreement on the rest of the directive was reached in November 2004. It has been referred to the EP whose Citizens' Rights Committee has proved critical of the measure.
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Formerly sidelined social and economic issues have not therefore been reintroduced into asylum policy-making in the same way as many charting the post-Amsterdam institutional reforms had expected. Where socioeconomic issues were reintroduced, they did not necessarily render asylum policy any more balanced. Unsurprisingly after September 11 and the subsequent attacks on Madrid, the social integration of third-country-nationals has an important place in the Hague Programme. The Programme talks of the need for „obstacles to integration... to be actively eliminated” (European Council 2004:19), but it has become clear that the attitudes of third-country-nationals are perceived as the obstacles: equality of opportunity will not be achieved by extending rights to migrants, without making this conditional upon some reciprocal change of attitude on their part. The special needs of asylum-seekers are not mentioned in the Programme. Many asylum-seekers are involuntary migrants, and UNHCR and some NGOs worry that the same demands will be made of them as are made of voluntary immigrants. The resurgence of the social agenda at the European level is not necessarily synonymous with the emergence of asylum as a more independent policy area.

With the sidelining of the supranational element of policy-making after September 11, narrower national interests were reasserted, and the possibilities for 'hard' burden-sharing following the establishment of the European Refugee Fund in 2000 were set back. Forms of 'soft' burden-sharing were however realised: although a core band of member states dominated first-wave negotiations, these were not the countries like Greece or Portugal which generally have the poorest provisions in place. The large member states and main receiving countries, UK and Germany, instead set the course for the European asylum system. Southern states' attempts to push for more 'porous' minimum standards – particularly under the 2002 Spanish Presidency - were generally resisted, and the leeway to maintain existing provisions cut. Policy harmonisation above a lowest-common-level is understood as evidence of burden-sharing amongst those states with previously poor provisions. Burden-sharing is therefore compatible with securitisation, however it arises not from supranational policy-making or a sense of solidarity, but from member states with higher standards of provision exerting pressure on those with lower ones.

The reordering of the security agenda after September 11 is clear in the slothful adoption of the first-wave measures. Asylum had slipped down the JHA agenda except insofar as could be

understood as part of a broader terrorist threat. The aim of drawing up a 'European asylum policy' lost much of the backing it had received from the member states. The ebbing drive behind the creation of a common asylum policy was particularly apparent in the elaboration of the Hague Programme. The member states, apparently exhausted by their efforts to reach agreement on the Tampere first-wave procedures directive, shied away from tying themselves to the realisation of too many new measures.

The UK and Germany opposed further structural and operational harmonisation, preferring instead the more *ad hoc* structures in place, whereby the Commission calls together member states officials when required. The same reluctance to increase the EU's powers informs the development of a common asylum procedure. UNHCR, promoting the 'EU prong' of its new asylum strategy, proposed plans for a centralised single authority to assess applications. The Commission made it clear that procedural centralisation was not the aim, and that the EU's own operational power in this domain would be minimal during the five year period. This reflected many member states' positions, particularly the UK's and Germany's.

The UK was particularly wary of the member states' producing a 'visionary' plan for the next five years (House of Lords 2005:48). It put the emphasis on pragmatism, and met with general support. The general orientations of the Hague Programme lay particular emphasis on the implementation and evaluation of measures. This is the first time that the Commission has been required to monitor JHA implementation during the transposition period (Peers 2004a).

UNHCR, in particular, supported the efforts to monitor implementation. The idea of the Commission drawing up yearly implementation reports was resisted by some states, but earlier experience of those states with laxer standards signing up to measures, which they then poorly transposed, was decisive. The UNHCR-Commission-UK led emphasis on evaluation and implementation chimes with national parliaments' concerns (House of Lords 2004). It arises from the understanding that migration flows can be best controlled and 'bogus' asylum-seekers excluded not by endless restrictions to access to asylum, but rather by improvements in the administration of asylum systems. It also reflects a desire to cement soft burden-sharing by ensuring that those member states with poor national provisions raise them in line with first-wave standards. Again, then, the continued inter- and transgovernmental influence over asylum policy since September 11 has not proved entirely detrimental to attempts to draw up a well-rounded asylum policy that respects democratic values.

Thus, despite the growing influence of the supranational actors as the immediate impact of September 11 recedes, the securitarian agenda still shapes the development of asylum policies. Building on initial input from the UK, proposals by the Commission for the 'external processing' of asylum applicants showed a marked concern for the resettlement of asylum-seekers in the EU and capacity-building in third countries (European Commission 2004; ECRE 2004). This suggested that external joint processing was being developed to save asylum-seekers from making dangerous journeys to the EU, rather than as a means to keep them at bay. Nevertheless, the British NGO Statewatch pointed out that the securitarian agenda continued to set the frame of reference for new, increasingly democratised EU asylum policies: it argued that it is securitisation that has closed off access to asylum, forcing 'genuine' asylum-seekers to resort to dangerous illegal means of entry to the EU (Statewatch 2004). Yet, instead of treating this central securitarian bias, new policies are being constructed according to its underlying principles. It is unclear whether communitarisation will lead to the fundamental rolling back of the securitarian agenda, or will merely fuse new elements to European asylum policy whilst maintaining its securitarian foundation.

3.4. The externalisation of asylum policy

Post-Cold War international relations have created a challenge for asylum policy-makers by increasing mobility, but also offered a partial solution to these problems by opening up paths for the resolution of the causes of migration at their root. Since September 11, foreign and development policy instruments have been employed in dealing with root-causes of migration (Niessen 2004). This attempt to repackage asylum policy, by making it less reactive, and more curative, has not been unproblematic though. Critics complain that development aid is targeted not at those areas most in need of it (for fear of making populations there more mobile), but rather at more affluent areas which produce the most illegal immigrants (Boswell 2003).

Nevertheless, attempts to infuse external policy tools with a securitarian, reactive mentality have not always been successful. In 2002, the British and Spanish Prime ministers Blair and Aznar argued for development aid to be made dependent on third countries' efforts to stem migration flows. Their suggestion was opposed by France, Luxembourg and Sweden (Guardian 2002) on the grounds that this kind of reactive externalisation of internal security goals would be counterproductive to the EU's broader external policies.

The British government's 2003 paper 'New Vision for Refugees' suggested that military intervention would be justified in those states from which there was mass and uncontrolled emigration, because of the threat posed to security (UK Government 2003). This reflected a desire to transfer to a reactive policy area the precepts of a foreign policy that cites Britain's new responsibilities in a 'post-Westphalian' system of international relations in order to intervene more actively in other states. It also reflected a desire to use conventional interstate means to settle an internal security threat posed by non-state actors. The attempt to further link the internal and external security fields met with little enthusiasm at the European level. Whether this suggestion for better controlling access to asylum could be made compatible with the strictures of the democratic system is therefore unclear.

The Hague Programme meanwhile invites policy-makers to explore the possibilities of dealing with asylum externally. The question of the joint external processing of applications remains one of the most controversial aspects of the Programme, and states' reactions run the gamut from outright approval to complete opposition. There is currently no consensus about what form this joint processing would take, however it may offer the EU a means to use its external capacity not as a tool for dealing curatively with the root causes of migration, but rather for acting in a fundamentally reactive manner, removing all those who apply for asylum within the EU to processing centres outside its territory. In fact, this might prove the most complete form of the reactive securitarian approach, simultaneously dealing with the abuse of asylum by voluntary immigrants since the Cold War, and by terrorists since September 11 by clearing asylum-seekers from the EU. It would relieve the EU of the need to deal pro-actively with the external root-causes and the initial internal social effects of asylum-seeking. Those member states worried that external processing would entirely replace the national reception of asylum-seekers stipulated that any external processing will be "in complementarity with the Common European Asylum System" (European Council 2004:18).

Germany and other proponents of external processing deployed humanitarian rhetoric, arguing that external processing would relieve applicants of the need to undertake dangerous journeys to the EU by processing them near to their countries of origin. Yet member states opposed to the scheme saw external processing as a means to co-opt third countries into the EU's efforts to shirk its own human rights commitments. The German conception of external processing for example foresees the establishment of facilities in Libya - a Geneva non-

signatory. Belgium and Sweden thus demanded the introduction of the phrase „the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees” (European Council 2004:21). Such phrases apparently form part of a strategy to raise the profile of the member states’ international obligations and to scupper the project entirely. Moreover, by promoting abroad democratic values like asylum, these member states hope to deal curatively with the causes of migration and to spread the burden of receiving applicants in a positive manner.

4. Options for the democratisation of asylum policy

It is by no means the case that the democratisation of JHA processes that has occurred since 2001 has either rebalanced asylum policy or upheld international obligations. This is in part because of the legacy of securitarian activity, and partly because democratisation is not ‘complete’ and the position of previously sidelined actors is still precarious. Further, the course of democratisation thus far may have reinforced actors like the European Parliament which bring democratic input to policy-making, but in continuing to sideline the European Court of Justice, the respect for normative democratic rights like asylum is still weak. As was noted above, democratic input is not necessarily complementary to the protection of normative democratic values, as those rights enjoyed by third-country-nationals are seen to exist at the expense of the electorate.

Arguably, the Parliament did not take full advantage of the means accorded it in the policy-making framework during the first-wave. Party politics in the European Parliament reinforced its relative exclusion from asylum policy-making. When asylum issues were dealt with by the 1999-2004 Parliament, a split regularly opened up between the Right on one side, and the Socialists, Liberals and Greens on the other. The Centre-Left’s expansiveness was encouraged by their exasperation at the EP’s marginal position in the decision-making process, and the divergence of their priorities from the substance of the legislation emanating from Council. The fact that the Council sidelined the EP further in the passage of some of the initial pieces of legislation by reaching political agreement before the EP had delivered its opinion, exacerbated the situation.

Despite its marginal position, the Parliament was a prime focus of lobbying on the part of even resource-strapped NGOs. Yet the potent cocktail of abstract demands from certain rights-based NGOs, and its marginal decision-making position, meant that the Parliament paid too little attention to the practical realities of asylum policy. One telling example concerned the question of asylum-seekers’ access to education. ECRE had recommended that “children must be given access to the State education system at the earliest opportunity” (ECRE 2001). The Commission proposed that access to education be granted within 65 working days of an application being lodged. The British Liberal MEP Sarah Ludford shortened this to 21 working days in her proposed amendment (European Parliament 2002:26). Since the initial 65 day period was already felt to be impractical if applicants arrived at the beginning of the summer vacation- ‘working days’ being held to run on during school vacations- the amendment was wholly unrealistic.

Rather than exploiting the limited consultative tools at its disposal, the EP turned to more contentious channels. It actively used the judicial tools available to it as a bargaining chip in decision-making (the asylum procedures directive), as well as reactively, to challenge legislation after its adoption (family reunification directive). In some policy areas, the EP has shown that it is willing to act ‘sensibly’, taking account of member states’ preferences, in order to gain decision-making powers. Thereafter it has become more activist. This tactical

restraint has not been the rule in asylum policy. Its strategy was born of frustration at its lack of influence, and of its understanding of its institutional and democratic role in the EU. In order to neutralise this strategy, the member states may be tempted to involve the Parliament more in policy-making, in order to draw it into the European ‘Establishment’ (Maurer 2004).

The EP has certainly pursued non-citizens’ interests in the past, and finds itself somewhat removed from the electoral pressures that member state governments cite as an *apologia* for restrictive migration policies. Yet it is unclear to what degree the reassertion of parliamentary influence at the European level will contribute to the upgrading of third-country-nationals’ rights and interests. The Parliament structurally incorporates the same ambivalence towards non-citizens and minorities which is characteristic of domestic democratic systems. It is precisely the distance from electoral pressures that accords the EP a certain margin of manoeuvre to push for the extension of non-citizens’ rights, which also denies it much of the legitimacy required to carry out such a task. By involving the Parliament more heavily in policy-making, the member states are effectively drawing it into the European ‘Establishment’, reducing its freedom of manoeuvre. Such a move makes the EP’s activities more perceptible to its electorate and renders the need for it to justify the extension of its powers more pressing. Whether an EP thus implicated in asylum policy-making will enjoy the tools necessary to roll back the effects of securitisation is doubtful.

The development of European asylum policy highlights the tension between the democratically expressed will of the electorate and the sometimes countervailing democratic mechanisms which regulate its realisation. European asylum policy integration has been instrumental in realising the perceived or expressed will of the citizens of the member states where countervailing democratic mechanisms at the national level were more robust. As justification for these developments, policy-makers have cited a desire to safeguard democracy more broadly: when its will is constrained, the electorate may be tempted to turn to those political parties that scorn democratic mechanisms. The menace of the far-right in Europe has served as justification for restrictive asylum policies.

This aspect of the EU’s ‘democratic deficit’ is unusual because the margin of manoeuvre won by policy-makers at the expense of democracy has principally been used to respond to the narrow interests of national electorates. Only to a limited degree has it been used in a technocratic manner to meet those economic, demographic and humanitarian aspects of asylum and immigration policy that may not appeal to voters.

Whilst the upgrading of the Parliament in policy-making signals the more direct democratic input of the European electorate, it is the reassertion of those democratic mechanisms mediating the will of the electorate and protecting individuals from the state that will prove most challenging to the securitarian agenda. With the eventual entry into force of the Treaty establishing a Constitution for Europe, normative mechanisms would be reinforced alongside the European Court. The fact that in the aftermath of September 11 the Commission was asked to review the compatibility of the EU’s international obligations – in particular under the Geneva Refugee Convention – with the provision of internal security, sheds light on the member states’ disinclination to upgrade the Court’s role.

The potential restraints exerted by the Court on the EU’s capacity to realise the perceived or expressed wishes of the electorate raise questions about whether an elite-driven project like European integration, which lacks popular legitimacy, can deal with controversial issues in a fully democratic fashion. The Union nevertheless remains under pressure from the European

Parliament, national parliaments, NGOs and some member state governments to democratise this area of policy-making.

If these democratic pressures are as uncongenial to the realisation of the securitarian agenda as the policy-venue-shopping thesis posits, European asylum policy could move in any one of three directions:

Firstly, asylum policy could be repackaged such that measures to reduce the number of asylum applications would be compatible with the reinforced democratic mechanisms. The emphasis would shift to burden-sharing, curative and capacity-building policies. Where this reconciliation proved impossible, the EU's incapacity to reduce the numbers of asylum-applicants could force a fundamental re-conception of asylum, with asylum-seekers no longer being framed as a threat to the interests of citizens. National electorates would need to be educated about the rationale behind such a system.

Secondly, and alternatively, where it proved impossible to reconcile policies to reduce the number of asylum-seekers with democratic pressures, some reform of the democratic mechanisms could occur. Perhaps the weak point of the democratic system is the normative protection of third-country-nationals' rights. It is arguable that the only thing that has thus far relieved the pressure to reform the Geneva Refugee Convention is the fact that policy-makers have found ways to circumvent it. If the Convention is enforced with renewed zeal, its future may be put in question. Its reform is an option that has been thrown up by Austria and the UK.

Thirdly, the reassertion of democratic pressures also entails the reinforcement of international norms. This considerably reduces member states' capacity to reform the relevant human rights and refugee norms. The search for more favourable policy-making venues may therefore begin again. The UK, which enjoys an opt-out, has already signalled its reluctance to join the second wave, and its „new vision for refugees” (UK Government 2003) has encouraged it to cast around for partners outside the EU.

The end of the Cold War and the attacks of September 11 appear to have further damaged the EU's capacity to draw up a well-rounded asylum policy which is democratic both in its formulation and effect. This is explicable with reference to the two events' interaction with the processes of securitisation, europeanisation, externalisation and democratisation. Yet the two events have not only presented challenges to the EU but also opportunities. They have accelerated europeanisation, raising the possibility of burden-sharing between member states. They have reconfigured international relations allowing the member states to tackle root causes pro-actively. However, the laboratories of JHA policy-making have been unable to grasp these opportunities. The predominant form of europeanisation facilitated by the two events has been trans- and intergovernmental, and has not been conducive to the realisation of anything but narrow national goals. Meanwhile a lack of coordination between internal and external policy actors has prevented the EU from meaningfully tackling root causes.

5. Abbreviations

E.C.	European Community
E.C.J.	European Court of Justice
E.C.R.E.	European Council for Refugees and Exiles
E.P.	European Parliament
E.U.	European Union
I.G.C.	Intergovernmental Conference
J.H.A.	Justice and Home Affairs
M.E.P.	Member of the European Parliament
N.G.O.	Non-Governmental Organisation
Q.M.V.	Qualified Majority Voting
S.E.A.	Single European Act
T.E.C.	Treaty Establishing the European Community
T.R.E.V.I.	Terrorisme, Radicalisme, Extremisme et Violence Internationale
U.K	United Kingdom
U.N.H.C.R.	United Nations High Commissioner for Refugees

6. References

- Anderson, A. and Apap, J. (2002) 'Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation' (Brussels: Centre for European Policy Studies).
- Baumann, R. Boesche, M. Hellmann, G. Herborth, B and Wagner, W. (2005) 'De-Europeanisation by Default? Germany's EU Policy in Defense and Asylum'. *Foreign Policy Analysis*, pp.143-163.
- Baumgartner, F. and Jones, B. (1993) *Agendas and Instability in American Politics* (Chicago: Chicago University Press).
- Bigo, D. (1994) 'The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention'. In Anderson, M. and Den Boer, M. (eds) *Policing across National Boundaries* (London: Pinter), pp. 161-173.
- Boswell, C (2003) 'The 'External Dimension' of EU Immigration and Asylum Policy'. *International Affairs*, Vol.79, No. 3, pp.619-638.
- Cebeci, M (2004) 'EU Foreign Policy after September 11 and the Significance of the Mediterranean'. *The European Union and the Mediterranean: The Mediterranean's European Challenge*, Vol. 5, pp.197-214.
- Economist magazine (2005) 'Punishment Please'. 27.08.2005.
- Edelman, M. (1991) *Pièces et règles du jeu politique* (Paris : Editions du Seuil).
- European Commission (2004) 'Communication on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin - „Improving Access to Durable Solutions”'. COM (2004) 410.
- European Council (1999) 'Presidency Conclusions'. Tampere European Council, 15/16 October 1999.

- European Council (2004) 'Presidency Conclusions'. Hague European Council, 4/5 November 2004.
- ECRE (2000) 'The ECRE Tampere Dossier'. (Brussels: ECRE).
- ECRE (2001) 'Position on the Reception of Asylum Seekers'. (Brussels: ECRE)
- ECRE (2004) 'ECRE Comments on COM (2004) 410'. (Brussels: ECRE).
- European Parliament (2002) 'Draft Report of Hernandez Mollar: Amendments 116-224'. PE302.296/AM,
<http://www.europarl.eu.int/meetdocs/committees/libe/20020409/462338en.pdf>.
- Forsythe, D (2000) *Human Rights in International Relations*. (Cambridge: Cambridge University Press).
- Fukuyama, F. (1992) *The End of History and the Last Man* (London: Penguin).
- Gazzo, M. (1985) *Towards European Union. From the 'Crocodile' to the European Council in Milan* (28-29 June). (Brussels: Agence Europe).
- Geddes, A (2000) *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press).
- Geddes, A (2003) 'Still beyond Fortress Europe? Patterns and Pathways in EU Migration Policy'. Queen's Papers on Europeanisation, No. 4.
- Guardian newspaper (2002) 'Blair expects new EU asylum laws'. 19.06.2002.
- Guiraudon, V. (2000) 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping'. *Journal of Common Market Studies*, Vol. 38, No. 2, pp.251-71.
- Hill, C. (1988) 'The Capability-Expectations Gap, or Conceptualising Europe's International Role' *Journal of Common Market Studies*, Vol. 17, No.1 pp.305-28.
- Hix, S. (1999) *The Political System of the European Union* (London: Macmillan).
- House of Lords (2004) 'Eleventh Report. Handling EU Asylum Claims: New Approaches Examined' (London: House of Lords).
- House of Lords (2005) 'The Hague Programme: A Five Year Agenda for EU Justice and Home Affairs' (London: House of Lords).
- Maurer, A. (2004) *Die Macht des Europäischen Parlaments. Eine prospektive Analyse im Blick auf die kommende Wahlperiode 2004-2009* (Berlin: Stiftung Wissenschaft und Politik).
- Kostakopoulou, T. (2000) 'The 'Protective Union': Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe'. *Journal of Common Market Studies*, Vol. 38, No. 3, pp. 497-518.
- Monar, J. (1995) 'Democratic Control of Justice and Home Affairs: The European Parliament and National Parliaments'. In Bieber, R. and Monar, J. (ed.s) *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (Brussels: Inter University Press), pp.243-257.
- Monar, J. (2001) 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs'. *Journal of Common Market Studies*, Vol. 39, No. 4, pp.747-764.
- Niessen, J (2004) 'Five Years of EU Migration and Asylum Policy-Making under the Amsterdam and Tampere Mandates'. (Brussels: Migration Policy Group).
- Pastore, F (2001) 'Reconciling the Prince's Two 'Arms': Internal-External Security Policy Coordination in the European Union'. (Paris: Institute for Security Studies).

- Peers, S. (2000) 'Justice and Home Affairs: Decision-making after Amsterdam'. *European Law Review*, Vol. 25, No. 2.
- Peers, S. (2004a) 'The "Hague Programme": Annotation of Final Version'. (London: Statewatch).
- Peers, S. (2004b) 'Statewatch Briefing: Vetoes, Opt-outs and EU Immigration and Asylum Law'. (London: Statewatch).
- Pierson, P. (1996) 'The Path to European Integration: A Historical Institutional Analysis'. *Comparative Political Studies*, vol.29 no.2 pp.123-163.
- Podolski, A (2004) 'The Hague Programme (Internal Security and Justice in the Period 2005-2009): the Polish Perspective'. (Warsaw: Centre for International Relations).
- De Ruyt, J. (1987) *L'Acte Unique Européen – Commentaire* (Brussels : Editions de l'Université de Bruxelles).
- Samers, M. (2004) 'An Emerging Geopolitics of Illegal Immigration in the European Union'. *European Journal of Migration and Law*, Vol.6, pp. 23-41.
- Statewatch (2004) 'Killing Me Softly? „Improving Access to Durable Solutions“: Double Speak and the Dismantling of Refugee Protection in the EU'. (London: Statewatch).
- Thielemann, E. (2005) 'Towards Refugee Burden-Sharing in the European Union: State Interests and Policy Options'. Ninth Biennial International Conference of the European Union Studies Association (USA), March 31-April 2 2005, Austin, Texas.
- UK Government (2003) 'New Vision for Refugees.' 07.03.2003 (London: UK Government)
- Wessels, W. (2001) 'Nice results. The Millennium IGC in the EU's Evolution'. *Journal of Common Market Studies*, Vol.39, No.2, pp. 197-219.
- Wivel, A. (2005) 'The Security Challenge of Small EU Member States. Interests, Identity and the Development of the EU as a Security Actor'. *Journal of Common Market Studies*, Vol. 43, No. 2, pp. 393-412.