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KATRIN NYMAN-METCALF

# Borders in the new Europe

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RGSL WORKING PAPERS No. 15

RIGA 2004

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ISSN 1407-8732

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## Introduction

Development of the European Union (EU) has led to important changes to the concept and meaning of nation state borders in Europe. More borders now exist on the map of Europe than fifteen years ago - but they look different. The reason for more borders as such is clear: the Soviet Union, Yugoslavia, and Czechoslovakia have split up into several states, all with their own borders and border controls. The background to the different look of the various borders may be found in the changing political make-up of Europe. The external borders of the EU are strongly guarded, and some of the non-EU borders as well - whether in anticipation of one or another state joining the EU, or for other reasons. As for the internal borders between EU Member States, these have to a large extent disappeared altogether.<sup>1</sup>

On the one hand, within the EU nation state borders are increasingly losing their importance and traditional role. The so-called Schengen area without internal frontiers includes 13 EU members and, by special agreement also Norway and Iceland. For the EU candidate states, the Schengen system forms part of the *acquis communautaire* and, thus, of the rules they have to incorporate in the process of accession to the EU. This means that there will soon be several more states in the borderless Europe. Travellers and freight forwarders in Europe are noticing changes and new procedures with almost every journey. As well as the disappearance of intra-EU borders, the borders to states that are not (yet) members of the EU have been reinforced. High demands are put on the candidate countries concerning their border controls with non-member states on what will be the future external borders of the EU. As a result, in many instances border controls have become tougher and broader.

In fact, a borderless Europe is not a contemporary phenomenon. If you had ventured the ride from Athens to Helsinki in the 11<sup>th</sup> century, you would have encountered many dangers, but border control would not have been one of them. Border controls developed the role and design they still have at the

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<sup>1</sup> In EU documents, borders are often referred to as "frontiers", which does not have any different meaning, legally or otherwise. The word "boundaries" is also sometimes used, again with the same meaning.

time of the development of the nation state, especially in the 19<sup>th</sup> century. For goods, the application of rules and restrictions on entry and exit from different countries has a longer and somewhat more consistent history, than for persons. The multitude of rules, financial regulations, taxes, and other factors, that are linked to sale of goods are the background to this. Reasons for restricting or controlling the movement of persons are less obvious. They tend to be linked either to limits on immigration mainly against the backdrop of the economic situation in the country concerned or to restrictive and totalitarian regimes that wish to limit free movement as a goal in itself.

This article looks at what borders mean in public international law, as well as the changing look of borders in today's Europe and what this means from the legal and related practical viewpoint. It is the development and enlargement of the EU that provides the background and starting point for the article, with the issue seen mainly from the aspect of external borders of the EU. This includes the borders of Central and East European states, which will form the new EU external borders - seen from both sides.

## Borders in public international law

Borders have as their main function to demarcate and show the territory of a state, thus providing a basis upon which to apply different rules of national and international law. This includes not least the principle of non-intervention, and the right for a state to manage its own internal affairs and determine its own state- and political system. With the international system we have today, centred around the nation state, a need exists for nation-state borders of some sort. These territorial limits for a certain system and (in most cases) for a jurisdiction must be indicated in some way. They must also be guarded to such an extent that the role they fulfil can be guaranteed. When the system changes, the practical border-related issues also change. This is seen very clearly concerning internal borders between EU members, as compared with the external EU border. Nothing in public international law prevents states, through agreements with other states, from changing the traditional role of borders - including abolishing them *vis-à-vis* certain states. The borders stay as a demarcation of territory, but the traditional control function of the border is delegated or changed.

To know whether we need borders at all, their purpose must be analysed. Under the criteria used in public international law in determining what constitutes a state, borders feature even if not as criteria *per se*. A state must have a territory, a population, and control over that population on the territory. It is not regarded as absolutely necessary that the territory be definitely defined (i.e. even states that have border disputes are recognised as states), but the area must be known with some degree of certainty if it is to be seen as the territory of a state.<sup>2</sup> Questions of jurisdiction and the more complex question of sovereignty are all linked to the concept of territory, which clearly needs borders in order to be known. The International Court of Justice has in several cases dealt with border issues - both on land and in other environments. In such cases it has stated the importance of borders as the tool

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<sup>2</sup> The recognition in 1991 by a number of states of Croatia, while she was involved in a war and only had control over part of her territory, was a step away from the previous state practice that control over at least almost all of the territory, was a precondition for recognition as a state. The issue is discussed in e.g. P.Radan *Secessionist Self-Determination: The Cases of Slovenia and Croatia*, AJIA (48), 1994, pp. 183-195.

for determining the extension of other rights and obligations.<sup>3</sup> Thus no question arises about the importance of borders in their role of demarcating territory. As a state must be able to defend its territory (in different senses of the word), the defence and security aspects of a border are also relevant. Very simply put, a state must be able to know, tell, and show where its competence begins and ends.

Where borders are drawn on the map, and located geographically, can be based on many different factors. Looking at a map of Africa, it is easy to see how someone sat at a desk with a ruler and drew the lines of the borders between the countries. Many of these have very little to do with geographical, historical or ethnic factors. Even if a combination of such factors may lie behind the determination of a border, most borders are based on some form of political decision at some point in time. There are countries in Europe as well as elsewhere that have existed within the same borders for a long time. However, there is also no shortage of "new" countries, or of border disputes, on many continents. Although the role and function of a border is the same regardless of what it is based on, it may in reality be easier to defend (in theory and practice) and guard a border that has a strong historic and/or geographical basis. The older the border, the more likely also that its guarding and passage were long since worked out, and function according to set principles.

Agreements in whatever form, setting out the borders of a state, are seen as remaining in force even when the circumstances around an agreement change - the *uti possidetis* principle is an exception from the *rebus sic stantibus* principle. The fact that borders are normally seen as remaining, even when other agreements change, means that drawing a border is likely to leave traces beyond the factors that gave rise to the border in the first place. State succession normally does not affect the border as such. This idea has its origin in the acceptance by South American states of colonial borders at the time of gaining independence; African states later adopted the same view.<sup>4</sup> As so much of international law and the relations between states are based on

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<sup>3</sup> See e.g. the Preah Vihear Case, *ICJ Rep.* 1962, the Continental Shelf Case, *ICJ Rep.* 1978, the Mali-Burkina Faso Case, *ICJ Rep.* 1986 and the Libya-Chad Case, *ICJ Rep.* 1994. See also P-M . Dupuy *Droit international public*, 4<sup>th</sup> ed. Dalloz, 1998, esp. at pp. 39-40.

<sup>4</sup> P.Malanczuk *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> ed. Routledge, 1997 at pp. 162-163. See also the case Burkina Faso v. Mali, *ICJ Rep.* 1986 (Frontier Dispute Case).



borders and territories, certain stability is essential. The principle that borders remain unchanged is reflected in the Vienna Convention on the Law of Treaties<sup>5</sup> (Article 62) and can be regarded as an accepted principle of international law. That is not to say that there is no opposition to this principle. However, when disputes on border issues appear, they are more often based on disagreement concerning the actual factors that led to the border being drawn in one or another place, and also to the point in time when the border should be fixed, rather than on the principle of permanence of borders as such.

Delimitation of borders is a political decision, which is later followed up by actual practical demarcation of the border. The latter is a practical activity, which is supposed to follow clearly the delimitation decision. However, due to difficult geographic conditions or to any unclarities concerning delimitation, demarcation is not necessarily a simple activity. Indeed, the connection between borders setting out the territory and the different elements of international law tied to the territory, mean that demarcation may play an important role in itself as the link and the evidence between a fact and a legal role. However, agreements setting out where a border is to be drawn, normally accompanied by maps, are more important than markers on the ground. Even if, as mentioned, it is not unusual that border disputes take place - mainly of course at times and in situations where some changes occur to borders and territories - basically the border must be a determined line. No system operates with indeterminate border areas, even if for practical purposes examples exist of a so-called "no mans land" between the border controls of different states. The system in force for the law of the sea, with different zones, or the undetermined extension upwards of territorial sovereignty over airspace, has no equivalent on the ground.<sup>6</sup>

Examples abound of commissions, often called boundary commissions, being set up to adjudicate between states on border-related issues - that is, not merely the drawing of a border as such, but also other issues related to it. This may include what rights other states have on the territory of others. Such rights may exist based on various historical factors often combined with

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<sup>5</sup> Vienna, 23 May 1969, in force 27 January 1980. 1155 *UNTS* 331.

<sup>6</sup> The special issues concerning borders and border controls at sea (and to some extent in the air) will not be dealt with in this article.

geographical conditions. Even if not regulated in any general instruments of international law, a certain right of innocent passage over territories of other states has been recognised since Grotius' *De Jure Belli ac Pacis*, especially for land-locked states or states with geographically disadvantaged territories.<sup>7</sup> Natural events leading to geographical changes of a border area may pose special problems.<sup>8</sup> What, however, is a more common problem in determining borders in times of change in the identity of states, of which there are many in recent years in Europe, is: What time in history should determine where the border is located. The issue of intertemporal law - the acceptance of different rules of international (and national) law at different times - poses questions when deciding which borders are the ones that should benefit from the stability of borders as explained above. The Estonian insistence on reverting to the 1920 Tartu Peace Treaty borders with Russia, rather than the Soviet era borders, is one such example. In this case, as often in such circumstances, the final outcome is based on a new agreement between the parties. It is impossible to stipulate a general rule about how far or how little one should go back in time to decide what treaties and laws should be applied - this is bound to depend on too many different factors to be reduced to a simple rule.

As for movement across borders, international law does recognise the right of a state to decide who can be present on its territory. Special provisions may appear in international agreements or in national law, but in general international law there is no obligation for a state to let in the citizens of another state. In theory it may be possible to argue that a state is not under any obligation to let in anyone at all, but this would be almost unsustainable even from a theoretical viewpoint, as no normal relations between states would be possible in such a case. As for letting people out, human rights obligations (which in modern international law are increasingly regarded as binding on states as part of general international law) do stipulate the right for people to leave their countries. As a state is always responsible for its citizens, any attempt to throw out citizens (by taking away their citizenship or by other

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<sup>7</sup> D.J.Harris *Cases and Materials on International Law*, 4<sup>th</sup> ed., Sweet & Maxwell, 1991 at pp. 235-238 with cases quoted there, the most important being the Portugal v. India Right of Passage Case, *ICJ Rep.* 1960.

<sup>8</sup> Like the Chamizal arbitration between the USA and Mexico in 1911 following the change of course of the Rio Grande, 5 *AJIL* 782 (1911).

means), or to refuse to let them back in, would be a clear violation of international law.<sup>9</sup>

Human rights also have an impact on border-related issues in another way. Border control entails a need for checks on persons, for use of force - or at least certain coercive measures and other such activities against persons - that may interfere with personal freedoms and liberties. Thus border control and how it is carried out is - and by necessity should be - influenced by human rights considerations. In all authorised uses of force and constraints against individuals, human rights considerations should come into the picture in any state which regards itself as a state governed by the rule of law. One issue, which needs addressing in legislation, is that the instances and circumstances in which force can be used against individuals must be clearly defined. Both officials, and persons who may be subject to coercive measures, must know in what circumstances this can happen, what the limits are, how they can complain, and other related issues. Thus borders in public international law can be seen from at least two different angles: the importance of borders for demarcation, and the requirements existing on how the border is to be enforced and policed.

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<sup>9</sup> Which unfortunately does not mean that this does not occur. Many totalitarian states of different persuasions have used the instrument of stripping citizens of their citizenship and expelling them from the country as a form of punishment. This violates e.g. Article 12 of the International Covenant on Civil and Political Rights (New York, 19 December 1966, in force 23 March 1976, 999 *UNTS* 171) and Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, in force 3 September 1953, *ETS* 5-1950, the Strasbourg Protocol 16 September 1963, in force 2 May 1968, *ETS* 46-1963).

## Borders in Central and Eastern Europe

The motivation for writing about borders, especially in Central and Eastern Europe, is of course that due to the recent turbulent political situation there, many events and factors have influenced where borders are drawn, what role they fulfil, and how they influence relations with other states. The changing role of borders in a free Europe, as compared to that divided by the Iron Curtain, also means that states must address various legal and practical issues connected with the different role of borders. If most issues related to the actual location of borders, although often controversial, have been settled in some way or other, the use of borders may still require further work before it meets the standards that should be expected in Europe today - within the EU or outside of it. A border fulfils an important function in international law and for many aspects of national law, and thus must be regulated by legislation. At the same time, crossing a border is a notably practical exercise, and theoretical reforms alone will not entail any change.

EU candidate countries are undoubtedly influenced in a very direct manner by the EU view of borders, and its border-related demands. They have to meet these demands before they can be considered as members, so their outer borders to non-EU members will change, often quite dramatically. This will be especially so when they join Schengen, which will be a certain number of years after joining the EU, and when each individual country is ready to meet those obligations. Also other countries that are not candidates for membership may be affected by EU rules and demands because of their extensive trade and contacts with the EU and/or because of harmonisation requirements in agreements with the EU, such as the Partnership and Co-operation Agreements (PCA) with former Soviet Republics. EU assistance to border controls through practical means, education, and legislative assistance also means that the EU is in the process of putting its mark on practically all borders in Europe.

The situation in many countries in transition is that in normal cases, that is, ordinary crossing of a border, the border control functions well. However, the situation may be different in special cases, and there may be inadequate safeguards against abuse of power by the border services - in case this occurs,

which would typically also be in extraordinary cases. In Central and East European EU candidate states, reform of border control has been going on for some time and most matters have been dealt with by now. Joint border controls with modern equipment have been set up, with EU support, in many candidate countries (as between the Baltic countries), where travellers only need to be checked by the state of entry. Borders in states to the East of what will be the enlarged EU are still experiencing problems, which are of direct interest to the EU as this will be the external border of the EU in the relatively near future.

The challenge in Central and Eastern Europe is to get away from the mentality in which borders are seen as instruments for keeping people in - not just in the geographical sense. With strict borders and strictly limited ways of crossing them, citizens could be held within certain confines and knew little of the world around them. That kind of "border control" has also disappeared, thanks to factors including modern technology, and better communications. Today, even without leaving your country you can acquire information about what goes on in other countries. Keeping people in, in the mental sense, has become much more difficult. To go from there to actually easing physical travel as well is not necessarily a simple step. Any legal change must take into account that mentality may still be an obstacle to a smooth functioning of border crossings in certain places. The law must of course be adequate and provide the safeguards necessary, but a change of law in itself will not be enough. Border legislation is by necessity restrictive and includes policing powers of some sort. It is hard indeed to design legislation that of itself sets the limit between permissiveness, to allow for flexibility, and restrictiveness, to ensure law and order. Legislation needs to be coupled with competent personnel to implement it. The need to get away from the fear of free movement of people - whether it is citizens leaving or foreigners entering - requires a change in mentality. This is happening, it should be strongly encouraged and supported, but can probably only be gradual. Many examples exist of remnants of an authoritarian mode of thinking in legislation concerning border crossing. Examples would include former Soviet states, and also

legislation in states that require all foreigners to register.<sup>10</sup> Such legislation used to be normal in most European states, but now in Western Europe most people would find it unacceptable to have to register with the authorities if they are only on a short visit to another country, or for citizens to have to register any foreign guests. States must move away from the control mentality and restrict controls to what is objectively needed for the security and proper functioning of the state. That this latter only means a minimum of control of foreigners that are not permanently in the other state, is shown by the many examples of non-restrictive states that do not encounter major problems; and conversely also by problems with terrorism and serious crime, including by foreigners, in restrictive states.

One problem with the legal regulation of border issues in many Central and East European states and the states of the former Soviet Union is that border-related matters are found in very many different pieces of legislation. This makes an overview difficult, and the regulatory framework non-transparent. The great importance of borders in police states, with an interest in keeping their citizens in, is reflected in this legacy. The detail given in many laws is also a reflection of this. There was no room for discretion when it came to ensuring that the state had total control over who entered or left the country. As with all overly detailed regulations, the consequence will be that either there is really no flexibility in the application or that the officials who apply rules start ignoring them. In Central and Eastern Europe under the Iron Curtain era it was mainly the former that happened, recently it has tended to be the latter - until reforms are introduced. In many Central and East European countries there are special laws on the border, including setting out how it is demarcated, and guarded. The Border Guards and their role, authority, and tasks are often to be found in another law, with customs and immigration also regulated separately. In Western European countries it is usual to find fewer pieces of legislation, and also fewer provisions with less detail (although this varies from country to country throughout Europe). With well- and long-established borders, which have for a long time been subject to a functioning border crossing regime, the need for detailed provisions is not so great. In

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<sup>10</sup> For example the laws in Russia, Belarus and Ukraine and also Bulgaria. Interestingly, such requirements are less common in other parts of the world (outside Europe) even in some not totally free and democratic regimes.

recent democracies (and especially in states that have only recently obtained or regained their independence) the border issue is perceived to occupy a different kind of importance.

The needed change of mentality regarding borders cannot take place independently of legal reform - just as legal reform will not in itself be sufficient for a change of mentality. Legal reform may happen relatively quickly, not least since international examples are available (even if foreign laws should never be adopted completely into other legal systems, without regard for national specificity). It must by necessity also be coupled with training, so the new mentality of the new laws permeates down to the working level. Moreover, using military conscripts to carry out border control at border crossings (and not just the monitoring of the "green border", i.e. the border line as such) is not beneficial to the professionalism of the border personnel.

It has long been recognised in the immigration legislation of many countries that citizens in border regions can be treated differently, and benefit from a simplified border regime. This is particularly so when borders may be more or less arbitrarily placed without any geographical characteristics; and especially so for new borders, where it would otherwise be too big an interference in the lives of people. Such interference is in itself nothing rare, however: if the Berlin wall was the most obvious and visible line between neighbours, other such lines do exist as well. However, specialised border area regimes are not necessarily compatible with EU rules. In their efforts to strengthen the external borders of the Union, potential members that have such regimes (for example, Estonia and Latvia with Russia) have to abolish these to meet EU requirements. This need to abolish functioning simplified procedures for border-region inhabitants is seen as a problem in many parts of East and Central Europe, where one state is applying for EU membership and has to adapt to EU rules, whereas the other is still far from EU membership, if indeed it will ever be eligible. The EU view may in some cases be too inflexible. Simplified regimes may be efficient and beneficial, so it is worthwhile to study if and how they can be maintained, provided sufficient safeguards are installed. It is not an unusual fear in East and Central European states that membership of the EU may in some ways weaken their ties to the east, to non-EU neighbouring states. If the first desire after the fall of the Iron Curtain was quickly to become part of the West and nothing else, with time the

usefulness of different ties with the East has also shown itself. The need to abolish special visa regimes may involve all sorts of negative consequences, for trade but mainly for personal relations. But having more open borders fits badly with the striving of the EU to do what it can to keep illegal immigrants and illegal goods from, e.g., the former Soviet Union, out of the EU, so the dilemma becomes apparent.<sup>11</sup>

A special case appears in the shape of the Kaliningrad enclave. This has been the subject of EU discussions with Russia, together especially with the most affected candidate countries: Lithuania and Poland. The EU showed a rather imaginative approach in trying to come up with a solution for this rather special case and doing so before the states concerned actually become EU members. For the purpose of EU-Russia negotiations, the EU Council requested that for the purpose of transit to Kaliningrad, Lithuania should apply its laws on border control in a flexible manner, although retaining the right to refuse entry and being assured that the special situation would be taken into account for its Schengen membership.<sup>12</sup> Following the negotiations, in April 2003 Regulation 693/2003 was adopted establishing a specific Facilitated Transit Document and a Facilitated Rail Transit Document for the situation of a third country national (following the enlargement) who must cross the territory of one or several (new) Member States to travel between parts of their country. These documents as described in the Regulation can act like transit visas in specific situations.<sup>13</sup>

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<sup>11</sup>As pointed out in a survey in "The Economist", another issue also plays a part in the discussion on borders: for those (Poles, in the specific example given) who recently were on the wrong side of the Iron Curtain, they are reluctant to have a new such curtain even if it is "softer". *The Economist*, October 27<sup>th</sup> 2001 special survey of Poland.

<sup>12</sup> Bulletin EU 10-2002, 1.6.93 Council conclusions on Kaliningrad.

<sup>13</sup> Regulation 694/2003 sets out the uniform format of the Facilitated Transit Documents.



## Free movement of goods and persons in the EU

While free movement of goods and persons is an essential feature of the EU, the phenomenon of free movement as such is not only restricted to the EU. With global trade and globalisation in its different shapes and forms, more and more goods as well as persons move across borders, usually with less and less formality. Today's borders are not there to keep trade, manufacturing, services or other such things within a confined territory. At the same time, however, they are still there to help ensure that nation states can enforce certain rules and norms related to the movement of individuals or items across borders. The only example of a number of countries giving up this possibility almost completely is the EU, with its customs union and area of free movement. Provisions in the original treaties creating the European Communities - later to become the EU - stipulated how goods, workers, services, and capital could move freely. Secondary legislation, treaty amendments (especially concerning capital) as well as the interpretations of the European Court of Justice have over the years provided flesh on the bones of these articles, leading to a developed system of free movement. For example, the definition of persons allowed to move freely is now much wider than that of workers only. The treaties said less about the actual borders that these goods and persons could move across.

Article 14.2 of the Treaty of the European Communities (EC) states that: *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.* This phrase has been interpreted by most member states of the EU, as well as by most commentators, as meaning what it says - that the EU should be an area with no internal borders. Most of the EU we can see today also provides a practical example of what that means. This has already been the case for goods for some time - customs union and free movement of goods was an early success of the then European Communities. It is also becoming increasingly true for persons. Travel is easy from north to south or east to west in the continental parts of the European Union without encountering any border control. You may board an aircraft in Rome and step out in Helsinki, straight into arrivals without anybody asking for

your travel documents.<sup>14</sup> But the United Kingdom interpreted the article differently, as really only restating the existing norms for free movement. This led to creation of the Schengen system, allowing other member states to move towards a borderless Europe.<sup>15</sup> In the Amsterdam Treaty, the system became part of EU law proper, with exceptions for the UK and Ireland.<sup>16</sup> The relevant rules provide for abolition of border controls on borders between the participating EU states, and for various other measures to compensate for this, including information exchange and police co-operation. Only in emergencies can states re-introduce border controls. Controls may still to some extent be carried out at borders, but only if there are special reasons or occasional random checks.<sup>17</sup>

Looking at the issue first from the viewpoint of goods, there is no question that the functioning of trade-flow across borders is crucial for the success of a country. It is indeed hard to imagine any prosperous state in today's world without external trade. Many factors determine which states deal with which others, but one factor without doubt is how easy it is to do business. Trade is one way of becoming part of the world community, and in Europe of becoming part of the EU or its trading environment. Secondary rules and administrative provisions abound on border-related issues, especially in connection with customs. Customs legislation is indeed voluminous, and adapting to it and ensuring its proper implementation is an arduous task for any state. Given the current method of organising these issues, there is no identifiable way that this could really be changed. Customs legislation as such may not be so complicated, but what makes it difficult to handle is the necessity for detailed rules such as categorising items. To get this right in all cases is not easy at the best of times, while for states that have previously had very little free trade it is a cumbersome thing to have to learn. At the same time, as mentioned, the structure of the customs system as it stands today is

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<sup>14</sup> This is without taking into account the security measures by most airlines in checking that the name on the ticket is the same as that on a piece of identification.

<sup>15</sup> Because of special rules between the UK and Ireland on movement of persons, etc, Ireland also had to stay out of the co-operation of the rest of Europe in this respect.

<sup>16</sup> And so, for different reasons, did Denmark.

<sup>17</sup> In Case C-378/97 *Wijssenbeek* [1999] ECR I-6207 the issue of border controls in the EU and the effect of citizenship is highlighted. The case also denied direct effect of Article 14.2. This is discussed in Reich and Harbacevica *Citizenship and Family on Trial: a fairly optimistic overview of recent court practice with regard to the free movement of persons*, CMLRev 40, 2003, pp. 615-638.

such that it would be difficult to abandon this categorisation and change the structure of the system to any significant extent.

If customs tariffs are complex and detailed by necessity, their application does not have to be made more difficult than is absolutely needed. This means that frequent changes of customs tariffs and regulations should be avoided, especially as it may be difficult to ensure that all concerned are informed of such changes in a timely and accurate manner. For businesses to plan their trade according to certain rules in force and then for these rules to suddenly change can be highly disruptive. Phytosanitary and veterinary controls are such as may be needed and legitimately carried out on borders. In the normal flow of traffic between e.g. EU members even such controls should be kept to a minimum, but the need for them in special situations can become evident, as in connection with foot and mouth disease in the United Kingdom and elsewhere in Europe. The Court of First Instance has recently had to conclude that a continuing lack of harmonisation may result in a continuing need for some checks when crossing a border, even within the EU.<sup>18</sup>

Another area of legislation, which may be relevant in this context, is transport legislation and related issues. With ever-decreasing border controls or other obstacles to movement across borders, the means of achieving this movement in practice takes on greater importance. Many different international agreements and rules exist concerning different types of transport, to enable the smooth functioning of transport, and still also to some extent to safeguard national interests (such as cabotage rules for sea and air transport). In some events the EU has taken over the role of states in matters related to other states. For example, the EU external border may be the relevant border if different transport-related issues are determined from a border onwards.<sup>19</sup> Furthermore, in relation to transport, environmental regulations come into the picture. If looking at the movement between states and across borders in an all-encompassing context, then all such rules play a part. The Central and East European states already to some extent form part of this network and may do so more in the future. Transport is an area in which

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<sup>18</sup> Case T-170/00 Förde-Reederei GmbH v. Council and Commission, decision on 20 February 2002. The case as such concerned the legality of abolishing tax free sales, which the Court upheld.

<sup>19</sup> The EU is also the relevant entity in the so-called Open Skies aviation negotiations with other states, Case C-466/98.

the EU has taken a gradually growing interest, now covering all forms of transport.<sup>20</sup> A number of framework programmes administered by the European Commission are in place to cover transport from a multitude of angles, including such diverse issues as space-based transport related systems like GNSS, urban transport, intermodal transport, and aeronautical telecommunications. Transport is seen from technical, practical, and environmental viewpoints - with the movement issue (such as borders) playing a smaller role but still clearly of importance to enable its other aspects to function as intended.<sup>21</sup>

For the movement of EU nationals, rules on social benefits, education, recognition of diplomas and similar matters were a necessary corollary to the movement provisions as such, even if these rules developed comparatively slowly. From studying the EU context, it can thus be seen that many different areas of legal regulation are covered by EC legislation, quite apart from mere rules on free movement as such. To enable and ensure genuine free movement, harmonisation should include all issues relevant from a functional point of view, and not just apply to the laws defined under one or another heading. This is why the creation of an area without internal borders in the EU entailed the need for legal reform in so many sectors, including matters as diverse as transport, environmental law, or immigration and asylum law. The fact that even within the EU certain areas of law - although linked in some way to movement across borders - remain mainly in the national sphere is more an anomaly than the harmonisation of rules.

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<sup>20</sup> The EC Treaty originally covered rail, road and inland waterway transport, with the possibility to extend to other areas, Article 80 (formerly 84). The extension of EC law to also other types of transport is still ongoing.

<sup>21</sup> The Directorate General DG VIII/E for transport publishes a Transport Research publication series in the framework of the Transport Research and Technological Development Programme that gives details on the different aspects of the programme.

## Borders to keep people out

Unfortunately the asylum policy of certain states, not just or even mainly in the EU, today shows the same kind of considerations as did border policies in the Iron Curtain era. However, it is now a question of keeping people out at all costs, rather than forcing them to stay in. The treatment of the mainly Afghan refugees taken on board a Norwegian freighter in the summer of 2001 is one example that comes to mind.

For the EU, the abolition of internal borders so that people can physically move freely within the area of the EU, just like goods, has also meant that issues related to third country nationals have been brought into the EU sphere. After initially being regulated in a special manner under the Third Pillar of the Maastricht Treaty, the Amsterdam Treaty (in force 1999) brought these matters into the First Pillar and EC law. This change was more than a transfer of provisions from one treaty to another - it also meant that asylum and certain other immigration issues became part of common EC/EU issues, to be dealt with in an all-EU context. A new section in the EC Treaty (called Title IV Visas, asylum, immigration and other policies related to free movement of persons) sets out the gradual transfer of such issues from Member States to the EU. This is in line with the border of the EU being the one border that to all intents and purposes counts *vis-à-vis* the external world.<sup>22</sup> Prior to the Amsterdam Treaty, Member States regulated certain issues related to third country nationals through agreements, negotiated within the framework of the EU Third Pillar but in form normal inter-state agreements. Developed co-operation also existed in working groups and other fora to avoid negative effects of different national laws and systems.

Many NGOs and other groups have accused the EU of becoming a fortress that does all it can to keep non-EU nationals out, suggesting that the transfer of immigration issues to EU competence is just a way to make it even more

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<sup>22</sup> Although there are still limitations on what it is that falls within EC/EU competence, this must be based on the EU provisions themselves. Before the entry into force of the Amsterdam Treaty (in May 1999), member states still held to their right to use the inter-governmental procedures under the Third Pillar unless issues were clearly within EC competence, even if this meant a narrow interpretation of the Treaty, as shown in case C-170/96 regarding airport transit visas, decided on 12 May 1998. The issue to a large extent dealt with interpretation of when a border was crossed. Even if the competence of the EU is now larger, political will of the Member States is still needed to give full force to common policies. The issue of migration policies as such is, however, beyond the scope of this article.

difficult for people to get into the EU. However, EU policies can also be seen as a means of simplifying for the benefit of legitimate asylum seekers and other immigrants as well. Without giving any view on this primarily political issue, it can be regarded as uncontested that immigration-related issues are of great importance in Europe today - both in the sense of large numbers of people moving around and as far as political agendas are concerned. Legal as well as illegal immigrants are of concern. Especially for the latter, border controls take on direct importance. It is by nature difficult to form a clear picture of the number of illegal immigrants in a country, but estimates put the number of illegal immigrants to the EU at about 500 000 per year.<sup>23</sup> The number varies considerably from country to country, depending on geographical location but also to an important extent on the fact that it is harder to get in to some states than others - even with supposed harmonisation, border controls are not equally watertight throughout the EU.

The issue of an EU border police that would replace the national border police has been discussed in more depth, most recently at the June 2002 EU Seville summit dealing with immigration. Given that EU police co-operation, through the special organ of Europol and otherwise, still mainly centres round co-operation rather than joint functions as such, it is also likely that actual border police co-operation is some way off.

The right to seek asylum is recognised in international law, and many states have also through conventions bound themselves to accept refugees if they meet certain criteria. The functioning of asylum legislation, international law and its application in national legislation, requires that borders are not used to keep people out to the extent that asylum applications as such will be impossible. Asylum legislation is new to most Central and East European states, although many of them have already for some time found themselves as important asylum countries or transit states. One of the elements on which training as well as attitude changes are necessary among the staff who fulfil different functions on borders, is that asylum seekers should be treated in a manner which respects international law and which enables them properly to exercise their right to apply for asylum.

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<sup>23</sup> Figure taken from *The Economist*, June 15<sup>th</sup> 2002.

## Borders and documents

With the early institution of border controls for the purpose of checking individuals, travel documents were also created. The issue of passports or other travel documents is closely related to the question of border controls, as each presupposes the other. In the general debate, misconceptions often arise regarding passports, and the terminology used in that context. The passport is documentary evidence of citizenship but not a prerequisite for it. Under international law, persons are citizens according to legal criteria for this status even if they have never applied for a passport. If a person holds multiple nationalities, the question of whether this will be permitted by the different states of nationality has no direct link to whether the person also holds one or more passports. It is normally considered that the question of who is a citizen of a state and how this status is given, is a matter of internal law, to be determined by each country itself.<sup>24</sup> The same is true for the question of allowing multiple citizenship or not. However, the fact of citizenship being the criterion by which the “belonging” of individuals to states - and thus to subjects of international law - is set out, means that this question cannot just be one of national law, but also has important ramifications for international law. General principles of international law would most likely prohibit a state from denying citizenship to certain individuals connected with it and its territory, just because they did not comply with special procedures for passport application or something similar. Depriving persons of citizenship and making them stateless is prohibited by international law. At the same time, since public international law does not set out criteria and detailed rules about citizenship, documents for citizens and others (apart from certain special cases regulated in international agreements, such as refugees), or the details on rights of movement across borders, the questions remain internal issues - albeit set against an international background.

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<sup>24</sup> See on this e.g. Malanczuk, *op. cit.* n. 4, pp. 263 onwards. The Nottebohm case (Lichtenstein v. Guatemala, *ICJ Rep.* 1953) regarding a genuine link for the provision of an internationally recognisable citizenship is often quoted in international law books, but its continued relevance may be discussed as multiple factors may decide what a genuine link is in a world where many people will have changing links with many countries during their lifetime. In the EU, even if there is a Citizenship of the Union, this is of subsidiary nature to national citizenship and the citizenship laws are in the competence of Member States, see Case C-369/90 Micheletti [1992] ECR I-4239.

Some states have systems of different internal and external passports, with a requirement for all to have an internal passport, which may be called either internal passport or identity card. The terminology of internal passport was used in many of the former Eastern Bloc states, in which it was also very difficult to get an external passport. Requirements of having identity documents do not *per se* conflict with any human rights such as a right to integrity, if the use of such a card is proportional to its aims. Most people would assent to showing identification to withdraw money from an account, and to performing other transactions where the identity of the person is important. Similarly, most people would not assent to showing identification to cross the street. By contrast, the need to have a travel document to be allowed to enter another state is one of the most widely recognised uses of identity documents. It is accepted in international law that states check the movement of people across their borders (although, as mentioned, in historical terms this is a relatively new issue), from which can be deduced that it is also a requirement that these people should prove their identity. The passport in its present shape and form has been developed as a practical means of fulfilling that requirement. Passports tend to look similar in all countries and although also the design of the passport is a matter for internal rules, its role as an internationally recognised document has led to actual harmonisation and certain common requirements, not least regarding protection against forgery. An effective mechanism exists for ensuring adherence to international norms through the actively used possibility for different states to refuse to recognise documents that do not meet these norms. States have an obligation to provide documents that meet certain standards, as the system is dependent on this. If one state were to issue travel documents without any check on identity, then the current system - where states can trust the passport - would not be workable. In the fight against terrorism, which has assumed unprecedented importance after the spectacular attacks against the US in September 2001, the importance of high standards for issuing travel documents as well as for checking them at borders has taken on a new urgency.

Rules on identity documents, which may or may not be related to rules on travel documents, are another area of concern for border-related issues. Restrictive rules in the laws on travel documents, such as the rule in Russia that persons applying for a passport must state the reasons for doing so, can



act as obstacles to movement. As the right to move freely, including leaving one's country, is in reality often dependent on a person's ability to get a travel document, this latter becomes a human rights requirement, even if that in itself is not listed in international conventions. Co-operation in preventing and detecting forged documents, information exchange about suspected individuals, and other such co-operative international measures, are more effective safeguards against terrorism and other crime than restrictive practices in issuing travel documents.

## Functioning border controls - some ideas for improvement

Borders within the EU are disappearing, with all the consequences discussed above. This is the reality Central and East European EU candidate states have to adapt to. At the same time, the EU is supporting border controls and encouraging, advising, and insisting *vis-à-vis* applicant countries and other states with which it has relations, that border controls on such borders as remain should be functioning, secure, and efficient. This is sometimes presented as just the desire to keep out the unfortunate people who are not (yet) part of the EU. Although EU visa and immigration policies may justly be criticised for often being too strict, this would, however, still appear to be too negative a view of the issue. The need for strong border controls actually fits well into the EU system, as has also been shown to some extent above. Internal free movement cannot function if there is no trust between the states involved in it. The long process of joining the EU shows that it takes time and effort to build up this trust. A weak link in an external border, towards a country that has not yet proved that it fits into this system of trust, could undermine the entire system. Strong external border control will remain a necessity as long as not all neighbouring states can be expected to live up to the same demands.

Border controls exist to meet many different requirements, and perform many functions - some of which may even appear contradictory. Consequently the demands put on borders from e.g. the EU are also based on widely differing considerations. Facilitating trade and making illegal activities more difficult appear to raise very different issues, but still both these functions should be performed at the same time and place. Fashioning border controls to meet such different requirements is not easy, but nevertheless important. Borders themselves also look quite different. A border may be a land or maritime border or indeed an airport or seaport as well. These latter may of course be located far from the actual frontiers of the state, but if they may be points of entry to the county they are also external borders. Borders normally have some authorised entry points, but there may be long stretches without any such points, while the entry points may be located within the territory rather than

at the actual border.<sup>25</sup> The importance of a functioning border control is to be seen in the context of crossing the border at an entry point - for the rest of the border its effective control to prevent illegal crossing is a matter for security forces of the state, aided by whatever technical-practical methods may be used - if any.

What simplifies procedures at borders, from the customs point of view, is various institutionalised mechanisms. The very basic red and green channel system is one such mechanism and introducing this in Central and Eastern Europe and the former Soviet Union is in itself a step on the way to better customs procedures at borders. There are existing models of best practice at borders to deal more efficiently with the border crossing as such and especially customs-related matters. To quite a large extent such best practice simply consists of the practical structuring of the border crossing, at what (geographical) point different controls are carried out, what the premises look like, and so on. Many changes would need no amendments to legislation. In this context, the resources and training available with EU or other international funding can be a big help in actually imparting knowledge that can be applied relatively simply and without great cost, but with considerable benefits. It should not be forgotten that efficiency is not just a good thing in itself; it also helps prevent corruption and other such ills. If the legal system functions well, the interest in finding ways of circumventing it just to save time disappears, and the possibilities of corruption lessen. In the customs context, the law enforcement agencies can concentrate on serious smuggling instead of on petty crime, such as someone just wanting to pay to get across a border faster and with less paperwork, albeit with goods legal as such.

It is also important that it is possible to differentiate between different groups at the border. A normal traveller - maybe even a daily commuter - without much baggage, should be able to cross faster and more easily than a truck loaded full of various goods for which there may be, e.g., import quotas, or tax restrictions. This arrangement is in some ways mainly a practical arrangement of different lanes, or even different border crossing points, but may also necessitate some legal changes. It is well established, in relation to

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<sup>25</sup> There is a discussion on this for the EU context in the Opinion of Advocate General Fennelly in his opinion on case C-170/96 (Airport Transit Visas case) delivered on 5 February 1998, especially in paragraph 31 onwards.

customs legislation and customs procedures, that not all border crossings of a state need have full capacity for all types of customs-related issues. It is not unusual that there are border crossings open only for normal travellers and not for cargo, or that certain goods have to be cleared through certain ports or other border posts. For EU countries, the special points of entry and exit have to be seen in the EU-wide, and not the national, context. This practice permits a concentration of knowledge in connection to special issues; taking the matter on the EU level, the concentration and expertise can be even greater. At the same time, if this practice were to be too widespread it would have a restrictive effect on free movement of goods. Considered application is thus needed.

Various services operate at borders. It is not just the border guards as such who check the movement of persons and whether they have the appropriate travel documents. Customs officials check merchandise, and these or other officials are also present for tax purposes, to check any possible illegal activity, for veterinary and phytosanitary control, and so on. The functional division of tasks and the administrative organisation of the border service vary between countries, so that it cannot be said that a common standard, or a European practice, exists. In some cases, the police guard the border - special sections or ordinary units. There may also be a special border guard unit, which may or may not be part of the military structure. This is the most common solution in Central and Eastern Europe, where the border guards are often structured as a military unit although they may not form part of the ordinary military structure. The way the guarding of the border is practically managed is relevant. The border guards carry out a law enforcement function, implying a possible use of force, which is not without importance if they are a military unit, a police unit, or a unit with its own status within the state administration. This may influence its possibilities to use force, appeal against their decisions, and the like. In any case, as for all use of force against individuals, it is important that there are clear rules. Rules are needed on, e.g., when force can be used, proportionality, in what context, how the decisions are made, how they are appealed, and who can take the decision. Transparency of decision-making and appeals is also important - as it always is, but especially so when use of constraining measures against individuals may be used.

One way of making control more efficient is to allow different services to perform each other's functions. This saves money, as it allows for fewer persons on duty so that funds can be re-allocated to allow more crossing-points to be open. This should not mean a reduction of competence or efficiency, but there is no real reason why it should. In many Central and East European states, there is a fear of allowing this, a kind of jealousy between different services, which is often not productive. The law should allow for co-ordination and co-operation. For officials carrying out certain law enforcement functions, a legal basis should exist for doing so. If the rules are differently formulated (as they most likely are) for when a police officer or border guard can open and search a bag and when a customs officer can do it, then to let them do each other's work the law must be framed so as to allow it. This should not necessitate any important or complex legal changes. Co-operation across borders, between the services of different countries, could also of course mean important efficiency savings as well as being good for all sorts of other reasons. It can most efficiently be done by having just one border control, on one side of the border. This should be based on an international agreement and must be in compliance with any obligations that the countries concerned may have. EU membership and its special border arrangements will pose special demands that may actually make agreements with other countries more difficult - as is also the case for special border area regimes. In this context, it is especially important also to pose the question of what the function of borders is. If a border is seen as a friendly administrative limit between states, there is no reason to limit co-operation over that border. If a border is the limit between hostile or unfriendly parties, the situation is of course different.

It may be tempting to see border crossings as a way of earning revenue for the state. It cannot simply be said that it would always be against legal principles that a fee is charged, provided it is for actual services. There is EC legislation as well as case law on different kinds of fees, establishing that they are not fees with an equivalent effect to customs duties or measures with an equivalent effect to quantitative restrictions, provided they are genuine fees. The fee must represent actual compensation for a service, or something else of value. Again, a differentiation must be made: to charge a fee from everyone wanting to cross a border is not legitimate. States should not do anything to discourage movement across borders provided legal requirements are met, and

charging is obviously a possible disincentive. The cost of border control and border formalities should come from normal state revenue. Fees should be levied only for special measures that may be justified for certain types of goods.

Modern border legislation is clearly necessary for the functioning of borders, although legislation is never everything. At the same time, the situation should be avoided in which legislation may hinder the efficient functioning of control. Excessive requirements in legislation can hamper effective control and make its day-to-day facilitating more difficult. The multitude of different pieces of legislation, as mentioned above, is one issue that makes efficient border controls more difficult, and something on which rapid reform should not be too difficult. Training is in many ways even more important than legal reform, and in the best case these should of course go hand in hand, always followed by a change in mentality as well. An essential feature - which falls outside of the scope of this article - is increased police and other co-operation, to compensate for the abolition of borders. In this era of increasing terrorism and with serious problems with international organised crime, it is extra important to safeguard the advances made toward a functioning borderless Europe and not to give in to the gut reaction of strengthening border controls again. With increased co-operation and co-ordination, negative effects of free movement can be jointly combated, even if the excessive border controls of the 20<sup>th</sup> century remain relegated to history.

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