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Migration policies and security in Germany and the EU: border control dilemmas in the 21st century

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Declaration

“I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and where due acknowledgement has been made”.

(Signature)

(Date)

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Brief summary:

This thesis takes up the intimate link between migration realities and the necessity to ensure security on the territory of nation states. Unluckily, migration has the same effect as international terrorism, i.e. blurring the borders between an external and international security dimension. Therefore migration management is often understood as migration control. But the security dimension of migration gets sometimes too predominant, neglecting human rights of individual migrants. National policies are influenced by a wide range of actors within the society, who contribute to focusing the debate more on the integration rather than the control dimension, even if the majority of public opinion has anti-immigrant positions. Germany will provide the case study for analysing the national level. An economics, laws and politics triangle provides the basic analytical framework. The emergence of a securitised migration approach on the EU-level is linked to the willingness of member states to cooperate on this sensitive issue. Other cooperation processes occur outside the EU framework, but it is generally not less focused on security and control. Illegal migration is particularly outlined here, even if it is extremely difficult to get statistical data for scientific foundation. Criminal networks are also often trans-national, which makes cross-border cooperation indeed effective. But the vulnerability of individual migrants within societies, particularly those living in illegal situations, ought not to be neglected for the sake of security needs.

Main key words:

- Migration management
- Security dilemma
- Border control
- EU
- Germany
- Frontex
- Human rights

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Glossary

<i>AHWGI</i>	Ad Hoc Working Group on Immigration
<i>Anwerbestopp</i>	end of work recruitment ordered by the German government on 23.11.1973
<i>Asylmißbrauch</i>	term used by Genscher: abuse of the asylum system
<i>Auslieferungsvertrag</i>	extradition treaty
<i>Aussiedler</i>	expelled or returned expatriates of German ethnic origin
<i>Bundesgrenzschutz (BGS)</i>	federal border control agency
<i>Bundesland (= Länder)</i>	regional entity of the federation (16 in all)
<i>Bundesrat</i>	federal parliament (region representation)
<i>Bundestag</i>	federal parliament
<i>Bundesverfassungsgericht (BVG)</i>	Federal Constitutional Court of Justice
<i>CEEC</i>	Central and East European Countries
<i>Christlich Soziale Union (CSU)</i>	Christian-democratic party (in Bavaria only)
<i>Christlich Demokratische Union Deutschlands (CDU)</i>	Christian-democratic party of Germany
<i>ČR (Česká Republika)</i>	Czech Republic
<i>Deutsche Volksunion (DVU)</i>	Extreme right-wing party (German popular union)
<i>Deutschtum</i>	German-ness: debate over the German identity
<i>Deutschtumelei</i>	term used by the SPD disagreeing with this debate launched mainly by the CDU/CSU
<i>Deutscher Gewerkschaftsbund (DGB)</i>	German trade union
<i>ERF</i>	European Refugee Fund
<i>Etat-gendarme</i>	“police state”—minimalist definition of the tasks of a state: guaranteeing a nation’s security
<i>Eurodac</i>	fingerprint database for asylum seekers (EU)
<i>Extremistenerlasse</i>	repressive measures of the government against extremist movements
<i>Freiheitlich-Demokratische Grundordnung (FDGO)</i>	free democratic fundamental order
<i>Freiheitlich-Demokratische Partei (FDP)</i>	Liberal party

<i>Frontex</i>	EU Agency for the Management of External Borders
<i>Gastarbeiter</i>	(temporary) guest-workers, recruited in the 1950s-70s on the basis of work contracts: often stayed after the end of the contract
<i>Grundgesetz (GG)</i>	Fundamental Law in FRG since 1949
<i>Landtag</i>	regional parliament (federal system of FRG)
<i>Leitkultur</i>	“leading culture”: debate over the integration of foreigners
<i>Linkspartei</i>	Left-wing party since 2005
<i>Nationaldemokratische Partei Deutschlands (NPD)</i>	Extreme right-wing party
<i>Non-refoulement</i>	principle, according to which a refugee cannot be expelled if facing a life-threatening situation
<i>QMV</i>	Qualified Majority Voting
<i>Rechtshilfevertrag</i>	Legal Assistance Treaty
<i>Reisefreiheit</i>	freedom to travel
<i>Rote Armee Fraktion (RAF)</i>	Red Army Fraction: terrorist left-wing group 1960s-1990s in FRG
<i>Schicksalsgemeinschaft</i>	community of fate
<i>SIS</i>	Schengen Information System
<i>Sozialdemokratische Partei Deutschlands (SPD)</i>	Social Democrat Party of Germany
<i>Spätaussiedler</i>	cf. <i>Aussiedler</i> , yet arriving to FRG after 1994
<i>Statistisches Bundesamt</i>	statistical federal agency
<i>TCN</i>	third country nationals
<i>TREVI group</i>	minister meetings against terrorism, radicalism, extremism and international violence
<i>Überfremdung</i>	excessive proportion of foreigners among the German population
<i>VIS</i>	Visa Information System
<i>Zuwanderungsgesetz</i>	Immigration law

Introduction—Research construction

1) Framing and outlining the relevance of the topic

In October 2004, European Union (EU) justice and interior ministers met in Luxembourg in order to drive the process of a common asylum and immigration policy forward. The deadline for such a common EU policy was set for 2010, which shows that it is a topic that ministers do not easily agree upon.¹ In the actual context it is unlikely that a common Europeanized immigration policy will be agreed upon, because states do not want to lose control in controlling migration or preventing crime. A cause for this is the fact that migration challenges one of the oldest tasks of a sovereign state, i.e. guaranteeing security to nationals, be it within or outside the territorial boundaries. It blurs the lines between traditional definitions of external or internal security, a characteristic shared with global terrorism, which contributes to equating migration with the issue of security. Surreptitiously, managing migration has thus been increasingly understood as making sure that potential criminals/terrorists are kept out of the borders of the national (or EU) territory.

Besides national migration policies and laws (i.e. against illegal migration), the EU approach to migration and security with the establishment of the EU Agency Frontex in Warsaw is important to underline. In what way does migration affect the legitimacy and the traditional role of nation-states? One of the main effects on or through the lens of state sovereignty in handling the reality of migration is that states are simply not ready to push the issue on the EU level, despite the creation of the mentioned agency. It also means viewing migration more and more as a threat, as created through mainstream security discourses by governments, security agencies and the media, which in turn stirs up popular beliefs and fears, populism and radicalisation on the domestic scene.

The EU is not a specific case, as current protest movements in the USA against tightened migration laws prove it. Migration is an inherently international issue, in which dialogue between governments has become necessary, but also ever more difficult with the fight against terrorism remaining top priority. The efforts of the IOM and UNITAR in 2006 to favour intergovernmental dialogue are significant indicators of the importance of migration in global politics. Furthermore, immigrants in their various categories (asylum seekers, labour migrants, family reunifications...) are protected by international law

¹ K. Bennhold, "EU ministers set deadline on immigration policy" (26.10.2004), International Herald Tribune, Available [online]: 08.06.2005, on: <http://www.ihrt.com/articles/2004/10/25/news/immig.html>

regimes, making democratic states, which are dedicated to the cause of human rights (HR), responsible for them.

Nonetheless, one of the most attractive features of this research topic applied to the EU is its actuality and relevance at a time, part of the EU deals with the future integration of the new member states (MS) into the Schengen zone and when national governments such as Germany, France or the Netherlands discuss deep-going reforms in their migration policies. National immigration policies and laws influence continuously the EU process on its way of establishing a common asylum and immigration policy. This however cannot be interpreted as strengthening the entities of the state, but rather as its weakening point—the intimate link between migration and security lies at the bottom of the entity of the nation-state itself. Not emerging from, but getting new relevance and visages through globalization, getting the balance right between migration and security needs is therefore at the heart of the 21st century challenges on all the levels involved.

2) Assumptions, hypotheses and methodological construction

International migration can be regarded as being either an independent variable, which explains various social and political changes in the EU. Here however, the assumption is reversed, i.e. international migration is a dependent variable, the understanding of which is shaped by institutions within receiving states and by relations between the states.² Out of this perspective emerges another core assumption throughout this work: governments and the EU have handled migration predominantly under its security aspects. Critics have called this an evolution towards a “fortress Europe”, free inside but difficult to penetrate from the outside; international observers have also issued worries that selective migration will harm the overall cause of refugees.³ The major aim of the thesis will be, on the one hand, to discuss evolution and implications of migration policies based on border control, also in terms of illegal migration (only randomly evoking issues like family reunification or labour migration when necessary); on the other hand, broader implications of migration management will be outlined, which make it necessary to go beyond the territorial aspect of security.

It is expected that the gradually evolving communitarian EU approach in migration and asylum issues goes into the same direction as its MS in terms of prioritizing the

² Cf. A. Geddes, The Politics of Migration and Immigration in Europe, London/Thousand Oaks/New Delhi: Sage Publications, 2005, p. 2f.

³ M. Sunjic/N. Prokopchuk, “Fortress Europe: The wall is getting higher” (26.04.2006), UNHCR, Available [online]: 03.05.2006, on: <http://www.alertnet.org/thenews/newsdesk/UNHCR/b81f202eecb8f80d4a4d8f9c97dfb6cc.htm>

security-based definition. It is not the endeavour of this work to determine how the EU is capable to influence MS, but rather as is argued here that both entities are tightly intertwined and that they go into the same direction. A second hypothesis is that more restrictive immigration policies do not find their roots in an objective threat emanating from immigrants, but are often captured by political parties in order not to lose votes to the far-right. Finally, a third hypothesis is that stricter border controls might have a reverse effect, favouring the formation of cross-border smuggler networks through the restriction of accessible legal options and thereby do not contribute to limiting the crime element of illegal migration, but rather harms immigrants altogether.

The reasons for an ongoing securitization of migration are various and can be found within the multi-disciplinary nature of migration itself, at the crossroads of demography, economics, history, law, political science, sociology and anthropology.⁴ Each discipline tackles migration from a different perspective, which in turn shapes the choice of the levels or units of analysis to be emphasised. Micro-level research analyzes more concretely how larger forces shape the decisions and actions of migrating individuals or families and, by extension, how communities are affected by them. Structural political, legal and economic conditions shaping migration flows are tackled by the macro level of analysis. The units of analysis can vary as well, focusing on individuals (economics, anthropology or law in case studies), the population (demography, history), the state or/and the international system (political science) and so on. Since the 1990s quite a few researchers have called for more interdisciplinary, cross-national research projects (Castles, Massey, Brettell and Hollifield among others). Still, the broad perspective has to be narrowed down to fit the research aim in this work.

Mainly political, economic and legal factors (cf. pp. 18ff.) will be therefore taken into account; where necessary, statistical demographic data will be used. The macro-level of analysis will be given preference, because the aim is to discuss policies determining rules of entry and exit and thereby regulating migration flows. The primary units of analysis will be the international system itself, encompassing international law and organisations active in this sphere, the EU- and the national level. Due to material reasons (mainly lacking language proficiency to analyse the national legal frameworks and political debates), it was not possible to make a cross-national comparison of the EU MS. The national level will therefore be represented by Germany due to its geo-strategic position, historical evolution and contemporary political debates.

⁴ C. Brettell/J. F. Hollifield, Migration Theory—Talking across disciplines, New York/London: Routledge, 2000, pp. 1-26

The main methodological approach applied here is qualitative analysis;⁵ some statistical demographic data will be used when trying to get a better picture of the German national situation (e.g. in terms of the evolution of foreigners' criminality). The focus however will lie in the analysis of government policies and actions, especially because statistics were not as pertinent to use as expected (quantification methods and definitions used by official federal bodies in Germany changed in 2004). Primary sources will mainly be legal texts, but also speeches and statistics; the secondary sources will heavily rely on research articles, books and news articles providing information on policy impacts on the societal level. The dependent variables are government or EU policies (admissionist vs. restrictionist and their shifts) and their outcomes (integration and control), determined by impacts from new global security threats. Independent variables can be institutions and legal rights, as well as interests guiding decision-makers. To get insight-knowledge and perspectives on these issues, interviews with responsible authorities would have been excellent, but it was an unrealistic method to realize within the limited network and time frame available for this research. Analysing media approaches can at least indirectly circumvent these limits.

3) Structure of the thesis

The structure of the work will be as follows: An introductory chapter will define and analyse the concepts of security and migration, as well as the consequences of their interconnectedness in a global world. The main argument will be the fact that migration is blurring the traditional external vs. internal security concept, thereby leading to a securitized approach to migration itself. The chapter will outline the ways, in which migration challenges nations' conceptual, organisational and territorial boundaries, leading to more restrictive migration policies. Main security threats emanating from the post-cold war context and radicalisation of terrorism support this evolution.

The following chapters will be dedicated to the levels analysed more in depth. The second chapter will therefore give a more specific account of the evolution towards initiatives in migration policies on the EC/EU level, starting with the principle of free movement of persons since the Treaty of Rome. It shows that the 1990s have been particularly important for the establishment of migration approaches, particularly since the issue was moved from the third pillar to the first pillar in 1999. Current texts adopted

⁵ Ch. C. Ragin et al., "Political Methodology: Qualitative Methods", A new handbook of political science, Chapter 33, ed. by Robert E. Goodin/Hans-Dieter Klingemann, Oxford University Press, Oxford/New York, 1996: pp. 750-768

by the Commission or the European Council, proposed by the European Parliament (EP) will show the direction EU has taken in recent years, despite some reticence from the side of MS. A sub-chapter will narrow down the broad perspective to the area of central Europe, currently preparing to enter the Schengen zone and responsible for border management to the eastern EU border. This makes sense as national immigration policies are partly influenced by fears of Western EU people that the 2004 enlargement to the East would also let in a flow of migrants from geographically closer crisis regions.

The third chapter will give an in-depth analysis of the national level, based on the case study of Germany: the country is particularly interesting for its specific migration patterns and recent evolutions in immigration policies. Its geographic position at the border of Central Europe has led Germany to be active in the EU enlargement process. The country has also been particularly approached from asylum seekers and refugees in the 1990s; therefore, Germany became a promoter of the Europeanization of migration policies. The perspective will draw heavily on the above-mentioned three-fold analysis in political, economic and legal terms. Some discussion will be dedicated to the situation of crime when linked to migration in order to analyse whether policies have become more restrictive. The goal is to test the hypothesis as far as possible of whether strict border control is efficient against crime when there is a link to migration. This was indeed the most problematic point of the thesis, since it was not possible to rely too much on statistical data; this problem has been outlined by most researchers specialised on German (illegal) immigration as well. Understandably, the nature of illegal migration as such makes it difficult to find reliable numbers on them. Because of the federal system of the country, the chapter will dive into the *Länder* level and will analyse the societal debate between political parties, interest groups and private actors.

The fourth chapter summarizes the interconnectedness of German and EU policy evolutions, although the linkage will be mentioned throughout the thesis where necessary. It was not possible to include an analysis of the international level within the scope of this work, even if it is not less crucial, particularly for such a global phenomenon as migration and security. Therefore, the international legal framework and some international and intergovernmental cooperation initiatives imposing duties on Germany outside the EU framework will be at least briefly outlined in the end. Cross-border problems and policy responses ought to be dealt with by constructive dialogue among governments on all levels, also relying on international organisations as mediators. Regional cooperation, e.g. between Bavaria and the Czech Republic has just as positive effects on migration management. But the HR dimension for individual migrants has to be given more attention in these cooperation processes.

Chapter I: *The challenge of migration to national security policies*

A—Contemporary context: security and human rights as main tasks of the state

a) Globalization and new threats: new perception of the notion of security

i. *Traditional role of the state: ensuring a nation's external and internal security*

From the end of World War II (WWII) to the start of the 21st century the notion of security has acquired diversified meanings moving from a mainly military definition to incorporating a human, ecological, economic, financial, health dimension etc. The *Universalis Encyclopaedia* defines security as:

“1. absence of danger; 2. confident and tranquil state of mind in a context of absence of danger (real or imaginary absence; there can be a false impression of security); 3. button that blocs the functioning of an instrument, an armament, a machine”⁶.

In a broad sense, the third definition can be seen as anything perturbing a system from working. In a strictly traditional concept of state theory, it is one of the principal duties of a state to ensure the internal and external security of the nation (minimalist state definition, so-called *Etat-gendarme*). Max Weber well defined a state as being a form of political organisation characterised by the monopoly of power of constraint on a given territory and a given population, and by a set of stable judicial rules (constitution, laws). Over time, states have extended their role until the emergence of Beveridge's British Welfare State (WS) system in 1942. Since then, various liberal ideologies have emerged to reduce the state's role back to a minimal one: what remains in the core of its tasks is the issue of assuring the security of a population on a clearly defined territory.⁷

To tackle a possible danger from its roots, sources and targets have to be clearly defined, meaning that the community to be protected and the enemy posing a threat have to be apparent. In 1932, Weber's colleague and Nazi state-counsellor Carl Schmitt—supporter of a strong state entity—saw the criteria of “the notion of politics” in a friend-enemy distinction, which helps state authorities to form a clear notion of belonging by shutting away outsiders. It is this distinction, according to him, that transcends any

⁶ “Définition: sécurité”, *Encyclopaediae Universalis*, DVD-Version 8, 2002

⁷ J.-Y. Capul/O. Garnier, *Dictionnaire d'Economie et de Sciences Sociales*, Paris: Hatier, 1999, pp. 168-179 ; C. Roux-Lanier et. al., *La Culture Générale*, Paris: Hatier, 1998, pp. 133f.

community into a political unity.⁸ His theory had provided the basis for strengthening the Nazi regime; but if taking this ideological dimension out, the theoretical framework is valuable to explain international relations during the Cold War period, in which the world was clearly defined in dogmatically centralized boundaries and firm ideologies, in central organisations and rigid, near-impenetrable borders.⁹

The 1989/90 events, and later 9/11, were decisive turning points in recent world history. The inherent change can be seen in the fact that threats have to be increasingly faced collectively. Gradually moving from a clear system of nation-states to one of a “planetary village” (McLuhan)¹⁰ where many phenomena are inter-linked, most security threats do not stop at state borders and can have dramatic, far-reaching effects both in geographic and time dimensions. Particularly the attacks on the US World Trade centre made it clear that threats had themselves changed in nature, moving away from clear identities, traditional warfare and standing armies towards guerrilla fights and non-state actors. Other societal security issues, such as interstate or internal migration, environmental protection, food and water security and job security have long been regarded as mere domestic political issues.

Yet despite the fact that threats have changed, that enemies are not visible as states used to be and that their motivations are neither quest for territorial gain nor power expansion (except in a religious way in the case of extremist fundamentalists), responses to them remained guided by a traditional (realist) view of security. Thus, the reactions to 9/11 were perpetrations of military attacks on clearly defined territories (i.e. Afghanistan and later Iraq) despite the fact that enemies had not yet been clearly identified. Ironically, the attitude to attempt defining an enemy against whom to ally remained unchanged; the international community had trouble overcoming ideologies it had been embedded with over the past 50 years and thus addressed (and agressed) once again the state level.

ii. *Contemporary world politics blurring the line between internal and external security dimension*

The changes that did take place in world settings were quite abrupt. As Jowitt outlines, the world moved to a world, in which the borders of territory, ideology and

⁸ C. Schmitt, *La notion de politique. Théorie du partisan*, Paris: Flammarion (Champs collection), 1992

⁹ Cf. N. Poku/D. T. Graham, “Redefining Security for a New Millenium,” in: Poku, Nana/Graham, David T., *Redefining security—Population Movements and National Security*, eds. Pokus/Graham, Westport, Conn.: Praeger, 1998, pp. 1-3

¹⁰ M. McLuhan, *Guerre et paix dans le village planétaire*, Paris: Robert Laffont, 1970

issues were gradually attenuated, becoming unclear and diffuse.¹¹ Warren Christopher enumerates these new threats as follows: ethnic and religious conflicts; weapons of mass destructions in the hands of unstable powers; outbursts of old rivalries in the Middle East, in Europe and Asia; various global challenges ranging from AIDS and overpopulation to the destruction of the planet's support system. It has now been accepted among security specialists that the traditional definition of threat in military terms and with clearly defined ideologies linked to a political regime is *passé*.

Ex-US president Clinton pointed out already in 1993 that the division between what is domestic and foreign does not longer hold; the greatest threats to the global system tomorrow stem from what we name "internal" today. It entails that such dangers cannot be handled by distinct entities alone. In security terms, this has frequently meant relying on resolutions and interventions of the UN Security Council. Another development blurring state borders is the enlargement and integration process of the EU. Part of its driving force can nonetheless be seen in the same endeavour to find solutions without being limited by state entities. The 21st century also set out a warning to the EU with the Madrid bombings in 2004. Although Spain for example was used to dealing with terrorist acts because of ETA, the Madrid bombing stemmed from global actors (the network Al Qaeda has become a near-synonym for this new phenomenon). In December 2003, the European Security Strategy "A secure Europe in a better world" named terrorism, weapons of mass destructions, regional conflicts, state failure and organised crime as the new key threats. As Guéhenno argues, a tight and effective international cooperation becomes necessary in a world, where "[...] *the solitary individual is face-to-face with a globality, which cannot be mastered, but which cannot be ignored either*".¹²

The global state entities themselves have ever more become main sources of threats for their citizens. Rather than facing military attacks from one state against another, individual human beings found themselves in situations of catastrophic insecurity, induced by the inability of (the international system of) states to provide protection (even when states were not themselves the perpetrators). Not external threats by enemies outside state borders (according to the traditional military security concept), but oppressive policies from their own governments were the sources of fear for the citizens. Human rights (HR) abuses have led to sadly known genocides in Rwanda, Indonesia or ex-Yugoslavia in the 1990s.

A redefinition of the security concept (moving towards a concept of human security, rather than national-state security) has therefore become urgent. Baldwin bases

¹¹ Quoted in: N. Poku/D. T. Graham, Redefining security... (pre-cited), p. 2 and 6

¹² Pierre Garrigue, "Action humanitaire", in: Encyclopaediae Universalis (pre-cited)

his arguments on the fact that a total “absence of danger” as defined above cannot be achieved. Therefore, he proposes to take a more inclusive view of security as “a low probability of damage to acquired values.” He outlines two factors as his framework, which can be helpful in this analysis as well: one factor aims at specifying the actor(s) whose security is under discussion; another factor specifies the values to be protected, such as political autonomy, territorial integrity and continuity of state identity. States still face challenges to sovereignty and territorial integrity, but other agendas emerged and incorporated migration, AIDS, environmental and social security. Further variables remain important when elaborating a security policy: sources of specific threats; means and policies to be used for pursuing security; time period for a given security policy and the opportunity cost of security for specific values. Finally, a distinction has to be made between objective (real) and subjective (perceived) threat. Waever names immigration of ‘others’ and an ensuing competition of incompatible identities as an example for the impact of subjective threat.¹³

Indeed, if migration is only one of the new dimensions of the new global landscape, it has important impacts on the redefining process of security.

b) The effects of migration on borders and the link with illegality

i. *Migration's impacts: challenging various kinds of boundaries*

Migration is part of those agendas getting more and more attention in the post-cold war context. There is no universally accepted definition of migration, but the movement of entities across boundaries constitutes its core feature (therefore ‘migration’ is a notion also broadly used in botanic, cellular biology and informatics). There are varying definitions of migration across the states; the International Organization for Migration (IOM) defines international migration as the ‘movement of people across borders’ and as “(...) a *trans-national phenomenon that presents major policy and management challenges and opportunities for governments and other actors in all regions of the world.*”¹⁴ The UN Population Division estimated the number of international migrants at about 175 million people, double the amount in comparison with 1965, which

¹³ N. Poku/D. T. Graham, *Redefining security...* (pre-cited), pp. 9-11

¹⁴ IOM, “The International Agenda for Migration Management,” (16./17.12.2004), Available [online]: 28.04.2006, on: http://www.bfm.admin.ch/fileadmin/user_upload/Themen_deutsch/Internationales/The_Berne_Initiative/IAMM_E.pdf, p. 15 f.

comes down to an average of 2.9 per cent of the world's population.¹⁵ Migration is linked to wide-ranging topics, e.g. development, trade, health, environment and national security. Therefore it is appealing to notice that—regardless of the international dimension of migration—states handle mainly *immigration*, the inflow into a country. Immigration is then typically understood and managed “(...) as a domestic concern marked by the responsibility of the interior ministries and associated agencies for the regulation of immigration.”¹⁶

The interplay of the phenomena of migration and security, both standing at the crossroads of international and domestic politics, poses many fascinating challenges to the involved actors in the 21st century. Defining migration and its impacts on security requires defining the ‘borders’ that are crossed beforehand. When investigating into Baldwin's security framework (the actors to whom security has to be granted and what values ought to be protected), it appears that migration has contributed to call into question different kinds of previously clearly set boundaries, a fact to which states have to adapt in their policy responses.

One such boundary—the ‘conceptual border’—is related to the above-outlined Schmittian friend-enemy distinction and continuity of state identity, not only challenged by non-state terrorism, but interestingly enough also by migrants (a feature sometimes sealing their fate when covered with a bad public image). Geddes defines conceptual borders as notions of belonging and identity, inherent to trans-national, national and/or sub-national communities. The issue of ethnicity is also predominant in multicultural European societies, yet policy responses have tended to emphasise socio-economic and linguistic adaptation, labelled with the vaguely defined concept of “integration”.

The second, more obvious value that a state tries to protect is its territorial integrity. Migration is face to face with the sovereign authority of states to exclude at territorial borders, i.e. land, air and sea ports of entry. Territorial boundaries have themselves moved as a result of the 2004 EU enlargement (the EU has since tried to consolidate these new borders) on the one hand. On the other, they have moved through the fact that migration management now tries to tackle the issue already directly in the countries of origin of the migrants (so-called ‘remote control’ migration). More and more actors become involved in tackling migration, because the state level cannot deal with it by itself. In an inaugural lecture in 2001, Guild stated that “[the] *exercise of migration controls at territorial borders has (...) moved up, down and out to include, for instance,*

¹⁵ Ibid., p. 5

¹⁶ A. Geddes, “Europe's Border Relationships and International Migration Relations,” in: *Journal of Common Market Studies*, vol. 43, no. 4, 2005: pp. 788 ff. (and the following)

supranational actors, third countries, and private actors such as truck drivers, ferry operators and airlines".¹⁷

A third important boundary defied by migration is the more concrete organizational or functional one, i.e. the borders of institutions such as the access to the labour market, WS and citizenship, which represent the sites of a political community's membership conditions. It includes learning the language and social habits, as well as the legal rights applicable to newcomers. Here the different types of migrants are of importance, since the rights vary according to the categories, be it asylum-seekers, highly- or lower-skilled migrants, seasonal workers, students or family migrants to name only the most common ones. The largest problematic category of migrants are however those who are illegal or undocumented, trying to avoid policy measures altogether.

ii. *Associating migration and illegality—the root of an emerging bias against migrants*

Because of the wide-ranging effects of migration on such basic values as the WS system, the balance of the labour market and the definition of national identities itself, the reaction of state authorities is specific according to the society the migrant tries to integrate into. Natural tendencies have been to try to keep out the necessity of handling the issue altogether by providing individuals with the right to exit but not to enter states. As the UN puts it, "(...) *no State allows the unlimited and unpatrolled crossing of its borders*".¹⁸ Ronald Skeldon analysed the element of control as being the root of much migration policy; he furthermore sees in it a bias toward limitation and restriction rather than toward promotion and facilitation.¹⁹ Part of this has derived from equating migration more and more with one of its sub-categories, namely irregular or illegal migration.

Democratic states have to face two obligations in their policy responses. For one thing, human dignity and the dedication of liberal democratic states to international values and HR makes migrants part of the (national) community to be protected (i.e. actors), despite their not being citizens. In the case of refugees fleeing from humanitarian disasters, it has—by international law custom—become unacceptable to oblige these non-citizens to go back to a country, where they are endangered. For another, immigrants switch to the other, threat-posing group (i.e. source of threat) if carrying

¹⁷ Quoted in: *Ibid.*, p. 789

¹⁸ United Nations, *World Population Monitoring, 1997. Issues of International Migration and Development: Selected Aspects*, Population Division of the Department for Economic and Social Information and Policy Analysis of the United Nations Secretariat, ESA/P/WP, New York, p. 117

¹⁹ R. Skeldon, "Migration Policies and National Security," in: N. Poku/D. T. Graham, *Redefining security...* (pre-cited), p. 30

extreme political or religious opinions: in the worst case, life-threatening risks to a state's own citizens through terrorist activities are conceivable. What results from this is a dichotomy for the state: migration challenges state identity (values), obliging it to re-think the notion of community beyond citizenship, which leads to a broadened concept of community. Another factor however remains unchanged—the need to ensure security—, which together poses the starting point for the link between external (ethnic implosions, humanitarian disasters...) and internal security (societal instability).

In diverse public discourses, the merging of external and internal society is being analysed as a result of organised crime, terrorism and illegal migration, which has awkward consequences on migrants' public image. The recent meeting of the British, French, German, Italian, Polish and Spanish Ministers of the Interior in Heiligendamm (22/23 March 2006) confirms this. The aim was to elaborate a common strategy for integrating immigrants, next to which the ministers decided to cooperate more closely in combating illegal migration, organised crime and terrorism. The fact that both issues are discussed side by side discloses the even unconscious closer look given to immigrants in terms of security suspicions.²⁰

Didier Bigo criticises this underlying framework, which he regards as being commonly accepted by security analysts.²¹ He views the blurred external and internal security concept as deriving from a transformation of the social world and from ways, in which different (security) agencies construct these 'changes' as threats. In addition, he outlines the role of personal interest in the competition for budgets, legitimacy and missions and the impacts of how political, bureaucratic and media games do (not) construct social change as a political or security problem. This comes down to security agencies having increasingly replaced the old, military definition of threat by crime. This shows, Bigo continues, in the fact that "[governments] *have tried to apply to illegal migrants the techniques that police use against criminals, and this is perhaps one of the strongest reasons for the link between crime and migration.*" This assumption has also spread to the EU-level with the creation of fingerprint databases in the sphere of immigration (Eurodac), a technique taken over from national anti-crime measures. Finding a balance between integrating migration policies and sufficient control mechanisms is a difficult task for nation-states locked in control dilemmas.

²⁰ Bundesregierung, "Gemeinsam für Integration" (23.03.2006), Available [online]: 24.03.2006, on: <http://www.bundesregierung.de/-,413.978899/artikel/Gemeinsam-fuer-Integration.htm>

²¹ D. Bigo, "Migration and security," in: *Controlling a new migration world*, eds. V. Guiraudon/ Ch. Joppke, New York/London: Routledge/EUI Studies in the Political Economy of Welfare (Florence), 2001, p. 121 f., p. 134

B—Migration as a threat: migration management based on control dilemmas

a) Restrictive policies as a result of control dilemmas

i. *Migration in a triangular relationship of politics, economics and law*

As briefly outlined above, migrants fall into the categories of those whose security is under discussion, while challenging the values of a community to protect. Thus they are increasingly identified as objective sources of threat because of terrorism or as subjective sources, e.g. among xenophobic extreme-right wing political opinions. Vaughan Robinson, analysing the evolution of the linkage between migration and security from WW II to the 1990s, concludes that an increasing number of countries now feel beleaguered by migration threats: existing migrant communities who challenge models of social and cultural homogeneity, mass illegal migration impacting on labour markets, asylum seekers overwhelming the WS or having too great demands on the natural environment, and threats from victims of environmental catastrophes. In short, immigrants are seen as a threat to the international order, to national economies, governments and homogeneity, welfare provisions, local ecosystems and personal security. The author states that within 50 years the specific sub-group of refugees has thus been metamorphosed from victims into a burden and 'international pariah group'.²²

One can agree with the argument that contemporary migration exacerbates tensions between democracy and capitalism and between democracy and liberal norms. Particularly the interplay between economics and politics is under pressure, for WS systems have limits and there are both costs and benefits for accepting migrants. Yet over the last 30 years, the legal dimension has been more enforced by activist high courts pushing immigration policy towards taking a more normative turn than Robinson suggests it (e.g. in terms of family reunification). Guiraudon and Joppke conceptualize current control dilemmas in a triangular relationship between (democratic, populist, anti-immigrant) politics, law (liberal norms, activist judiciaries) and economics (free trade, mobile capital, interest in foreign labour, global mass tourism).²³

Concerning the political implications, it has to be acknowledged that the media and public debates (e.g. on TV, involving the public) contribute to pressing migration as a potential source of danger on the forefront of political agenda. Consequences of popular

²² V. Robinson, "Security, Migration and Refugees," in: N. Poku/D. T. Graham, Redefining security... (pre-cited), pp. 67-90

²³ V. Guiraudon/Ch. Joppke, "Controlling a new migration world," in: Controlling a new migration world (pre-cited), pp. 8-11

fears are populism, radicalism and new forms of racism on the domestic scene; main arguments are the viability of the tax system, social and pension systems, as well as a tighter competition for jobs. Quassoli inserts the contribution of the judiciary to the process of blurring lines between external and internal security. According to him increasing migration waves are often coupled with crime rates in stereotypes: "(...) migrants' criminality is constructed in multiple and often related social contexts as an 'objective social fact' and a source of social insecurity." He investigates more precisely the ways, in which courts use a social categorisation of viewing the immigrant as an irregular, marginal, and finally criminal person. The author does not suggest that what he labels "racial, ethnic, social biases in the administration of justice" happens on a subjective basis, rather that they can be imputed on procedures used to recognize, describe, explain the reality of migrants' criminality.²⁴

Economics are the last element of the triangle. While the economic argument predominant in the 1960s and 1970s viewed migration as a factor contributing to economic growth in the receiving states and to development in the sending states, it had shifted to considering immigration as intolerably high, taking part in the competition over scarce resources. The importance of labour migration has regained importance recently: governments recognize more frequently the need to overcome pressing demographic situations by recruiting e.g. high-skilled IT specialists or cheap unskilled labour.²⁵

Some researchers criticise the growing gap between goals and outcomes of national immigration policy, which creates greater hostility toward immigrants and pressuring authorities to adopt more restrictive policies. Guiraudon and Joppke do not agree with this analysis, for policies are faced with contradictory pressures and conflicting goals at the same time; furthermore, it is difficult to clearly identify policy outcomes. "*One has to evaluate policy outcomes also along the illegal and criminally framed (human smuggling) flows [...], which are naturally much more difficult to measure, and which by definition escape the official statistics on entry and residence.*"²⁶

ii. Specificity and implications of illegal migration and political options

An IOM analysis stated that more restrictive legislation has been a result of confusing the status of refugees and illegal migrants, while relating security concerns

²⁴ F. Quassoli, "Migrant as criminal—the judicial treatment of migrant criminality," in: *Controlling a new migration world* (pre-cited), p. 151

²⁵ IOM, "The significance of migration," in: "The Migration-Development Nexus: Evidence and Policy Options", *IOM Migration Research Series*, no. 8, 2004, pp. 7 ff.

²⁶ V. Guiraudon/Ch. Joppke, "Controlling a new migration world" (pre-cited), p. 11

with the problem of asylum seekers.²⁷ To the degree that immigration is unwanted immigration policy is likely to become in effect a control policy addressed in negative terms. In 2004, Norbert Cyrus published a detailed account for the Agency for Immigration and Integration in Germany about the problems related to the illegal status of migrants. He therein warns against a lacking systematic link between research projects focusing on the social situation of illegal migrants on the one hand, or on the importance of smugglers and human traffickers on the other hand. This argument can be understood with reference to the assumption that illegal migration has indeed specific implications based on the above-outlined triangular relationship. Cyrus summarizes effects of illegality on the labour market and on the social situation in Germany; he also interprets main causes of illegality within the legal framework and pulling demands for cheap labour by (national) employers. Routes towards illegality and thereby negative impacts in terms of societal insecurity can be barred by providing more secure and legal options for migrants within the country.²⁸ This argument will be picked up in this thesis.

There are diverse ways, through which a migrant can fall into the category of illegality. These thus represent the starting points for politicians to tackle the issue. According to the first periodic security report by the German Ministry of the Interior and the Ministry of Justice in 2001²⁹, illegal entry can occur as follows: abuse of the freedom to travel (*Reisefreiheit*), i.e. entering as tourists or visitors and then work in the country; entry with falsified documents (often used by asylum seekers and refugees, but also by labour migrants from visa-requiring countries); visas received on the basis of wrong statements; and finally entry without any documents—this option has received a lot of attention because of the impressive conditions linked with it, often smuggled in by night and fog, even leading to death.

However, as Cyrus outlines, most cases of illegality occur *after* official entry at border checkpoints (e.g. visa overstayers). Conversely, tighter border controls make entry without documents more difficult, demand for and reliance on smugglers higher (including price conditions and thus incentive for these criminal networks). Also, an analysis of the crimes committed by illegal foreigners in 2003 in Germany shows that most offences linked with illegal entry or residence was the falsification of documents or

²⁷ Cf. IOM, "The significance of migration" (pre-cited), p. 7

²⁸ N. Cyrus, "Bericht für den Sachverständigenrat für Zuwanderung und Integration, Nürnberg—Aufenthaltsrechtliche Illegalität in Deutschland" (2004), IBKM Universität Oldenburg, Available [online]: 05.03.2006, on:

http://www.forum-illegalitaet.de/Materialien/04_Expertise_Sachverst_ndigenrat_Cyrus.pdf

²⁹ Bundesministerium des Innern; Bundesministerium der Justiz, Erster Periodischer Sicherheitsbericht, Berlin: Bundesministerium des Innern, Bundesministerium der Justiz, 2001, pp. 333 f.

the consequences of the asylum or foreigners law (thus offences that, by definition, can only be committed by foreigners).³⁰

Four main political options for migration management can be sketched (these can also be tested in other states). Too restrictive immigration measures—the preferred option of the radical right—can in practice not be nowadays implemented; next to the impossibility to physically shield all the borders, HR are too deeply-rooted in democratic societies (at least in theory). The second option would be to have restrictive legislation, but be lenient with the putting into practice of the regulations, yet this would deepen citizens' mistrust in politics. A third way would be to find pragmatic political solutions to the realities of the time, following rather a method of small steps rather than one big resolution, e.g. to avoid humanly degrading situations or to fight the bases of informal economy. *"In its core, this policy aims at strengthening social institutions for an increased self-regulation of economy and society."*³¹ The last option available is not to have any regulation at all and to allow everybody to stay; this is neither possible, for it would lead to a totally uncontrolled labour market and thus to neglecting societal security.

Interestingly enough, Cyrus does not call for stricter border control measures to hinder entrance into Germany, but focuses on measures to alleviate harsh social situations within the country, i.e. by guaranteeing access to basic medical care, scholarly education of immigrant children, providing legal access to the labour market and guaranteeing access to the legal framework of the state. Guiraudon and Joppke support the hypothesis that risks associated with migration increase as a result of tighter control. *"States' control policies thus indirectly play into the hands of international crime organizations."*³² But it should not be forgotten that migration is an inherently trans-national phenomenon and that it therefore has implications across borders that can be responded to by international cooperation.

b) Impacts of EC/EU enlargements on migration management

i. *Putting border control on the forefront of the agenda*

The case of Germany is particularly interesting for diverse geopolitical, historical and economic reasons, and will therefore be analysed more in depth in this work (a European-wide comparative analysis of the MS was not possible to undertake). The case

³⁰ N. Cyrus, "Bericht für den Sachverständigenrat..." (pre-cited), p. 16

³¹ Ibid., p. 5 [translation: mine]

³² V. Guiraudon/Ch. Joppke, "Controlling a new migration world" (pre-cited), p. 20

analysis can provide the background for showing problems faced by the state in handling illegal migration and border management as well as showing one example of how different, involved actors and levels (from the supranational to the *Länder* level) are interconnected. The link between EU and German politics is very close and this feature probably even constitutes a main driving force for including migration on the agenda of the EU in the long run.

The debates over the EC/EU enlargements from the 1970s essentially had to do with fears of massive migration flows. Germany even opposed the widening of the EC to countries in the south, i.e. Greece, Spain and Portugal, for this very reason. When the European Community did deal with migration, it did so in the domain of co-ordinating control policies, aimed particularly against trans-national crime networks. Hence it is sometimes argued that the overall trend toward securitization of migration in Europe finds its roots within the Europeanization of the policy itself. Migration was finally taken over on the agenda together with asylum, when a growing number of asylum seekers came to Europe: proponents of Europeanised migration policies came particularly from the main destination country Germany and from refugee support groups, who wanted to prevent refugees from being caught further between the states.³³

Nonetheless, concrete actions touching migration more generally started in the 1980s and unfolded towards the end of the 1990s. While mainly correlated to security and focusing on preventing illegal migration, there has been a clear tendency to focus on the issue of border control within migration management. This trend, far from being attenuated, has led to the creation of the European Agency for the Management of the External Borders (*Agence Européenne des Frontières Extérieures*, Frontex) in 2005. It is not by accident that the seat of the Agency is in Warsaw. It has been put in place in the aftermath of the eastward enlargement of the EU: the migration of the EU borders and the disappearance of passport controls within its territory—which will be also apply to ID card controls in new MS once they will have integrated the Schengen area in a few months/years—have reinforced the necessity of the EU to make her borders more secure. In fact, it is not within the logics of EU integration to put up borders, rather to make them disappear. Nonetheless, the parallel construction of a 'fortress Europe' as many analysts called and criticised the evolution in the 1990s, was based once again on the minimal traditional role of nation-states to ensure security to their citizens: with the permeability of the borders, this task could not effectively be guaranteed anymore, lest states profited from the EU by co-operating where previous intergovernmental

³³ B. Marshall, "The European dimension", in: The new Germany and migration in Europe, Manchester/New York: Manchester University Press, 2000, p. 118

agreements had proven insufficient. With regard to the terrorist attacks in Madrid and applied to Geddes' analysis of migration as a challenge to territorial, conceptual and organizational borders, the following can be agreed to:

“The EU has become particularly concerned with the projection of territorial borders focused on the regularization of migration flows defined as unwanted or less useful in order to maintain organizational borders of work, welfare and citizenship that remain primarily national.”

ii. *Questions for analysis ensuing from the Europeanization and securitization of migration*

Several problematic points emerge when analysing the ongoing securitization of migration in the EU with far-reaching impacts on the national level; but migration itself remains strongly embedded on the national and international scene (cf. Chapter IV B).

As already mentioned, Germany will provide the case example as representing the national level in this work, although it has to be stated that the situation of immigration varies greatly across the national states. This is also the reason, why researchers tend to specialise on one country (e.g. Marshall on Germany or Geddes on Great Britain). Angenendt has published a comparative analysis of asylum and migration in the EU MS by making a compilation of articles on the diverse national situations by diverse researchers.³⁴ It had been my endeavour to focus on the situation in Central Europe and therefore to compare the Czech Republic (ČR), Poland and Germany to see whether the new Eastern EU border would have effects on the situation of illegal migrants in the EU. This question can somewhat be answered to when looking into German statistics of migration inflow in 2004, but I did not have the linguistic requirements to analyse the legal evolution in Poland or the ČR. Keeping the specificities of the German case in mind, it nonetheless makes sense to focus on the country situated in the geographical middle of the EU, a destination country for long years, and particularly with such radical changes in policy development since reunification.

Numerous assumptions have been outlined in the previous sub-chapters, which have now to be tested. At first, have immigration and border control policies indeed become more restrictive? To find an objective measure to approach this question, the evolution of laws and political debates in the German *Länder*, on the federal level and within the EU will be outlined; the involvement of different actors will also be discussed. The triangular relationship outlined by Guiraudon and Joppke and Baldwin's variables

³⁴ Angenendt, Steffen, *Asylum and Migration Policies in the European Union* (DGAP), ed. by Angenendt, Bonn: Europa Union Verlag, 1999 (new version available following the 2004 enlargement)

will provide the basis for the analytical structure. The time frame will start with the Treaties of Rome, but will cover mainly the 1990s and will focus on recent years (2000-2005) insofar as official statistical data allows it.

Then the evolution of illegality itself will be of interest, in order to find out whether restrictive policies or tighter border controls have direct effects on illegality or whether alternative policy options would indeed be more efficient. This question is particularly difficult to reply to, because of the inherent nature of illegality as such. This problem can be somewhat overcome by giving estimations founded on statistics on crime rates committed by foreigners. Yet it has to be acknowledged from the start that they often remain assumptions and that effects therefore cannot be established with scientific certainty. In the case of Germany, illegal immigration and its consequences can also be tackled through specific welfare states responses, such as regularization programmes of illegal migrants, which provide social security care (regularization programmes is a measure currently proposed in the US).

Finally, it seems that the national level focuses on 'integration' of immigrants in public debates, while the EU puts accents on the issue of security. What would then be the logics of an EU-wide migration policy? Would there be a further securitization of national discourse on migration or is the EU a reflection of such an already existing discourse equating illegal immigration with criminalization? External evolutions, such as global terrorism and technology (used in border controls) also interfere with this phenomenon. In a first step, the incorporation and reach of migration policies will be analysed on the EU-level. In a second step, Germany will be analysed as a case example and a third chapter will deal with the country's intergovernmental and supranational cooperation implications.

Chapter II: Emergence and implications of EU migration policies

Giving an overview of the EU level has to be done with great care, for it is deeply linked and even reliant on national governments' political will and development. It has to be clarified what entails the previously outlined hypothesis that the securitization of migration comes as a consequence of its Europeanization. It seems that national governments could only agree on further cooperation, when it served the security cause. This is particularly true for the period of the 1990s, which was responsible for a start of migration policies altogether, the more so after the European Council in Tampere (1999). The 2004 enlargement has played an important role in furthering this evolution, too; some attention will therefore be given to the geographic area of central-east Europe.

Focusing on the EU makes sense in several respects: first of all, political entities with differing welfare systems are faced with a similar problem of migration, which is nonetheless difficult to be dealt with commonly. As the IOM Chief McKinley pointed out in March 2006 in Sicily, a better organized labour market would make access to labour market easier. This would be an effective antidote to underground arrivals, but a precondition would be international cooperation.³⁵ As of now, the EU continues focusing mainly on securing the territorial rather than the conceptual or organizational boundary.

A—Steps towards Europeanized and securitized migration approach (1957-2002)

In order to give a better understanding of the European dimension of migration and its focus on migration control, this chapter will be dedicated to the steps taken towards European migration policies into the 21st century. In a chronological-thematic way, the last 15 years will outline the relative rapid evolution from the 1990s onwards and the main themes standing at the forefront of discussions. As analysed by Jörg Monar, migration and asylum gained more influence in the EU after the issue was moved from the rather weak third pillar (Maastricht, 1993) to the influential community pillar in the Amsterdam Treaty 1999.³⁶ The chapter outlines the trend towards emphasising the dimension of controlling immigration within an emerging common migration approach.

³⁵ S. Castelfranco, "IOM Chief Calls for Cooperation Against Trafficking of Illegal Immigrants," (13.03.2006), Available [online]: 15.03.2006, on: <http://www.voanews.com/english/2006-03-13-voa18.cfm>

³⁶ J. Monar, "Die EU als Raum der Freiheit, der Sicherheit und des Rechts und die Herausforderung des internationalen Terrorismus," in: *Integration*, Institut für europäische Politik, 25th y., 3/2002: p. 171

a) Evolution from the Treaty of Rome to the 1990s

The fact that the EU justice and interior ministers agreed on a necessary time period of six years to establish a common asylum and immigration policy (cf. the previously mentioned Luxemburg conference, p.8) fits UN consultant Peter Stalker's statement that "[ultimately] *immigration in Europe is controlled by national governments*".³⁷ Furthermore, European integration has had effects on producing 'good' (to be encouraged) and 'bad' (to be restricted) types of international migration, which have to do with the ways in which international migration is viewed by the state and supranational decision-makers.³⁸ What have been the milestones of MS' contribution to include a European dimension in migration and asylum issues over the last 50 years? And, more importantly, can the hypothesis of a trend towards an ever more securitized approach to migration be verified in this development?

i. *From the principle of free movement for EC nationals to the Schengen Convention (1957-1995)*

Migration in Europe has been shaped by diverse factors over the last 50 years. Different migration theories focus on diverse causes, such as the establishment and existence of networks forging paths for future migrants, economic needs for states attracting labour migrants (as was the case for the German state's recruitment of guest-workers, cf. Chapter III), colonial ties also played an important role in determining specific migration patterns between European states. The EC has focused on the economic aspect before broadening the approach later on; two steps were taken to lever migration in favour of EC-internal (mainly labour) migrants as opposed to non-EC citizens.

In a first step, evolutions concerned citizens of the EC territory only. Ever since 1957, the Treaty establishing the European Economic Community has integrated provisions to ensure the right to seek work outside national state boundaries (but within the EC) to MS nationals, including the Commonwealth and the French DOM. Regulation no. 1612/68 was based on the principle of equal treatment of all EC nationals, starting to abolish entry or exit requirements, which de facto represented obstacles on the way of

³⁷ P. Stalker, "Migration Trends and Migration Policy in Europe," in: *International Migration*, IOM, Vol. 40(5), 2/2002, p. 165

³⁸ Cf. A. Geddes, Politics of Migration... (pre-cited), p. 3

seeking a job abroad.³⁹ Several judicial cases have contributed to gradually form a unified market (completed by the Single European Act/SEA in 1987), e.g. the application of the direct effect clause for self-employed (*Van Duyn* case, 4 December 1974), the right of establishment (*Reyners*, 21 June 1974) or in the service-sector (*Van Binsbergen*, 3 December 1974). The economic component then led to including the free movement of family members, the right of residence beyond the termination date of the professional activity and specific provisions for students (three directives implemented in 1990 and 1993). The main remaining characteristic was to be EC-citizen (ex-Article 18); the Maastricht Treaty (1993) finally conferred the right to move and reside freely within the EC/EU (ex-Article 14).⁴⁰ MS are also restricted by Directives in their right of expulsion, since workers from other MS have the right of recourse to the courts if a deportation order is issued against them. Limitations of the right of free movement are provided exceptionally if relative to the protection of public order, public security or public health. Since there is no uniform definition of what is “public order”, the *Bouchereau* case (27 October 1977) determined that it meant a “threat affecting a fundamental societal interest” being “real and sufficiently serious” and related to the personal behaviour of the individual to be expelled (e.g. if the person has already committed an infraction).⁴¹

In a second step, MS took moves towards developing policies on non EC-nationals. Member governments held regular consultations on this topic since 1975 and, interestingly, one year before the *Bouchereau* case the so-called TREVI Group (*Terrorisme, Radicalisme, Extrémisme, Violence Internationale*) came together, i.e. a meeting of ministers that aimed at cooperating on issues of law and order (incorporating also policing of drug pushing). The initiative was a sign of the governments not to forget the security dimension when tackling the issue under a mainly economic perspective. The pertinence and longevity of this standpoint was made obvious, when the group of ministers turned into the Ad Hoc Working Group on Immigration (AHWGI) responsible for illegal immigration and asylum in 1986.⁴²

At about the same time, French-German economic and political cooperation was consolidated, but border controls still represented restrictions in the movement of flows on the EC labour market (e.g. long delays at the Franco-German borders). A strike by the truck drivers on both sides induced the signature of the Sarrebruck Accord (13 July 1984), enlarged to the Benelux countries on 14 June 1985, which had already abolished

³⁹ EU Commission, “Free movement of persons,” Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l14001.htm>; EU Commission, “Free movement of workers,” Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l23013a.htm>

⁴⁰ J.-C. Gautron, *Droit européen*, 10th edition, Paris: Dalloz, 2002, pp. 279-289

⁴¹ *Ibid.*, p. 288

⁴² P. Stalker, “Migration Trends...” (pre-cited), p. 167

their mutual borders in 1960. The formal Schengen Convention was signed in 1990, which removed border controls between the five adherent countries, while strengthening the now common external frontier. Seven points represented the core contents of the Schengen Accord: visa policy (a common list of countries requiring visas for entry into the EC); combating illegal immigration (obligations for the transporting companies, i.e. air companies); computerised databank on immigration, asylum and policing (Schengen Information System/SIS); coordination of treating asylum applications (within one state); customs cooperation; police cooperation (possibility of cross-border pursuits); judicial cooperation (including extradition).⁴³

Several EU MS and two non-EU countries—Iceland and Norway—have adhered to the Schengen area since, with the two notable exceptions of the UK and Ireland; some exemptions of the convention were also provided for Denmark. The new EU MS (2004) have no choice and will have to adhere as soon as the preparations are met (probably in 2007), since the acceptance of the EU and Schengen acquis was a pre-condition for accession (cf. the incorporation of the Schengen Accord in the Treaty of Amsterdam in 1999). The Schengen Agreement came into force officially on 26 March 1995.

ii. *Gradual communitarisation of migration management in the 1990s: linking economic and political priorities*

The mainly commercially driven cooperation among EC MS allowed incorporating migration and asylum on the European agenda in the 1980s, when increasing waves of asylum-seekers came to Europe. This tendency increased with the crumbling of the Communist block and somewhat postponed the signature of the Schengen Convention from 1989 to 1990. First debates had started with the signature of the SEA in Luxembourg (February 1986), because the ex-Article 8 A had defined the single market zone as an “area without internal borders in which free circulation of goods, *people*, services and capital is assured according to the dispositions of the treaty”. The sensitivity of migration issues can be seen in the fact that the realisation of the market was to be fulfilled by the method of qualitative majority voting (QMV), except for the free movement of the people and fiscal harmonisation (requiring unanimity vote).⁴⁴ Too precious was the sovereign right of MS to control immigration from third countries (not of EC-nationals).

⁴³ J.-C. Gautron, *Droit européen* (pre-cited), pp. 135f.

⁴⁴ *Ibid.*, p. 98 [translation and emphasis: mine]

During the implementation period of the Schengen provisions after 1995, “[the] *focus was entirely on the fight against illegal immigration in the future (...)*”.⁴⁵

By 1990 however, the common feature of rising numbers of migrants to be handled by the EC governments led to the necessity and wish to harmonise national legislations. To this effect the Dublin Convention (15 June 1990) created a system to determine the state responsible for examining asylum applications lodged in one MS.⁴⁶ The underlying aim was to end the practice of ‘asylum shopping’ in several EC MS; the Eurodac database also allowed MS to keep track of rejected asylum claims. The London Resolution (1992) added the principle of ‘manifestly unfounded applications’ for asylum, as well as the principle of ‘host countries’ to the Dublin Convention. This resolution had however no legal weight. The background arguments were the protection of the rights of refugees and the protection of the MS against any abuse of the system itself. The AHWGI elaborated the principles of ‘safe third country’ and ‘safe country of origin’: if the country of origin itself was defined as ‘safe’, procedures for not granting asylum became thus quicker. Also, less rights of appeal were granted: if asylum is refused, an application can be made only after a period of two years (currently also a discussion point in French immigration reforms). A common problem that this regulation entails is the destruction of identification documents by asylum seekers, so that their country of origin cannot be determined, in order to prevent deportation.

The debate became closely linked with deliberations about future institutional structures of the EC and had repercussions until the reform of the Treaty in 1999. In April 1991, the Luxembourg presidency submitted a plan to the MS, in which immigration and asylum remained dealt with on an intergovernmental basis within the third pillar. The Maastricht Treaty (1992/93) extended cooperation in foreign policy areas and ended temporary restrictions on migration from Spain and Portugal to other EC countries. Massive migration from southern Europe to Germany had been a wide-spread fear among the German population, a phenomenon that repeated itself with the 2004 enlargement. Cooperation remained intergovernmental and dominated by the QMV method, except for the visa policy, which was incorporated into the first pillar (Art. 100c). Title VI of the Maastricht Treaty on Justice and Home Affairs (JHA) implicitly associated migrants and refugees with criminals, for it encompassed asylum policy next to external border control, policies on third country nationals (TCN), drug trafficking and fraud. It also

⁴⁵ B. Marshall, “The European Dimension,” in: *The new Germany...* (pre-cited), p. 123; also pp. 124ff.

⁴⁶ EU Commission, “Convention determining the State responsible for examining asylum lodged in one of the MS of the European Communities” (97/C 254/01), Available [online]: 19.03.2006, on: [http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0819\(01\)](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0819(01))

left migration within the intergovernmental scope of decision-making. HR activists and pro-integration advocates were therefore unhappy with title VI.⁴⁷ A counterargument is that experiences of forced prostitution and modern servitude infringe on HR so outwardly that it can justify its being handled within the policing pillar of JHA, if not abused of.

After Maastricht the AHWGI was turned into the Council of Ministers for JHA. Collective policy initiatives on immigration were still intimately linked to public domestic concerns about negative implications of immigration, even if areas such as family reunification and judicial rights for immigrants were maintained out of moral and legal constraints. If agreements were achieved, it happened mainly in the stricter, controlling element of policy making. Thus, in December 1995 the JHA Minister issued a 'Recommendation for the harmonisation of means to combat illegal immigration and illegal employment, as well as for the improvements of respective control mechanisms'.

Even if political compromises emerged on the basis of commercially driven interests and then focused on asylum and (mainly illegal) immigration control, analysts deplore that the single market and opening of the borders has not yet applied to labour migration. The Lisbon Council in 2000 outlined economic reform objectives to promote a more flexible European labour market. In addition, the Community EQUAL initiative aimed at facilitating the social and occupational integration of asylum seekers on the basis of trans-national cooperation.⁴⁸ According to Geddes, the externalization aspects of EU migration and asylum policy was driven by concerns to maintain key organizational and conceptual borders of work, welfare and citizenship. The endeavour was to view the migrant as a useful contributor to the system, rather than building up a European fortress against immigration.⁴⁹ Nonetheless, criticism against a growing distinction of the EU's migration management between 'good' and 'bad' immigrants, leading to a 'demonisation of settled migrant workers' and thus racism remains present up to today.⁵⁰

⁴⁷ Cf. R. Koslowski, "Security and sovereignty in uniting Europe," in: Controlling a new migration world (pre-cited), p. 101

⁴⁸ EU Commission, C(2000)853 (05.05.2000), Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/cha/c10237.htm>

⁴⁹ Cf. A. Geddes, "Europe's Border Relationships and Intl Migration Relations" (pre-cited), p. 801

⁵⁰ Liz Fekete, "Fortress Europe – effects and consequences of labour migration," Available [online]: 02.03.2006, on: <http://www.irr.org.uk/2006/march/ha000008.html>; C. Kern, "Fortress Europe? A critical analysis of the evolution of common European Immigration and Asylum Policies," in: *L'Europe en formation*, no. 1, published by Centre international de formation européenne, Paris, 2003, pp. 75-123

b) Concrete steps towards a communitarised migration policy

i. *Legal and political steps: the Treaties of Amsterdam and Nice and the European Council in Tampere (1997-2000)*

The Treaty of Amsterdam signed in 1997 came into effect in 1999, with a transition period of five years for the application of Community procedures. It represents a main step towards the communitarisation (not supra-nationalisation) of asylum and migration. Not only does it aim at establishing an 'area of freedom, security and justice' (AFSJ), but it extends this principle to all the persons at the internal EU borders whatever their nationality. Both the Schengen Agreement of 1985 and the Implementing Accord of 1990 were integrated into the Treaty (Britain, Ireland and Denmark retained their specific provisions). The European Court of Justice (ECJ) could now be asked for rulings by national courts in the area of migration and asylum policy—this was an important step, because the legal integration power of the ECJ was already quite extensive. An exception remained however jurisdiction over internal border controls for the sake of safeguarding internal security.⁵¹ The Commission has the right since the end of the transition period (1 May 2004) to develop initiatives in the area of immigration and asylum. On 3 December 1998, the Council and Commission laid down a timetable of measures to be adopted to achieve objectives of common standards on controls at the external borders of the EU (visas, asylum policy and immigration mainly) by 2004.

The probably real start of communitarian EU migration measures is to be found in the European Council in Tampere (October 1999). The heads of government underlined that the freedom to move in conditions of security and justice—alias the AFSJ—was not 'the exclusive preserve of the Union's own citizens'. Common policies should rather 'offer guarantees for those who seek protection in, but also for those seeking access to the EU'.⁵² In addition, the Commission was conferred the task to elaborate tools to achieve this goal: partnership with countries of origin aiming at keeping migrants closer to their country of origin (this shows again the blurred line between internal security concerns and foreign policy); more specific asylum measures with common minimum standards (determine the state responsible for examining asylum application, conditions for receiving asylum applications, minimum standards on the procedures, qualify and determine contents of refugee status); equal treatment in economic, social and cultural

⁵¹ S. Peers, "The future of the EU judicial system," in: *European Journal of Migration and Law*, ed. by P. Boeles (special ed.), vol.7/no. 3, 2005, p. 265

⁵² Quoted in: E. Brouwer, "Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?," in: *European Journal of Migration and Law* (pre-cited), p. 219

life for TCN; management of migration flows (e.g. common policies on visas and false documents or tackle illegal immigration, trafficking in human beings and economic exploitation of migrants).⁵³

In 1999, the High Level Working Group on Asylum and Immigration (HLWGAI) established action plans for Sri Lanka, Afghanistan, Albania, Iraq, Morocco and Somalia, countries thought to be the root causes of migration. Yet as Geddes points out, “[the] reports were criticised for reflecting EU priorities of migration control, readmission and return rather than the pursuit of partnerships based on real dialogue.”⁵⁴ The Dublin II regulation defined the state responsible for asylum claims, established minimum protection standards for refugees and gave a common definition of refugees.⁵⁵ In addition, The Eurodac files were to incorporate fingerprints of asylum seekers and illegal immigrants and a European Refugee Fund (ERF) was created to give financial support for reception centres and voluntary repatriation schemes in the case of sudden emergencies.⁵⁶ Although humanitarian and security dimensions were tried to be dealt with side by side, the application of methods used traditionally against criminals was striking. Therefore, the European Parliament’s Civil Liberties and Internal Affairs Committee rejected the proposal of the JHA Council at first.⁵⁷

Among the most important features of the Treaty of Nice (2000) was the shift to the codecision procedure in visa, asylum and immigration policy, as well as to QMV (with prior unanimous adoption of common framework legislation on asylum, and only applicable to asylum and temporary protection). Since 1 May 2004 the shift to QMV occurs for conditions of free circulation of TCN if they are legal residents (Art. 62 EC Treaty). The conclusions of the treaty asked to take more concrete measures on combating trafficking in human beings and combating illegal immigration.⁵⁸ The Nice Treaty was important from the point of view of HR, for the integrated Charter of Fundamental Rights considered non-EU nationals with residence and work permit the same as EU citizens.

ii. *Focus on combating illegal migration (1998-2004)*

The years 1997/98 laid milestones towards dealing more specifically with illegal migration. An important contribution was the Conference of Ministers on the “Prevention of Illegal Migration” in October 1997 in Budapest, which aimed at harmonizing

⁵³ A. Geddes, “The Politics of migration”... (pre-cited), pp. 136ff.

⁵⁴ A. Geddes, “Europe’s Border Relationships and Intl Migration Relations” (pre-cited), p. 792

⁵⁵ Cf. Joint Position 96/196/JHA (04.03.1996), Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l33060.htm>

⁵⁶ Council Decision 2000/596/EC (28.09.2000), Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l33078.htm>

⁵⁷ B. Marshall, “The European Dimension” (pre-cited), p. 132

⁵⁸ EU Commission, “Free movement of persons” (pre-cited)

legalisation to combat trafficking in aliens and linkages with other forms of organized crime. A few months later, in January 1998, an Action Plan was adopted by the EU Foreign Ministers reducing the numbers of Kurds arriving illegally in the EU, on grounds that these 'illegal refugees' and 'illegal immigrants' "(...) *almost always make use of traffickers, of whom the majority appear to be part of organized crime networks, with contacts in the EU*". Out of the 46 points proposed, most were focused on restrictive measures against illegal immigration, such as enhanced border control or effective removal; six points were dedicated to humanitarian aid.⁵⁹ The same year, the UK held the presidency of the European Council and UK Home Secretary Jack Straw made specific reference to combating organized crime and illegal immigration. In May, the JHA Council signed a Pre-Accession Pact on Organized Crime based on judicial and police cooperation. Background arguments were that the reality of public concern on EU drug trafficking and organized crime had to be responded to; but Monar regrets the lacking financial funding programmes and the limited scope of the otherwise crucial Pact.⁶⁰

A positive aspect of this tendency was to ensure personal security more in general—including a focus on combating human trafficking—and this principle was now also being applied to TCN. Through this, a shift was taking place also in terms of widening the conceptual boundary of the EU integrating non-nationals in the EU legal framework. The Cardiff European Council in June encouraged MS to ratify conventions on fraud and extradition, as well as to recognize the decisions of each other's courts.⁶¹ The Council called in an Action Plan on how to best implement the ASFJ of the Treaty of Amsterdam (3 December 1998).⁶² Yet the European Council in Laeken in 2001 was a set-back in the supra-nationalisation process of migration and asylum: no greater cooperation on immigration issues than the level already agreed on could be achieved.⁶³ Instead, a comprehensive Plan to Combat Illegal Immigration and Trafficking in Human Beings was to be adopted urgently. The issue of irregular immigration could somewhat re-launch the process in June 2002 at the European Council in Seville. Joint management, it was now thought, could provide a more targeted approach of the root causes of irregular immigration, putting all EU foreign policy instruments at the disposition of the MS. It aimed at reducing underlying causes of migration flows by closer

⁵⁹ Council, quoted in: Migration News Sheet, "Influx of Kurds Prompts Adoption of a 46-Point Action Plan," *Migration News Sheet*, no. 177/98-02 (February), pp. 4-6

⁶⁰ J. Monar, "EU Justice and Home Affairs and the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies" (Discussion Paper), Bonn: Zentrum für Europäische Integrationsforschung (ZEI), 2001, p.26f.

⁶¹ R. Koslowski, "Security and sovereignty in uniting Europe" (pre-cited), pp. 103f.

⁶² Council and Commission Action Plan (03.12.1998), Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l33080.htm>

⁶³ P. Stalker, "Migration Trends..." (pre-cited), p. 167

economic cooperation, trade expansion, development assistance and conflict prevention. The European Council argued:⁶⁴

“(...) any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.” (III.33)

“The European Council highlights the importance of ensuring the cooperation of countries of origin and transit in joint management and in border control as well as on readmission.” (III.34)

“Inadequate cooperation by a country could hamper the establishment of closer relations between the country and the Union.” (III.35)

This extract shows the rather firm standpoint of the European Council on illegal immigration and in particular the far-reaching impacts of cooperation refusals on readmission. It conceptualized illegal immigration as a foreign policy issue, making security definitions melt once again. Statewatch editor Tony Bunyan comments this outcome harshly: *“We should be ashamed (...). The swathe of measures being put in place means the EU is heading for a situation where people fleeing poverty and persecution are to be expelled, repatriated, deported, back to where they have come from regardless of the circumstances.”*⁶⁵ This criticism is tough, especially because HR abuses can sometimes only be responded to by firm actions. Indeed, the Council may adopt measures under the Common Foreign and Security Policy in the case of unjustified lack of cooperation.⁶⁶ But this statement also means that Seville did not underline the urge of taking humanitarian needs into consideration. Illegal immigration could be approached from a different perspective, such as by controlling demands for illegal workers on the domestic labour market. The political component of migration, it therefore seems, has by now clearly taken predominance over its economic aspect.

B—Contemporary evolutions—depending on the will of the states

Several theoretical approaches find causes for restrictionist politics on migration and asylum by comparing the domestic politics of individual European states. National governments and situations have real impacts on the policy formation on the EU-level, due to the subsidiarity clause in some cases, to QMV or unanimity decision-making in others. The role of the European Council accounts for this approach. Koslowski gives a

⁶⁴ Statewatch News online, “Seville Conclusions on asylum & immigration,” Available [online]: 28.03.2006, on: <http://www.statewatch.org/news/2002/jun/14seville.htm>

⁶⁵ Ibid.

⁶⁶ EU Commission, “Free movement of persons” (pre-cited)

different, interesting argument: there is a "(...) possibility of restrictionist politics operating at the European level in tandem with the political objective furthering European integration in general."⁶⁷ This applies when highly mediated issues such as forced prostitution or children trafficking are used to push cooperation forward, because the public remains sensitive to them.

In recent years the Commission received the right to take initiatives in the area of migration and asylum, next to the Council of the EU. But besides the political EU-level, the role of the judiciary and NGOs were significant in order to put the dimension of required individual HR protection back on the EU agenda next to the gradual and ever more concrete evolution of making EU borders secure. The rules and goals set out in the treaties and by the European Council provide the basis on which more precise legal and technical texts could and can be elaborated, which will be outlined first. Then the argument will be developed that the process is rather slow, because of the parallel enlargement preparations to include central and eastern European states in 2004 and the specificities of migration realities in this area.

a) Legal and technical applications of migration policies

i. *Evaluation, implementation and budget dedicated to migration priorities*

The document JAI 141/MIGR 56 established by the Council of the EU (14 June 2002) summarises advances made in combating illegal immigration (it does thus not include the Seville goals). The main points outlined are: visa policy (introduction of a common Visa Identification System/VIS); information exchange on illegal immigration; cooperation with countries of origin prior to border-crossing; improved quality and effectiveness of border controls (e.g. at maritime borders); readmission and repatriation policies; strengthened operative role of Europol (combating trading of human beings); repressive measures against crimes. The last point is interesting, because it mentions protection and assistance to victims and "*combating employers who illegally employ non-member country nationals who are illegal residents*".⁶⁸ The perspective used here is broader, incorporating impacts of domestic demand for illegal migrants. Furthermore, specific cooperation between the EU and some regions, e.g. EU candidate states, Asia

⁶⁷ R. Koslowski, "Security and sovereignty in uniting Europe" (pre-cited), p. 101

⁶⁸ Council of the EU, JAI 141 MIGR 56 (14.06.2002), Available [online]: 19.03.2006, on: <http://register.consilium.eu.int/pdf/en/02/st10/10009en2.pdf>, p. 5

(ASEM Ministerial Meeting), Russia, Ukraine, the Mediterranean (MEDA funds support the regional Valencia Action Plan) is mentioned. Still, the measures seen as particularly important in the future are restrictive ones: establishment of a common VIS, speeding up negotiations of readmission agreements, elaborate deep-going expulsion and repatriation policies and strengthening cooperation between national police services.

What these measures have in common is a reinforcement of the territorial dimension of the EU, either expelling illegal immigrants or pushing asylum claims outside the EU borders. The problem is thereby offloaded on sending states, as the Thessaloniki EU summit in June 2003 proves: the conclusions, based on a UK proposal to create regional or transit processing centres, was to keep asylum seekers in camps in neighbouring, non-EU countries (Romania or Albania). An obvious criticism was that asylum seekers were at greater risk when put beyond the domain of justice. The Commission therefore proposed to introduce resettlement schemes where responsibility is shared between the MS and protected entry procedures from outside the EU. Morrisson talks about the creation of a previously unknown category of 'illegal asylum seekers'. Based on the EU documents on migration management, it can be said that "[action] was most evident in the more coercive aspects of migration policy (...), measures on asylum, irregular migration, trafficking, smuggling and border controls."⁶⁹

A concrete action put in place was the establishment of a common list of visa-requiring and visa-exempted states, implemented by a Council regulation in 2001. The technical application of fingerprints of asylum seekers and illegal migrants was executed by a 2003 Council framework. MS proved reluctant and rather slow in implementing the Convention on Mutual Assistance on Criminal Matters adopted in May 2000; the Council therefore pushed MS to create joint investigation teams in order to make cross-border police cooperation and law enforcement more efficient. The effectiveness of these actions can be inferred upon the coming into force of the mentioned Convention in August 2005.⁷⁰ First positive results have been since noticed on the collaboration of joint investigation teams, even if lack of enthusiasm remains understandably present in the sphere of exchanging intelligence information. More effective police cooperation allows overcoming popular fears that the abolishing of internal borders leads to the erosion of

⁶⁹ A. Geddes, "Europe's Border Relationships and International Migration Relations" (pre-cited), p. 796

⁷⁰ Council Regulation (EC), No. 539/2001 (15.03.2001), Available [online]: http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2001&nu_doc=539; Council Regulation (EC) 2725/2000 (11.12.2000); Official Journal C5 (10.01.2003), Available [online]: 19.03.2006, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l33081.htm>; Council Framework Decision, Available [online]: 19.03.2005, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/l33172.htm>

(criminal) law enforcement. The same steps are now being taken to drive cooperation in fighting terrorism forward, yet it remains a sensitive area.

Financial measures were also used as incentives for putting legal rules into practice. The budget AENEAS, dedicated to the period 2004-2008, provides €250 million to the countries having negotiated readmission agreements with the EU (cf. regulation EC 2004/401), i.e. for setting up measures for migration legislation, legal immigration, refugee protection, preventive measures, legislation against irregular immigration and readmission.⁷¹ In addition, the ERF was prolonged for the period 2005-2010 by the Council Decision 2004/904/EC (2 December 2004). In its recent communication COM (2006) 67 final (17 February 2006) to the Council and the European Parliament, the Commission asked for an amendment to the ERF in order to make more funds available for practical cooperation through Community actions. Reasons for this are the lacking flexibility of existing financial opportunities to complete the 'ambitious mandate set in the Hague Programme' (cf. following paragraph). Specific amendments aim at enabling MS to access funds more quickly and with few bureaucratic processes to allow for a rapid reaction to potential sudden arrivals of people in need for international protection. The same ought to apply for the funding contained in the ARGO programme (13 December 2004) for administrative cooperation in the fields of external borders, visas, asylum and immigration. This is an important step, because EU actions have to become operable faster in emergency situations (unlike it happened in the Kosovo crisis) and the endeavour to improve the quality of the common EAS is a good step into this direction.⁷²

ii. *Contents and implications of the Hague Programme 2004*

One of the most important texts in contemporary European migration policy is the Hague Programme (13 December 2004) from the Council of the EU—in line with the above-outlined implementation steps and posing the basis for future actions on the EU-level. It outlines concrete implementation steps to take for strengthening freedom, security, and justice in the EU—the goal of creating an AFSJ. The Commission has to establish yearly scoreboards on the results of the Hague Programme (as was done with the Tampere results). The overall aim is to give pragmatic steps based on Tampere, to maintain fundamental rights (cf. the European Convention for the protection of Human Rights/ECHR), to develop practical methods for Eurojust and Europol and to prepare

⁷¹ A. Geddes, "Europe's Border Relationships and International Migration Relations" (pre-cited), p. 796

⁷² European Commission COM (2006) 67 final (17.02.2006), Available [online]: 19.03.2006, on: http://eur-lex.europa.eu/LexUriServ/site/fr/com/2006/com2006_0067fr01.pdf, pp. 1-10

legal reviews in the case of the implementation of the Constitutional Treaty.⁷³ The similarities with former documents on migration prove the consistency of EU policies in this area. Also, the importance of return and readmission policies and migration management is re-instated.⁷⁴

The chapter on strengthening freedom in the programme includes following topics: EU citizenship; asylum, migration and border policy (an interesting link); the establishment of a common European asylum system (EAS); the fight against illegal employment; the integration of TCN and partnerships with the Mediterranean. The SIS II (Schengen Information System), VIS and Eurodac are to be effectively interoperable by 2007. Alphanumeric and biometric identifiers are to be introduced in travel documents and minimum standards for national ID cards to be established. Internal border controls are to be abolished and replaced by an integrated management system for external borders: "*The control and surveillance of external borders fall within the sphere of national border authorities*", but for 'long or difficult stretches of external borders' or 'exceptional migratory pressures on these borders' the European Council is in charge.⁷⁵ Frontex was planned to be in place by 1 May 2005 (cf. p. 44f.), a European system of border guards is planned. A positive aspect is the explicit recognition of the need for a balanced approach between law enforcement and safeguarding individual rights. Nonetheless, freedom, it seems, can only be guaranteed by knowing where its limits are.

The security measures concern mainly mutual intelligence information exchange (to be effective by 2008) and its use to protect also the *internal* security of other MS: this is an interesting step, which requires a high level of solidarity among the MS. To this effect, the interoperability of Europol, Eurojust and the EU Counter Terrorism Coordinator is to be assured, as well as common measures in fighting terrorism (e.g. against financing terrorism or assisting victims of terrorism). Joint investigation teams and systematic exchange programmes are to reinforce police cooperation; crises within the EU have to be managed with cross-border effects, i.e. the European Security Strategy (cf. p. 15) is to be linked with the internal EU public order. Two committees were to be created: the Committee on Internal Security and the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). The SCIFA shows the importance of border control in immigration matters. The security aspect of migration also names steps to undertake against crime prevention, organised crime and corruption and offences related to drugs.

⁷³ This last point has lost its relevance since the non-ratifications of the Treaty by France and the Netherlands in 2005 have refrained debates on introducing such a constitution in the near future.

⁷⁴ Council of the EU, The Hague Programme, JAI 559 (13.12.2004), Brussels

⁷⁵ Ibid., pp. 14f.

Within the strengthening justice chapter, fewer points are directly related to migration as such. The judicial cooperation in criminal matters evokes the need to recognize mutually the framework decision on the European Evidence Warrant, minimum rules for procedural law, as well as the need to define criminal offences and to determine penalties. It also includes mutual recognition of family law, on the grounds of which family reunification measures can be applied.

Evelien Brouwer questions the real application of the freedom to move freely in the EU in conditions of security and 'justice accessible to all' as outlined in Tampere. She argues that there are significant differences between the Tampere goals and the Hague Programme: the steps taken rather lead to an 'area of justice for EU citizens'. She underlines the need for legal remedies against the database regulations of Eurodac, VIS, SIS and SIS II, for instance, although she recognises the improvement of the legal provision in SIS II, since it included the right to be informed about the reasons for issuing the alert into SIS II. Yet, she also writes that almost 90% of the information stored into SIS on individuals concerns 'TCN to be refused entry to the Schengen territory'.⁷⁶ These doubts about the protection of individual rights and effective application of justice and freedom to non-EU nationals—related to far-reaching data storage of personal information for a period up to five years—have to be kept in mind and legal guarantees ought to make sure that individual rights are not eroded. One positive evolution has been the extensive Commission communication establishing a framework programme on Solidarity and Management of Migration Flows for the period 2007-2013.⁷⁷

b) Impacts of the 2004 EU enlargement: institutional changes, human rights abuses and protection of territorial boundaries

The evolutions of EU migration policies have affected the MS of EU-15 and certainly—to a great extend—of EU-25 as well. Not only was the EU experience as such new to Central and East European Countries (CEEC), but also the phenomenon of immigration, since countries such as the ČR gradually turned from a transit into a destination country. Newer EU MS had distinguishing factors, namely higher levels of economic informality and differently configured state-society relations, to which older MS had to get used to.⁷⁸ After outlining institutional implications of EU-intern changes on the

⁷⁶ E. Brouwer, "Effective Remedies for Third Country Nationals..." (pre-cited), pp.213-236/quote:p.230

⁷⁷ Commission, COM (2005) 123 final, Available [online]: 30.04.2006, on: http://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/com/2005/com2005_0123fr01.pdf

⁷⁸ A. Geddes, Politics of Migration... (pre-cited), p. 192

new MS, the security dimension of the EU enlargement and protection of HR will be analysed.

i. *Institutional adaptations and the parallel evolution of the EU and NATO eastward enlargements—EU response to terrorism*

The specialist on EU JHA Monar analysed the evolution of the EU into an AFSJ 1999 as a 'major and rapidly developing integration process.' No other example in the history of EC/EU integration process, he continues, has permitted an area of loose intergovernmental cooperation making its way so quickly to the top of the Union's political and legislative agenda, the more so since the communitarisation of asylum and immigration through the incorporation of the Schengen acquis took place. He also states that this development has represented a major challenge for the eastward enlargement in many ways. A first factor is the 'security rationale of the AFSJ', shared by the Schengen system and based on the concept of a common single internal security zone. This analysis fits Geddes' arguments of the EU focusing on the strength of its territorial boundaries and, to some extent, also on conceptual boundaries when determining who has to remain outside this zone (cf. VIS and the proposals during the Thessaloniki summit in 2003). The sensitivity of JHA in the national context—integrating issues of asylum, immigration, border controls and fight against crime and drugs—is a second factor. Monar points to the risk of xenophobic tendencies profiting from an altogether not too popular eastward enlargement. The two last mentioned factors are linked to EU-intern developments, i.e. late preparations for accession in the area of JHA (late definition of the EU JHA and Schengen acquis in 1998/99); and the rapid growth of the EU acquis itself after the entry into force of the Amsterdam Treaty.⁷⁹

Next to these institutional challenges, a distinctive political change took place, namely the parallel NATO enlargement of the very same region. Although migration issues and the NATO enlargement are normally not discussed jointly in research papers, there is a link between the two, because it implied that security issues were particularly present in the minds of decision-makers. The new NATO and EU MS had too recent an experience of national sovereignty to give it back again for the sake of European Security and Defence Policy or migration policies. If coupled with the terrorist attacks in Madrid and agenda dedicated to ways how to make the EU more secure, the step towards a

⁷⁹ J. Monar, "EU Justice and Home Affairs and the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies" (Discussion Paper), Bonn: Zentrum für Europäische Integrationsforschung (ZEI), 2001, pp. 3-8

more restrictive view of migration does not lie far away, as some intergovernmental conferences show (cf. Heiligendamm conference, p. 19). Illegal migration is viewed as a potential threat source, thus being a subjective threat. In addition to territorial integrity, the particular sensitivity of some CEEC representatives towards political autonomy and national sovereignty turns them into values to be protected according to Baldwin's framework (main protagonists of the issue are e.g. Kwansniewki and Klaus).⁸⁰

From an institutional perspective, Monar is in favour of an increased "cross-pillarisation", which would be beneficial in the case of combating terrorism. He backs his argument in the Union experience of resettlement agreements in asylum and immigration policy, where systematic cooperation with third countries is already taking place. Cross-pillarisation would contain economic and financial concessions from the first pillar, a necessary component in the fight against terrorism. The impression occurs that just as the contours of security definitions blurred, so should internal and external measures be more systematically linked.⁸¹ One of the most obvious reasons for linking migration and the EU fight against terrorism are found in the antiterrorist measures adopted by the EU Head of States and Governments in Brussels (25 March 2004): the proposed measures are strikingly similar with those taken against illegal migration (e.g. stronger cooperation between intelligence, police and justice), reinforcing the illegal migrant—terrorist link.⁸²

"(...) The setting up of a database containing criminal records, lost and stolen passports *and visa applications*;

- The introduction of visas by making them computer-readable, including biometric features, by the end of 2005 for all EU countries; (...)

The EU leaders instructed ministers to accelerate the development of the EU shared data-base of visa seekers that would determine whether a foreigner is allowed to enter the EU. (...) They also instructed the European Commission to speed up the development of a system that would allow the police to access a Pan-European Database of DNA, fingerprints and visa data. (...)"

In a concluding manner, the IOM—while supporting policy and actions against terrorism—calls for a balanced approach, which prevents overreaction towards migrants and TCN who can be affected by xenophobia and discrimination.⁸³

⁸⁰ Cf. J. Delors, *Mémoires*, Paris: Pocket, 2004, p. 572f. ; J. Graff, "Rotten at the Core?" (25.01.2004), World Economic Forum/ Davos, Available [online]: 20.01.2005, on: http://www.time.com/time/europe/davos2004speed_2.html

⁸¹ J. Monar, "Die EU als Raum der Freiheit..." (pre-cited), p. 184

⁸² IOM Belgium, "EU Leaders Adopt Terrorism Action Plan" (26.03.2004), Available [online]: 06.03.2006, on: <http://www.belgium.iom.int/PDFDocuments/2006030614393123400062.PDF>; For the whole text: cf. Appendix 1, p. 102 [emphasis: mine]

⁸³ *Ibid.*, p. 2

ii. *Border control and human rights dimension of the EU enlargement*

The EU enlargement to the East has contributed to put the security dimension on the forefront of the discussion, a way of responding to re-emerging fears of mass influx from the new MS. Most importantly, CEECs like Poland, the ČR or Slovakia, which had been turned into a buffer zone in the 1990s by Germany in particular, were now to be incorporated into the EU territory. The border itself was now migrating to the east, eliminating the buffer zone and putting the EU face to face with Croatia, Serbia, Romania and Russia—'large and potentially very large migrant and asylum-seeker sending states', as Koslowski puts it.⁸⁴ Because of persisting problems of corruption, organized crime, smugglers and bondage cases in CEE countries (the example of a Kosovo Albanian smuggling gang has been widely publicized), a special multilateral meeting was launched by Germany prior to the enlargement and in collaboration with these states to reduce illegal migration through south-east Europe.

The geo-political widening of the EU had therefore important human security implications. New migration flows were added to existing patterns of European migration. The traditional nature of European migration, namely guest-worker and post-colonial migration patterns (e.g. Turkish and Polish community in Germany, Morocco migration to France etc.), were gradually supplanted by irregular migration networks, such as smuggling or human trafficking (cf. the concrete example of Bulgarian irregular migration to Germany in recent years, p.68f.). Inflow from crisis regions—regions of political instability, economic weakness and even recent ethnic cleansing experiences—became more likely due to geographical closeness or even neighbourhood to the EU external border to the East. The proximity of these new EU migration states have contributed to the increased attention that has been paid to the external dimension of EU migration and asylum policy, concludes Geddes.⁸⁵ Out of this situation probably emerged the wish to externalise control of irregular migration rather than to take internal measures against the informal sector of the economy.

As mentioned, on 1 May 2005, the European Agency Frontex (*frontières extérieures*) took up its responsibilities. Interestingly, a military was nominated as its chief: the Finnish Colonel Ilkka Laitinen was appointed Executive Director to run the European Agency on 25 May 2005. The seat chosen for Frontex was Warsaw, which makes sense with respect to its proximity to Ukraine and being the territory on which the Russian enclave of Kaliningrad is present. The agency is a co-ordinating body, which

⁸⁴ R. Koslowski, "Security and sovereignty in uniting Europe" (pre-cited), pp. 111ff.

⁸⁵ A. Geddes, "Europe's Border Relationships and Intl Migration Relations" (pre-cited), p. 791

monitors land, air and sea borders between the MS, supporting national authorities with training, risk assessment and organisation of joint return operations. Underlying aims are again linked to the Hague Programme of maintaining an AFSJ: "*The spectre of international terrorism, the human tragedies of victims of trafficking and the equally sad and grave consequences of illegal migration into the EU, are constant reminders of that we need to do even more to combat the many and diverse threats facing this area,*" concludes the Vice President of the Commission Frattini. Too recent is the creation of this Agency to evaluate its reach (the website <http://www.frontex.eu.int/> is still under construction)⁸⁶, yet the creation of the agency is already interesting in itself.

Due to the clandestine nature of human smuggling, it is nearly impossible to tackle its real extend. In 1999, Jonas Widgren (member of the International Centre for Migration Policy Development) estimated that some 400,000 people are smuggled into the EU (EU-15) annually.⁸⁷ Russian and Eastern European women are trafficked for (often forced) prostitution into the EU, 58 Chinese suffocated to death in the back of a truck as an attempt to be smuggled into the UK during the Feira European Council (Dover-case, 2000), in February 2004 23 (again Chinese) cockle-pickers were discovered dead in Morecambe Bay in England. The snakehead was judged a few weeks ago in England which is a positive evolution of law, also applied to illegal human beings, thus providing legal security to them. Yet this is not always the case. The scale of the global irregular migration and human trafficking business is estimated to range between \$12 billion (IOM numbers) and \$30 billion (US evaluation).⁸⁸

NGOs have a more local access to individual cases of human abuses and make public statements to defend their causes. On 25 November 2004, the conference "Fighting Human Trafficking across Europe" by La Strada in Prague debated more concretely the example of women trafficking from Macedonia to the ČR. It outlined the importance of NGOs in preventing women trafficking, supporting victims' rights and

⁸⁶ IOM Belgium, "Inauguration of the European Agency for the Management of Operational Cooperation at the External Borders of the MS" (04.07.2005), Available [online]: 06.03.2006, on: <http://www.belgium.iom.int/PDFDocuments/2006030614565612500065.PDF>; Migration Policy Institute (mpi), "Conference summary—The Presidency Conference on Future European Cooperation in the Field of Asylum, Migration and Frontiers" (2004), Available [online]: 08.06.2005, on: <http://www.belgium.iom.int/document/Summary.doc>; Communitarian Agencies, "Frontex," Available [online]: 10.05.06, on: http://europa.eu.int/agencies/community_agencies/frontex/index_fr.htm; cf. Appendix 2, p. 104

⁸⁷ The Economist, "A Single Market in Crime," *The Economist* (16.10.1999)

⁸⁸ A. Geddes, "Chronicle of a Crisis Foretold: The Politics of Irregular Migration, Human Trafficking and People Smuggling in the UK," in: *British Journal of Politics and International Relations*, vol. 7, no. 3, 2005-08: pp. 324-339 (numbers: p. 325)

influencing EU legislation.⁸⁹ NGOs are active in trying to pressure more thorough legal protection for TCN on the EU agenda, for it is often argued that TCN are being granted insufficient protection in EU law. Under the ECHR, protecting jurisprudence could stop non-nationals from being expelled from the territory of MS if there is a real risk that they will be subjected to inhuman or degrading treatment (Art. 3 ECHR) or if there is a disproportionate interference with their right to respect for family life (Art. 8 ECHR). In 2004, the Standing Committee of Experts on International Immigration, Refugee and regional HR law ("Meijers Committee") presented a draft Directive to the European Parliament on legal protection and remedies in matters of immigration control.⁹⁰ Apart from this example and the EU Migrants' Forum (funded by the Commission), pro-migrant NGOs tend to be relatively weak, probably because public opinion across the EU is rather anti-immigration and because non-national migrants themselves have limited access to local, national, let alone European political systems.⁹¹

As a way of concluding this section, it seems difficult to re-affirm Angenendt's statement dating from 1999 that the many entrenched national differences in MS' immigration policies make their integration therefore 'illusory'.⁹² Quite big national differences do remain visible in migration trends, as the next section will show concerning the specificities of Germany. But there have still been significant advances on the EU-level in terms of communitarisation of migration policies. The outlined idea that this step was linked with a securitized approach was verified by many documents taken over the last five years and by the impact of the institutional reforms undertaken in 1999. Yet it also has to be said that the necessity to protect individual TCN rights and the need for a more balanced approach between fighting terrorism and migration is only starting to find its way to the EU-level, supported by the ECJ and NGOs. Angenendt could not foresee the developments of the EU-policy evolutions in 1999 and also made a point when outlining the differences in national political strategies in their way of addressing migration challenges, based on national histories, varying economic and social structures and distinct political cultures.

⁸⁹ La Strada International, "Fighting Human Trafficking Across Europe," (25.12.2004), Radio Free Europe/Radio Liberty, Prague

⁹⁰ R. Cholewinski, "The need for effective individual legal protection," in: *European Journal of Migration and Law* (pre-cited), pp. 238ff. and E. Brouwer, "Effective Remedies for Third Country Nationals..." (pre-cited), pp.213-236

⁹¹ A. Geddes, *The politics of migration...* (pre-cited), p. 144

⁹² S. Angenendt, *Asylum and Migration Policies...* (pre-cited), p. 4f.

Chapter III: Germany's immigration policies: difficult adaptation to the 21st century

Section 1: Historic-political evolutions of immigration realities and debates

Germany is an important actor geo-strategically and politically in the debate over national and European-wide migration issues, but the German case of immigration policies also has some distinctive features with an ethno-cultural dimension and economic arguments that have had an impact on its WS identity. For these reasons, developments on the EU level cannot be understood without reference to Germany. The more in-depth study of this country will allow giving some insight in the problems faced on a national, regional and local level: the federal system of the FRG provides therefore one more argument for using it as an example. A first section will give the historic-political background and debates that have shaped the different perceptions of immigration issues over time in the German state(s). This will then help understanding the more specific positions of political actors, which will be analysed in a second section.

A—Historic background of actual German immigration policies (1945-1990s)

A country's policies are forged by the political culture underlying distinctive features of the WS systems: Esping-Andersen noted that WS systems are deeply influenced by history and politics, on the basis of which different WS regime (ideal-) types can be discerned. Germany belongs to his category of conservative/corporatist WS, meaning that the country is moderately de-commodifying (i.e. that citizens can more or less freely opt out of work without potential loss of job, income or general welfare) and etatist in terms of social stratification (i.e. the ability to regulate social relations are imputed on the state).⁹³ The issue of immigration has however posed quite a big challenge on the German state. As pointed out by Geddes, immigrant policy focuses on the "(...) *implications of the relationship between Germany as a welfare state and Germany as an ethno-cultural national community and the resultant articulations between inclusion and exclusion that this has generated.*"⁹⁴ Thus, some attention will be

⁹³ G. Esping-Andersen, The Three Worlds of Welfare Capitalism, Polity Press, 1990, pp. 23-29

⁹⁴ A. Geddes, "Germany: Normalised immigration politics?", in: The Politics of Migration... (pre-cited), p. 80

dedicated to the impacts of immigration on the German WS while taking into account the ethno-cultural dimension. This approach outlines the interesting evolution of policies at the beginning of the 21st century, when the EU dimension becomes more influential, either as a consequence of national political will or taking its own dynamics, according to the theory of European integration that is adopted for interpretation.

a) Contested notion of traditional immigration country

Germany's immigration patterns have to be understood on the background of historic developments, because they have greatly influenced recent immigration policies. While Germany had been a country of emigration in the 19th century, the tendency radically inverted after the end of WW II, the period of which turned Germany into "one of the most important destination countries for immigrants".⁹⁵ Nonetheless, it was only in 2001 that the country recognized itself as a country of immigration. There is a striking misfit between migration realities regarding the numbers of influx and outflow of the country and its contradicting long-term official statements. In a first step, historic evolutions and ethno-cultural elements can provide a response for the establishment of this principle in 1977 and in a second step, political debates in the 1990s between the two main political parties can help understanding how the shift was finally induced.

i. *Migration patterns from the aftermath of WWII to the 1990s*

A main pull-factor for migration from 1945 onwards was the booming economy in the period of post-war reconstruction, which had disclosed a big gap in the labour market, particularly with the human losses of the national-socialist regime and the war.

In a first period lacking workforce could be replaced by expelled or returned expatriates of German ethnic origin (so-called *Aussiedler*, i.e. from the *Sudete* region in Bohemia). Consequently, the Basic Constitutional Law (*Grundgesetz*) of the newly created Federal Republic of Germany (FRG)—which remained the legal point of reference after reunification—included a provision in its Article 116(1) that accorded the German nationality to residents of the German Reich as of the borders on 31 December 1937 and thus allowed ethnic German expellees to return:

⁹⁵ V. Oezcan, "Germany: Immigration in Transition" (July 2004), Migration Information Source, Available [online]: 08.06.2005, on: <http://www.migrationinformation.org/Profiles/display.cfm?ID=235> (Social Science Centre, Berlin)

Article 116: (1) According to this Fundamental Law (...), is German whoever has the German citizenship or who has been taken over as a refugee or an expellee of German ethnic origin or as his/her spouse or descendent in the geographical area of the German Reich as of 31 December 1937.⁹⁶

From 1945 to 1955, refugees and expellees represented about 12 million people in FRG and were seen as being part of a "*Schicksalsgemeinschaft*" (community of fate).⁹⁷ This point of view remained a permanent feature especially among the political right (CDU/CSU) and was to provide the basis for more open immigration practices at the eve and in the aftermath of German reunification in 1989/90. Regardless of the difficulties that the *Aussiedler* had to face, they nonetheless represented a major part of immigrants to Germany after the war: Münz and Fassmann noted that some 3 million ethnic Germans continued to immigrate to their 'mother' country between 1950 and 1993, with part of them allowed to emigrate after financial inducements had been transferred by the FRG to the respective countries.⁹⁸ The main countries of origin were Poland, Romania and the former Soviet Union. According to the two authors, ethnic migrants made up for over 75% of the European East-West migrants in this period and the rest were refugees, asylum seekers and labour migrants.⁹⁹ Yet however big these migration movements might seem, they did not suffice to fill the immediate needs of the labour market. As political tensions with the German Democratic Republic (GDR) and the Soviet Union reached its peak with the construction of the Berlin wall in 1961, the possibility of attracting labour force from this population pool to the western part of Germany was terminated. The GDR accepted immigrants from socialist countries and Vietnam, while the FRG had to rely on foreign labour.¹⁰⁰

Seeking to attract foreign temporary workers (*Gastarbeiter*) from Italy, ex-Yugoslavia and Turkey had already started earlier, but it now became the only available option. The most frequent sectors for employment of guest workers were gastronomy, the car industry and the metal industry. If some of them were also employed in agriculture, most of them settled in bigger towns, where such sectors were implanted. At the beginning of the 1950s the practice of hiring foreign labour had occurred on a non-official basis (e.g. in the case of Italian labour migrants), but soon thereafter formal measures were undertaken in the form of bilateral agreements with dramatic

⁹⁶ Grundgesetz für die Bundesrepublik Deutschland (on 26.11.2001), Die Deutsche Bibliothek, 9th edition, Baden-Baden: Nomos Verlagsgesellschaft, 2001, p. 211 [translation: mine]; original: cf. Annex

⁹⁷ A. Geddes, *The Politics of Migration...* (pre-cited), p. 80

⁹⁸ B. Marshall, "West Germany and migration 1945–89", in: *The new Germany...* (pre-cited) p. 8/9

⁹⁹ R. Münz/H. Fassmann, "European East-West Migration 1945-92," in: *International Migration Review*, no. 28 (3), 1994: pp. 520-538

¹⁰⁰ B. Marshall, *The new Germany...* (pre-cited), pp. 5-19

consequences for today's immigration patterns. Contracts were signed with Italy (1955), Spain and Greece (1960) and Turkey (1961). This practice was expanded in a more limited scope with Portugal (1964), Tunisia (1965), and Morocco (1963; 1966). In 1970 there was a peak of immigration especially to the *Bundesland* Bavaria.¹⁰¹

This trend was radically slowed down with the world-wide economic oil crisis of 1973, giving way to more restrictive immigration policies between 1973 and 1977. On 23 November 1973 the federal government stopped the immigration inflow from non-EEC countries (e.g. Turkey) with its "*Anwerbestopp*". The reason for this was that it had become clear by then that the hope that the 'guest' workers would return after their—what was thought to be a temporary—work contract was over, was not happening. The German term is quite precise in its meaning, implying that from then on no more new labour migrants were attracted to the country. This did not mean though, that the doors were closed completely to immigration. Rather, migration patterns shifted from predominantly male single workers in the 1950s/60s to a feminisation of migration through family reunification (immigrating wives and children) after the stop of economic migration. In 1982, Interior Minister Gerhard Baum summarised the state's approach by stating that after having brought guest-workers into Germany since the 1950s, they were entitled to some (moral) obligations. Joppke furthermore outlines the role of law and the courts, since the FRG's Fundamental Law puts individual rights before state power. In addition, just as is the case for the social security system, the rights of the family could not be limited in scope for Germans.¹⁰²

Next to the consequent family reunification flows, the 1970s and 80s were marked by increasing refugee and asylum seeker inflows. The effect accompanying this dramatic raise was an ever growing reluctance to recognize refugees as such. Reservations already emerged in the 70s against (left-oriented) political refugees, who were suspected of keeping up their activism in Germany, and against "economic asylum seekers". Former Chancellor Kohl labelled them as such, suspecting them of using the asylum system for economic reasons.¹⁰³ The system had been put in place to conform to the requirements of the international Geneva refugee Convention from 1951 (cf. p.89f.). In some cases there were no doubts that persecution on grounds of political opinion had taken place: this was for example the case for left-wing refugees after the Chilean coup in 1973. These refugees remained disrupting for some members of the political right in Germany, who were afraid that they could import revolutionary ideas to the country, as

¹⁰¹ R. Münz/H. Fassmann, "European East-West Migration 1945-92" (pre-cited)

¹⁰² Cf. A. Geddes, *The Politics of Migration...* (pre-cited), pp. 82-86

¹⁰³ Cf. B. Marshall, *The new Germany...* (pre-cited), p. 18

Thränhardt analysed it.¹⁰⁴ Such fears coincided with a national context of instability and even psychosis among the population induced by the terrorist activities of the Baader-group (*Rote Armee Fraktion*), which wanted to change what they called a 'bourgeois society'. No link can be made between politically left-oriented refugees and this terrorist group, but the context itself did not shed a favourable image on the new-comers.¹⁰⁵

Politicians like Kohl made a clear distinction between the asylum seekers who were and those who were rather not welcome. He justified the pertinence of the asylum system on grounds of the 'historic guilt' and the 'crimes which were committed' by the Germans. But he reminded that the country's commitment to its past and to humanitarian values had not been intended for people emigrating for economic reasons. Thus, even when asylum seekers were not considered dangerous politically, they were thought to have left their country of origin mainly to improve their living standards abroad, a fact that did not fit the Geneva Convention definition. Interior Minister Genscher from the liberal FDP went as far as to call this phenomenon an "*Asylmißbrauch*" (abuse of the asylum procedure). Caroline Kern tones this position down by pointing out that the motivation of this immigrant behaviour was probably induced by an attempt to enter the otherwise closed labour market.¹⁰⁶ More restrictive policies (the introduction of visa requirements and shortened asylum procedures) paralleled growing popular discontent against immigration. In 1977 these developments led to the mentioned statement that Germany was not a country of immigration, a point of view that was stuck to well into the 1990s.

ii. *Demographic evolution and public opinion after reunification*

When a law was passed by Gorbachev in 1986, with the effect of loosening emigration restrictions from the Soviet Union, the ethno-cultural element became crucial again. It caused an immigration jump from the countries of the Soviet block to the FRG, especially after the fall of the iron curtain (e.g. ethnic Germans from Romania in 1990 after Ceaucescu's fall).¹⁰⁷ The 1989/90 euphoria over the reunification of Germany led to a peak of mass emigration from GDR to FRG in a first time, but then gave way to a general trend of internal migration within the country. Between 1991 and 1999 about 1.7 million people moved to the West, but 1.2 million also moved to the East of Germany, an

¹⁰⁴ Quoted in: A. Geddes, *The Politics of Migration...* (pre-cited), p. 86

¹⁰⁵ H.-H. JANSEN, "Stabilität und Reform – Innenpolitik 1949–1999," in: *50 Jahre Bundesrepublik Deutschland: Daten und Diskussionen*, preface Hans MOMMSEN, ed. by E. Conze/G. Metzler, Stuttgart: Deutsche Verlags-Anstalt, 1999, pp. 25–38

¹⁰⁶ C. Kern, "Fortress Europe?..." (pre-cited), p. 82

¹⁰⁷ Bundesregierung, "Politische Ziele," on: http://www.zuwanderung.de/3_polit-ziele.html; "Zeitstrahl," on: http://www.zuwanderung.de/1_zeitstrahl.html, both available [online]: 08.06.2005

often omitted fact.¹⁰⁸ The start of the 1990s were marked by relatively liberal asylum provisions and a right to return for foreigners with ethnic German background (called *Aussiedler* directly after the collapse of the Communist block, but labelled *Spätaussiedler* when they emigrated after 1994). The new immigration law includes the latter group in statistics, since they were considered as being part of a broader understanding of the German community. Most of them came from Kazakhstan, Russia and Romania.¹⁰⁹

These relatively open asylum rules were based on a self-imposed wish to conform to international HR laws and were thus also responsible for the immigration increase in reunified Germany.¹¹⁰ Article 16 of the *Grundgesetz* stipulates that “*politically persecuted people have a right to asylum*”, but this right was drastically limited after a tremendous peak of asylum applications to Germany in 1992. Pessimistic economic realities caught up with the initial elation over reunification. Post-communist transition proved more difficult than expected and led to massive emigration to the Western *Bundesländer*, although a solidarity fund had been put in place to overcome the gap between the *Länder* budgets. The identity of Germany as a WS was under threat, for unemployment was a rather new experience in the post-communist *Länder* and remained at a high level.

In addition, it had been mistakenly assumed that the ethnic national community dimension was now resolved, but it is still a central point of the immigration debate in Germany as of today: “*The Germans have so far not been able to create a picture of themselves that lets immigrants know exactly what this country is all about. That has to do with the negative experiences of National Socialism (...)*”, stated migration specialist Klaus Bade (cf. societal debate, section 2 in this chapter).¹¹¹ Besides, mentalities had evolved quite differently behind each side of the wall since the 1950s, more and more focusing on the question of German national identity, even leading to xenophobic stances in some cases. This fits the statement that immigrants contribute to testing “*a country’s sense of itself, forcing people to define what they value*”.¹¹² Only once there is a clear definition on what or who is German can there also be a consensus on who can

¹⁰⁸ P. J. Opitz, “Internationale Migration” in: *Informationen zur politischen Bildung* (Bundeszentrale für politische Bildung), “Internationale Beziehungen II—Frieden und Sicherheit zu Beginn des 21. Jahrhunderts,” no. 274/2002, p.48

¹⁰⁹ Bundesministerium des Innern, “Das neue Zuwanderungsgesetz,” Available [online]: 08.06.2005, on:

http://www.bmi.bund.de/cln_012/nn_165090/Internet/Content/Themen/Zuwanderung/DatenundFakten/Das_neue_Zuwanderungsgesetz.html; S. Angenendt, *Asylum and Migration Policies in the European Union* (DGAP), ed. by Angenendt, Bonn: Europa Union Verlag, 1999, p. 167

¹¹⁰ A. Geddes, *The politics of migration...* (pre-cited), p. 79

¹¹¹ Quoted by: A. Tzortzis, “In Europe, quizzes probe values of potential citizens” (04.10.2006), *The Christian Science Monitor*, Available [online]: 21.04.2006, on:

<http://www.csmonitor.com/2006/0410/p01s04-woeu.html>

¹¹² *The Economist*, “The Longest Journey: A Survey of Migration,” (02.11.2002), p. 4

find a path towards German citizenship or who has to remain outside of this realm. It also assumes that citizenship can be gained upon other criteria than having German blood.

Effectively, a survey over the perceptions on current demographic trends (published in 2005) states that “[the] *differences in the perceptions and opinions between East- and West-Germans have been maintained. (...) East-Germans consider foreigners to be a far greater danger than is the case among West-Germans*“.¹¹³ The survey also discloses the differences in the perceptions of the demographic situation in Germany in comparison to the real situation in 2002/03. A commission was established in the year 2000 to put in place an immigration policy; the body argued that immigration could be a way not to overcome, but at least to relieve problematic demographic developments.¹¹⁴ It was also important to get the pulse of public opinion in this endeavour, since such new relevant policy developments needed the support of the people.

Three numbers are revealing in the survey that juxtaposes public opinion and real demographic developments. Firstly, the expected number of population aging was extremely overestimated, since the proportion of 65 and older was of about 17.5% (not as estimated 30.1%). Population ageing is relevant since it is often used as an argument for loosening immigration policies. Secondly, it was argued that the average fertility rate, another demographic argument for favouring immigration, is very low. This was confirmed by the official statistical data body (*Statistisches Bundesamt*): in 2004, Germany’s fertility rate counted about 1.37 percent, which is still a bit higher than in the ČR, for instance (1.16 percent).¹¹⁵

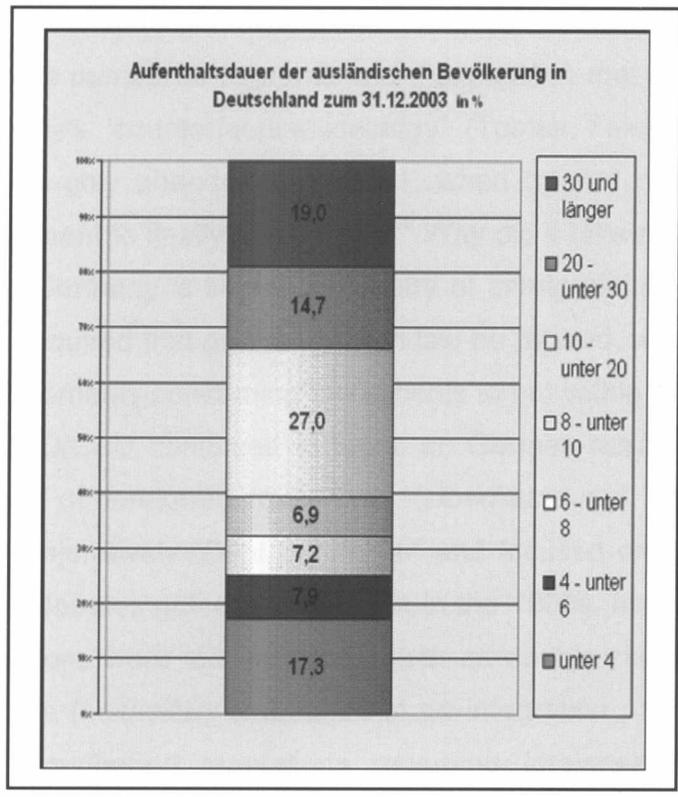
Thirdly and most strikingly, the numbers of expected foreigners was greatly overestimated, exceeding the real situation by 36.4%. Statistics count about 7.3 million foreigners, which represents 8.9% of the total population. This naturally excludes illegal migrants, escaping official data by definition. The main country of origin of the immigrants to Germany remains Italy within the EU, Turkey and the former Soviet Union from non-EU countries (especially of Jewish origin). The length of stay also varies quite significantly and does not fit a common popular belief that once a foreigner comes, s/he never leaves. The following graph shows that a little more than 60% of the officially

¹¹³ Bundesinstitut für Bevölkerungsforschung beim Statistischen Bundesamt, “Einstellungen zu demographischen Trends und zu bevölkerungsrelevanten Politiken—Ergebnisse der Population Policy Acceptance Study in Deutschland,” J. Dorbritz/A. Lengerer/K. Ruckdeschel (2005), Available [online]: 08.06.2005, on: http://www.bib-demographie.de/info/ppas_broschuere.pdf, p. 8 [translation: mine]

¹¹⁴ Bundesministerium des Innern, “Migrationsbericht,” ed. by Sachverständigenrat für Zuwanderung und Integration, BAMF, Berlin (2004), Available [online]: 08.06.2005, on: http://www.bmi.bund.de/cln_012/nn_121894/Internet/Content/Common/Anlagen/Broschueren/2004/Migrationsbericht__2004,templateId=raw,property=publicationFile.pdf/Migrationsbericht_2004

¹¹⁵ Bundeszentrale für politische Bildung, “Bevölkerungsentwicklung”, *Informationen zur politischen Bildung*, no. 282/2004, p. 18

registered remain longer than 10 years with 40% leaving the country beforehand. And only 19% stay seemingly “forever”.¹¹⁶



The net immigration inflow rate, established by subtracting the outflow from the inflow of migrants, was conversely greatly underestimated by 33.4%. There is another, probably more precise way of establishing an approximation of net migration when subtracting the total number of deaths and births from the total of the overall population rate. Statistics are but a gross approximation and can only be seen as an indicator of the real situation in a country. According to Norbert Cyrus' expert analysis for the government in 2004, uncertain estimations of those living in Germany without residence permit amount up to 1.3 million people.¹¹⁷ By 2003 Germany counted roughly 103.000 immigrants as opposed to the highest peak of 595.000 in 1992, due to the asylum compromise pointed out earlier.¹¹⁸ This shows the impact that policies *can* have in terms of immigration management (not to say control).

¹¹⁶ Bundesregierung, "Statistik," Available [online]: 08.06.2005, on: http://www.zuwanderung.de/images/img/large/1_5.gif

¹¹⁷ N. Cyrus, "Bericht für den Sachverständigenrat..." (pre-cited), p. 8

¹¹⁸ "Deutschland", in: Der Fischer Weltalmanach 2005—Zahlen-Daten-Fakten, Fischer Taschenbuch Verlag, Frankfurt am Main, 2004, p. 145

b) Political debates starting to tackle pressing migration realities in the 1990s

The summary of the conference “Future European Co-operation in the Field of Asylum, Migration and Frontiers” in Amsterdam in 2004 stated that “Germany has Europe’s highest absolute number of migrants and a population that is about 13 percent foreign-born.”¹¹⁹ Germany’s ‘counterfactual ideology’ (Tomas Faist) of not being an immigration country was only abandoned in 2001, when Interior minister Otto Schily made the opposite statement to finally fit realities.¹²⁰ Why did it take politicians so long to officially recognize that Germany is indeed a country of immigration? A main reason is that admitting this also required that an immigration law be passed, when there were still so many political disagreements concerning the accents to put within immigration issues. While the right-wing CDU/CSU continued to focus on German-ness (*Deutschtum*) and feared a predominance of foreigners over time (*Überfremdung*), the left-wing SPD labelled this discourse pejoratively “*Deutschtumelei*” and focused on the fate of asylum seekers instead. These debates gained momentum in the 1990s, but have not yet been resolved today. Discussions were led on issues such as double citizenship or German culture as a ‘leading’ one (*Leitkultur*) embedded in an integration process. The CSU in Bavaria only recently toughened regulations regarding foreigners, forcing them to “integrate” into German society under the threat of financial sanctions if they refuse.¹²¹

The first broad debate concerned the asylum compromise of the year 1992/93, followed by diverse issues that laid the basis for the immigration law passed in 2004.

i. *From the asylum compromise to the end of the CDU/CSU-FDP coalition (1993-1998)*

In 1991 a new law on foreigners’ rights came into force, facilitating the procedure to get the German citizenship. The following year recorded a historic peak of immigration to Germany with 440.000 asylum applications, yet in the end only 4.25% were actually entitled to it. This launched a sensitive societal uproar over foreigner and asylum policies to which an alternative had to be found, especially after violent physical attacks were launched against asylum housings. The Christian Democrats’ (CDU/CSU) primary goal was to reduce the number of asylum seekers in order to relieve the tension, whereas the coalition-partner Free Democrats (FDP) and the opposition party SPD asked for more

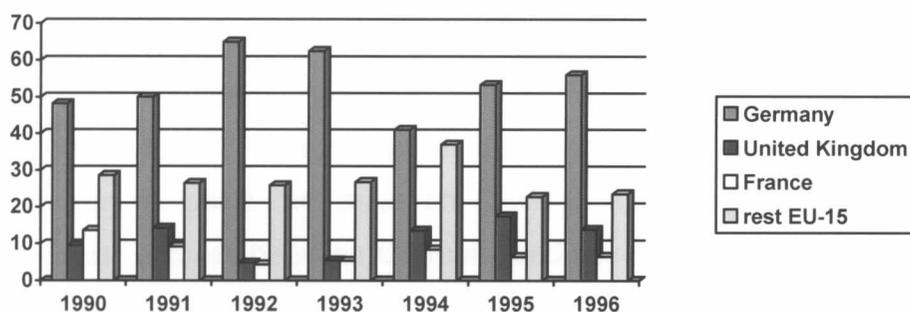
¹¹⁹ Migration Policy Institute, “Conference summary—...” (pre-cited)

¹²⁰ Quoted in: A. Geddes, *The Politics of Migration...* (pre-cited) p. 15+79

¹²¹ “Stoiber besteht auf Sanktionen für unwillige Ausländer” (08.04.2006), Spiegel Online Politik, Available [online]: 24.04.2006, on: <http://www.spiegel.de/politik/deutschland/0,1518,410557,00.html>

progressive measures turned towards integration. After some bargain, the government coalition of CDU/CSU and FDP reached an agreement with the SPD, the so-called “asylum compromise” on 6th December 1992.¹²² The article 16a(2) of the *Grundgesetz* specified the country of origin of “politically persecuted persons” entitled to claim asylum: it excluded all the EC countries and the third states, in which the Convention for the protection of HR and basic freedoms is guaranteed (defined as ‘safe’ countries of origin).¹²³ As a result, the number of asylum-seekers dropped radically the following year and remained a downwards trend until the end of the millenary. Exceptionally, Germany accepted about 345,000 refugees who had fled from Bosnia-Herzegovina in the mid-1990s, but about 90% of them had returned by 2002.¹²⁴ The situation remained somewhat stable until 2000, with one law in 1997 improving the living conditions of foreigners and facilitating the extradition of foreign criminals to their country of origin.

The following graph gives a rough overview of the proportions of asylum applications to Germany from 1990 (the year of German unification) to 1996, when the situation was somewhat stabilized; it opposes them to the United Kingdom and France, the two countries having received the highest numbers of applications within the EU-15 after Germany, and the rest of the EU-15. It shows how disproportionately great Germany was touched by the phenomenon of asylum seekers in the first half of the 1990s, even if the following numbers are but an approximation in itself.¹²⁵



A distinctive feature of the CDU/CSU – FDP coalition was the use of bilateral agreements to resolve border issues in the aftermath of reunified Germany. Germany’s Eastern border was finally clarified by the German-Polish Treaty on 14 November 1990, establishing the Oder-Neisse line as irreversible. On 17 June 1991 another Treaty was signed by the two countries, guaranteeing the cultural and linguistic rights of the Polish minority of German ethnic origin. Chancellor Kohl signed a cooperation and friendship

¹²² Bundesministerium des Innern, “Migrationsbericht...” (pre-cited), p. 14

¹²³ Grundgesetz für die Bundesrepublik Deutschland 2001 (pre-cited), p. 27

¹²⁴ V. Oezcan, “Germany: Immigration in Transition” (pre-cited)

¹²⁵ Annual numbers of asylum applications, 1990-1996, based on: B. Marshall, *The new Germany...* (pre-cited), p. 35

treaty with the Czech president Václav Havel on 27 February 1992, which however did not tackle claims by the *Sudete* minority expelled in 1945 from Czech lands. This was done a few years later on 21 January 1997 with a common declaration between the same two politicians, outlining the pains endured on both sides due to the war.¹²⁶

Next to border issues and minority rights, bilateral *resettlement* agreements were signed by the government, thereby taking up the method used for establishing temporary work contracts in the 1950s and 1960s. But this time around, the negotiating states were respectively to arrange the reception of their national asylum applicants when the latter were rejected. Such agreements were signed with Romania (1992), Poland (1993), Croatia, Bulgaria and the ČR in 1994 and with the Federal Republic of Yugoslavia and the Republic Bosnia and Herzegovina in 1996.¹²⁷ It was also agreed upon, that third state members, who had illegally crossed the border, would be taken over, even if this point often made difficult political bargain necessary.

Furthermore, Glatzel pointed out that "*Germany has always emphasised upon the conclusion of bilateral taking-back agreements that it is aiming at creating a European-wide system of taking-back agreements.*"¹²⁸ Indeed, the government regarded asylum as an issue touching the whole of Europe, which therefore had to be tackled on a broader basis. Logics of burden-sharing between richer and poorer *Länder* were in a way sought to be transposed on the community level. It can be said that the endeavour was successful to a limited extent, since it led to the Council of the EU ministers of interior and justice forging a draft for an EU-wide model for bilateral agreements in 1994. Yet despite this effort on the EU-level, countries such as Great Britain and Austria were vehemently opposed to such EU-wide burden-sharing advocated by Germany.

Another attempt to tackle the issue on a wider scope was the launching of multilateral agreements, such as between Germany and the Benelux countries on 7 July 1994. The aim was to take common actions in the sphere of asylum and consular cooperation. The most far-reaching agreement as of then nonetheless remained the Dublin Convention (cf. p.31).¹²⁹ It had the ambitious goals of establishing a harmonized system of border controls, creating a common visa policy and judicial information system. This finally led to the creation of the Centre for Information, Discussion and Exchange on

¹²⁶ "Allemagne—Actualité (1990-2001)," *Encyclopaedia Universalis*, DVD-Version 8, 2002

¹²⁷ H. Glatzel, "Bilaterale Rücknahmeübereinkommen und multilaterale Harmonisierungspolitik", in: Bundeszentrale für politische Bildung, *Migration und Flucht—Aufgaben und Strategien für Deutschland, Europa und die internationale Gemeinschaft*, band 342, ed. by Steffen Angenendt, Bonn, 1997, pp.107-115

¹²⁸ *Ibid.*, p. 114 [translation mine]

¹²⁹ "Übereinkommen über die Bestimmung des zuständigen Staates für die Prüfung eines in einem Mitgliedstaat der Europäischen Gemeinschaften gestellten Asylantrags," Available [online]: 08.06.2005, on: <http://migration.uni-konstanz.de/pdf/ge/Voelkerrecht/Dublin.htm>

the Crossing of Frontiers and Immigration (CIREFI) in 1992.¹³⁰ Common visa policies are still a guideline for the Commission (cf. the Hague Programme, p.39ff.) and Eurojust is responsible for the harmonization of judicial information systems.

It can thus be argued that the system of bilateral agreements has laid the path towards the coordination of asylum and migration policies of the EU. In contrast to this, Angenendt stated in 1997 that this system represented a hemming factor in a Europeanizing process, in maintaining the issue on a mainly national, intergovernmental mode of cooperation.¹³¹ This may have been true at first, but the 2003/109/EC regulation, which standardizes the legal status of TCN on their long-term stay in an EU country, proves the impact that the issue has gained a few years later.¹³²

ii. *Late 1990s political debates between the parties*

Politics shifted in Germany at the end of 1998 shortly before the Amsterdam Treaty moved immigration and asylum issues to the first community pillar in a title covering free movement, immigration and asylum.¹³³ As Monar points out, the heads of state and government referred for the first time to “our territory” in singular form in the conclusions of the European Council of Tampere in October 1999.¹³⁴

There are two theories concerning the interplay of the domestic and the EC/EU level of migration policy at the turn of the century: one emphasises the input of EU developments into the domestic level, hence emphasising the supranational level, while the other views the use of Europeanized migration and security policies as a way of pushing through domestic interests that were otherwise being hindered by legal or/and political barriers, remaining state-centred. Yet another way to look at it is to outline the European-wide phenomenon of spreading xenophobic and extreme right-wing movements/parties in countries such as Austria, Germany and the Netherlands. Similar domestic rather local experiences have pressured upon the governments to take up measures more urgently and efficiently.

In the German case, domestic politics were certainly important in shifting national positions about migration. On 26 April 1998 the extreme right-wing party *Deutsche*

¹³⁰ “EU immigration policy” (CIREFI), Available [online]: 06.04.2005, on: <http://www.europa.eu.int/scadplus/leg/en/lvb/133100.htm>

¹³¹ S. Angenendt, “Perspektiven einer deutschen Migrationspolitik,” in: *Migration und Flucht (...)* (pre-cited), p. 283

¹³² Richtlinie 2003/109/EG (25.11.2003), “Rechtsstellung der langfristig aufenthaltsberechtigten Drittstaatsangehörigen”, Available [online]: 08.06.2004, on: http://www.bamf.de/template/internationales/anlagen/eu_richtlinie_langfrist_aufenthalt.pdf

¹³³ *Ibid.*, p. 137

¹³⁴ J. Monar, “Die EU als Raum der Freiheit...” (pre-cited), p. 171

Volksunion (DVU) entered the regional parliament (*Landtag*) of Saxony-Anhalt by gaining 12.9% of the votes and on 5 September 1999 the same party entered the parliament of Brandenburg. On 27 September 1998 the social democrats gained the federal elections and created a governmental alliance with the green party (Bündnis '90/Die Grünen) in its aftermath. The new coalition launched the process of many deep-going, though greatly contested reforms, among which a revision of the nationality code.¹³⁵ Those reforms had been necessary also in the light of harmonizing attempts of national policies on the EU level, yet they happened in a climate of great political tension. On 21 May 1999 the Bundestag adopts the project reforming the nationality code.

The political tension remained nonetheless critical up to the point of Chancellor Schröder's calling for advanced parliamentary elections in 2005. A closely related question had become the viability of such a highly redistributive WS system as the German one is, for the problem of demography (ageing and low birth rate) directly affects social security and pension systems. A way of approaching this problem had been for the government to gradually view immigration as an economic opportunity rather than a nuisance.¹³⁶ Yet if one recalls the two main tasks of a WS as defined by Esping-Andersen—de-commodification and social stratification—one can derive the hypothesis that although the reforms in matters of immigration were necessary and represented a progress in some areas, the German WS itself suffers from them under certain aspects. Stronger intergovernmental dialogue and cooperation processes launched within the eyesight of a unique EU territory and a common EU border can harmonize the community approach and thereby maybe clarify conditions on the national levels.

B—Policy trends 2000-2005: coalition and compromise needed for reforms

a) 2000-2002: U-turn in German immigration policies

i. *State regulation of work permits – the “green card” system*

At about the same time as the Council of the EU met in Tampere the new government coalition of SPD – Green party put the issue of migration on the forefront of its agenda and codified by law a series of immigration-related bills. Migration was used mainly as an economic argument again (like during the guest-worker period): it was seen

¹³⁵ C. Kern, “Fortress Europe?...” (pre-cited), p. 82

¹³⁶ The Economist, “The Longest Journey: A Survey of Migration”, published on 02.11.2002, p. 4

as a positive measure when certain sectors of the economy suffer from lacking specialised workforce or when nationals do not accept low-qualified positions. But the negative aspects of economic migration concern fears of people from economically less developed countries flooding in, hoping to get better living conditions. Exceptional measures were undertaken on the EU-level in the face of EU enlargement in May 2004 to limit access to the Western European labour market for two years to some of the new MS. Germany is not exempt of a similar dichotomy. General fears had emerged among EU-15 citizens that cheap labour force from Central Europe would flood the Western European labour market. The driving force behind these measures was fear of salary dumping or higher unemployment. A 2001 research lead by Brücker's German Institute for Economic Research (DIW) for the European Commission had investigated expected effects of EU enlargement on the labour market.¹³⁷ According to his estimations, 335,000 people were to move west a year until the flow slowed down after the convergence of the salaries. This trend has not yet been verified. Furthermore, the general EU principle of free movement of persons already stated in the Treaty of Rome (1957) does not allow a permanent discrimination against non-German EU citizens in terms of employment.

Labour migration was used in the summer of 2000 by the German government, when the 1973 *Anwerbestopp* protective measure was loosened by an exception clause providing for the distribution of 324,000 additional work permits. In 2002 up to 374,000 temporary work permits were issued. Mostly seasonal workers benefited from it, but they are allowed to remain maximum 90 days in Germany for this purpose. Contract workers have the right to stay longer (maximum two years); in over half of the cases, contract and seasonal workers are from Poland, Hungary and the ČR.¹³⁸ The measures were meant to loosen restrictions on the labour market to favour circular migration. In the case of Polish temporary or seasonal workers, family reunification is not necessary if borders can be easily crossed back and forth. Furthermore, incentives for falling into an illegal status are diminished, because such a contract is renewable and because it is still possible to re-enter the country once a migrant has left the territory. The "Green-card" initiative was launched to attract 20,000 ICT specialists lacking to drive the German economy forward. In order not to repeat the 'overstaying of the guest-worker' phenomenon, their residency is limited to five years and the family members of these IT specialists were excluded from work for the first year after arrival. Mostly workers from India, Poland and Russia made use of this possibility. Yet these policies were not popular, the more so because the initiative failed to attract the expected number of workforce to restart German economy.

¹³⁷ The Economist (2002), p. 6

¹³⁸ Bundesministerium des Innern, "Migrationsbericht..." (2004) (pre-cited), p. 16

ii. *Reform of the citizenship law (2000)*

Next to the economic aspect of migration the new government tackled the issue from the citizenship perspective. A clear u-turn occurred in the German approach from a traditionally predominant *ius sanguinis* to a more moderate provision including *ius soli* regulations, as used by custom in France. Over the last decades, the earlier approach had led to the feature that the children of long-term guest-workers were not recognized as German citizens, despite being born in Germany and having adopted a German way of life. Differences among generations of migrants emerged and were crucial in forging a heterogeneous German society: as first-generation migrants from Turkey did not believe that they would remain in Germany, they sometimes sent their children to their country of origin for school attendance. When returning to Germany to look for better employment, they were inadequately adapted workforce.¹³⁹ Hence, Angenendt argued for a renewed policy questioning the *ius sanguinis* concept and allowing double citizenship instead.¹⁴⁰

The reformed law on citizenship came into force on 1 January 2000. From then on, children born to foreigners received the German citizenship, when one parent had been a legal resident in Germany for at least eight years. Children affected by this clause have to choose one of the two nationalities between age 18 and 23, except when bilateral agreements allow to keep the double citizenship (as is the case with France). This meant that the *ius sanguinis* clause was not abolished, but broadened. Dispositions against extremists were added and the foreigners had to prove sufficient knowledge of German, so that they could fulfil the primary goal behind this law, i.e. integration.¹⁴¹ The CDU/CSU parties did not recognize dual citizenship—a critique aimed primarily against German-Turkish dual citizenship. The party started a large campaign among the population and gathered quite a number of signatures against the new law. This upheaval could not be ignored by the government and this is why dual citizenship is today only granted in exceptional cases (e.g. when the original citizenship cannot be abolished). This definition had the effect of decreasing the number of foreigners in statistics by about 80,000.¹⁴² These policies having yet again opened the path for sensitive political discussions, Minister of the Interior Schily created a commission in 2000 to elaborate proposals on an ambitious immigration and integration policy.¹⁴³

¹³⁹ The Economist (2002), "Feeling at home", p. 9

¹⁴⁰ S. Angenendt, "Perspektiven einer deutschen Migrationspolitik," in: *Migration und Flucht* (pre-cited), p.278

¹⁴¹ Bundesregierung, "Politische Ziele" (pre-cited); "Allemagne—Actualité (1990-2001)," *Encyclopaedia...* (pre-cited)

¹⁴² Oezcan (2004) (pre-cited)

¹⁴³ Bundesregierung, "Zeitstrahl" (pre-cited)

b) 2002-2005: difficult bargain towards and after the imposition of an immigration law

i. *Political conditions prior to the Zuwanderungsgesetz and its content*

The commission report "Structuring Immigration, Fostering Integration" was handed over to Schily the following year. It summarized demographic facts (aging population, viability of social security and pension schemes etc.) and proposed to focus on the goal of integration via education and language. It suggested having a quota of annually 20,000 immigrants, the criteria to choose the applicants were to be based on a point system (education, age and language skills, a procedure used also in Canada). It also aimed at speeding up the asylum procedure. Based on this report, the government coalition handed over a bill to the *Bundestag*, taking over some of the commission's proposals. The bill focused on promoting highly qualified migration and integration and was consequently passed by parliament and signed by president Rau in March 2002, despite popular discontent (cf. p.81f.).

Yet the conservative parties were dissatisfied with it and blocked it through the Federal Court (BVG) on grounds of a procedural flaw at the end of the year. From then on, the political parties tried to achieve an agreement similar to the asylum compromise in 1992. It was a tight political bargain, especially since the *Bundesrat* had a CDU/CSU majority and thus had the necessary backing support for the negotiations. Whereas the government parties stressed integration of foreigners, conservative parties stressed threats that immigration might pose to interior security.

The question became pressing in spring 2004, precipitated by the "Kaplan"-affair. The extremist Islamic leader Metin Kaplan was the head of the Islamic association "*Kalifatstaat*" (caliphate state), forbidden in 2001 because of anti-terror laws. In March 2003, Kaplan had been convicted to four years of imprisonment on the grounds of incentives to murder and was to be handed over to Turkey. The Cologne administrative court confirmed the end of the asylum status he had been granted in 1992, but refused his extradition to Turkey. These judicial questions were solved only in May 2004, when the Münster higher administrative court admitted Kaplan's expatriation.¹⁴⁴

Finally, an outcome was agreed upon between the Chancellor of the time Gerhard Schröder, the representatives of the Green party, the conservatives and the FDP. This political agreement became the basis for the elaboration of a new legislative draft. Schily summarized the main aspects of the law in his presentation speech on 1 July 2004

¹⁴⁴ Der Fischer Weltalmanach 2005, Fischer Taschenbuch Verlag, Frankfurt/Main, p. 145

before the upper chamber.¹⁴⁵ He picked up the topics of labour migration, humanitarian measures, integration and security. He welcomed the promotion of labour migration of highly qualified persons through the process of facilitating family reunification. In addition, a federal institution for migration and refugees was created (*Bundesamt für Migration und Flüchtlinge/BAMF*), the role of which is to implement the concepts of the law. Schily referred to opinion polls to underline the importance of security matters, since 80% of the population believed that security measures had to be taken into account in a law on foreigners. The sensitivity of the issue has been under greater spotlights after the (terrorist) attacks in Washington and Madrid and contributed to the conservative parties' insistence in adding the possibility to deport foreigners on the basis of a "threat prognosis".¹⁴⁶ The law was accepted by both chambers in July 2004 and the new immigration law came into effect on 1 January 2005.¹⁴⁷

The 1973 measure against the inflow of low- or non-qualified workers was maintained and cannot be overcome lest by very exceptional measures. Incentives for migration are economically for unskilled labour for those jobs that Germans are reluctant to take (this is momentarily the case for harvesting asparagus). Independent workers are allowed to work in Germany if they create at least ten new jobs and invest one million Euros. The formerly proposed point system was abolished. One innovation concerned humanitarian right, which was improved in taking into consideration non-state persecution and gender-related persecution; it makes an explicit reference to the Geneva Convention for the rights of refugees (28 July 1951). The maximum number of months to stay was fixed at 18 and the possibility to prolong the stay every three months was abolished, since some refugees had already made abusive use of it. The security issues included the provision of expelling foreigners on the basis of a well-founded threat prognostic (cf. p.70f.). This applies to "spiritual fire raisers" and "hate sermons" (Kaplan falls into this category). If expulsion is not possible because of an expected death penalty or torture in the country of origin, the person remains under strict watching and can eventually be imprisoned (§53 foreigners law¹⁴⁸).

¹⁴⁵ O. Schily, "Zuwanderungsgesetz ist ein Gewinn für Deutschland" (01.07.2004), Available [online]: 08.06.2005, on:

http://www.bmi.bund.de/cln_012/nn_122688/Internet/Content/Nachrichten/Reden/2004/07/Schily__Zuwanderungsgesetz__ist__ein__ld__95157__de,templateId=renderPrint.html

¹⁴⁶ Bundesministerium des Innern, "Das neue Zuwanderungsgesetz," (pre-cited)

¹⁴⁷ Der Tagesspiegel, "Vermittlungsausschuss billigt Zuwanderungsgesetz", published on 01.07.2004 by DPA, on: <http://www.tagesspiegel.de/tso/aktuell/artikel.asp?TextID=39977> (Tagesspiegel), last consulted: 08.06.2005; Bundesregierung, "Zeitstrahl" (pre-cited)

¹⁴⁸ Appendix 3, p.105 §53 AuslG/Abschiebungshindernisse (measures stopping extradition procedure)

Language and integration courses were put in place to facilitate the integration of foreigners. They were paid by the state, for which it dedicated 200 million € annually: 50,000 foreigners have to follow these courses and sanctions can be applied if they refuse to do it (for example through non-prolongation of residence permits).¹⁴⁹ The level to be achieved should follow the common European reference system for the knowledge of languages.¹⁵⁰ Further programmes are dedicated to integrating women more in particular, who may have to adapt from a different environment in their country of origin, to help them access the job world more easily. Churches, trade unions, employer unions and other societal groups are incorporated into these projects.

ii. *Rising popular discontent over the “integration” of immigrants and the “visa scandal” in February 2005*

Contrary to expectations, the party compromise did not soothe moods over the integration of immigrants. Having lifted the taboo on the topic seemed to have unleashed more debates. The issue added to a general sense of dissatisfaction in 2005, which finally led to Schröder’s anticipation of elections. The government crisis and high unemployment rates were expressions of failed social stratification, a feature continuing in 2006 with strikes and unsuccessful attempts to settle disagreements between trade unions and employers even through third parties (so-called *Schlichter*). The inclusion of foreigners poses a major challenge to the national WS not only in financial but also in socio-political terms.¹⁵¹ The viability of the actual German WS system cannot be assured in the long run, which is the reason why the previous government had launched such unpopular reforms as Hartz IV and Agenda 2010. Both measures had tried to tackle issues like unemployment, social security, health and pension system. In 2005 the number of unemployed people rose, due to a new definition of unemployed persons that hit foreigners in particular.

Rising popular discontent also challenged governmental authority to solve the sensitive problem of integration. The government summarizes the importance and the goal of ‘integration’ by stating that it “(...) cannot be limited to organizing a life in togetherness of people from different cultures. A society cannot bear an internal

¹⁴⁹ Bundesministerium des Innern, “Integration,” Available [online]: 08.06.2005, on: http://www.zuwanderung.de/3_prognosen.html

¹⁵⁰ *Gemeinsamer Europäischer Referenzrahmen für Sprachen*

¹⁵¹ S. Mau, “Globalisation and the Political Viability of the Welfare State” (2004), Available [online]: 08.06.2005, on: <http://www.apsoc.ox.ac.uk/Espanet/espanetconference/papers/ppr.1.SM.pdf>, p.6

separatism based on cultural borders."¹⁵² This sort of separatism adds to the heterogeneity and turbulence of German society, which can lead to a renewed and diffuse sense of danger. As the above-mentioned survey showed, people in Germany are generally in favour of integration, but they demand that those who reject it be expelled.¹⁵³ Integration as understood by the government has been mainly a question of language, but it is increasingly also a matter of culture. The so-called second generation (children of immigrants) may have sufficient language skills, but may not be able to clearly define its place in society, becoming alienated and hostile rather than contributing to cultural diversity. In the opinion of deputy major of Marseilles Claude Bertrand this can contribute to an increased occurrence of petty crime among immigrants.¹⁵⁴

The Muslim immigrant population is observed more closely, establishing more or less directly a link with terrorism and security, which becomes clear when taking into account recent proposals on the Länder-level for the establishment of immigration tests (cf. p.75ff.). Such reactions by politicians aim at limiting inner-political consequences of immigration, namely loss of political legitimacy and a further rise of the extreme-right. A few *Länder* especially in the eastern part of Germany have indeed at times experienced a renewed increase in support for the extreme right-wing NPD.¹⁵⁵ Yet as Marshall points out, "(...) *acceptance and integration of foreigners could to some extent be 'fair-weather attitudes'*". The late 1990s have led to a renewal of hardened attitudes against foreigners. In addition, membership numbers in right-wing extremist organisations, which could function as an indicating variable, may have increased: this nonetheless does not mean that a real downturn of right-wing extremism has taken place, as change of tactics can be at the origin of this phenomenon.¹⁵⁶

To add to the tension, a scandal broke out in Germany in February 2005 concerning the attribution of visas in Eastern Europe, particularly Ukraine, which became known as the "visa affair".¹⁵⁷ The visa procedures to Germany gave way to several abuses in terms of corruption by consular officials but also because of too liberal regulations. In fact, a measure taken by Ludwig Volmer, former state-minister in the ministry of foreign affairs, was at the origin of the debate back in 2000. It contained the provision that whenever there was a doubt about whether to confer a visa, the benefit was to be turned towards the freedom of travelling. The core problem was its abuse by

¹⁵² Bundesministerium des Innern, "Integration" (pre-cited) [translation: mine]

¹⁵³ Bundesinstitut für Bevölkerungsforschung beim Statistischen Bundesamt (2005), p. 11

¹⁵⁴ The Economist (2002), p.9 f.

¹⁵⁵ S. Angenendt, "Perspektiven einer deutschen Migrationspolitik," in: Migration und Flucht (...) (pre-cited), p. 275

¹⁵⁶ B. Marshall, The New Germany... (pre-cited), pp. 71-73

¹⁵⁷ M. Wehner, "Glückwunsch, Du kannst nach Deutschland" (20.02.2005), Frankfurter Allgemeine Sonntagszeitung, no. 7, p. 4

the mafia, especially in terms of using this option as a channel for human trafficking. The minister of foreign affairs of the time Fischer was severely criticised by the media:



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Minister Fischer, your embassies give visas away for merely 400€. You are killing our prices, Senore!

Roman Krištof, former IOM consultant and responsible for prevention of trafficking in persons at the Czech NGO “La Strada”, said that the scandal was worrisome especially from the point of view of human trafficking. He viewed the paradox of a visa regime in the fact that it aims at filtering unwanted criminals; but intermediary people, who are asked for help in the procedure of getting a visa, can turn out to take abuse of the situation and turn their clients into victims of human trafficking (be it consciously or unconsciously). He added that this was a feature applying not particularly to German, but also to Czech officials for example. But so far, the MS have not been very successful in implementing the provisions for an AFSJ of the Amsterdam Treaty.¹⁵⁹ The writer Wladimir Kaminer views the impacts of the scandal in slightly different terms, namely in the danger of promoting xenophobia.¹⁶⁰ The interviewing journalist pointed out that the unemployment rate of over five million people might justify the fact that Ukrainian people working on the black market are not popular, but Kaminer replied that they are very popular among those who employ them for ridiculous wages and that Ukrainian

¹⁵⁸ J. Thurau, “Fischer übernimmt Verantwortung in der Visa-Affäre” (20.02.2005), Available [online]: 08.06.2005, on: http://www.dw-world.de/dw/article/0,1564,1488915_00.html; “Visa-Skandal” (20.02.2005), Frankfurter Allgemeine Sonntagszeitung, no. 7, Available [online]: 08.06.2005, on: <http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~E11C40E9635C44133A004CADF861876AB~ATpl~Ecommon~Scontent.html>

¹⁵⁹ R. Krištof, *Interview on the link between migration and legislation—the example of the Roma in the Czech Republic*, held on 05.05.2005 by Jan Havlík and Noémie Bürkl

¹⁶⁰ W. Kaminer, “Deutschland muss raus aus der Tiefgarage”, *Interview* by Michael Sontheimer (Spiegel Online), held on 14.03.2005, Available [online]: 08.06.2005, on: <http://www.spiegel.de/politik/deutschland/0,1518,346346,00.html>

prostitutes apparently also find enough demand. His argument is backed by Cyrus' analysis on irregular migrants in 2004, in which he outlines the role played by a "*booming informal labour market opening up diverse possibilities to illegal immigrants*".¹⁶¹

The federal agency "Finance control black market" (Finanzkontrolle Schwarzarbeit) was set up by the former red-green government to launch deterring punishing procedures against illegal activities: shadow economy accounts for about 15% of the economy according to the actual finance minister Peer Steinbrück.¹⁶² The government's main argument behind calling this "economic criminality" is however not predominantly the status of the illegally employed, but rather the loss in terms of annual taxes for the state. Stronger controls against the black market in the sectors of transport and logistics in addition to the already existing control of the construction branch still ought to limit illegal work opportunities for irregular migrants.

Section 2: Negative impacts of (il)legal migration and societal debate in Germany

This section tackles more in depth diverse approaches within Germany on illegal migration realities, leading to border securitization. There are several obvious reasons for which public opinion has an often reticent opinion about opening up borders for new arrivals, which makes immigration a popular topic in media coverage and for politicians in election campaigns. It also deals with the underlying question of the effectiveness of stricter territorial controls to resolve problems linked with illegal immigration. Although it is quite difficult to determine what the social realities are, statistics can give an indication of some trends. Illegal border crossing, residence status and crime rates related to migration will be of interest here, since both issues provide basic arguments for calling for stricter border control measures.

In a first part, negative impacts, such as HR abuses and risks of political extremism are outlined as factors of societal instability; furthermore, border control measures and supposed illegal migration flows are discussed. A second part is dedicated to the societal debate on migration within Germany, the actors involved in it and how much importance is dedicated to the negative impacts of migration.

¹⁶¹ N. Cyrus, "Aufenthaltsrechtliche Illegalität..." (pre-cited), p. 13

¹⁶² "Bund und Wirtschaft kämpfen gegen Schwarzarbeit," (13.04.2006), Deutsche Presseagentur, Available [online]: 21.04.2006, in: http://www.stuttgarter-zeitung.de/stz/page/detail.php/0/stz_crawlerindex/2006-04-10

A—Need for control: negative consequences and scope of illegal migration in numbers

A statistical comparison is useful in finding out whether the law on immigration has decreased illegality and/or crime rate related to it. One factor made this however difficult: the register for foreigners has been re-evaluated in the year 2003, rendering numbers from 2004 (the latest available ones) incomparable with the previous years. It is therefore impossible to establish a clear trend up to today. Some other statistical tools, such as asylum-seeker or refugee numbers and their countries of origin can give hints over the overall evolution of the migration situation in Germany in recent years. The following numbers provide arguments for the necessity of keeping up traditional border control measures; however, investigations also indicate that most victims of HR abuses had entered the country *legally*, calling into question some aspects of the judicial system.

a) Negative outcomes of (il)legal migration: human rights abuses and political extremism

i. *Human trafficking and forced prostitution*

Unfortunately, statistics do not allow drawing clear conclusions about interrelationships of higher or lower numbers of victims from certain countries of origin. The latest data available stems from 2004 (published in August 2005) and indicates that the number of victims from Ukraine is comparatively higher from Ukraine and proportionally high from Bulgaria. The analysis from the BKA (Federal criminal agency) points to the fact that EU enlargement and new possibilities for EU citizens to legally act as prostitutes in Germany make it difficult to determine victims and potential perpetrators. It can however be said that most of the victims are females between the age of 15 and 30; about 50% of the crimes are linked to prostitution. Germany remains the country of origin of most victims under age 18: 51% of the German victims were under age 21. This also applies to Bulgarian victims (nearly one in two victims is under age 21). In a little more than 50 per cent of the cases of victims, forced to take up or continue with prostitution, have been objects of physical or psychological violence.¹⁶³

If trying to look at the proportion of foreigners involved in this crime, it can be determined that German citizens represent the major part of the people suspected of

¹⁶³ Bundeskriminalamt, "Bundeslagebild Menschenhandel 2004" (August 2005), Available [online]: 15.03.2006, on: <http://www.bka.de/lageberichte/mh/2004/mh2004.pdf>

crime. At a closer look, one notices that 18% of them were born abroad and have acquired German citizenship later on, the country of birth being mainly Kazakhstan, Russia, Turkey or Poland. A great proportion of suspects stem from countries of Central and Eastern Europe, particularly Bulgaria. German citizens remain the victims of predominantly German suspects making use of financial dependencies, abusing of faked love affairs or family relations. Between 75 and 84 per cent of the suspects are male. Among the suspect women a number of former prostitutes can be found who either supervise victims of human trafficking or attract women from their home countries.

It is very striking that most of the victims (about 70 per cent) have immigrated to Germany *legally*. Border control measures thus seem to remain an ineffective measure if it aims at combating cross-border criminality and calls those claims into questions arguing for stricter entry conditions. This applies mainly to people who entered from the new EU MS and associated states. The sort of the discovered victims range from "unknown", expulsion, resettlement, voluntary return, political witness protection to 'other' categories (marriage or asylum application). In the year 2004 about one third of people were listed as "unknown", nearly 23 per cent chose to return on a voluntary basis and nearly 18 per cent were asked to leave Germany. No statistics are available on other horrible criminal activities as organ trafficking or modern slavery, mainly women subjected to sexual harassment by employers or house maids who are subjected to an excessive number of working hours for a low salary and difficult, inhumane tasks.

These extreme situations are often known, but reactions on the sides of victims or the population at large are frequently entrenched with a 'no-way-out' syndrome as some documentaries show. As long as there are not enough legal alternatives for victims of irregular immigration paths, individuals will continue suffering from the dramatic negative consequences of criminal networks. Academics have called for legalising measures for illegal or irregular migrants in order to help at least some of them to step out from the 'shadow', but then again the counterargument that this might also have the effect of attracting even more undercover migrants thereafter is true as well. Also, this measure would not help legal immigrants who are victims of psychological violence (e.g. blackmailed with the fate of their families in their countries of origin) or financial dependence. But at least legalisation ought to be more systematically used and evaluated on a case-by-case basis.¹⁶⁴ A lot remains to be done in this issue, but quite often attention is focused on the danger emanating from terrorist networks.

¹⁶⁴ G. Pflaumer, "Kein Mensch ist illegal," AktionCourage, Available [online]: 12.05.2006, on: <http://www.aktioncourage.org/ac/pressemitteilungen/kmii.htm>

ii. *Stigmatisation of immigrants derived from political extremism and violence of and against foreigners*

Immigrants have a negative public image and a majority of Germans still think that no immigration law should exist at all (cf. p.81f.); maybe this also stems from the knowledge of the risk of above-mentioned HR abuses—a way to respond to them would be not to let immigrants into the country at all, the argument seems to go. What's more, next to worries about diminishing work opportunities remaining available for Germans, an underlying worrying point is a 'general suspicions against foreigners' attitude. The government therefore gave out an official pamphlet informing citizens over the contents and impacts of the new immigration law, including the section "What happens to safeguard interior security?" This indicates the wish to reassure citizens against fears that the state is abandoning its duty of guaranteeing citizens' security on national territory, a task remaining predominant for a government at all times. It also shows the link established nearly automatically between security and immigrants, in this way unconsciously perpetuating stigmatisation of the new arrivals.

It has to be acknowledged that the connection between foreigners and violence or crime has to do with the experience of terrorism and criminality of and against foreigners particularly in the 1990s, nearly always driven by extremist political, religious or xenophobic ideas. The pamphlet lists measures that can be taken against "people from whom a terrorist danger can derive", against smugglers of human beings or foreigners suspected of being part of a forbidden movement (based on hatred-spreading speeches in mosques, for example, cf. Kaplan). Underneath general definitions, the target group remains Muslims, although the world-wide Islam community has asked governments and people continuously not to make a too inseparable Muslim – terrorism link. Extradition is faced by the first group, when "danger prognosis based on facts" is established (an unclear definition in itself). Smugglers have to be expelled when condemned to imprisonment. The third group can also be expelled, and potential anti-constitutional activities hinder the process of acquiring permanent residence permit or citizenship.¹⁶⁵

When looking at the numbers of suspects with foreign nationality in police statistics and the political importance of each case in election campaign, it shows that the criminality of foreigners is systematically overestimated. The main danger next to an extreme-right wing party entering *Länder* parliaments is the fact that democratic parties toughen their discourse and policies on behalf of foreigners, thus letting radical opinions

¹⁶⁵ Bundesministerium des Innern, "Das neue Zuwanderungsgesetz," (pre-cited), p. 5

enter public debates, as happened in France in 2002.¹⁶⁶ Violence against foreigners should not be neglected: racism does not belong to the past, as the news sadly keep testifying with new cases in all European countries.

Another issue of concern is the membership of foreigners in extremist organisations in Germany, which does pose a direct threat to the country's internal security. There is again a link between external and internal security when people in exile continue supporting movements in their country of origin from Germany, be it in terms of financial support or through vocal support, as was both the case for the Kosovo Liberation Army.¹⁶⁷ A predominant element in the debate over German identity and sense of community is therefore the immigrant's commitment to the liberal post-war "free democratic fundamental order" (*Freie Demokratische Grundordnung*, FDGO). Following the chief of the employers Schleyer's murder by the extremist RAF group, the government launched the so-called "*Extremistenerlasse*" in 1977 to protect the FDGO.¹⁶⁸ The trend to take repressive measures against any activist extremist movement has become deep-rooted in German politics, the reasons of which can be traced back to events occurring during the Weimar Republic. It thus seems natural that the government pays particular attention to radical movements going beyond political far-right or far-left cleavages and turns increasingly to dangers emerging from potentials based on Kurdish, Kosovo-Albanian or Islamic causes. It is also striking that most of extreme-right immigration organisations in Germany are Turkish (e.g. the Islamic Federation ICCB or the Islamic association *Milli Görüs*). Marginalisation, lacking integration and acceptance as well as the rise of fundamental political Islam in Turkey might be the causes for this feature. Still, these extremist positions represent a small percentage of the overall number of immigrants (0.6 per cent in 1999).

b) Illegal immigration to Germany – the dilemma of border controls

There is by definition no way to get certainty over the number of illegally immigrating persons to any country. Angenendt points out that one possibility to get at least a vague idea is to use statistics of the police on the criminality of foreigners. Still, some important flaws remain: some of the "crimes" can by definition only be committed by foreigners, e.g. over-staying or losing residence permits after a divorce. Therefore, the researcher concludes, "[the] *only firm conclusion that can be drawn regarding illegal*

¹⁶⁶ S. Angenendt, *Asylum and Migration Policies...* (pre-cited), pp. 182 ff.

¹⁶⁷ B. Marshall, *The new Germany...* (pre-cited), pp. 64-79

¹⁶⁸ H.-H. Jansen, "Stabilität und Reform – Innenpolitik 1949–1999" (pre-cited), pp. 25–38

immigration is that it has increased during the last few years, and that this trend will most probably continue."¹⁶⁹ This statement dates from 1999, prior to the immigration measures launched by the government. In the meantime labour immigration regulations have been loosened in some sectors and tighter controls on the black market seek to narrow down employment options and thus—probably— demand for illegal labour force.

Statistics also cannot provide clear answers at how many people succeed in bypassing border controls, even if Angenendt outlines the possibility to use statistics of the border patrol on arrested illegal immigrants (cf. p.96). Border controls have become stricter over time by involving private actors, such as long-distance bus drivers (e.g. Eurolines company) or increasing checkpoints at airports. Companies face financial punishments if they contribute (indirectly or directly) to helping illegal migrants crossing the borders. Immigration law reforms have included the possibility for other actors than the police to hold back suspect passengers in the transit area of airports (the "airport procedure"). This concerns nearly exclusively Frankfurt.¹⁷⁰ The double effect aimed at is to keep suspects possibly out of the territory and to make passengers feel more secure when travelling. Again, it is the visibility of policies that makes border control an attractive measure for the state to take.

Already in 1985, Murray Edelman pointed to the symbolic uses of politics rather than actual law enforcement practices.¹⁷¹ Bigo argues that it is rare that there is often a differing reality between governments' discourse on security and real resource increase the police, military police and border security agencies. This would however happen in real terrorist threat situations and certainly also if crime and migration were really directly correlated. Bigo outlines the paradox of border control as follows: "*It is not possible to block all those who want to enter, only those who had no plan to enter illegally, such as asylum seekers and tourists, so anti-migration policies are only efficient against the wrong targets and do not affect clandestine networks.*"¹⁷² Tougher controls leads to searching for alternative ways, such as recurring to smugglers in order to circumvent too narrow legal frameworks, especially when a migrant is not highly qualified and does thus not fit the image of the "good migrant". In this sense, stricter controls have the reverse effect of favouring clandestine networks and thus make the demand for alternative options more lucrative. This background analysis would favour loosening border controls.

A counter-argument would be the mentioned fact that the negative consequences of migration occur in 70 per cent of the cases despite legal entry procedures, especially

¹⁶⁹ S. Angenendt, *Asylum and Migration Policies...* (pre-cited), p. 172

¹⁷⁰ BAMF, "Flughafenverfahren," in: *Referat 125—Statistik*, Nürnberg: BAMF, 2004, p.49

¹⁷¹ Cf. M. Edelman, *The Symbolic Uses of Politics*, Urbana (Il.): University of Illinois Press, 1985

¹⁷² D. Bigo, "Migration and security" (pre-cited), p. 124

since the 2004 EU enlargement: if verified, this would be an alarming statement for legal frameworks of national MS and the EU's capacity to ensure legal security within EU territory—the more so at the eve of applying Schengen provisions. Territorial controls—however strict they are—*can* be circumvented; the Mexican case in the US is a well-known example for this (migrants take up a death-threatening journey to risk crossing the border), even if Guiraudon and Joppke are right in pointing out that this case cannot be generalised for all state policies.¹⁷³

This would mean that the question of “how to prevent entry to the territory?” is not very pertinent. One should rather ask how to prevent people from wanting to come without secure possibilities to create a dignified human living. As the next sub-chapter will show, concrete measures can be found in the legal framework.

B—Political actors and societal influence in the German institutional system: keeping migrants in or out?

The government (with the support of private actors) is not the only responsible instance for fighting against negative consequences of migration. Germany's institutional framework led to spreading migration responsibilities on the federal, *Länder* and local levels. Up to the immigration reform lacking coordination and centralisation were the reasons for a frozen societal debate over migration. This has changed with the recognition of Germany being an immigration country.

This chapter deals with the actual societal debate between political actors, trade unions, NGOs and private persons and shows in what directions migration policies are steered: the focal points of the debate are not so much security issues and illegal migration, but how to best integrate migrants. The chapter outlines by way of a few concrete examples what kind of actors involved, which values are promoted and what are the subjective perceptions of the sources of threats among the population. In public debates, the previously mentioned problem of human trafficking and smuggling are evoked only little, probably because they are too sensitive, too far from private people's everyday concerns and also because it is thought to fall under the sphere of influence of the state (police, justice...) whereas society's role is to integrate new arrivals.

¹⁷³ V. Guiraudon/Ch. Joppke, “Controlling a new migration world,” in: Controlling a new migration world (pre-cited), p. 4

a) Federal level—integrate and control

The government has set up federal agencies to handle legal, economic and political aspects of migration with the two predominant goals to find ways to integrate migrants effectively into a multicultural society while fighting against illegal migration. Since the role of major agencies (BKA and BAMF) and the evolutions of the executive have been mentioned in the previous section, some more attention will now be paid to impact of the judiciary system and the legislative power.

The judicial dimension is important when having to distinguish between the notions of “informal” versus “criminal” in law processes. Informality and criminality depend on the regulatory framework of the states (e.g. whether prostitution is defined as legal) and the ensuing enforcement practices; judicial policies concern how immigration crimes are defined and characterised. There is also a procedural element that impacts on how migrants are considered: at the start of a process it is a standard procedure to consider the foreign defendants’ real name, address and identity as uncertain by definition, since passports are either not available or it would be impossible or too expensive to check the papers. In a second step, the stability of his/her way of living is checked, in order to find out how probable it is that the defendant commits new crimes. Quite often no alternative (legal) source of income can be determined, especially when the legal employment status is dependent on the residence status.¹⁷⁴ So the judicial system itself is responsible for the status and opportunities for illegal migrants.

As a result, Norbert Cyrus proposes legal alternatives to fight the negative consequences of illegal migration: by providing legal security to migrants, legal norms can limit self-justice phenomena, e.g. when illegally employed migrants do not get the promised (level of) salary, trying to impose their due by force.¹⁷⁵ Minister of Justice Zypries also has a weighty voice in political debates. In December 2005, she vehemently opposed the idea to imprison foreigners suspected of terrorist activities as a preventive measure, supported by her SPD colleague and responsible for security affairs Markus Meckel.¹⁷⁶ The BVG has also been influential in the past by imposing moral obligations on the German state, e.g. in family reunification matters.

The *Bundestag* has also used the judicial channel and passed several laws to strengthen state authority since 1994. Since it occurred with support of the opposition, it shows that there was an overall consensus on the need to make state authority visible.

¹⁷⁴ F. Quassoli, “Migrant as criminal...” (pre-cited), pp. 153-165

¹⁷⁵ N. Cyrus, “Bericht für den Sachverständigenrat...” (pre-cited), p. 6

¹⁷⁶ Ngo-online.de, “Streit um Sicherungshaft terrorverdächtigter Ausländer,” (05.12.2005), Available [online]: 12.05.2006, on: http://www.ngo-online.de/ganze_nachricht.php?Nr=12446

Some initiatives were for example: the “Law for the Fight against Illegal Drug Trafficking and Other Manifestations of Organised Crime” (1993), the “Money Laundering Law” (1997), the “Federal Border Guard Law” (1994) and the “Anti-Crime Law” (1994). When the Kurdish cause caused public turbulences in 1996, the “Law to Amend Rules Governing Foreigner and Asylum Seeker Regulations” was passed. According to this law, one could already be expelled when participating in a demonstration that was deemed to threaten public security. Yet the issue of foreign criminality remains a difficult question to tackle, not only for political actors: academic opinions range from warning against dangerous rumours of disproportionately high crime rates on the one hand to an admonition against a just as dangerous naïve downplaying of the phenomenon.¹⁷⁷

The outcomes of federal initiatives on the federal level show that the prime responsibility is to manage (or visibly control) migration.

b) Role and influence of the *Länder*—financial burden-sharing and integration

The *Länder* play an important role in German politics due to the federal institutional structure, the more so since they are concerned with the concrete realities of providing social, health care and housing to asylum seekers. They pressured the government to restrict migration provisions, particularly induced by the financial burden that they had to carry and often overwhelmed by the task. They became main protagonists in the idea of burden-sharing among EU MS, particularly since Germany had been the main financial contributor to the EU until the end of the 1990s. In May 1998, the CSU representative and Bavarian Prime Minister Stoiber tabled a resolution in the *Bundesrat*, in which he called for equal conditions for all EU MS in asylum policies. He implied that the national level had been lifted from its main prerogatives by the EU, while at the same time denouncing the lack of burden-sharing among the MS. The issue was from then on also increasingly used in electoral debates to the detriment of the EU. During the Kosovo crisis, the *Länder* to which the refugees were distributed, only reluctantly provided shelter. As a result, the federal government reduced the original offer of accepting 40,000 refugees for shelter to 10,000. This happened also as a consequence of the previous Bosnian crisis, where many Bosnian refugees who had come to Germany did not return to the former Yugoslavia and still represented an important financial burden for the *Länder*. Kosovar Albanians were granted three month-visas if they promised not to apply for asylum.¹⁷⁸

¹⁷⁷ B. Marshall, *The new Germany...* (pre-cited), pp. 65f.

¹⁷⁸ B. Marshall, “The European dimension” (pre-cited), pp. 134ff.

The *Länder* were also active in fighting criminality. In 2004, an initiative was launched to make the federal and *Länder* level cooperate by the Fighting Crime Commission (*Kommission Kriminalitätsbekämpfung*). The project group encompassed Baden-Württemberg, Berlin, Bremen, Nordrhein-Westfalen, Lower Saxony and Saxony. Federal agencies joined the team: the Federal Police, the Finance Control of the Black Market Agency and the BKA. The aim was to analyse the role of the police in human trafficking, smuggling, criminality and illegal employment activities. Child trafficking was a particularly underlined problem and options to better enforce protective norms on national and international levels were evoked.¹⁷⁹ This was one of the rather rare concrete initiatives to fight illegal migration other than on the state level and it occurred in cooperation with federal institutions. In general the regions' main responsibility is to integrate foreigners into the society, a task shared with the communal level.

In the past months Baden-Württemberg and Hess were particularly in the newspaper headlines for issuing own citizenship test proposals. At first, Baden-Württemberg proposed a guideline for discussion, later known as 'the muslim test' for asking questions like: "Do you think that a husband has the right to beat his wife?" Then Hess Minister of the Interior Volker Bouffier proposed a catalogue of 100 questions to answer to become German. Among them the question "The German painter Capsar David Friedrich painted a landscape on the Rügen Island on one of his most famous paintings. What motive is shown on the picture?" Next to the possibility of learning the answers by heart, people started to wonder whether these questions were really distinctive for being German, especially when many Germans could not reply to them.¹⁸⁰



Critiques called the tests an attempt to limit access to German citizenship, pushed for political reasons (Baden-Württemberg held parliamentary election in March 2006) and based on a general suspicion against foreigners. In the eyes of journalist Robert Misik, the citizenship tests postulated *laissez-faire* culture while actually doing the opposite. To

¹⁷⁹ BKA, "Bundeslagebild Menschenhandel" (pre-cited), p. 22

¹⁸⁰ J. Fleischhauer/M. Huje, "Wer ist Deutschland?" in: *Der Spiegel*, 12/2006, pp. 22-26

him, the underlying feature of the tests was to keep foreigners out: only those with an incredibly high level of general culture and mastering tricky questions with a liberal undertone (checking the adaptation to the FDGO, mainly addressed to Muslim applicants) could become German. But in effect, the liberalism promoted in the tests expected positions, which were debated within the society itself.¹⁸¹

The question emanated whether to introduce federal citizenship criteria. Chancellor Merkel supported a unique citizenship procedure for immigrants, based on the idea that the real incentive of a person to become German has to be apparent—the *value* of being German has to be felt, unlike the response of a new German citizen asked how it feels like to be German—“Just like always.”¹⁸² On 3 May 2006 the Ministers of the Interior found an agreement in Garmisch-Partenkirchen. The compromise is to have federal rules and the application will be carried out by the *Länder*. Prime criteria are participation in integration and language courses under the responsibility of the BAMF and having a FDGO attitude. This regulation is ‘in the national interest of people and the state’ by preventing problems at their roots. Conversely, new German citizens will not only get rights, but will also be subjected to obligations (e.g. military service).¹⁸³

This debate shows again the sensitivity of parties and political actors to immigration, as well as the attempt to control migration as far as possible; if not at the borders, then at the latest when migrants want to become German citizens.

c) Other politically involved actors

i. *Approaches from political parties*

A 1993 survey asked people according to their party affiliation, whether foreigners who had committed criminal acts had to be expelled, even if they were born and had lived in Germany all their life. The reason for this was that, in practice, the law meant that they were sent “abroad”; conversely, committing a crime was then considered a grave abuse against hospitality rights. The results were generally in favour of such an expulsion: CDU/CSU 62%; FDP 54%; SPD 50%, Bündnis ‘90/Die Grünen 33% and PDS (in former GDR countries) 44%. It shows that only the Green Party is against a harsh

¹⁸¹ R. Misik, “Integrationsdebatte in Europa—Liberales Selbstdementi,” Available [online]: 12.05.2006, on: http://www.qantara.de/webcom/show_article.php/_c-468/_nr-514/i.html

¹⁸² SZ, “Neue Bürger für das Land,” (04.05.2006), Available [online]: 05.05.2006, on: <http://www.sueddeutsche.de/deutschland/artikel/92/75017/>

¹⁸³ dpa/AFP/AP, “Innenminister einigen sich auf Einbürgerungsregeln,” (05.05.2006), Available [online]: 05.05.2006, on: <http://www.sueddeutsche.de/tt2m2/deutschland/artikel/207/75132/>

interpretation of the law.¹⁸⁴ The debate is not *passé*: discussions over who has the right to be German and how to check the honesty of immigrants' candidacy have been very heated in the last months, as outlined above. The following will be an actual overview of party positions in addition to those already mentioned (cf. p.55f.).

The far-right party DVU included a clear definition of who belongs to the Germany community in its party programme. It states explicitly that it is against violence against foreigners, but the core DVU being "safeguarding German identity", "not giving up legitimate German interests" and "equal position for Germany in the world", there is no place for welcoming more foreigners. The DVU asks for "*limiting the percentage of foreigners, stopping increasing foreigner influx, making asylum processes faster and expelling criminal foreigners*".¹⁸⁵

The liberal FDP has a quite different standpoint: the expert for internal affairs within the FDP *Bundestag*-fraction Hartfrid Wolff referred himself to the principle of free movement of the people, which applies to the whole German territory. This is why the party was clearly against the different standards emerging on the *Länder* level and called for unique, federal integration criteria. Coherently with its general party programme, the FDP underlined the value of the FDGO and Germany's cultural and historic background, making a serious long-term integration process more relevant than a punctual test.¹⁸⁶

The CDU/CSU said that newcomers would have to adapt to national culture if they wanted to become part of that community: the party expected active participation in this process, expecting that requirements of culture and language would be met (following Goethe's definition of "*Kulturnation*"). On the integration debate, the party supports the standpoint of the FDP to have federal integration criteria.¹⁸⁷

The SPD fraction leader Peter Struck also supported unified regulations in this case, for "[there] *is no such thing as a Hess (...) citizenship, only a German one.*" Furthermore, he supports the idea of having integration courses, which deal with German language, but also with the role of the state for society and understanding (and accepting) the FDGO values.¹⁸⁸

¹⁸⁴ Institut für Demoskopie Allensbach (IfD), "Straffällig gewordene Ausländer ausweisen," allensbacher berichte, 1994/no. 8 (IfD 5080, 1993)

¹⁸⁵ Deutsche Volksunion, "125-Punkte-Wahlprogramm," Available [online]: 28.03.2006, on: <http://www.dvu.de/125-PUNKTE-WAHLPROGRAMM.html>

¹⁸⁶ K. Steinhäuser, "Wolff: Einbürgerungstests bundeseinheitlich gestalten," press information no. 383 (20.03.2006), Available [online]: 28.03.2006, on: www.fdp-fraktion.de

¹⁸⁷ BZ am Sonntag, Interview with CDU/CSU fraction leader Volker Kauder, held on: 26.03.2006, Available [online]: 28.03.2006, on: http://www.cdu.de/index_12324.htm

¹⁸⁸ Süddeutsche Zeitung, "Auch SPD will Einbürgerung bundesweit regeln," (24.03.2006), 62th year, 12/70, Bavarian edition, p. 1+4

The Green party in Germany is very active in integration policies. The party supports the idea of having language classes coupled with integration courses, but also states that insufficient knowledge of German should not be imputed on the immigrants' 'lack of integration will', but should rather question the quality of the courses as such. Since the *Länder* do not participate in financing these courses, the party emphasises the importance not to cut the promised funds on the federal level.¹⁸⁹

In December 2005, the Linke/PDS party called for a thorough revision of citizenship laws. According to the 2000 citizenship law, Germans lost their nationality when picking up another one – this measure was meant to avoid double citizenship in general, but in effect this meant that 21.500 naturalised Germans who had taken up their Turkish citizenship again, thereby lost the German again. The title of the article therefore ironically states that '21.500 ex-Turks are now again ex-Germans'. The Linke/PDS party indicated that this meant in practice that those people had to go through the whole procedure of getting residence status once again, despite having lived and worked in Germany for many years. This is the main point they fought against.¹⁹⁰

ii. NGOs—pushing the HR dimension for migrants

The trade union DGB (*Deutscher Gewerkschaftsbund*) has created an educational group promoting equal rights for migrants, supported and recognized by federal agencies, so that their engagement for migration in general has to be acknowledged. In cooperation with other NGOs the DGB issued a pamphlet in March 2006 defending migrants' rights.¹⁹¹ Two major NGOs are active for migrants' rights in Germany: "Pro Asyl" (PA) and the "Interkultureller Rat" (IR). On the occasion of the above-outlined citizenship debate, the PA, IR and the trade union DGB elaborated the pamphlet "One step forward, two backwards—against a more restrictive immigration law". The IR representative Jürgen Micksch called it irresponsible from sides of politicians to use existing stereotypes and prejudices against migrants instead of fighting against them, going as far as calling the debate racist.¹⁹² At a time when German immigration law has

¹⁸⁹ Bündnis 90/Die Grünen, "Vielfalt lohnt sich. Grüne Integrationspolitik," (13.07.2005), Available [online]: 12.05.2006, on: <http://www.gruene-bundestag.de/cms/zuwanderung/dok/78/78211.htm>

¹⁹⁰ Ngo-online.de, "21.500 Ex-Türken sind jetzt wieder ex-Deutsche," (02.12.2005), Available [online]: 12.05.2006, on: http://www.ngo-online.de/ganze_nachricht.php?Nr=12438

¹⁹¹ DGB, "DGB begrüßt, dass Beibehaltung der Übergangsregelung bei der EU-Osterweiterung," (10.04.2006), Available [online]: 12.05.2006, on: http://www.migration-online.de/beitrag_cGikPTIzJmlkPTM4OTI_.html; DGB, DGB Bildungswerk, Available [online]: 12.05.2006, on: http://www.migration-online.de/cms/index_cGikPTIzJnNpZD16aWVsZQ_.html

¹⁹² J. Micksch, "Deutsche Integrationsdebatte nimmt rassistische Züge an," Available [online]: 12.05.2006, on: http://www.interkultureller-rat.de/Presse/Presse_2006/Presse_04_05.shtml

to be revised in order to integrate new EU regulations, German foreigners' law remains mainly 'danger prevention law' ("Gefahrenabwehrrecht"). Immigration paths remain small and full of 'stones', integration policy is reduced to the acquisition of the knowledge of German language and the humanitarian regulations for refugees do not apply. In addition the pamphlet criticises that next to the police foreigners and border control institutions have the right to keep asylum seekers, once discovered, on the spot; during the asylum seeking procedure the people subjected to it are put in "resettlement detention" if another MS is responsible for them according to the Dublin II rules.¹⁹³

This criticism is supported by the HR NGO Amnesty International in Germany, which in addition asks that no refugee is expelled to the unstable crisis regions of Afghanistan, Iraq and Kosovo.¹⁹⁴ These initiatives are very important in Germany, because the mentioned associations have moral authority, which can thereby contribute to the debate. Nevertheless, they do not have political power.

The association AktionCourage is also an important player in the humane dignified discourse on migrants. Gerd Pflaumer underlines that the fate of illegal migrants is too little evoked, despite being in very vulnerable situations outside the legal framework. Often called "those who are living in the shadow", they try to live without ever being in contact with official bodies, which could discover and denunciate their situation by asking them for papers. In other countries, Pflaumer notices, these people are more respectfully called "without documents" (e.g. in France "*sans-papiers*"); "illegal" is a term carrying a negative connotation close to "criminal". Pflaumer's main point of criticism is that the issue is still a taboo in politics. He welcomes first initiatives by the independent commission immigration (Süssmuth Commission in 2001) and the 2002 and 2005 government reports. They both recognised the legal framework in Germany as being insufficient from a HR perspective. Germany also has international obligations toward illegal migrants (cf. p.89f.). The International Covenant for economic, social and cultural rights requires signatory states to provide equal access to health, UN children right Convention asks that access to education be granted to children regardless of their legal status.¹⁹⁵ These examples show that NGOs remain important even in democratic Germany for their outlining the precarious situation of illegal migrants and in calling for the necessity to constantly stress and push the maintenance of HR.

¹⁹³ PA/DGB/IR, "Ein Schritt vorwärts, zwei zurück—gegen die Verschärfung des Zuwanderungsrechts," Available [online]: 12.05.2006, on: <http://www.interkultureller-rat.de/Themen/Zuwanderung/Aenderungsgesetz-PA-DGB-IR.pdf>, p. 3

¹⁹⁴ amnesty international, "Der Weg zur Integration: Zuwanderungsgesetz verbessern statt verschärfen," (26.04.2006), Available [online]: 12.05.2006, on: <http://www2.amnesty.de/internet/deall.nsf/AlleDok/623873A5C40CCD68C125715C003B406C?Open>

¹⁹⁵ G. Pflaumer, "Kein Mensch ist illegal" (pre-cited)

iii. *Public opinion—fearing predominant foreigner proportion in FRG*

Quassoli summarizes the impact public opinion can have on the shaping of migration policies: “Public opinion can put a great deal of pressure on the police’s law enforcement decision and can allow or oblige the police to increase their presence in the “hot spots” of the city, the degree of street control and consequently the rate of arrests for typical street crimes.”¹⁹⁶ Political parties are by definition dependent on public opinion out of fear to lose votes or, more idealistically, because politicians aim at representing the wishes of the people. This concerns all aspects of migration, not only economic ones, and is even more sensitive when radicalised opinions against asylum seekers exist. These can lead to centre-right politicians taking “preventive measures” by holding a more security-based discourse not to lose votes to extremist parties. Surveys have shown that public opinion predominantly has a negative image of foreigners without distinguishing between ethnic Germans or other migrants. Asylum seekers had the worst score of popularity in 1991.¹⁹⁷

Four Allensbach opinion polls can give some indications about the evolution of public opinion since the crime and migration became more debated in the 1990s. In 1993, the question of whether foreigners who had committed criminal acts were to be expelled in any case was posed as above to non-party affiliated citizens. 54% of the interrogated people believed that foreigners who were born and grew up in Germany had to be expelled if they had committed a crime, which fits the FDP score. Political party opinions therefore generally do reflect the average of the overall population approach. In any case, these positions show the priority that is given to the *ius sanguinis* approach to citizenship among the population.¹⁹⁸

A few years later, in 1999, the Germans felt more relaxed, particularly in terms of criminality: the overall tendency shows that the percentages fearing criminality at the beginning of the 1990s was much greater.¹⁹⁹ At the occasion of the introduction and voting of the immensely debated immigration law, an opinion survey found out in 2002 that “The federal president has signed a law, the quality of which is doubtful to the majority of the people.”²⁰⁰ Effectively, the opinion poll finds out that only 17% of the Germans were convinced that the law was a good one and 49% thought that it was ‘doubtful’ whether the law was overall positive. The most striking result was that 50%

¹⁹⁶ F. Quassoli, “Migrant as criminal...” (pre-cited), p. 165

¹⁹⁷ B. Marshall, *The new Germany...* (pre-cited), p. 80

¹⁹⁸ IfD, “Straffällig gewordene Ausländer ausweisen” (pre-cited)

¹⁹⁹ IfD, “Deutsche Sorgen und Ängste” 1999/12, IfD 6077

²⁰⁰ IfD, “Das Zuwanderungsgesetz” 2002/11, IfD 7020, p.1

were against immigration altogether and therefore even against having a law regulating immigration at all. This position was particularly strong among the new *Länder* in the east of the country. But when asked about opinion climate, i.e. what people think that the majority of Germans would prefer independently of their own opinion, it came out that they thought in 84% of the cases that the population was against immigration. The overall opinion climate was thus very negative and certainly contributed to making discussions last two years before a compromise was finally achieved in 2004 (cf. p.62 f.).

The same year, another opinion poll asked a question similar to the one in 1994, thus measuring evolutions over a time period of ten years. The survey wanted to find out what the Germans feared and what they were worried about the most.²⁰¹ In comparison, the outcome was that less threats emanating from environmental catastrophes or from criminality in general were felt. Yet 46% of the interviewed fear 'that more and more foreigners come into the country', which is also the issue the interviewed agree on the most. The second point that was the most worrisome was 'that my salary, my living standard sinks' in 45% of the cases. One can then ask if there is a link between the two questions and which one: are fears of salary dumping connected with foreigners entering the country? 42% feared bigger terrorist attacks occurring in Germany. According to other, even more recent opinion polls, 54% Germans fear "*Überfremdung*"; five years ago—prior to the Islamic attacks—the percentage lay at 33%.²⁰² This means that the fear of a predominance of foreigners in Germany rose steadily over the last five years, a worrisome outcome. Even if politicians generally recognize this feature as a reality, opinion polls provide the proof for the fact that the tendency is not declining.

iv. *Private actors in churches and other organisations—promoting cultural and societal integration*

Private people have also increasingly sought to fight anti-migrant positions. Societal commitment is quite frequent in Germany, mainly within churches or NGOs. The two mainstream Protestant and Catholic churches have frequently taken position in immigration policies by criticising lacking HR protection for refugees. It has happened that parishes have circumvented official state law by granting protection from deportation to rejected asylum-seekers until their claim was re-examined. This turns them into real players in political decision-making, the more so since such re-issued claims have often had a positive outcome. This however leads Angenendt to shed doubts on the "fairness

²⁰¹ IfD, "Ängste und Sorgen in Deutschland" 2004/21, IfD 7063

²⁰² SZ, "Neue Bürger für das Land" (pre-cited)

and wisdom” of asylum procedures altogether.²⁰³ One of the most famous religiously motivated groups acting for the sake of migrants’ rights is CARITAS (latin for charity). It is a world-wide organisation, but is indeed very active in Germany. The German bishop conference took up the issue within its commission for migration issues and published the report “Life in Illegality – a humanitarian and pastoral challenge” (2001). Three years later, the Catholic Forum “Life in illegality” was founded, which published the “Manifesto illegal immigration – for a differentiated and solution oriented discussion” (March 2005), signed by over 400 personalities from public political, scientific, cultural, media and economic life. Another initiative aimed to improve the health situation of irregular migrants—“respect instead of neglect”; several doctors stated as a result to be willing to provide their services without remuneration, thus implementing international duties.²⁰⁴

Several citizens participate in initiative outside the political or religious framework. One quite broad initiative is the idea to create a museum on migration as a centre for culture, art and history, based on the example of the Ellis Island Immigration museum in New York. This idea is being promoted by the “Migration museum in Germany” organisation, created in September 2003 by immigration communities and scientific researchers. It emerged out of the recognition of an obvious memory ‘hole’ of immigration history (also due to the late recognition that Germany is an immigration country), not adapted to the presence of immigrants in everyday life. The aim is to integrate immigrants from Italy, Greece, Spain, Portugal, Turkey, ex-Yugoslavia, Morocco, Tunisia, South Korea (for the former Western FRG), Vietnam, Cuba, Mozambique and Angola (former GDR) within the awareness of German history.²⁰⁵

The DJO (German Youth in Europe) is an organisation promoting cultural understanding between young Germans and immigrants through common activities and political discussions. It wants to integrate migrants to the German society and help them finding their identity and is mainly engaged against deportations and for the protection of social, political and cultural rights of refugees. Activities are practically orientated everyday missions, i.e. providing help in mastering school and professional life.²⁰⁶

The group “Clandestino-Illegal” tries to raise public awareness for the individual situations of illegal people. “*No person is illegal, one is made illegal, a situation, in which more and more people have to fall involuntarily.*” It gives a more detailed account on the ways, in which a person can find him/herself in the situation of illegality without being a

²⁰³ S. Angenendt, *Asylum and Migration Policies...* (pre-cited), p. 190

²⁰⁴ G. Pflaumer, “Kein Mensch ist illegal” (pre-cited)

²⁰⁵ Migrationsmuseum in Deutschland, Available [online]: 12.05.2006, on: <http://www.migrationsmuseum.de/index-Portal-Vision.php>

²⁰⁶ DJO, Available [online]: 12.05.2006, on: <http://www.djo.de>

criminal. It also promotes economic and educational opportunity rights to be granted to immigrants; lacking facilities could lead to precarious situations, despair and—in extreme situations—violence and crime. The same applies to immigrants' health: since doctors have to signalise illegal people, they often wait until expensive health care cannot be circumvented. Protection and humanly dignified solutions do theoretically exist for all migrants, but scared of deportation once they make their status official, they prefer to go underground: a direct path towards making them 'modern slaves'.²⁰⁷

These are only a few examples of the ways private actors have chosen to be active for protecting migrants' rights. Even though none of them contests the legitimacy of states to control its borders, they all press politicians to take up and face the difficult question of irregular people. It also shows that these actions are not mainstream positions among the overall population that remains sceptical towards migration. A reason for politicians not evoking this problem more is the unpopularity of the topic and the difficulty in resolving it. The focus therefore lies on how to best integrate those migrants, who have been allowed 'in', while remaining more or less quiet about the rest.

This chapter has tried to analyse in depth the evolution and the participation of diverse actors within the national level of Germany. Several conclusions can be outlined: firstly, the institutional component of the country allows for a more decentralised tackling of the issue. A great variety of actors are implicated in integrating migrants into society; the main focus lies much less on the security dimension of (illegal) immigration within the German societal debate than on the supranational level. It seems that the securitization of EU migration policies does not transpose itself on the German national level (although this might be the case in Great Britain, France or the Netherlands, for instance). However, there also is an underlying juxtaposition of irregular migration with criminality, which makes the status of illegal migrants an unpopular topic in politics, even if awareness only starts to arouse on the precarious situation of this population group within the country. Indeed, intergovernmental cooperation remains crucial in limiting the scope of trans-national crime, which—because of its cross-border nature—can only be effectively fought against by common actions. But interstate cooperation also has to address the issue of more effective individual rights protection more directly.

²⁰⁷ Clandestino-Illegal, Available [online]: 12.05.2006, on: <http://www.clandestino-illegal.de/Internetcafe/Bildschirm/bildschirm.html>

Chapter IV: Embedding Germany in cross-border cooperation processes

Germany is embedded both in EU politics and in the international system itself. More attention has therefore to be given to some ways, in which the levels are interlinked. This is what German political scientists call "*Politikverflechtung*" ('interwovenness of politics'). Some examples will be added to the EU-level in a first sub-chapter, before mentioning the international level, which could not be distinctly be analysed within this thesis, although it would have been pertinent. It will include intergovernmental cooperation initiatives from the German state or *Länder* outside the realm of the EU.

A—EU and German "Politikverflechtung"

When analysing distinctive features and problems linked with the German immigration system, a recurring pattern emerges, namely the fact that the country is conscious of the possibility for MS to contribute to the process of harmonization of immigration and asylum policies on the EU-level. Germany seeks to participate in furthering EU actions especially in terms of multilateral resettlement agreements or by launching conferences with international experts to promote ideas for establishing common EU-wide systems. As mentioned, Germany has been a proponent of the harmonisation of European immigration policy because of burden-sharing among the MS.²⁰⁸ Ex-Chancellor Kohl had tried to launch initiatives towards a common migration policy at the summit in Luxembourg in July 1991; the Luxembourg presidency had merely proposed to integrate migration and asylum in the intergovernmental third pillar, not however in the communitarian first EC pillar, a German idea. Bi- and multilateral agreements proved an efficient method to circumvent the EU-level and this method is therefore still popular on both federal and *Länder* level. For instance, Germany sought to play a role in the recent process of eastwards enlargement and also benefited from it: Bavaria collaborates closely with the ČR, which turns more and more from a transit to a destination country (cf. pp.95-97).

Several impacts can be inferred from the national situation of Germany on the European level. In the following, a few points of debates will be picked up again and the ways, in which both levels are interconnected, outlined. Firstly, Germany has called

²⁰⁸ Cf. also Angenendt, Asylum and Migration... (pre-cited), p. 166

several times for asylum burden-sharing, renamed 'solidarity', concerning the lot of refugees. Yet in the long run, the Bavarian civil servant Wilton Park said in July 1995, Germany started to feel like being the 'laughing-stock of the Union' because the country was welcoming and catering ever new refugee flows. The relative reluctance from other MS, particularly those geographically further away from the trouble zones of the Balkans, to accept more refugees in times of urgency finally led the country to be also more reluctant in accepting Kosovo refugees, even despite the fact that the German population was in favour of helping refugees. By 1999, the German position was still convinced that a common refugee policy in the EU was still far from being in place.²⁰⁹

Secondly, the seemingly national scandal of the visa affair did not remain an inner-political dispute, but spread over the whole of the EU and even led to the EU Commission taking part actively in the debate. The justifications for the interference of the Commission are to be found in the Schengen area provisions, which had set as a main goal to unify the system of visa-requirements among the Schengen members:

"The parties shall endeavour to approximate as soon as possible their visa policies in order to avoid any adverse consequences that may result from the easing of controls at the common frontiers in the field of immigration and security."²¹⁰

Concretely, this meant that a residence permit had to be issued at the first EU country entered, but was then valid EU-wide. The German scandal thus had consequences directly affecting neighbouring countries; this could in the worst case lead to spreading the scope of human trafficking. In reaction to this, the EU Commission declared the Volmer measure contrary to EU-law on visa-issuance within the Schengen area in May 2005.²¹¹ The fear underlying this statement was that such entry requirements would lead to "visa-shopping" (a problem addressed at the Amsterdam conference in August-September 2004). This added to the MS' worries of security threats inherent to illegal cross-border activities already present in the 1990s and emphasised even more in the aftermath of terrorist attacks. SIS II, VIS and the creation of Frontex are a consequence of the wish to make EU external borders secure again, recovering a feeling of lost security. Thus, the German visa affair in effect contributed to make an impression of subjective threat re-emerge in the EU.

Thirdly, refugee protection and the organisation of their resettlement discussed at the Amsterdam conference was picked up by the German government. Quite a few measures were implemented to deal with this programme—generally in cooperation with

²⁰⁹ Quoted in: B. Marshall, "The European Dimension" (pre-cited), pp. 133-135

²¹⁰ Schengen Agreement, Article 7, in: Kern (2003), p. 86

²¹¹ "Union sieht in der Visa-Affäre neue Dimension" (11.05.2005) by Reuters press agency, Available [online]: 08.06.2005, on: <http://www.reuters.de/newsPackageArticle.jhtml?type=politicsNews&storyID=725871§ion=news>

'IOM Deutschland'—, for example the REAG (Reintegration and Emigration Programme for Asylum-Seekers in Germany) and GARP (Government Assisted Repatriation Programme). The government works closely with the EU programmes EQUAL and AENEAS, the European refugee fund. Since the end of 2002, about 400 Afghans have returned voluntarily on the basis of a financial contribution.²¹² In April 2005, the BAMF director launched an international conference dealing with European harmonisation of voluntary return of refugees to their home country. The conclusion was that European projects were desirable and ought to be pursued—a rather feeble statement, yet at least a start. Furthermore, it was acknowledged that voluntary return of foreigners is a more humane and also less costly procedure.²¹³

Nevertheless, international criticism against the German immigration system was harsh, when in May 2005 a series of flights started to deport 50,000 Kosovo refugees back to Slatina. The majority of the deported persons were Roma and HR group said that these expulsions reflect "*deeply held prejudices in Germany's immigration system*". A main reason for these deportations is the fact that they are dependent on welfare, thus representing a burden of about 500€–630€ a head per month on regional authorities.²¹⁴ This exemplifies what the presidency of the Amsterdam Conference has summarised: "*(...) the world's countries of immigration all share the disappointing reality that their immigration systems are broken: (...) unauthorized migration and failures in integrating immigrants are growing.*"²¹⁵ An ensuing proposal was to create a European Agenda for Migration Management that would tackle these problems in common. Yet the date of its realisation is still pushed into the future, the Luxembourg conference later that same year evoked the year of 2010 to create a common asylum and migration policy. Until now, the MS have a veto right on these decisions, which blocks deeper-going advancement on EU-harmonizing measures. So communitarization of migration works if it deals with its security dimension, not however a supranationalisation of this policy area.

Yet it has to be acknowledged that some EU agencies are well implemented by now: in the face of the European-wide phenomenon of increasing extreme-right wing movements, Europol was created. The Eurodac system was established in December 2000 by the EG regulation 2725/2000 to more effectively implement the Dublin

²¹² O. Schily, "Rede anlässlich des Festakts 50 Jahre IOM Deutschland", held on 16.11.2004, on: http://www.bmi.bund.de/nn_165090/Internet/Content/Nachrichten/Reden/2004/11/Schily__Festakt50JahreIOM.html, last consulted: 08.06.2005

²¹³ Bundesamt für Migration und Flüchtlinge, "Internationale Fachtagung—Europäische Harmonisierung der freiwilligen Rückkehr von Flüchtlingen in ihr Heimatland", held on 05./06.04.2005, press notification no. 003/2005, on: <http://www.bamf.de/>, last consulted: 08.06.2005

²¹⁴ N. Wood, "Expelled by Germany, Roma face a bitter Kosovo" (18.05.2005), International Herald Tribune, Available [online]: 08.06.2005, on: <http://www.iht.com/articles/2005/05/18/news/roma.php>

²¹⁵ Migration Policy Institute (mpi), "Conference summary (...)" (pre-cited)

Agreement. This was implemented and amended by Germany in 1997 and now falls into the area of competence of the new BAMF.²¹⁶ Especially from 2001 on, the EU became quite active in forging incentives for national frameworks on immigration and asylum issues. The Council of the EU had created CIREFI, which established an early warning system for the transmission of information on illegal immigration and facilitator networks in 1999. In 2001, the European parliament issued with A5-0304/2001 a resolution on a common asylum procedure and proposed a charter for TCN rights.²¹⁷ From the side of the Commission, several regulations were put in place, e.g. 2001/55/EC on temporary protection measures in the case of mass inflow of refugees (20.07.2001); 2003/9/EC on minimum norms to apply to asylum-seekers (27.01.2003); 2003/86/EC on the right of family reunification (22.09.2003); 2004/38/EC on the right of EU-citizens and their family members to move and reside freely in the territory of the MS (29.04.2004). These numerous regulations have had a big impact on German law that tried (and still tries) to adapt accordingly, notably family reunification.²¹⁸

The prevailing method of forging Community immigration policy remains the open method of cooperation which makes states cooperate closely, but which has no power to sanction and is thus sometimes regarded as a weak instrument. Finally, the Treaty on a Constitutional Draft had included provisions that could have promoted a common immigration and asylum policy, but the rejections by referenda in France and the Netherlands momentarily put a hold on this matter. Although the diverse European systems of immigration share many challenges that would have to be addressed across borders, national problems often seem to be more pressing to handle and sometimes an essential part of negotiations is therefore lacking, namely political will. This is not a distinctive feature of the EU, only that contradicting goals and pressures seem to be condensed on this level. Germany is also dependent on other self-imposed obligations on the international level or through intergovernmental cooperation initiatives, which are outlined in the following.

²¹⁶ Verordnung Zuständigkeit für die Durchführung der Verordnung (EG) Nr. 2725/2000 des Rates der Europäischen Union vom 11. Dezember 2000 über die Einrichtung von "Eurodac" für den Vergleich von Fingerabdrücken zum Zwecke der effektiven Anwendung des Dubliner Übereinkommens, Available [online]: 08.06.2005, http://bundesrecht.juris.de/bundesrecht/asylzbv_1997/

²¹⁷ Cf. Kern (2003), pp. 102 ff.

²¹⁸ On the EU regulations, cf.: Bundesamt für Migration und Flüchtlinge, "Rechtssysteme," Available [online]: 08.06.2005, on:

http://www.bamf.de/template/internationales/anlagen/eu_richtlinie_aufenthalt_unionsbuerger.pdf;
http://www.bamf.de/template/internationales/anlagen/eu_richtlinie_familienzusammenfuehrung.pdf;
http://www.bamf.de/template/internationales/anlagen/eu_richtlinie_vorschlag_mindestnormen_de04.pdf;
http://www.bamf.de/template/internationales/anlagen/eu_richtlinie_vorueber_schutz.pdf

B—International and regional influences on / of German policies

a) International obligations for Germany and intergovernmental cooperation

i. *International law—the basis for the German commitment to the cause of refugees*

The right of nations started to implement more concretely HR for individuals in the aftermath of WWII. International rules have from then on tried to protect the human dignity and fundamental rights of persons, influencing also states, since it had been recognized that threats could emanate from nationals' very own governments. The international legal framework regulates relations among various international players (thus also international organisations and individuals) and is a clear guideline for German principles and laws. The first article of the German fundamental laws of 1949 underlines the inalienable nature of human dignity and the guarantee of HR by the state and its people, still applicable today. In addition, article 25 guarantees the predominance of international over domestic law.²¹⁹ Yet the main problem of international law remains its relatively lacking independent sanctioning power, which depends on the will of the adherent states. The International Court of Justice created in July 1998 would have been a great step forward in enforcing international law, but the important candidature of the USA was retrieved by the president.²²⁰

Still, some texts have gained more power over the years and it has become increasingly unacceptable to circumvent rules, which are now part of international customary law (e.g. the principle of *non-refoulement*).²²¹ Two major texts have contributed to induce states to accept refugees despite illegal entry or residence status on the national territory: the Universal Declaration on Human Rights (10 December 1948) and the Geneva Convention Relating to the Status of Refugees (28 July 1951). The first text represents an important starting point for international right to asylum in its article 14, according to which any person facing persecution has the right to seek asylum in other countries. Even more importantly, the Geneva Convention, labelled the 'Magna Charta of

²¹⁹ Grundgesetz für die Bundesrepublik Deutschland (as of 26.11.2001), Die Deutsche Bibliothek, 9th edition, Baden-Baden: Nomos Verlagsgesellschaft, 2001

²²⁰ C. Péry, "Cour Pénale Internationale," in: *Encyclopaedia Universalis* (pre-cited)

²²¹ R. Cholewinski, "The need for effective individual legal protection in immigration matters" (pre-cited), p. 237

refugee law by Eichenhofer,²²² defined the conditions for a person who can be called a refugee, clarifying a previously vague statement. A refugee is anyone, who:

(...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²²³

Signatory states have the responsibility to make the accession to the refugee status accessible to anyone fitting this definition and to deliver all the official administrative documents, passport and civil status to them (art. 25, 27 and 28). Furthermore, states must not impose penalties on refugees having entered the country illegally, if they present themselves to the authorities and launch the process of asylum-seeking without delay and if there are good causes for their illegal entry or presence (art. 31). Equally important is the provision of *non-refoulement* (art. 32 and 33): a refugee may not be returned to the country of origin when s/he would face a life-threatening situation there. One notable exception remains: "The Contracting States shall not expel a refugee lawfully in their territory *save on grounds of national security or public order*" (art. 32(1)), nor when a refugee constitutes a danger to the community of the receiving country when already convicted of a 'particularly serious crime' (art. 33(2)).²²⁴ The Office of the United Nations High Commissioner for Refugees (UNHCR) created on 14 January 1951 has the task to check the application of the Geneva Convention by the signatory states. It coordinates international action for protecting and assisting refugees and wherever necessary the UNHCR supervises repatriation operations.²²⁵

Other international texts have mentioned the situation of refugees more regionally. The Convention of the Organisation of African Unity (10 September 1969), gives a larger definition of the status of refugees and the Carthaginian Declaration for Central America of 22 November 1984 adds the notion of 'massive violations of HR'. Other texts provide indirect judicial bases for not sending concerned refugees back to their country by forbidding torture, a fate they would face if sent back: the European Convention for the prevention of torture

²²² E. Eichenhofer, "Migration und Illegalität" (pre-cited), p. 31

²²³ Convention Relating to the Status of Refugees (28 July 1951), Article 1(2), Available [online]: 19.03.2006, on: <http://www.ufsia.ac.be/~dvanheul/migration/genconv.html>

²²⁴ Ibid. [emphasis: mine]

²²⁵ P. Moreau Defarges, "Haut-Commissariat des Nations unies pour les réfugiés," in: Encyclopaedia Universalis (pre-cited); The UNHCR is supported by the UNRWA, specialised UN agency for the protection of Palestinian refugees.

and pains or illegal or degrading treatments, the International Covenant on Civil and Political Rights (1966), the UN Convention against torture and the ECHR.²²⁶

The German law has incorporated the right to asylum in its basic laws, albeit reforms had become necessary as a result of domestic inputs (cf. the asylum compromise of 1992, pp.55ff.). These international commitments are generally not questioned by German politicians, even if asylum seekers are not all that welcomed among the population. Out of the tragic past of the country emerged a particular dedication to the protection of HR and asylum seekers, but this also led to the idea that the asylum 'burden' was an international one and therefore ought to be addressed by the international community as a whole.

A recent international text crucial for the migration–security debate is the UN Convention against Trans-national Organized Crime against four main trans-national offences: participation in organised criminal groups, money-laundering, corruption and obstruction of justice. International cooperation involves measures of extradition, mutual legal assistance or joint investigation. Additional protocols aim to 'prevent, suppress and punish trafficking in persons', fight 'against the smuggling of migrants by land, air and sea' and 'against the illicit manufacturing of or trafficking in firearms'. It is interesting to notice the ostensible definition in terms of crime side by side of firearms trafficking and smuggling or trafficking of human beings. The elaboration of the Convention in 2000 shows how vulnerable migrants are; but it also shows that the international community is increasingly aware of and takes legal actions against the phenomenon.²²⁷

ii. *International Migration Management and crime prevention*

Several global efforts have sought to promote strengthened dialogue among all countries in the field of migration. Total global revenues for business of human smuggling, car theft, money laundering and other trans-national criminal activities are estimated to be increasingly important and therefore have to be fought against more efficiently. Germany has actively participated in most of these initiatives and thus also voluntarily ties itself to international obligations.

The Berne Initiative was created to develop an inter-state, non-binding policy framework on migration that draws on effective practices emanating from regional cooperation mechanisms. The outcome was 'The International Agenda for Migration Management' in 2004, with the goal to develop a "more orderly and humane

²²⁶ J.-E. Malabre, "Droit d'Asile," in: Ibid.

²²⁷ UNODC, "Summary of the UN Convention against transnational organized crime and protocols thereto", Available [online]: 28.03.2006, on: <http://www.unodc.org/palermo/convensumm.htm>

management of migration at the national, regional and international levels, for the benefit of migrants and societies".²²⁸ While agreeing with the general measures of managing migration like visa requirements or border control, the agenda warns against the negative associations from abusive types of irregular migration and migration in general. The difficult tasks for governments is to ensure the credibility and transparency of their ability to manage irregular migration flows by providing authorised channels of entry and stay alongside information about these channels and deterring measures against irregular movements. It recommends the signature and ratification of the above-mentioned Convention and the establishing of clear distinctions between traffickers and their victims. Point 16 is dedicated to international security and terrorism: it provides possible solutions of how to facilitate mobility for dynamic economies while ensuring safety of the host community and without stigmatising migrants. Effective practices would be to strengthen national security enforcement and risk evaluation systems, share information collectively, make public campaigns against "scapegoating" of migrants, protect HR and the use of personal information and increase integration of migrants.²²⁹

In 2002 the Geneva Migration Group (GMG) was established. It has the same overall goal and is composed of international organisations dedicated to migration or being more indirectly linked with it, namely the International Labour Organisation (ILO), IOM, United Nations Conference on Trade and Development (UNCTAD), UNHCR and UNODC. It aims at furthering dialogue and cooperation also at the supra-national level between relevant agencies. In October 2005, the Global Commission on International Migration (GCIM) published the report "Migration in an interconnected world: new directions for action". It is an intergovernmental cooperation initiative in cooperation with the UN framework. The countries part of it are: Germany, New Zealand, Sweden, Switzerland, Brazil, Morocco, South Africa, Mexico, USA, Australia, Canada, Pakistan, India, Philippines, Ireland, Russia, Egypt and Spain. Quite extensively does the report outline problems faced by most countries and endeavours to cooperate more closely between them. It strongly recommends incorporating financial international actors into the otherwise positively rated GMG initiative. As a way of conclusion, it therefore strongly suggests enlarging GMG to an "Inter-agency Global Migration Facility" by adding the institutions of OHCHR, UNDESA, UNDP, UNESCO, UNFPA, UNIFEM, World Bank and the WTO to it.²³⁰

²²⁸ IOM, "The International Agenda for Migration Management" (16./17.12.2004) (pre-cited), p. 10

²²⁹ Ibid., p. 37f.

²³⁰ Global Commission on International Migration, "Migration in an interconnected world: new directions for action," Available [online]: 19.03.2006, on: <http://www.gcim.org/attachements/gcim-complete-report-2005.pdf>

The transatlantic cooperation has been crucial in the decision to integrate biometric data in EU passports, since this has become a precondition for the entry of EU citizens to the USA. Since 5 January 2004, the US Visitors and Immigrants Status Indicator Technology (US-VISIT) programme fingerprints and photographs visa holders arriving in or leaving the country by air or sea. The purpose is to identify individuals having violated immigration controls and to supervise criminal records or possible affiliations to terrorist organisations. Most EU MS are exempted from the US-VISIT program, but since 26 October 2004 the US requires these countries to issue passports including biometric features; otherwise the visa-regulation applies.²³¹ This can of course be understood on grounds of the prime goal to stop terrorist cells from reaching the US territory, even if the extensive reach of this policy limits the travel freedom of individuals.

The awareness for the role played by migrants to security has its roots in US political agenda shaping even prior to the terrorist attacks of 9/11. In 1996, the US adopted counterterrorism legislation, which significantly affected the rights of legally resident aliens—analysts considered this immigration law to be a reflection of anti-immigrant mood in the US public. Mark Miller outlines that migration is always security-sensitive because migration changes societies and vice-versa. He regrets the insufficient attention paid to the marginality of political violence by immigrants and foreign-born populations, eroding migrant rights to combat international terrorism: “*a much greater danger can be seen in anti-immigrant violence and discrimination (...)*.”²³² The subjacent agreement of the majority of the population with such measures for the sake of American security has naturally increased in the 21st century.

Germany has followed this development by reinforcing cooperation procedures with the US in the fight against terror, especially after the recovery of the tense transatlantic relationship further to the US military intervention in Iraq in 2003. Fighting international criminality has become a common denominator for both countries. On 18 April 2006 US Minister of Justice Alberto Gonzales and the German Minister of Justice Brigitte Zypries signed additional contracts to the German-American extradition Treaty (*Auslieferungsvertrag*) from 1978. Interestingly, this signature was induced by already existing treaties between the USA and the EU concerning extradition clauses (another example is the 2004 debated Treaty between the US and the EU on data transfer to air

²³¹ IOM Brussels, “US and Biometric Data,” (09.01.2004), Available [online]: 06.03.2006, on: <http://www.belgium.iom.int/PDFDocuments/2006030614545664000064.PDF>

²³² M. J. Miller, “International Migration and Global Security,” in: N. Poku/D. T. Graham, *Redefining security...* (pre-cited), pp. 15-27; quote on p. 25

companies). Now the provisions already active on the EU-level have been transposed on the bilateral German-US level.²³³

b) Germany's actual cooperation initiatives in the region of Europe

Germany is also continuously part of inter-governmental cooperation processes within the region of Europe, but not necessarily on the EU-level, as the conference in Heiligendamm in March 2006 shows (cf. p.19). Another multinational initiative occurred on May 2005, when the Prüm Treaty was signed between Germany, Belgium, Spain, France, Luxembourg, the Netherlands and Austria: it deepens and makes cross-border cooperation easier in the spheres of trans-national crime, illegal migration and terrorism by more comprehend information exchange. Rules are currently being transposed into German law (March 2006). Federal Minister of Justice Zypries commented the result as being a positive outcome reaching the balance between efficient security measures and the guarantee of individual data protection of citizens. The treaty allows state parties to directly access DNA and fingerprint data of other state signatories; (person-)specific information can also be passed on in the case of "terrorist dangerous people"; preventive measures can be taken for big meetings (e.g. football games or European Council meetings). Tighter police cooperation or joint operations are possible and mutual help in extraordinary catastrophic situations, such as sending specialists. The treaty is open to all the EU MS and it is planned to integrate it into the EU legal framework in about three years. It thus goes hand in hand with the provisions of the Hague Programme.²³⁴

Still, bilateral agreements remain the most frequently used method of cooperation promoted by the German government, considering it a more practical way of implementing concrete ambitions. One such close bilateral cooperation procedure happens with the French neighbour, following a general tendency of Franco-German policy coordination. On the occasion of two consecutive meetings in Blaesheim of President Jacques Chirac and Chancellor Angela Merkel, it was decided to take common integration initiatives, open for other EU MS. In order to discuss more concrete measures, the French integration Minister Azouz Begag met with the State Minister

²³³ Bundesministerium der Justiz (BMJ), "Zypries und Gonzales zeichnen bilaterale Vereinbarungen für Rechtshilfe" (18.04.2006), Available [online]: 21.04.2006, on: http://www.bmj.de/enid/58.html?presseartikel_id=2425

Nonetheless, prisoners who might face death penalty in the USA need not be handed over by German authorities.(cf. Appendix 3, p.105)

²³⁴ BMI, "Grenzüberschreitende Zusammenarbeit zwischen sieben europäischen Staaten wird vereinfacht," (08.03.2006), Available [online]: 01.04.2006, on: http://www.bundespolizei.de/cln_030/nn_484498/DE/Home/01__Aktuelles/06Maerz/060308__Grenzu_eberschreitendeZusammenarbeit.html

Maria Böhmer, responsible for migration, refugees and integration affairs in February 2006. Main themes to be tackled are the improvement of education and labour market situations for young migrants, as well as their integration in exchange programs. It can be noticed that the economic and cultural component of integrating migrants into the respective societies occurs despite differing national histories: it is another step towards loosening the 'deeply entrenched national differences' (Angenendt) and can be rated as positive innovation, if rendered effective.²³⁵

The same month, Minister of the Interior Wolfgang Schäuble signed a readmission treaty with his Bulgarian colleague Rumen Petkov, touching 'illegal immigrated people from Bulgaria—both Bulgarian nationals and TCN and state-less people'. Reasons are the 'fight against illegal migration' from the Balkan region, comments Schäuble in an interview; Bulgaria is being recognised as a transit country for illegal migrants to Germany and by extension to the Schengen area. Furthermore, it represents an important move towards the EU integration of Bulgaria. Indeed, this political step is a logical move, probably induced by the most recent BKA statistics (published in August 2005) about the origin of the victims of human trafficking, among whom a great number of Bulgarian were identified (cf. p.68f.).²³⁶

As BKA statistics have shown a tendency for the new EU membership being a way to legalise previously irregular migration flows, Germany has also intensified cooperation in border control with its two neighbouring Central European countries Poland and the ČR. Monar outlined in 2001 the yet insufficient training and equipment problems keeping some elements of the old military border control system in former applicant countries, which are necessary to integrate the Schengen zone.²³⁷ According to the director of the West Bohemian foreigner and border police Jindrich Urban the highest illegal migration is registered at the border with Poland.²³⁸ In 2000, Germany had issued proposals to Poland to have German border officers control Poland's eastern borders jointly with Polish border guards. It was a delicate issue, since some Polish inhabitants had difficulties in accepting the idea of German guards patrolling on their territory, seeing it as a way to infringe on their national sovereignty or recalling bad memories from history. Helmut Dietrich outlined that Germany had made public funds available to

²³⁵ Der Integrationsbeauftragte, "Besuch des französischen Integrationsministers Azouz Begag," (16.02.2006), Available [online]: 23.04.2006, on: http://www.integrationsbeauftragte.de/gra/presse/presse_1289.php

²³⁶ NGO-online.de, "Schäuble unterzeichnet Rückübernahmeabkommen mit Bulgarien," (01.02.2006), Available [online]: 23.03.2006, on: http://www.ngo-online.de/ganze_nachricht.php?Nr=12837

²³⁷ J. Monar, "EU Justice and Home Affairs and the Eastward Enlargement" (pre-cited), pp.14-32

²³⁸ České noviny, "Number of illegal migrants at the Czech-German border dropping" (29.03.2006) České noviny, Available [online]: 29.03.2006, on: http://www.ceskenoviny.cz/news/index_view.php?id=179365

Poland in the 1990s, meant to be used in making borders more secure in the 1990s. German border officials regretted the hostility towards them by West-Polish citizens in particular. Dietrich explains that a large part of the population living closer to the border participated in illegal border crossing actions by renting small rooms or providing transport facilities, for instance.²³⁹ Poland's Minister of Internal Affairs and Administration Marek Biernacki responded however positively in 2000, stating that the country did not rule out the German proposal.²⁴⁰ Effectively, on 18 February 2002 a bilateral treaty for the extension of police cooperation in the border region was signed. A first step towards application of the treaty despite its non-ratification occurred on 2 April 2003 by the planning of a bi-national coordination instance in order to ensure security of citizens on both sides of the border. It is an effective cooperation among Polish-speaking civil servants from Brandenburg, the Federal border control agency (*Bundesgrenzschutz*) and the customs.²⁴¹

Cooperation with the ČR happens especially on the more concrete *Länder*-level with Bavaria, since there are at least 19 common border crossings between the two regions only. Teams—with one customs and police officer from each side—work directly together. Since 1999, the BGS provides personnel and materials for the development of border police organisations fitting EU standards. The Czech-German cooperation in fighting crime has become more intensive than with other German neighbours, such as Austria or France: police officers can chase criminal across the borders, without having to even stop. A border responsible of the Bavarian police has been posted in the border police inspection of Furth im Wald, working permanently with a Czech colleague. Ways to replace border controls, which will automatically end with the entry of the ČR into Schengen, are being elaborated: mixed working groups deal with specific issues of car smuggling or human trafficking.²⁴²

To give one very concrete example, on 26 March 2006 Police President Hans Junker and Police Director Josef Heisl presented the border situation in 2005 for the Czech-German border crossing of Waidhaus.²⁴³ The official press statement informs that the numbers of illegal migrants and smuggled people caught at the Czech-German and

²³⁹ H. Dietrich, "Deutsch-Polnische Polizeikooperation," CILIP59 (1/98), Available [online]: 19.03.2006, on: <http://www.cilip.de/ausgabe/59/koop.htm>

²⁴⁰ R. Koslowski, "Security and sovereignty in uniting Europe" (pre-cited), p. 115

²⁴¹ H. Homburg, "Schönbohm: Polizeikooperation mit Polen wird weiter verbessert," Nr. 044/2003, Available [online]: 01.04.2006, on: <http://www.brandenburg.de/sixcms/detail.php?id=66972>

²⁴² A. Mößner, "Kooperation am Schlagbaum," (27.10.2003), Available [online]: 01.04.2006, on: <http://www.europaspiegel.de/index/artikel209/page50/1>

²⁴³ Cf. Appendix 4 (Czech version), p. 106; T. Plößl, "Grenzlagebild 2005," Polizeipräsidium Niederbayern/Oberpfalz, Available [online]: 01.04.2006, on: <http://www.polizei.bayern.de/niederbayern/news/presse/aktuell/index.html/10006>

sinking appeal of Germany as a destination country for illegal migrants, harmonisation of EU law and loosened visa-requirements (e.g. for Rumania and Bulgaria), restrictive application of asylum regulations and therefore less asylum granting procedures and finally more people caught on the Czech side. Main problems remain car theft, driving under the influence of drugs and the increasing mobility of criminals. But all of these outlined examples show that cross-border cooperation has become more intensive and prepares the enlargement of the Schengen area also against fears of proliferating criminal gangs. The report also found out that 1.102 people could be caught on the basis of national or international arrest orders and that the SIS played a predominant role in it. This would be a positive sign showing that more travel freedom can indeed be granted EU-internally without having to fear the creation of a rule-less zone.



Conclusion

The work has tried to outline diverse facets interplaying in the tight balance to achieve between the duties of managing (sometimes paraphrased controlling) migration and ensuring security of the people. Both are also deeply entrenched with HR commitments and international law regulations. While the national and more regional level of German policies take into consideration economic and cultural components of migration, integrating these facets within the core of national interests, the focus lies mainly on fighting illegal migration on the intergovernmental and EU-level of cooperation (safe for some exceptions, such as the recent Franco-German integration initiative).

In parallel, the evolution of migration realities within Europe and its gradual communitarisation have been distinctively accompanied by a tendency of viewing migration management mainly from the lenses of ensuring security on the EU-territory. The EU itself has already taken steps towards pushing other dimensions on its agenda, such as HR of migrants. When in the Commission stated in September 2005 that Europe, not individual MS should be the main actor in policing deportations and Franco Frattini, the Commission's vice-president, proposed that temporary custody under immigration laws should not last longer than six months. Furthermore, there was a proposal to demand an oath of faithfulness to European laws and the charter of fundamental rights. Britain opposed this idea on the grounds that national citizenships exist and suffice. In effect, such an oath would be a way to generate a European supranational citizenship. And Britain is not willing to give up its anti-terrorist laws.²⁴⁴

There is an increased recognition that migration is just as intimately linked with development as with security. The problem is that it remains unclear what consequences can be expected from supporting the economic development in main countries of origin, for example on the African continent. When living under the poverty line, potential migrants do not have the possibility to get on the move; if getting richer, this possibility would therefore open up and would have the opposite effect of what was aimed at—it might actually support migration. In a very long-term perspective developing countries would be able to provide sufficient incentives for their nationals to remain in the country. But this presupposes also better law enforcement, in order to erase root causes (wars, genocides...) for refugees. When looking at the global level however, it has to be acknowledged that it is especially Western European countries that fear for their capacity

²⁴⁴ N. Watt, "EU calls for agreed rules on deportees" (02.09.2005), *The Guardian*, Available [online]: 01.03.2006, on: <http://www.guardian.co.uk/terrorism/story/0,12780,1561317,00.html>

of keeping migration flows in line, whereas it is developing countries which carry the main 'burden' of migration and especially refugee flows, as the example of Rwanda, Burundi and the DRC show. Furthermore, another main cause root for migration remains environmental catastrophes, which are by definition not "manageable", but can have just as many damaging and life-threatening impacts as security.

Migration pressure is therefore not easily manageable, because despite being a global phenomenon, it has such a variety of causes, implications and far-reaching effects (even on the very identity of peoples) that measures have to be just as encompassing. The focus on security stems from its being at the core of state responsibilities, as mentioned before. Understandably, it is subconsciously thought that something can and has to be done against terrorism or negative impacts of irregular migration in a Hobbesian 'homo homini lupus' perspective. The main enemy of the human being – next to environmental catastrophes – remains the human being itself.

Yet it is not enough to focus on the one security aspect of migration, even when tackling the issue internationally among states, which retain the main decision-making power in the end. The inherently problematic feature of migration remains the fact that it is both uses the increasingly open channels of liberalising, global markets and wants to be controlled at the same time. If extending this argumentation line to its end, anti-migration movements could even lead to the emergence of a counter-liberal ideology, calling for a 'shutting down the borders again', thereby reinforcing state entities at a time when borders are abolished.

Despite an increasing recognition that migration can be also efficiently managed through supporting development in countries of origin among migration experts, security remains the priority link to make for heads of government, as the Pan-European ministerial conference shows (24/25 January 2006 in Brussels). Its aim was to "*shape coherent and transparent migration-related policies aimed at improving security, migrant rights and promoting greater economic development and prosperity within the region (...)*". Significantly, foreign and interiors ministers were invited by the organizers of the conference (IOM and the Belgian government currently chair of the OSCE), as well as representatives of international organisations. Indeed, migration generally falls under the areas of competence of the ministers of the interior, but is increasingly a foreign policy issue. Blurring external and internal dimensions is the most important link towards the migration—security discourse. As a result, main conference themes tackled coherence in migration policies and its impact on migration management, security, democratisation and improving common prosperity in the OSCE region. IOM Director General McKinley said that the conference would especially deal with the security challenges of irregular

migration, but would also discuss legal labour migration. On the issue of border management per se, the participants at the conference stated that “(...) *border systems and high quality travel document security should not be seen only as means of limiting migration [but as] essential tools for facilitation of movement.*” Furthermore, border management needs to remain a tool among others, such as policy and legal instruments. This conference is to be followed by one in Vienna in May 2006 to give new impetus for a EU external strategy on migration and security issues. It will be interesting to see how this will develop further.²⁴⁵

Remaining problems are lacking implication for migrants' rights and large anti-migrant positions among the population, too big an incentive for politicians to insist on the visible security aspect of migration. Effective practices next to strengthening national security enforcement and risk evaluation systems are to share information collectively, to make public campaigns against the underlying bogus image of migrants (also recognizing their positive contribution on the labour markets), to protect migrants' rights and respect the use of personal information and, finally, to accept cultural diversity in order for societal integration of migrants to be a goal and not a duty. Some CDU politician stated that the new arrivals have to show their wish to become German—but Germany (and this is true for all the states) also has to show that they are actually welcome. For if irregular migration can have the most dramatic effects if taken abuse of, migration has always existed and is also enriching for international society.

²⁴⁵ IOM, “Pan-European ministerial conference,” (24/25.01.2006), Available [online]: 06.03.2006, on: <http://www.iom.int/en/news/PBN200106.shtml>; and: IOM Belgium, “Conference conclusions—session 2” (06.02.2006), Available [online]: 06.03.2006, on: http://www.belgium.iom.int/pan-europeandialogue/NewsDetails.asp?News_ID=26

Appendices

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Brussels - 3/6/2006 2:39:30 PM

Subject: EU Response to Terrorism
EU Leaders Adopt Terrorism Action Plan
Publication Date: 26 March 2004
Summary:

A meeting held on 25 March 2004 in Brussels, the EU Heads of States and Governments adopted an ambitious package of terrorism measures aimed at showing a united Europe in wake of the recent terrorist attack in Madrid. EU leaders agreed on a package of measures proposed by European foreign and interior ministers, with the objective to improve security in the EU through co-ordinated action. The lack of cooperation between their intelligence services and the police is mentioned as one of the shortcomings in anti-terrorist cooperation.

EU leaders agreed a number of steps, including:

- setting up of a database containing criminal records, lost and stolen passports and visa applications;

- introduction of visas by making them computer-readable, including biometric facial features, by the end of 2005 for all EU countries;

- implementation of already-agreed upon counter-terrorism measures, such as a pan-European arrest warrant, harmonising penalties for terrorist crimes, and the freezing of assets held by outlawed groups;

- retaining of all telecommunications data, including mobile phone records, for an agreed minimum time to enable intelligence agencies to track calls;

- implementation 30 June 2004 in all Member States the EU action plan against terrorism agreed to after the 11 September attacks in the United States. This includes the European arrest warrant, joint investigations and anti-money laundering measures;

- boosting of cooperation between police and justice officials in EU Member States;

- drafting of EU-wide rules on retention of phone and Internet records for use by police in investigations for up to three years;

- consideration that Eurojust should be used to the maximum to the purpose of co-operation in a cross border terrorism investigation;

- linking of trade and aid agreements with third countries with their compliance in enforcing anti-terrorist measures;

- strengthening of Europol's anti-terrorism task force and setting up an EU border control agency by 2005 to co-ordinate border security;



the adoption of a NATO-style 'solidarity clause' pledging that a terrorist attack against one Member State is considered an attack against all. The nation under attack will be benefiting from military and other assistance.

EU leaders instructed ministers to accelerate the development of the EU shared data-base of visa seekers that would determine whether a foreigner is allowed to enter the EU. Lower-level ministers have been instructed to propose common rules on internet providers on how long e-mail messages should be retained. Common rules are expected to be adopted by 2005.

EU leaders also appointed former Dutch deputy interior minister Gijs de Vries as a main EU representative/co-ordinator for terrorism. They called on Javier Solana to present during their next EU summit in June 2004 to present a proposal for integrating the "intelligence capabilities" into the EU Council Secretariat. They also instructed the European Commission to speed up development of a system that would allow the police to access a Pan-European Database of DNA, fingerprints and data.

Commentary: Regional Representative Peter von Bethlenfalvy of IOM Brussels reiterated the importance for establishing a pragmatic action against terrorism that would at the same time provide effective measures to protect potential victims and promote the creation of legal provisions for the just indemnification for victims and their next of kin.

While condemning all terrorist atrocities, IOM also wishes to prevent □ by all means □ overreactions towards migrants and host country nationals who may be affected by xenophobia and discrimination," stated Mr. von Bethlenfalvy. "IOM welcomes the new initiative taken by the EU Summit and the Irish Presidency and wishes to give the best possible support for a balanced policy and action against terrorism and its root causes. □

M Brussels - 3/6/2006 2:56:55 PM

Subject: Border Control
 Inauguration of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States
Publication: 04 July 2005
Summary:

On 30 June 2005 the Vice President of the European Commission and Commissioner for Justice, Freedom and Security and Luxembourg Justice Minister Luc Frieden, on behalf of the EU Presidency visited the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX Agency). During the European Council of April 2005 Warsaw was formally selected as the location for the Agency's headquarters while on 25 May 2005 Colonel Jarmo Laitinen of Finland was appointed as Executive Director of the Agency. Commander-in-chief of the Royal Marechaussee Jozsef Atte Beuving of the Netherlands and Major General Jozsef Bendek of Hungary were elected Chairperson and Deputy Chairperson respectively. The Agency will be steered by a Management Board, whose decisions are taken by a 2/3 majority of members. The Agency will have a staffing up to 57 people for 2005-2006, consisting of 26 officials or temporary staff, including Executive Director and his deputy, and 24 detached national experts from the Member States and 7 contracted staff.

In line with the priorities set out in the Hague Programme (European Council of 4-5 November 2004), the Agency will coordinate/assist the competent services of Member States responsible for implementing the Schengen acquis on control of operations at the external borders. In particular, the Agency will be entitled to:

- Coordinate operational cooperation between Member States in the field of management of external borders;
- Assist Member States on training of national border guards, including the establishment of common training standards;
- Carry out risk analyses;
- Follow up on the development of research relevant for the control and surveillance of external borders;
- Assist Member States in circumstances requiring increased technical and operational assistance at external borders;
- Provide Member States with the necessary support in organising joint return operations.

The budget for the Agency is - 6,28 Mio for 2005 and 9,95 for 2006. The European Commission has also proposed an amount of 20 Mio for 2007, -25 Mio for 2008 and -30 Mio for the years after.

With this Agency's stated Vice President Frattini and Minister Frieden, we have finally in place at European level an efficient operational cooperation mechanism for the national border guards. The visit to the external border has further strengthened our confidence in our capability to establish and maintain an area of freedom, security and justice for everyone living in the EU. The spectre of international terrorism, the human tragedies of victims of trafficking and the equally sad and dire consequences of illegal immigration into the EU, are constant reminders that we need to do even more to combat the many and diverse threats facing this area.

Vice President Frattini added: The European citizens rightly expect us to find efficient solutions to these security problems. These solutions must always fully respect human rights and preserve the integrity of the common, free travel area provided by the Schengen cooperation.

3—§ 53 Ausländergesetz—Abschiebungshindernisse

- (1) Ein Ausländer darf nicht in einen Staat abgeschoben werden, in dem für diesen Ausländer die konkrete Gefahr besteht, der Folter unterworfen zu werden.
- (2) Ein Ausländer darf nicht in einen Staat abgeschoben werden, wenn dieser Staat den Ausländer wegen einer Straftat sucht und die Gefahr der Todesstrafe besteht. In diesen Fällen finden die Vorschriften über die Auslieferung entsprechende Anwendung.
- (...)
- (4) Ein Ausländer darf nicht abgeschoben werden, soweit sich aus der Anwendung der Konvention zum Schutz der Menschenrechte und Grundfreiheiten vom 04. November 1950 (BGBl. 1952 II S. 686) ergibt, dass die Abschiebung unzulässig ist.
- (5) Die allgemeine Gefahr, dass einem Ausländer in einem anderen Staat Strafverfolgung und Bestrafung drohen können, und, soweit sich aus den Absätzen 1 bis 4 nicht etwas anderes ergibt, die konkrete Gefahr einer nach der Rechtsordnung eines anderen Staates gesetzmäßigen Bestrafung stehen der Abschiebung nichts entgegen.
- (6) Von der Abschiebung eines Ausländers in einen anderen Staat kann abgesehen werden, wenn dort für diesen Ausländer eine erhebliche konkrete Gefahr für Leib, Leben oder Freiheit besteht. Gefahren in diesem Staat, denen die Bevölkerung oder die Bevölkerungsgruppe, der der Ausländer angehört, allgemein ausgesetzt ist, werden bei Entscheidungen nach § 54 berücksichtigt.



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TISKOVÁ ZPRÁVA

23. březen 2006

Policejní prezídium Dolní Bavorsko/Horní Falcko prezentuje hraniční situaci 2005

„Pátrací filtr“ též po rozšíření EU na východ je významný

Klesající tlak migrace

Vzrůstající záchyty drog

Spolupráce s českou pohraniční policií prokazuje vzrůstající efekty synergie

Údaje statistických hodnot: (loňská čísla v závorce)

23. března 2006 představili v Rozvadově na hraničním přechodu, dálnice, **Policejní prezident Hans Junker a Policejní ředitel Josef Heisl** (Řezno) hraniční situaci 2005 na bavorsko/české hranici.

Již tradičně byl pódiovým hostem vedoucí České pohraniční policie pan ředitel, plukovník JUDr. Jindřich **Urban** (Praha). Oba dva regionální ředitelé České pohraniční policie, pan ředitel, plukovník Ing. Pavel **Vosický** (Plzeň) za Západočeský kraj a pan ředitel, plukovník JUDr. Miroslav **Zidek** (České Budějovice) za Jihočeský kraj, které spojuje již dlouhá léta uzká spolupráce s panem Junkerem a panem Heislem, byli vnímaví posluchači, kteří se zájmem konferenci sledovali.

Tisková zpráva Vám představí krátce a přehledně nejdůležitější oblasti „hraniční situace 2005“:

- Ilegální vycestování/migrace
- Zákaz vycestování
- Pátrání po osobách a předmětech
- Padělání listin
- Krádeže vozidel
- Nedovolený vývoz omamných látek a jedů
- Dopravní situace
- Spolupráce s Českou Republikou

Ilegální vycestování/zločinecká migrace

Na bavorsko/české hranici, dlouhé 356 kilometrů, zadrželi společně policie, Spolková policie a pohraniční celní služba v loňském roce dohromady 1416 osob (rok 2004: 1.435, 2003: 1.863), které ilegálně vycestovaly nebo byly převedeny přes hranice. Trestné pokusy mají podíl 869.

Z počtu 1416 zadržených osob, bylo 1.219 (rok 2004: 1.127) osob zadrženo služebnami pohraniční policie, to znamená zvýšení o 8,2.%.

Dohromady prokazuje počet zadržení na bavorsko/české hranici v posledních letech klesající tendenci. To platí obzvláště v oblasti „Zelené hranice“. Ubývajícím počtem zadržení byl též zaznamenán na bavorsko/rakouské hranici, kde bylo registrováno 3.037 (3.595) ilegálních přejezdů.

Úředníci pohraničních policejních inspekcí vyřešili na 19-ti bavorsko – českých **hraničních přechodech** v roce 2005 **27 případů ileg. migrace** (2004: 50; 2003: 34; 2002: 34) a zjistili **106 převáděných osob** (2004: 215; 2003: 203; 2002: 121). Oproti loňskému roku se přesunul počet vyřešených případů z hraničních přechodů na „Zelenou hranici“. Důvodem by mohly být intenzivní kontroly na hraničních přechodech, které se provádí cílevědomě a často společně s českou policií.

Společně se Spolkovou policií bylo na bavorsko/české hranici vyřešeno v roce **2005 73 (92) případů migrace** a zjištěno 78 (92) převaděčů, kteří převedli 232 (2004: 390; 2003: 528; 2002: 311) osob do Německa. Taktika převodů se v posledních letech změnila, z rozsáhlých převodů na malé převody a skupinové životy nebezpečné přejezdy s nákladními vozy, byly zaznamenány jen vyjímečně.

Registrované ilegální přejezdy se snížily o 20,7 %.

Národnost ilegálních cestujících/převedených osob

Na hraničních přechodech se pokoušeli o vycestování do Německa převážně státní občané Bulharska a Rumunska, přičemž na „Zelené hranici“ byli zadrženi Spolkovou policií občané Ukrajiny a Číny.

Hlavním bodem pro nedovolené překročení přes „Zelenou hranici“ je neustále úsek Selb/Bärnau/Waidhaus. Tím, že počet všeobecně neustále klesal, byl zjištěn vzrůst migračního tlaku na hraničních přechodech resp. pozoruhodný vzestup (+42,6%) nedovolených přejezdů/pokusů na hraničním přechodu Rozvadov BAB A 6.

Důvody pro klesající zadržení ilegálně cestujících a ilegálně převáděných osob jsou m.j.:

- ve všeobecném měřítku, ve spolkovém měřítku a v celošengenském měřítku zjištěná ustupující migrační tendence v Evropě
- klesající atraktivita Německa jako země cílová a její vývoj k zemi tranzitní
- harmonizace EU práva a s ním spojené zjednodušení cestování pro členy států zproštěných vízové povinnosti (obzvláště Rumunsko a Bulharsko)
- restriktivní využití azylového práva a z toho resultující malý počet uznání
- stoupající počet zadržených osob policií sousedního státu Česká Republika

Zákaz vycestování

Počet zákazů vycestování ubyl v roce 2005 opět o 12,5 % na **1.742** (2004: 1.993; 2003: 4.327). Rozšíření EU na východ 1. května 2004 se projevilo silně ve statistice z roku 2003 na 2004. Na základě toho, že Češi, Poláci a Slováci využívají jako členové EU volnost, je jejich zákaz vycestování podle EU práva jen omezeně možný.

Největší počet vrácených osob tvoří státní **příslušníci Bulharska a Rumunska**, kteří nespĺňují při kontrolách kritéria Šengenské dohody pro vycestování a pobyt.

Cestujícím nebylo často možné udat konkrétní cíl, resp. jméno a adresu místa pobytu. Nazvaný důvod cesty a prostředky na **živobytí připouštěl často pochybnosti** a opravňoval zákaz vycestování.

Pátrání po osobách a předmětech

Hraniční kontroly vytváří eficientní pátrací filtr. Tak vedla kontrolní činnost na hranicích k České Republice dohromady k **7.298 (7.347) osobám se záznamem k pátrání. 1.102 (1.356) osob bylo zadrženo na základě národního a mezinárodního příkazu k zatčení.**

U kontrol zjistily pátrací jednotky též v **503 (575) případech relevantní předměty**, mezi nimi 366 vozidel, 85 listin a 52 dalších předmětů.

Základem popsaných zásahů a výpisů je celošengenská síťová pátrací databáze (SIS), ve které jsou hledané osoby nebo předměty zadané.

Padělání listin

I když osoby, které se zabývají paděláním, pracují neustále profesionálněji a jsou na nejnovějším technickém stavu, bylo v roce 2005 zajištěno dohromady **1.042 (1.093) padělaných dokumentů**. Jedná se o průkazy osobní, řidičské, víza, technické listiny a další. Mnohokrát byly zjištěny padělané řidičské a osobní průkazy ve spojení s ilegální migrací.

Stálé zpracování a vypracování nových možností paděláním, se kterými se zabývají zvláště vyškolení kvalifikovaní úředníci (multiplikátoři), obnáší, že kontrolní úředníci mají stále aktuální stav informací v oblasti paděláním listin. Jen tak může být zajištěna vysoká kvalita kontrol na hraničních přechodech.

Krádeže vozidel

Počet krádeží v Bavorsku se pohyboval v posledních letech stále na stejné úrovni, v roce 2005 byl **zaznamenán citlivý pokles na 4.641 případů** (v loňském roce 5.140). 65%, t.zn. 2.999 (3.319) kradených vozidel **zůstává na dále nenalezená**.

Stále velmi vysoký podíl kradených vozidel v cizině, jsou vozidla od bavorských majitelů, **1.546 případů (1.854)**, z toho 408 (445) vozidel bylo ukradeno v České Republice.

Na hraničních přechodech bavorsko/české hranice se podařilo úředníkům pohraniční policie v loňském roce při vycestování zajistit 117 (177) vozidel (krádež, podvod).

Klesající počet zajištěných vozidel je způsoben převážně tím, že pachatelé se stále více vyhýbají hraničním přechodům a používají turistické a vedlejší cesty na „Zelené hranici“.

Zjištěn byl přesun k sasko/české hranici. **Profesionálně působící skupina** ze Severních Čech kradla vozidla a motorky a převážela je přes různé hraniční úseky na předělání do domácího regionu. Ruská organizace zpracovávala „zákazkovou listinu“ pro model BMW X 5, která byla nalezena u jednoho pachatele.

Nedovolený vývoz omamných látek a jedů

Dohromady se podařilo zjistit **714** (2004: 561; 2003: 326) **případů drogové kriminality**.

V České Republice v pohraničí je relativně jednoduché si bez problému zakoupit drogy. Ze zhora uvedeného počtu 714 spadá největší podíl na občany Německa a České Republiky. Znepokojující pro úředníky na HP jsou jízdy pod vlivem drog. Převážně se jedná o jízdy z východu na západ a počet na 730 (534) se zřetelně zvýšil (+36%)

Dopravní situace

V loňském roce přešlo **66,8** (63,4) **miliónů osob** a **20,1** (19,5) **miliónů osobních vozidel** přes silniční přejezdy na východní hranici k České Republice. To znamená mírný vzestup oproti loňskému roku, ale pohybuje se přibližně v pětiročním průměru.

U **těžké nákladní dopravy** byl zaznamenán v posledních sedmi letech stálý vzestup. V roce 2005 bylo registrováno **3,22 miliónů vozidel**, v loňském roce 2,68. V roce 1999 se pohyboval počet kolem 1,78 miliónů. Střediskem pro přeshraniční nákladní dopravu je hraniční přechod Rozvadov – dálnice, přes který přešlo 1,9 (1,3) miliónů vozidel, to je 58% z celé nákladní dopravy na bavorsko/české hranici.

Aby bylo možné zajistit vysokou bezpečnostní úroveň ve vnitrozemí, jsou nasazeni na kontrolu nákladní dopravy specializovaní úředníci. Tito **“úředníci pro technickou kontrolu vozidel (BtÜ)”** kontrolovali v roce 2005 **41.095** (40.847) nákladních vozidel, autobusů a přívěsů.

Počet reklamovaných vozidel byl u 10.319 (8.819). Z toho byl 4.386 (4.128) vozidlům – skoro 50% – zakázán výjezd.

Spolupráce s Českou Republikou

Policejní smlouva o kooperaci a **dotatek ke smlouvě o právní pomoci** jsou neustále základem bilaterální spolupráce. Na tomto základě byla již v roce 2004 **realizována dohoda pro společné zásahy** a pokyny ke „**kontrolám ruka – v ruce**“ na hraničních přechodech a k tomu potřebné **pásmové dohody**.

Použití těchto smluv a pokynů u společných hraničních kontrol se potvrdilo a patří již k „dennímu pořádku“.

Spolupráce mezi Bavorskem a Českou Republikou se praktikuje a prohlubuje již leta na mnoha společných konferencích a u pracovních skupin.

Důležitý spojovací článek u přeshraniční spolupráce je instituce Pohraničního **zmocněnce Bavorské policie pro Českou Republiku** u Pohraniční policejní inspekce Furth im Wald. **Funkci** splňuje v osobní unii vedoucí Pohraniční policejní inspekce ve Furth im Wald.

Aby byla možná co nejrychlejší výměna informací mezi různými útvary, jsou nasazeni **vztyční důstojníci**, kteří konají jejich službu v budově Pohraniční policejní inspekce Furth im Wald. Vztyční důstojníci jsou úředníci Pohraniční policie Furth im Wald, Spolkové policie a České policie.

Výhody této přímé spolupráce na hranici leží přímo na ruce:

Zaměstanci, kteří ovládají více cizích jazyků mohou přímo a rychle komunikovat, používat německé a české informační systémy a tím efektivně a úspěšně potírat přeshraniční zločin. 3.141 (2004: 2.696, 2003: 1.825) žádostím mohlo být v posledním roce vyhověno.

S východním rozšířením EU 1. května 2004 byl na hraničních přechodech postupně zaveden systém „**ruka-v-ruce-kontroly**“. Při společných kontrolách pracují německý a český pohraniční úředníci společně, to přináší cenné efekty synergie: Policejní informační systémy mohou být společně používány a poznatky obou policí mohou být optimálně využity a komunikační cesty jsou nebyrokratické.

V roce 2005 byly na 17-ti z 19 přechodů realizovány „**ruka-v-ruce-kontroly**“. K 1. květnu 2006 budou tyto kontroly na přechodu Waidhaus/Rozvadov B 14 též realizované. Na přechodu Waldsassen/Svatý Kříž nemůže být kontrolní modus z technických a prostorových důvodů realizován.

V říjnu 2004 podepsaná smlouva mezi Policejním prezídiem Dolní Bavorsko/Horní Falcko a ředitelstvím Západních a Jižních Čech, české cizinecké a pohraniční policie **o společných akcích a výcviku na hranicích**, byla v roce 2005 prakticky realizována: Vedle jiného opatření se uskutečnilo 215 německo/českých cílových kontrol a 110 společných výcviků a postgraduálních kurzů.

Závěr

Též v roce 2005 byly hraniční kontroly důležitým příspěvkem k potírání ilegální migrace a přeshraničního zločinu. Tato úspěšná bilance ovlivní přípravné opatření, které je vzhledem k brzkému Šenskému vstupu České Republiky a s ním zrušení hraničních kontrol zapotřebí učinit. Personální a hmotné zdroje musí být včas přesunuty, musí být určeny přehledné jednací a rozhodující stupně, a nalezeny nové cesty přeshraniční spolupráce.

Zločinci jsou stále pohyblivější a zločin musí být v době bezhraniční Evropy a narůstající Šengenské oblasti vzájemně potírán. Naší spoluprací a kontakty s mnoha evropskými útvary policie, především s našimi přímými sousedy jsme dobře připraveni.

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Tiskový mluvčí

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