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Security Threat or Human Right? Conflicting Frames in the Eastern Enlargement of the EU Asylum and Immigration Policies

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Abstract

Eastern enlargement of EU immigration and asylum policies occurs at various levels and covers a wide variety of activities. One can distinguish between the unilateral and bilateral activities of individual member states, coordinated initiatives at the EU intergovernmental level, multilateral processes, and measures taken within the official framework of EU enlargement. As a consequence, the Central and Eastern European countries' (CEECs)[1] adaptation to the EU *acquis* is promoted by a multitude of heterogeneous actors who sometimes follow divergent goals and expectations. The argument developed in this paper is that Eastern enlargement of EU asylum and immigration policies is characterised by a competition between conflicting ideational frames: on the one hand the realist frame of internal security, which emphasises the need to tighten up territorial borders and to fight illegal immigration, and on the other hand the liberal frame of humanitarianism, which incorporates the liberal and human rights based notions of freedom of movement and refugee protection. As a result, the applicant CEECs are left with mixed messaged and the need to reconcile the requirements of migration control with the respect for international human rights and the rule of law.

[1] The term CEECs refers to the ten Central and Eastern European applicant countries, that is Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.

Introduction

For almost four decades, the movement of persons from and through Central and Eastern Europe to Western Europe was only possible on an exceptional basis. The metaphor of the "iron curtain" vividly expresses this repression of free movement. Under the Communist regimes, citizens of Central and Eastern Europe were prevented from moving, or even travelling, to the West by an extensive system of exit controls and the military surveillance of the borders to Western Europe. On the other side of the "curtain", democratic regimes had long held a liberal stance on migration, rooted in the belief of a citizen's right to choose freely his or her place of residence. Part of this liberal approach was the establishment of an international regime for the protection of refugees within the framework of the United Nations, designed to provide relief for individuals whose basic human rights and fundamental freedoms had been violated in their home country. At the domestic level, these provisions were implemented in asylum laws and some Western European countries enshrined the right to asylum in their national constitutions.

Today, Western immigration regimes have undergone a profound transformation. The opening up of the Eastern bloc in 1989 coincided with the gradual institutionalisation of restrictive asylum and immigration regulations in the European Union. This "about-turn" in Western European migration policies can be traced back to the economic recession of the mid-1970s, after which all Western European countries revised their approach to economic immigration. In the light of rising numbers of asylum seekers and changes in the causes of forced migration the world over, this restrictive trend also reached the field of asylum policies. Since the mid-1980s, efforts to combat illegal immigration and to reduce the number of asylum seekers have increasingly been co-ordinated at the European level and are now an integral part of European Union (EU) policies.

This paper analyses the extension of the EU asylum and immigration policies to Central and Eastern Europe from the early 1990s until today and seeks to elucidate the institutional and ideational dynamics behind EU Eastern enlargement in this policy field. The central argument is that the CEECs' adaptation to EU asylum and immigration policies is shaped by conflicting ideational frames: on the one hand the "realist" requirements of border enforcement and migration control, promoted mainly in intergovernmental co-operation, and on the other the "liberal" demand to uphold humanitarian standards of refugee protection and respect the rule of law, which is mainly stressed by international humanitarian organisations and NGOs. As a consequence, the CEECs face the challenge to balance the demand for internal

security with the values of human rights and refugee protection in their efforts to join the Union. This task is further complicated through the fact that the CEECs do not share the humanitarian tradition of their Western neighbours and lack the legal, administrative and operational standards necessary for safeguarding international human rights norms and the rule of law. Yet, this paper argues that under its current setting, the enlargement process tends to give the securitarian frame precedence over the liberal one. This is mainly due to three factors:

> (1) the fragmented and multi-level nature of the EU *acquis* in this field which is split between limited and mainly restrictionist measures at the EU level and the continuity of diverging liberal traditions in the legal and administrative systems of the member states;
> (2) the dominance of intergovernmentalism in the enlargement process and herewith the dominant position of member states' governments; and
> (3) the difficult position of the CEECs themselves which, given their geographical situation, fear to be transformed into a "buffer zone" warding off undesired immigrants on their way to Western Europe.

This paper proceeds in five steps. After a brief discussion of the theoretical background of the analysis in section one, section two summarises the main elements of the EU *acquis* in asylum and immigration matters. The next section then turns to the beginnings of West to East co-operation in these policy fields and retraces the intergovernmental dynamics behind the extension of Western policies. The relationship between realist and liberal frames in the EU enlargement process is analysed in section four, before the conclusion ends with an interpretation of these processes in the broader context of Eastern enlargement.

1. Eastern Enlargement and the Transfer of Policy Frames

The focus on the ideational contents of the EU enlargement process in this particular policy field links up with the growing interest in ideas and norms in policy analysis and international relations.[2] The concept of frames derives from sociology and has been first adapted to policy analysis by Rein and Schon (1991) and Jachtenfuchs (1993, 1996). Policy frames can be defined as the ideational core of a particular policy field which contains the dominant interpretation of the underlying social problem and expresses guideposts for action. This definition is strongly related to the concept of "policy paradigms"

[2] For good overviews see Maier 1998; Nullmeier 1997; Schaber/Ulbert 1994.

used in Hall (1989 and 1992) and Weir (1992), the notion of "core beliefs" in Sabatier (1993) or Muller's and Jobert's definition of "référentiels" (1987). In short, the common characteristics of these policy ideas are their social and intersubjective nature in contrast to cognitive beliefs held by individuals, their relative stability and resistance to change, and their specificity to a concrete policy field. With regard to European integration, the role of policy frames or paradigms has been studied in the field of environmental policies (Jachtenfuchs 1993, Lenschow/Zito 1998), common agricultural policy (Coleman 1998, Skogstad 1998) and refugee policy (Lavenex 1999a).

These studies share the basic understanding that political behaviour and policy outcomes are shaped by shared, taken-for-granted ideational frames that become institutionalised over time. These frames contain both "factual" information about causal relationships and empirical facts and "normative" devices with prescriptive value as to the "goodness" and "badness" of political action.[3] Once established, these policy frames shape actors' perceptions and interpretations and influence the course of political action.

In looking at the relationship between policy ideas and policy-making, however, it is important to note that "ideas do not float freely" (Risse-Kappen 1994), and that the emergence and institutionalisation of policy frames is usually characterised by the existence of conflicting views and political struggles over facts, values, interpretations and consequences. This dependency of frames from the advocacy activities of particular groups or organisations implies that their implementation in public policies will usually reflect the position of the most influential actors. Therefore, the distribution of power among the actors involved in framing processes and the procedures guiding their access and interaction in the relevant policy arena are crucial in examining the development and the effects of policy frames. Framing processes are embedded in a broader institutional context which structures the distribution of power and capabilities among various individual and collective actors and thus impacts on the salience and the success of particular policy frames (Lavenex 1999a). Nevertheless, once institutionalised in public policies, policy frames become independent from the underlying power relations and can continue to affect the course of policy making even after the social power relations that facilitated their emergence have changed (Coleman 1998: 634).

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[3] These cognitive orders are heuristic devices that help to highlight the different dimensions of social knowledge. They are, however, only analytical distinctions that in reality are often interrelated and overlapping. The distinction between 'factual' and 'normative' knowledge draws on Eder 1992; Jachtenfuchs 1996 and Olsen 1995.

In the field of immigration and asylum policy, on can distinguish between two ideal typical frames: the "realist" frame of internal security and the "liberal" frame of human rights. The realist frame is rooted in a state-centred, realist philosophy. It concentrates on the question of border controls and underlines the norm of state sovereignty. In this frame, no distinction is made between different cross-border movements: illegal immigrants, asylum seekers and refugees are equal in the sense that they are third country nationals whose entry into the state's territory must be controlled. The liberal frame, in contrast, follows a humanitarian perspective. It focuses on the individual person and underlines the norms of human rights. Accordingly, not the cross-border movement as such but the individual and his or her rights are the central concern. With regard to refugees, this means that this frame underlines their right to receive protection and to have access to equitable asylum procedures.[4]

The dilemma in studying these framing processes is that in liberal democracies, immigration regimes always pursue a middle way between these two normative extremes; both these aspects, efficient control and the respect of human rights and liberal values, are interdependent. Too much liberalism might lead to control deficits and thus undermine state sovereignty and, ultimately, internal security; conversely, too much emphasis on control might undermine international human rights norms and the liberal principles of freedom of movement and refugee protection.

Against this theoretical background, the analysis of EU Eastern enlargement in asylum and immigration matters is structured along the following questions: Which frame of asylum and immigration policy is transported in the process of eastern enlargement? Which actors are involved in the extension of EU asylum and immigration policies to Central and Eastern Europe, and which is their relative degree of influence? And which consequences do these framing processes have for the CEECs' adaptation to the EU immigration regime?[5]

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[4] Of course, these two frames are only the ideal typical extremes of an imagined continuum between the two poles of securitarianism and humanitarianism. Their function is to make abstraction from a complex reality and to offer abstract categories, against which this reality can be empirically assessed and compared. On the construction of these ideal types and for a more comprehensive analysis of frames in European refugee policies see Lavenex 1999a.

[5] The term immigration regime applies to the totality of measures adopted in the fields of immigration and asylum policy. For comprehensive accounts on this see Guild/Niessen 1996; Joly 1996; Lavenex 1999a; Papademetriou 1996.

2. The Evolution of the EU Immigration Regime

Co-operation between the European Union and Central and Eastern Europe in asylum and immigration matters was induced by the historical coincidence of the opening up of the Eastern bloc with the institutionalisation of a restrictive immigration regime in the Union. Since the mid-1980s, EU member states have increasingly coordinated their immigration and asylum policies in view of relieving domestic asylum procedures and combating illegal immigration. This "first generation" (Lobkovicz 1993) of intergovernmental co-operation in the 1980s yielded the so-far most important agreements in the field of asylum and immigration: the Second Schengen Agreement of 1990 and the Dublin Convention of the same year (see below). Originally limited to purely intergovernmental negotiations outside the Community framework, in 1992 asylum and immigration were introduced into the Maastricht Treaty on the European Union as "matters of common interest". Together with the crossing of external borders, drugs, and fraud, as well as judicial, customs and police co-operation, these issues constituted the intergovernmental third pillar of the European Union on justice and home affairs. This introduction of co-operation in asylum and immigration matters into the EU framework was motivated by two developments. On the one hand, it was a reaction to the growing political weight of these issues in the member states, on the other, it followed the realisation that in order to function effectively, the Schengen and Dublin Conventions required more substantive harmonisation of national asylum regulations. In particular, they presupposed the approximation of the material criteria for granting refugee status and the equivalence of status determination procedures.

Major reforms of this institutional framework were introduced in the Treaty of Amsterdam concluded in June 1997. These reforms were motivated on the one hand by the dissatisfaction with the institutional rules of the third pillar, which were seen as increasing the democratic deficit and intransparency of EU decision making processes. On the other hand, the reforms were meant to give new impetus to co-operation in asylum and immigration matters which had largely stagnated under the Maastricht Treaty (Bank 1998, Hix/Niessen 1996). Beyond these internal dissatisfactions, a third motivation behind the deepening of co-operation structures in this policy field was the prospect of Eastern enlargement and the need to strengthen the legal basis for the extension of the EU *acquis* to the applicant countries.

The main reforms were the following. Firstly, the hitherto purely intergovernmental Schengen Agreement was incorporated in the Union's *acquis*. Secondly, the issues of asylum and immigration were transferred from

the third to the first pillar of the Union.[6] After a transitional period of five years after the entry into force of the Treaty (1st May 1999), the Commission will have the sole right of initiative in these matters and the Council will decide about the introduction of majority voting and about the competences to be attributed to the Parliament. Furthermore, flexibility clauses were introduced for the UK, Ireland and Denmark which have opted out from co-operation in this policy field.[7] The most important amendment might consist in the introduction of a competence of the European Court of Justice in asylum matters which will allow the examination of the conformity of EU-policies with international law.[8]

In terms of substance, common European asylum and immigration policies have concentrated so-far on the question of access to the territory and to asylum procedures. In parallel with the strengthening of the common external borders, these efforts have mainly consisted in the harmonisation of visa policies and the adoption of common list of third countries whose nationals require visas for the EU; the imposition of sanctions on carriers who enable the illegal entry of third country nationals; the allocation of responsibility for the expulsion of illegal immigrants and for the examination of asylum claims; and the harmonisation of simplified procedures for manifestly unfounded asylum claims. In contrast to these more restrictive measures aimed a the limitation of illegal entries and the fight against fraudulent asylum claims, substantive harmonisation of asylum and immigration policies has stagnated. A non-binding Council resolution on "minimum guarantees" to be accorded to asylum seekers during the status determination procedure was adopted in 1995.[9] This, however, reflects the lowest common denominator and do not lead to an approximation of

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[6] Visas, asylum, immigration and other policies related to free movement have been included under the Title IV in the EC Treaty.

[7] These provisions signify the continuity of certain intergovernmental structures in the first pillar and manifest the reluctance of the member states to transfer sovereignty in these matters.

[8] However, three significant reserves were introduced to the ECJ's activity in this area. Firstly, the traditional procedure for preliminary rulings under Article 234 EC (old Art. 177 EC) is modified in such a way that only national courts, whose judgement will not be open to further challenges in the respective legal systems, may request such a ruling. Secondly, the ECJ will not have jurisdiction over internal border control when "relating to the maintenance of law and order and the safeguarding of internal security" (Art. 68 II EC). This formulation exceeds other 'ordre public' clauses in the Treaty and may, if interpreted in an extensive manner, pose significant limits on the ECJ's activity in this area. The third limitation is contained in Article 68 III EC, which excludes the retroactive impact of ECJ rulings on (previous) rulings by national courts. This limit is again an important abrogation from traditional principles of EC law. Finally, the Court will have no jurisdiction over the non-binding resolutions and conclusions adopted under the third pillar unless they are translated into binding directives.

[9] Council resolution on minimum guarantees for asylum procedures of 20.6.1995.

asylum procedures in the member states (Boeles/Terlouw 1997; Guild/Niessen 1996). Similarly, the non-binding common position on the interpretation of the term of a refugee, [10] adopted after six years of difficult negotiations, does not lead to an approximation of national recognition practices (Carlier et al. 1997). Finally, no common approach has been developed with regard to the temporary protection of war and civil war refugees. As recent refugee crises in Bosnia and the Kosovo have shown, the majority of member states have persistently opposed the idea of "burden"-sharing in Europe and their admission practices still follow very disparate policies (Van Selm-Thorburn 1998 and Van Selm forthcoming).

To sum up, the conclusion can be drawn that, so-far, European intergovernmental co-operation under the third pillar has mainly been an instrument for member states governments to increase their means of countering undesired migration flows. Beyond this co-ordination of access and border control policies, however, national immigration and refugee policies still follow very much specific national legal, humanitarian, economic, and foreign policy traditions.[11] This state of affairs can be described as a "multi-level" *acquis*, in which the European and the national level interact in terms of formal competences and material substance: the measures adopted at the EU level are only single instruments which pursue mainly realist orientations, while the general administrative and judicial authority as well as the basic humanitarian norms guiding the exercise of asylum and immigration policy remain in the in the domain of the member states or international law.

These characteristics of EU asylum and immigration policies pose two challenges to the CEECs' accession. Firstly, in the light of the new competences attributed to the Commission and the ECJ in the Treaty of Amsterdam, one may expect that the hitherto fragmented and incomplete EU *acquis* in these fields will experience a dynamic evolution, which complicates the task for the CEECs to keep pace with the developments within the EU in their preparation for membership. The second challenge, however, derives from the limited nature of the EU-level *acquis* and its concentration on "realist", restrictive elements imposing limitations to the "liberal" post-World War II tradition in the member states. Considering that the CEECs, under communism, did not share the liberal tradition of the West, the implementation of these restrictive measures presupposes the establishment of basic legal, judicial and administrative

[10] Joint Position on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28.7.1951 relating to the status of refugees, adopted on 4.3.1996.

[11] On the various determinants of national immigration policies see Joly 1996.

standards for the safeguarding of international human rights norms. In turn, the perseverance of very different systems in the member states expresses the difficulty to determine which substantive models of asylum and immigration policies, laws and practices the CEECs should follow.

3. Intergovernmental Dynamics in the Propagation of EU Asylum and Immigration Policies

Long before official talks about EU enlargement in justice and home affairs took place, the extension of Western asylum and immigration policies was propagated at a purely intergovernmental level through the unilateral measures of individual member states, multilateral consultations and the activities of international humanitarian organisations and NGOs. In the context of the abolition of internal border controls in the single market, the liberalisation of the CEECs was perceived by Western European governments as leading to large scale immigration and challenging the evolving co-operation under the third pillar. Not only did the West fear mass movements by the citizens of the former communist countries, but it also feared that this region would develop into a major transit zone for immigrants and refugees coming from the poorer parts of the world. The EU member states therefore adopted a preventive strategy focusing on the incorporation of the CEECs into the evolving co-operation in asylum and immigration matters, including the allocation of responsibility for the handling of asylum seekers and illegal immigrants and the export of high standards of border control technology. The establishment of equitable systems of refugee protection has gained less attention and has mainly been put forward by international organisations and NGOs. These processes are summarised in the following subsections.

3.1 The Allocation of Responsibility

With the prospect of an abolition of internal borders controls in the EU, the major refugee receiving countries in the EU have pushed for the establishment of a system of responsibility allocation for the handling of illegal immigrants and asylum seekers in the Union. The underlying idea was to compel the traditional transit countries of Southern Europe to tighten up their external borders in order to avoid losing control over the entry and stay of third country nationals on their territories.

The Schengen and Dublin Conventions

The Schengen[12] and the Dublin Conventions[13] are the first results of this co-operation amongst the EU member states. With regard to asylum seekers, the central provision is the establishment of a system of redistribution for the handling of asylum claims based on the "first host country" principle. This principle assigns the responsibility for the examination of an asylum application to the contracting state which first enables the entry of the asylum seeker. Consequently, the result of the status determination procedure of the responsible state must be recognised by the contracting parties. The basis for this system of redistribution is the assumption of the existence of compatible standards of refugee protection among the participating states. Similarly, the Schengen Agreement regulated the responsibility of the "first host country" for the handling and expulsion of illegal immigrants. The intention to ward of undesired immigrants was further supported by the introduction of restrictive entry conditions, the tightening up of visa requirements, the imposition of sanctions on carriers enabling the entry of unauthorised migrants and finally the general strengthening of external border controls.[14]

Although originally limited to EU countries, the interest of some member states in extending the system of redistribution for the handling of asylum claims established by these conventions to other countries soon became evident.[15] In particular, both agreements contain a provision according to which

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[12] The term "Schengen Convention" includes both the First Schengen Agreement on the Gradual Abolition of Checks at the Common Borders of 14.7.1985 and the Second Schengen Agreement of 19.6.1990 applying Schengen I. Although originally concluded only amongst five member states (Germany, France, and the Benelux), all member states with the exceptions of the United Kingdom and Ireland have joined the Convention. It came into force on 26.3.1995. With the Treaty of Amsterdam of June 1997, the Schengen Agreement has been incorporated into the Treaty on the European Union. Flexibility clauses have been introduced for the UK, Ireland and Denmark.

[13] Dublin Convention on the State Responsible for the Examination of an asylum claim of 15.6.1990. The Convention finally entered into force on 1 September 1997 and replaces the parallel asylum provisions of the Schengen Agreement.

[14] These provisions are included in the Schengen Agreement and have now been introduced into the Community framework with the Amsterdam Treaty. Corresponding provisions were included in the draft external borders convention of designed for the Union as a whole, which, however, has not yet entered into force because of disputes between the UK and Spain over the status of Gibraltar.

[15] Given its membership in the Nordic Union, Denmark had an immediate interest in the adhesion of the Nordic non-EU states to the Dublin convention. Since full membership was restricted to EU members, a parallel convention was drafted for the participation of Norway, Sweden and Switzerland. With the delay in the coming into force of the Dublin Convention, these parallel agreements have been suspended and are only now re-entering the negotiations.

the participating countries retain the right to return asylum seekers to other third countries in accordance with their national legislation.

The Designation of Central and Eastern European Countries as "Safe"
This possibility of extending the system of redistribution based on the "first host country" principle to countries outside the Union was formalised with the adoption of a legally non-binding but politically very influential resolution on a harmonised approach to questions concerning safe third countries adopted under the third pillar of the Maastricht Treaty on 30.11/1.12.1992 in London.[16] This rule precedes the substantive examination of an asylum application and thus allows the direct rejection of an asylum seeker at the border when it is deemed that the person had an opportunity to apply for asylum in the third country.

The harmonisation of the safe third country rule at the European level was accompanied by its increasing implementation in the legislation of the member states.[17] In principle, this rule takes up the redistributive logic of the Schengen and the Dublin Conventions which provides that an asylum claim shall be examined by the first country with which the applicant has had contact and extends it to all potentially safe countries. However, its application towards the CEECs departs in one central point from the EU system: it is no longer based on the assumption of compatible standards of refugee protection among the participating states. The criteria for the determination of a country as safe are that the asylum seeker must not fear for his or her life within the meaning of Article 33 Geneva Refugee Convention; is not exposed to torture or inhuman or degrading treatment; and is afforded effective protection against refoulement within the meaning of the Geneva Refugee Convention.

In contrast to the Schengen and Dublin Conventions, the introduction of this rule and herewith the incorporation of Central Eastern European countries into the system of redistribution for the handling of asylum claims was a

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In the Schengen group, conversely, co-operation agreements were reached with Iceland and Norway. However, this form of co-operation shall be limited to the EFTA countries.

[16] Together with the London Resolution on manifestly unfounded asylum claims and the London Conclusions on countries in which there is generally no serious risk of persecution adopted on the same occasion, these measures represent the first results of a second generation of co-operation in asylum and immigration matters under the third pillar of the Maastricht Treaty on justice and home affairs. Their legal nature is non-binding and informal since the treaty provides only for the adoption of international conventions, joint actions or joint positions but not for resolutions or conclusions.

[17] For an overview of the implementation of the safe third country rule in the EU member states see Danish Refugee Council 1998.

unilateral measure of the EU countries - the third countries concerned did not participate in the elaboration of this regime and were not asked for their consent. Given that international law provides an obligation on states only to take back their own citizens, the implementation of the safe third country rule and herewith the return of third country nationals required the conclusion of readmission agreements with the third countries concerned.

The Conclusion of Readmission Agreements

Originally, readmission agreements aimed at the facilitated expulsion of illegal immigrants and rejected asylum seekers after examination of their claims. Such agreements can either be limited to the readmission of the nationals of the contracting parties.[18] or they can apply also to third country nationals. Today, these agreements are increasingly being used as a legal basis for the return of asylum seekers before status determination on grounds of the safe third country rule. They constitute an additional element in the extension of the system of redistribution for the handling of asylum claims which is at the core of the emergent European immigration regime.[19] The crucial difference between the Schengen and Dublin Conventions and the readmission agreements signed with "safe third countries" is that the latter do not contain any obligation of the readmitting country to examine the asylum seeker's request and thus do not consider the specific situation of asylum seekers deriving from human rights obligations. Furthermore, they are no longer based on the assumption of equitable standards of refugee law. This poses the question of their conformity with international law, especially with the norm of non-refoulement of article 33 Geneva Convention and article 3 ECHR which prohibits the return of refugees to countries where their life or freedom is threatened.[20] This problem has also been raised by the German Constitutional Court ruling on the safe third country rule, in which it warned that the application of this rule should not lead to chain-deportations, in which asylum seekers are deported further by the third to fourth and fifth countries where their are no longer safe from refoulement.[21]

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[18] Readmission agreements concerning the contracting parties' own state nationals are an implementation measure for the 1992 London Conclusions on countries in which there is generally no serious risk of persecution, see footnote 16.

[19] On these contemporary readmission agreements see Schieffer 1997; and Intergovernmental Consultations on Asylum and Migration Policy in Europe, North America, and Australia 1994.

[20] This lack of humanitarian provisions has been heavily criticised by the European Parliament (1995); the UNHCR (1994) and (1995); and NGOs, e.g. ECRE and Amnesty International (1995).

[21] Bundesverfassungsgericht, ruling 2BvR 2315/93 of 14.5.1996, see also below section 4.3.

The lead in this extension of the European refugee regime was taken by the Schengen states in 1991 with the conclusion of a first model readmission agreement with Poland.[22] This agreement, which applies does not only to citizens of the contracting parties, but also to nationals of third states including asylum seekers who passed through the Polish territory, corresponds widely with the redistributive mechanism of the Schengen and the Dublin Conventions.[23] It has been used as a model for later bilateral readmission agreements between single member states and third countries, and it also provided the basis for a harmonised approach in the "Draft Council Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a Third Country" adopted on German initiative in the Council of justice and home affairs Ministers on 30.11/1.12.1994.

Usually, the conclusion of such an agreement has been linked with the adoption of complementary measures for the strengthening of the Eastern borders against illegal immigration and financial transfers. In the case of Germany, the signature of the readmission agreements with Poland (7.5.1993) and the Czech Republic (9.11.1994) were linked to the transfer of DEM 120 million and DEM 60 million respectively which are intended to "diminish the financial burden resulting from the amendments of the German asylum law and the readmission agreement(s)" as well as to enhance border protection and set up an infrastructure for asylum seekers and refugees.[24]

3.2. The Sealing of Eastern Borders

The implementation of the "safe third country" rule and the conclusion of readmission agreements were accompanied by a wide range of related bilateral co-operation processes between single EU member states and CEECs which focus on the enforcement of Eastern borders and the setting up of an efficient infrastructure for the fight against illegal immigration. This co-operation includes the strengthening of national borders through technological innovation, the training of police and border guards, the introduction of information and

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[22] Signed on 29.3.1991.

[23] See Czaplinski (1994). These readmission agreements must be distinguished from another type of readmission agreement which concerns only the nationals of the contracting parties. The latter are specifically applied towards major countries of origin for illegal immigrants and asylum seekers and aim at the facilitated expulsion of these persons. Here, Germany has taken the lead and has concluded such agreements with Romania (24.9.1994); Bulgaria (9.9.1994); Croatia (25.4.1994); Bosnia-Herzegovina, and the Federal Republic of Yugoslavia (10.10.1996) but also with non-European countries such as Vietnam, Pakistan and Algeria.

[24] See Schieffer 1997: 194.

communication systems, and changes to criminal law, for example, the effective punishment of trafficking in human beings or the falsification or forging of documents.

Although there is little clarity over the concrete scope and contents of these often informal processes, it appears that they follow clearly geographical criteria. Thus, while Germany has focused on Poland and, to a lesser degree, the Czech Republic, Austria and Italy concentrate their efforts on Hungary and Slovenia, while the Scandinavian countries co-operate almost exclusively on the Baltic states. In the framework of German-Polish cooperation, roughly 85% of the money allocated in the framework of the bilateral readmission agreement (see above) have been invested in the strengthening of Poland's border control capacities.[25]

The need to co-ordinate these activities has led to the establishment of multilateral consultations among the Ministries of the Interior of all countries concerned which have materialised in what is known as the Budapest Group. This process, which evolved as a continuation of the first big intergovernmental Conference on the Movement of Persons from Central and Eastern European Countries held in Vienna on 24-25.1.1991, gathers together experts from the Interior Ministries of more than 30 countries. The main focus of these negotiations is the fight against illegal immigration i.a. through the proliferation of high standards of border control, sanctions against traffickers in human beings, tight visa policies and police co-operation. With the prospect of EU enlargement, most of these activities have been put on the agenda of the Union in its pre-accession strategies with the CEECs.

3.3 The Establishment of Asylum Systems

To a lesser degree, bilateral co-operation has also extended to the establishment of asylum systems in the CEECs. Co-operation in this field originated in the realisation that the effective implementation of the "safe third country" rule, and hence the extension of the system of redistribution for handling asylum claims to the CEECs, required the existence of a basic legal, administrative and social infrastructure. This need resulted from the fragmented and multi-level nature of the *acquis* (see above, section 2) and fact that the CEECs not only lacked the common Western European tradition in these matters, but also the norms,

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[25] DEM 54,6 millions were allocated to the Border Guard for the acquisition of communication materials, computers, vehicles, helicopters, infrared visors etc. Other 42,8 millions were given to the police for the consolidation of the technical system securing Poland's frontiers and the creation of a central database storing data on aliens.

practices and institutions for the protection of refugees which would be required for their definition as "safe".[26]

Similar to the co-operation in policing matters, this co-operation follows very much geographic criteria (EU Commission 1997a). The general focus of these programmes is to draft or reform asylum laws and establish an efficient administrative structure to process asylum claims, compatible with the EU *acquis* in this field. An important part of this co-operation consists in the exchange of information on the countries of origin. This is supported by concrete co-operation in the processing of asylum claims both in the administrative and judicial procedure and the training of officials. Compared to the efforts put in the sealing of Eastern borders, this co-operation has so-far received much less attention. Coming back to the German-Polish example, less than 1% of the agreed DEM 120 million allocated in the framework of the bilateral readmission agreement were given to the Polish Refugee Office, and part of it were invested in the strengthening of expulsion capacities (Paquet 1998: 25).

The extension of the international standards of refugee law has received more support in other multilateral processes involving not only states but also international organisations and NGOs. Many of these multilateral activities aim at remedying the lack of humanitarian traditions as well as legal and institutional standards in the CEECs partly as a counter-balance to the restrictive policies promoted by EU member states.

Due to its early Eastern enlargement, the Council of Europe and its specialised sub-organisations have been increasingly dealing with questions related to immigration and refugees. The Committee on Migration, Refugees and Demography (CDMG) concentrates on a wide range of migration issues such as the integration of legal immigrants, short-term migration programmes and the fight against racism and xenophobia. In addition, the Ad Hoc Committee of Experts on the Legal Aspects of Refugees (CAHAR) deals with asylum seekers and refugee law. Since it consists of EU member states, the associated CEECs and other European countries, CAHAR has become an important forum for deliberation amongst these different groups.[27] A second important organisation assisting the CEECs in their transition towards countries of immigration is the International Organisation for Migration (IOM). Its focus

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[26] In legal terms, the requirement of equitable systems of refugee protection in the CEECs for the implementation of the 'safe third country' rule was confirmed by a ruling of the German Federal Constitutional Court on 14.5.1996 (2 BvR 1938/93 and 2 BvR 2315/93), see above.
[27] See Council of Europe (1996).

is on technical assistance of CEECs as well as the former Soviet Union countries (CIS) in designing, developing and implementing comprehensive migration management programmes.[28] The Organisation on Security and Co-operation in Europe (OSCE) has also introduced the issues of refugees and immigration into its agenda and focuses mainly on the prevention of involuntary migration, protection, and institution building in Central and Eastern Europe. The most important international organisation monitoring the CEECs' accession to the international refugee regime is the UNHCR, which has opened regional liaison offices in all CEECs in order to ensure that the enactment of refugee law is consistent with international standards. According to its mandate, this organisation makes an important contribution to the adoption of basic legislative provisions and the establishment of the administrative and organisational infrastructure for the protection of refugees.[29] Together with IOM and the OSCE, the UNHCR co-ordinates the "CIS Conference" to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the Commonwealth of Independent States and some neighbouring CEECs. These endeavours are supported by several very active NGOs.

3.4 Conclusion

To sum up, the export of Western asylum and immigration policies to Central and Eastern Europe has started already at a very early stage and is being promoted by a variety of unilateral, bilateral and multilateral processes. The main actors in these processes are EU member states' governments and in particular their interior ministries, which, eager to minimise their exposure to migration flows, concentrate from a more "realist" perspective on the fight against illegal immigration and the maintenance of internal security. This "realist" frame includes the focus on border controls rather than individual rights and freedoms; the lack of differentiation between genuine refugees, bogus asylum seekers and illegal immigrants; the perception of international interdependence as a zero sum game, in which "porous" borders in one country immediately has negative effects in all other countries; and the handling of asylum and immigration as a problem of internal security.

The transfer of the "liberal" values of Western asylum and immigration policies has received much less attention in the intergovernmental framework and is mainly being promoted by international organisations and NGOs. Their

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[28] In addition, IOM has conducted several studies on the migration potential in Central and Eastern Europe and has set up return programs for rejected asylum seekers in several CEECs.
[29] See UNHCR (1996).

focus of activity is the establishment of asylum systems, the monitoring of transnational migration flows and the integration of legally resident aliens. From a liberal perspective, these actors concentrate on individual human rights and aim to transfer the values of freedom of movement and refugee protection which characterised Western post-World War II immigration regimes.

Which course do EU pre-accession strategies towards the CEECs follow, considering this complex, and at times contradictory, nature of contemporary Western immigration policies? The difficult balance between realism and liberalism in the enlargement of EU asylum and immigration policies is discussed in the next section.

4 Realism and Liberalism in the Politics of Eastern Enlargement

With the ongoing dynamics of integration, the issues of asylum and immigration have gained a genuinely European dimension: they have been introduced in the external relations of the Union and now figure amongst the general requirements for an accession to the EU. Adaptation to the *acquis* reached under the political pillars of the Union is no longer a problem of national interests or intergovernmental relations, but an indispensable step in the CEECs' efforts to become member states. This section analyses the relationship between realism and liberalism in the politics of Eastern enlargement. According to the theoretical framework presented in section one, its focus is on the institutional organisation of the enlargement process, that is in particular the ideational frames transmitted in these processes and the relative influence of governmental versus supranational or other international actors. The underlying hypothesis is that given the dominant focus on border enforcement and immigration control the bilateral processes (see above), intergovernmental structures will favour the transfer of more "realist" frames to the detriment of liberal elements. Considering the fragmented and dynamic nature of intra-EU co-operation in this field (see section two), this section starts with an analysis of the processes leading to the determination of the *acquis* in this field, before turning to the dynamics behind its West to East communication and ends with a discussion of the evaluation of the CEECs' adaptation.

4.1 The Determination of the "Acquis"

Notwithstanding the rapidly intensifying intergovernmental co-operation between individual member states and CEECs, the introduction of justice and home affairs into the EU strategy of pre-accession was only decided in December 1994 at the Essen European Council.

Three considerations may account for this relative delay in the introduction of asylum and immigration matters into the formal enlargement politics: member states' concern to retain sovereignty over these matters and, perhaps more importantly, the obscure legal nature of the agreements taken under the third pillar.[30] Furthermore, the introduction of these matters into the catalogue of conditions for EU membership represented a new dimension in EU external relations. In contrast to the earlier "political conditionality" imposed on foreign policy instruments like the PHARE-programme and general Co-operation and Association Agreements that gave equal billing to political liberalisation -- human rights, democracy, civic freedoms -- and to economic liberalisation of markets, trade, and investment regimes, the issues of asylum and immigration did not refer to the fundamental freedoms of own citizens but touched the respective countries' own external relations and their policies towards foreigners.

As a consequence, there was for a long time some confusion about the scope of the *acquis* reached in this field and about the measures which the CEECs would have to adopt in order to become member states. Indeed, the Union's legal *acquis* in these fields was and still is blurred between binding intergovernmental conventions, non-binding resolutions, conclusions, decisions and disparate member states' practices with regard to substantive and procedural regulations. Even within the European Commission, the exact scope of the third pillar *acquis* was not clear. Whereas some experts insisted that membership candidates could not and should not be asked to adopt any agreement that had not yet been fully endorsed by all EU member states at the time of accession, others maintained that these sensitive issues should be made compelling for the CEECs as early as possible.[31]

An informal determination of the *acquis* was finally made by the member state governments in 1996 with a letter from the Irish Presidency to the CEECs which included an extensive list of all instruments adopted by the EU member states and the Schengen Group before and after the entry into force of the Maastricht Treaty, together with the formally non-binding resolutions and conclusions.[32] This extensive determination was then formalised by the

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[30] Contrary to the instruments of "joint actions", "joint positions", and "international conventions" foreseen in the Treaty, the Ministers have so far operated with "resolutions" and "conclusions" which are not legally binding.

[31] See European Dialogue July-August 1996, no. 4: Justice and Home Affairs.

[32] Although this letter did not represent a formal determination of the *acquis* in the field, it nevertheless strengthened the legal status of these provisions since it made their domestic implementation compulsory on the CEECs in their efforts to join the Union.

Commission in its *avis* [33] (or opinions) on the applicants' progress in meeting the Copenhagen conditions in 1997.

In addition to the formal conventions and other legally binding instruments adopted by the member states, and informal and non-binding ones such as resolutions and conclusions, the *avis* laid down that the CEECs also have to adopt "the agreed elements of draft instruments which are in negotiation" (EU Commission 1997b: B.3.7). With the introduction of Schengen into the EU Treaty, it was furthermore decided that "for the purposes of the negotiations for the admission of new member states into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all states candidates for admission".[34] This means that contrary to the current member states, which were able to negotiate extensive opt-outs to asylum and immigration co-operation in the Amsterdam Treaty, future member states will have accept the *acquis* in full. This is supported by the new Article 49 TEU, which provides that every European state which wants to become a member of the EU must introduce the full *acquis* in its national laws.

Summing up, member states' governments have succeeded in determining the *acquis* in an extensive way. Considering the hitherto fragmented and mostly non-binding nature of this co-operation in the EU, this extensive determination was not unproblematic, as the confusion within the Commission shows (see above). Indeed, the fact that this determination occurred in parallel to the intergovernmental negotiations leading to the Amsterdam Treaty in 1997 indicates that the act of transferring asylum and immigration matters to the first pillar and of introducing Schengen into the EU framework were also a means to provide a legitimate base to these new obligations of the CEECs. As a consequence, this definition of the *acquis* exceeds the current obligations of the member states. This point is supported by the following considerations: firstly, the limping implementation of binding agreements in the member states; secondly, the exclusion of the possibility to negotiate opt-outs from this sensitive field of co-operation; and, finally, the obligation to adopt legally non-binding instruments plus those measures which are in the process of being drafted.

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[33] The Commission's *avis* of the ten applicant countries give a synopsis of the applicants' readiness for membership based on an overview of the political and economic situation in each country.

[34] Article 8 of the Schengen Protocol to the revised EU Treaty.

4.2 The Communication of the "Acquis"

The formal inclusion of co-operation in asylum and immigration matters into the EU's pre-accession strategies occurred only relatively late. Meanwhile, member states' governments had already developed a wide range of activities geared at the export of Western instruments of immigration control and refugee admission (see section three).

In July 1994, this rapidly expanding field of intergovernmental co-operation led the European Commission to urge the EU Ministers of justice and home affairs to take a decision on the procedures for consulting and informing the CEECs within a more structured and hence formal relationship in the fields of justice and home affairs. It regretted that, with regard to the content of intergovernmental co-operation in these fields, the emphasis had been placed on subjects related to the fight against organised crime, despite the fact that closer co-operation in asylum and immigration matters was urgently needed. It suggested that the establishment of adequate procedures and standards would be in the interest of all partners and an essential preparation for eventual membership in the Union (EU Commission 1994).

Following this suggestion, the Heads of State meeting at the Essen European Council in December 1994 decided to formally introduce co-operation in these matters into the instruments of pre-accession.[35] The following sub-sections retrace the communication of the EU *acquis* in the structured dialogue, the accession partnerships and the PHARE programme.

4.2.1 The Structured Dialogue

The structured dialogue was established in parallel to the bilateral system of co-operation in the Europe Agreements as a forum for multilateral consultations on various policy fields. Originally, this dialogue was to develop in a series of regular meetings between the EU institutions and the associated countries. This, however, proved relatively ineffective.

Between the Essen Council and summer 1997, the EU Ministers of justice and home affairs only met their Central and Eastern European counterparts twice. During that period, the focus of co-operation clearly centred on the question of illegal immigration. This is reflected in the list of priorities in the field of justice and home affairs set out at the informal Ministerial Conference

[35] In addition, several initiatives have been launched by the European Commission under Title VI of the European Union Treaty on justice and home affairs. For a general account of EU pre-accession strategies with the CEECs in justice and home affairs see Eisl 1997.

on Drugs and Organised Crime held in Berlin in September 1994. According to these priorities, co-operation should focus on combating serious forms of crime including traffic in human beings and illegal immigration networks (Council of the European Union General Secretariat 1994: 6). With regard to the latter, it was agreed to improve co-operation in visa policy; effective border controls and border surveillance; effective sanctions against sea and air carriers which enable the illegal entry of immigrants; the introduction of provisions that penalise the illegal smuggling of aliens, and the rapid return of illegal aliens to their countries of origin. To this end, several concrete measures were considered such as the exchange of liaison officers and experts for the transfer of expertise, technology and training. These issues continued to represent the focus of activities in the structured dialogue with the Council of justice and home affairs in the following two years.

In contrast to these activities aimed at fighting illegal immigration, the issues of asylum and (legal) immigration were given priority only in 1997 in the structured dialogue with the Council. At the same time, a first informal determination of the EU *acquis* in these fields was made (see above, section 4.1). The main points of discussion were the "safe third country" rule, the possibility of applying the Parallel Dublin Convention and the integration of refugees into society. During their meetings with the representatives of the Council, several CEECs expressed their concern with being swamped by asylum seekers returned by EU countries on grounds of the "safe third country" rule. In order to compensate for these eventualities, the CEECs proposed to differentiate between front-line countries, directly exposed to refugee flows, and centre countries, protected by the "safe third country" notion in the emerging pan-European refugee regime. These protected centre countries, which, given their relative wealth, would be the favoured destination of many migrants and refugees, would be requested to provide the front-line countries, in this case the CEECs themselves, with financial support.[36]

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[36] See also the alternative proposal of a draft skeleton readmission agreement made by the Czech Republic in 1995 which stipulates that a multilateral agreement, giving equal consideration to the interests of the Central European countries should be aimed for. Stating that the current Western praxis of readmission agreements tends to shift the burden of asylum seekers to the CEECs, the document expresses the intention to help EU countries, if these are in return prepared to assist the CEECs, for example, through the provision of 'financial reimbursement for the consequences of illegal migration.' From the Czech point of view, 'this can be understood as burden-sharing in the context of illegal migration in Europe.' On top of these declarations, the document expresses a clear and fundamental critique of the previous unilateral application of the 'safe third country' rule when it states that its application affects 'countries which have not been consulted on this approach' (See Third Meeting of the Expert

4.2.2 The Accession Partnerships

By summer 1997, dissatisfaction with the functioning of the structured dialogue opened a new phase in EU-CEECs relations based on the new strategy of "accession partnerships". These set up a common structure for all applicants, irrespective whether they are already engaged in negotiations, and set priorities for adaptation to the EU *acquis* on a timetable of short and medium-term priorities for each applicant. This phase was launched with the publication of the Commission's *avis* (see above) and the proposal for a new "reinforced" pre-accession strategy in its Agenda 2000.

With the progress of accession negotiations, the first priority in justice and home affairs has become the adoption of the Schengen *acquis*, which relates mostly to the strengthening of external borders and the fight against illegal immigration. At a meeting with EU Ministers of the Interior in June 1998, the CEECs agreed to gradually introduce the Schengen *acquis* even before their accession to the EU and put it into practice. At the same meeting, the Schengen states stressed that accession to the EU will not take place before the CEECs have implemented tight and efficient border control measures.[37] In order to stress this commitment, the EU and applicant countries signed a "Pre-accession Pact against Organised Crime" in May 1998 to support the CEECs' adoption of the *acquis* in justice and home affairs and to develop and implement joint projects against organised crime, including trafficking in human beings and "organised illegal immigration".[38]

4.2.3 The PHARE Programme

The extension of the PHARE[39] programme to justice and home affairs was prepared by the so-called "Langdon Report"[40] which set the priorities for co-operation in these areas and made propositions for the allocation of PHARE assistance. The report called firstly for the adoption of measures to combat illegal immigration and to enforce border controls, secondly the need to build up the institutions and procedures necessary for a working and well informed asylum system, and as a third priority the need to combat drug trafficking.

Group of the Budapest Group, Implementation of Readmission Agreements, Report on Theme 2: Revised version prepared by the Czech Republic and IGC, Budapest, 15-16 June 1995).

[37] Uniting Europe No. 13 of 29 June 1998.

[38] Uniting Europe No. 4 of 27 April 1998, No. 10 of 8 June 1998.

[39] PHARE stands for 'Poland, Hungary Aid for Reconstruction' and was originally designed to support economic reforms of the sectors of agriculture, ecology, finance, industry, infrastructure, the social sector and education. A similar programme has been established for the newly independent states of the former Soviet Union called TACIS.

[40] The report was named after its author, Anthony Langdon; an independent expert appointed by the European Commission.

Since then the Commission has engaged in a series of bilateral discussions with each associated CEEC to identify the specific needs for which PHARE funds might be used. In addition, the programme has moved from a demand- to an accession-driven philosophy. While before, the initiative for PHARE money had to come from the associated countries, new programmes can now be proposed also by EU member states, the European Commission and other institutions such as the Council of Europe or UNHCR.

According to the priorities set by the European Commission in the accession partnership, PHARE funding for all ten CEECs should concentrate on the development of effective border management and (only) in the medium term on the establishment of asylum systems and related measures.[41] With regard to the latter, the Commission would preferentially support the development of adequate institutional frameworks for dealing with refugees and asylum seekers, the implementation of asylum procedures, including the training of personnel, and the development of documentary and information sources. Furthermore, PHARE should also support the development of legal advisory systems and NGOs dealing with refugees. These activities could be accompanied by research, seminars and other exchanges dealing with refugees and specific elements of the *acquis* or other common practical issues (EU Commission 1997a: 32–33).

A corresponding EU project aimed at strengthening the "capacity of Central and East European countries (CEECs) to apply the European Union (EU) *acquis* on asylum and immigration as well as related standards and practices" was announced in February 1999 by the Commission and several member states.[42] In this framework, three million euros have been allocated for the period until the end of the year 2000. Compared to the amount of money invested in the field of border enforcement and the sum of 16.75 million euros set aside this year by the European Commission for projects in EU member states, this sum is relatively unimportant.

With the evolution of accession negotiations, the measures related to the strengthening of institutional and administrative capacities in order to ensure the application of the *acquis* to the same standards as current member states have been gathered under the heading of "Twinning". These co-operation

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[41] See the list of priorities in Uniting Europe No. 2 of 13 April 1998; No. 3 of 20 April 1998 and No. 4 of 27 April 1998. See also, European Report No. 2326 of 24 June 1998.

[42] These were Austria, Denmark, France, Germany, the Netherlands, Spain and Sweden, see Migration News Sheet 3/1999.

processes are guided by member states officials or representatives as "Pre-accession advisors" and funded by the PHARE programme.[43]

4.3 Evaluation of the CEECs' Adaptation to the "Acquis"

On the basis of the enlarged membership conditions mentioned in section 4.1, the *avis* given by the Commission in the fields of justice and home affairs cover a broad range of issues. As general conditions, they include the accession of the CEECs to relevant international treaties, the observation of the rule of law, the stability of administrative and judicial institutions, and data protection. With regard to specific policy fields, they assess the establishment of equitable asylum procedures and laws as well as the adoption of restrictive measures to limit immigration and to ensure stringent border controls. As such, they mention the tightening up of visa regimes; the strengthening of admission systems; the tightening up of enforcement and deportation procedures; the introduction of penalties for illegal immigration, and the adoption of sanctions against carriers enabling the illegal entry of foreigners; the conclusion of readmission agreements with Western and other Central, East, and South European countries; and finally the reform of the border management systems improving control and surveillance mechanisms.[44]

In sum, the list of issues raised in the *avis* illustrates the full complexity of the CEECs' adaptation to the EU *acquis* in asylum and immigration matters; it expresses the need to implement both liberal values and institutions, required for the respect of the rule of law, international human rights and fundamental freedoms, as well as tight control standards, necessary for the safeguarding of internal security and immigration control. Thus, the enlargement conditions include both levels of the *acquis*: the common "realist" measures adopted at the EU level and, as sort of pre-condition, the observation of basic "liberal" safeguards with regard to human rights and the rule of law contained in the national political systems.

Unlike the broader framework of enlargement processes, where the Commission is competent to evaluate the CEECs' preparations, the screening of their progress in justice and home affairs is assessed by a governmental body

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[43] 'Twinning' has been allocated 30% of the total PHARE programme per year and focuses on the following 'key areas' of the *acquis*: agriculture, environment, finance, and justice and home affairs.

[44] See the Reports on Progress Towards Accession by each of the candidate countries published by the European Commission in November 1998 and European Dialogue March-April 1999, no.2: Enlargement.

composed of governmental representatives of the EU member states. This expert group operates under the supervision of a political body, namely the Committee of Permanent Representatives of the Member States (COREPER). It makes an evaluation on the basis of information provided by the member states in their bilateral and multilateral activities with the CEECs, the member states' embassies in these countries as well as European Commission delegations, the European Commission through its role in the overall process of accession and the PHARE programme, and reports made by the Council of Europe on the implementation of the relevant conventions and recommendations. With these exceptional proceedings, the member states have once again asserted their sovereignty over the policy fields pertaining to justice and home affairs.

From the perspective of the CEECs, this extension of the EU *acquis* to include asylum and immigration matters was not uncontroversial. Central and Eastern European countries have criticised the EU's unilateral approach to the determination of the conditions for their membership and have pointed out that the EU manifested an unbalanced attitude with regard to the different policy fields included under the title "justice and home affairs". Here, the EU and its member states especially pushed issues related to (illegal) immigration, which represented highly sensitive matters for the associated countries. In this context, these countries expressed their disagreement with the fact that rules which affected them particularly, such as the safe third country rule, were negotiated unilaterally behind closed doors. The CEECs realise that asylum and immigration policies might be instrumentalised by EU member states in order to establish a "filter" or a "buffer zone" between them and the countries of emigration. Wary of being overburdened with asylum seekers returned by EU countries on grounds of the safe third country rule, the CEECs proposed differentiating between front countries who are directly exposed to refugee flows and centre countries which are protected by the safe third country notion in the European refugee regime, and to provide the front countries, in this case the CEECs themselves, with financial compensation.[45] These controversies show the reification of a realist approach in the CEECs' reception of the EU asylum and immigration policies, in which migrants and asylum seekers are confounded as undesired persons in a zero-sum game of negative redistribution.

While criticising their unilateral incorporation into Western restrictive asylum and immigration policies, the CEECs have all engaged in reforms of their immigration regimes in order conform with the requirements of the European Union. After a first wave in the early 1990s of very general, and

[45] This proposal was made at the second meeting of the justice and home affairs Ministers in Brussels on 27 May 1997, see above and footnote 36.

predominantly liberal reforms of their entry provisions and asylum policies linked to the implementation of the 1951 Geneva Convention,[46] all associated countries have carried through restrictive reforms aiming at the implementation of the EU *acquis* (see CAHAR 1997, European Parliament 1999, Lavenex 1999b). In accordance with the dominant frame transmitted in intergovernmental co-operation and in the EU enlargement strategies, the focus of these reforms has been on border enforcement, the tightening up of visa policies, the signing of readmission agreements, and measures to fight migrant smuggling. With regard to asylum policy, recent reforms include the introduction of restrictive instruments such as simplified procedures in "manifestly unfounded" asylum requests, the adoption of the notion of "safe countries of origin", and the implementation of the "safe third country" notion towards their own Eastern and south-Eastern neighbours. Similarly, the conclusion of readmission agreements with the West usually goes hand in hand with the conclusion of such agreements with the CEECs' Eastern and south-Eastern neighbours, thus carrying the risk of establishing a chain of readmission agreements to countries where the life or freedom of the persons concerned is threatened. As a consequence, recent evaluations of the CEECs' preparation to EU membership point not only at the need to foster even more the fight against illegal immigration, but also at deficits in the fields of refugee protection, human rights and the rule of law.[47]

As spelled out in a recent report by the European Parliament, some candidate countries are criticised for the "lack of a legal framework and an appropriate infrastructure" for the protection of refugees (EP 1999: 14). It happens that asylum seekers are denied entry at border stations and that the have no access to refugee status determination procedures (ibid., see also CAHAR 1997; EU Commission 1997a; UNHCR 1996). Another point of concern is the use of very tight time limits for the submission of asylum applications, the use of extensive exclusion clauses impeding access to the procedure, the difficult access to legal counselling, translation problems, and the difficulty for humanitarian NGOs and the UNHCR to intervene in the procedure (EP 1999: 15, 34, 55). Another point of concern is the treatment of undocumented migrants and asylum seekers at the border and their frequent detention in so-called transit zones pending deportation. These often prolonged

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[46] See Pehe (1994), Stainsby (1990), Engelbrekt (1994), and Shafir (1994).

[47] See e.g. the study by the European Parliament (1999), the Reports of the European Commission on Progress Towards Accession by each of the candidate countries released in November 1998 and the result of the screening in justice and home affairs conducted in March 1999 with those countries, with which accession negotiations have started and June 1999 for the other applicant CEECs.

detentions risk to be in breach of article 3 ECHR and often lack basic humanitarian standards.[48] In addition - and not surprisingly so, if one considers the difficult economic situation in most of the CEECs - important deficits exist also in the social reception capacities for these persons, e.g. with regard to food, shelter, and medical care (ibid.: 21). Finally, a more political challenge results from the self-proliferating dynamics of the redistributive notion of "safe third countries" and readmission agreements and their application by the CEECs towards their own Eastern neighbours such as Belarus or the Ukraine (EP 1999: 44). By this, a system of "burden shifting" risks to be established which pushes the function of immigration control and refugee protection further and further away from the EU's territorial borders, thus transforming Central and Eastern European Countries into "gatekeepers" for undesired aliens and challenging fundamental international norms such as that of non-refoulement.

5 Conclusion: Challenges to Eastern Enlargement

The analysis of West to East propagation of EU asylum and immigration policies shows that under the current institutional setting, the politics of EU enlargement tend to prioritise "realist" over "liberal" considerations. The extension of the EU *acquis* gives priority to the enforcement of Eastern borders and the fight against illegal immigration, the questions of legal migration and refugee protection, in contrast, have been given much less attention.

Three explanatory factors were identified behind these findings: the nature of the EU *acquis*, the dominance of intergovernmentalism and the situation in the CEECs themselves. The *acquis* adopted at the European level so-far is limited and concentrates from a "realist" perspective on border controls, the combat of illegal immigration and asylum abuse. As spelled out in the condition for membership, however, accession presupposes also the CEECs' adaptation to basic legal and institutional standards safeguarding the rule of law and the protection of human rights. These pre-conditions are however domestic institutions which look back on long and diverse national histories, neither have they been unified in the sense of European policies (such as e.g. substantive standards of refugee law), nor do the EU institutions have executive or legislative competences in these matters. This is complicated by the fact that in most current member states, this liberal tradition is no longer consensual and

[48] Violation of article 3 ECHR through prolonged detention has been stated by the European Court of Human Rights in the case Amuur vs. France, ruling 17/1995/523/609 of 25.6.1996.

that most Western governments have and still are limiting their original legal and procedural standards.

Against the background of this restrictive trend, the organisational set up of the pre-accession strategies with the dominant position of the member state representatives contributes further to the dominance of "realist" policies. This is complicated by the limited nature of the policies adopted at the EU level (see above), which puts additional constraints to the competence of the European Commission or the European Parliament in this area.

Finally, the "realist" orientation tends to be perpetuated by the CEECs themselves, which, given their geographical situation, fear to be transformed into a "buffer zone" warding off undesired immigrants from the wealthier countries of Western Europe.

This dominance of "realism" over "liberalism" in the export of EU asylum and immigration policies poses several challenges to the prospect of Eastern enlargement. Apart from the difficulty to reconcile the tightening up of asylum and immigration matters with legal and procedural safeguards against human rights violations, these processes conflict with the idea of free movement of persons which is an integral part of the single market programme. This tension has a long tradition since co-operation in justice and home affairs began as a counter-reaction to the confirmation of the aim to abolish internal border controls (see above, section two). For the CEE region as a whole, this challenge to the free movement of persons is aggravated by the prospect of an enlargement in stages. The emphasis on external borders and strict immigration policies might lead to tensions in the relations between the CEECs and threaten historical, economic and cultural ties in the region. The introduction of restrictive visa policies proves problematic in these newly liberalised states which for half a century have suffered from restrictions to the right to travel. The sealing of the Eastern borders also hampers the development of regional economic co-operation in the region, such as for example trade relations between Poland and the Ukraine. Furthermore, the fact the citizens of some associated countries like Bulgaria and Romania need visas to enter the Union, while others do not is a major point of controversy in their relations with the Union. Among the CEECs, finally, a major problem posed by the emphasis on external borders in an enlargement in stages concerns the presence of vast ethnic minorities spread over a number of neighbouring countries like, for example, the Hungarians in Romania, Slovakia, Slovenia, Serbia and the Ukraine. To conclude, these findings illustrate the challenges involved in moving the Union's borders eastwards, and symbolise the difficult relationship between realist concerns with state sovereignty and liberal values not only in

the field of asylum and immigration, but also in the broader process of European integration.

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