

SANDRA LAVENEX

# Safe Third Countries

Extending the EU Asylum and Immigration Policies  
to Central and Eastern Europe



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Central European University Press

Published by  
**Central European University Press**

Október 6. utca 12  
H-1051 Budapest  
Hungary

400 West 59<sup>th</sup> Street  
New York, NY 10019  
USA

© 1999 by **Sandra Lavenex**

Distributed in the UK and Western Europe by  
**Plymbridge Distributors Ltd.**  
Estover Road, Plymouth PL6 7PZ  
United Kingdom

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ISBN 963-9116-44-0 Paperback  
ISBN 978-963-386-493-7 ebook

**Library of Congress Cataloging in Publication Data**  
A CIP catalog record for this book is available upon request

Cover design by **Picture Elements**  
Printed in Hungary by **Akaprint**

**To M. I. H.**



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# Preface

This book analyses the bilateral and multilateral processes by which the countries of Central and Eastern Europe are gradually being incorporated into EU asylum and immigration policies. The extension of the EU refugee regime is on the one hand caused by the external effects of Western European policies, and on the other hand has become an integral part of the EU enlargement process. Highlighting the complex entanglement of domestic policies, European co-operation and international relations, this book analyses these processes from the point of view of their effects on the Central and Eastern European countries, the project of Eastern enlargement and the principles, norms and rules of the international refugee regime.

The book pursues the double goal of presenting a comprehensive introduction to contemporary refugee policy in Europe and of highlighting the dynamics of EU eastward enlargement in this policy field as follows. Chapter 1 presents the issue of refugee policy in an international relations context, focusing on its historical development, main legal provisions, and its normative and institutional foundations. Turning to the European context, Chapter 2 analyses the emergence and evolution of the European refugee regime, and its principal normative and institutional elements. Chapter 3 analyses the extension of EU asylum and immigration policies to the countries of Central and Eastern Europe with special reference to the processes promoting the exportation of this 'acquis' to the CEECs at the intergovernmental level, in the activities of international organisations

and NGOs and in the context of the pre-accession strategy of the European Union. Using a country-specific approach, Chapter 4 goes on to explore the way in which the CEECs have adopted the European 'acquis' and adapted to the European asylum and immigration paradigm in an attempt to simultaneously 'join Europe' and to adjust to their transformation from being countries of emigration to countries of immigration. Chapter 5 examines the comprehensive impact of the extension of the European refugee regime on the principles, norms and rules governing international co-operation in this field. Finally, the conclusion recapitulates the findings of the previous chapters against the backdrop of a future eastward enlargement of the EU and the need to accommodate immigration controls with the demands of international human rights norms.

My thanks go to all those who have helped me with the collection of data and who were willing to share their insights into these processes with me. I am particularly grateful to Andrea Lenschow and Dirk Lehmkuhl for their helpful comments on earlier versions of the manuscript, to Heather Grabbe for widening my knowledge on the question of EU enlargement, to the participants of the 1998 European Forum on International Migrations at the European University Institute in Florence for fruitful conversations, to Clare Tame for the enriching editing, to the European University Institute for offering me a splendid working environment, and, finally, to all friends who have supported and encouraged me in this enterprise.

# 1 Refugees and International Relations

For almost four decades, the movement of persons from and through Central and Eastern Europe to Western Europe was only possible on an exceptional basis. The metaphor of the 'iron curtain' vividly expresses this repression of free movement. Under the Communist regimes, citizens of Central and Eastern Europe were prevented from moving, or even travelling, to the West by an extensive system of exit controls and the military surveillance of the borders to Western Europe.

On the other side of the 'curtain', democratic regimes had long held a liberal stance on migration, rooted in the belief of a citizen's right to choose freely his or her place of residence. Part of this liberal approach was the establishment of an international regime for the protection of refugees within the framework of the United Nations, designed to provide relief for individuals whose basic human rights and fundamental freedoms had been violated in their home country. At the domestic level, these provisions were implemented in asylum laws, and some Western European countries enshrined the right to asylum in their national constitutions. Under the influence of 'cold war' ideology, persons emigrating from Central and Eastern Europe were welcomed by the West as 'fighters for liberty' and were generally admitted as refugees under the asylum scheme.

Today, Western migration regimes have undergone a profound transformation. The opening up of the Eastern bloc in 1989 coincided with the gradual institutionalisation of restrictive

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

This book addresses the reshaping of migration regimes between the countries of Central and Eastern Europe, subsequently referred to as CEECs, and Western European countries in the 1990s, placing particular emphasis on refugee policy. The CEECs includes the ten applicants for EU membership: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. The focus on the category of refugees is particularly challenging given the codification of this policy field in an international regime after World War II, as they constitute an exception to the discretionary power of sovereign states to control the entry and residence of aliens on their territory. Under human rights law, refugees are defined as persons who are forced to leave their country of origin because their life or freedom is threatened, and the prohibition against returning such a person to a place where his or her basic human rights are threatened has evolved into a fundamental principle of international law. This is the central difference between the right of asylum as an international institution and immigration policies as a privilege of the state: in the case of asylum seekers and refugees, state sovereignty is circumscribed by the universality of human rights norms.

In a context of increasingly restrictive attitudes on the entry of non-nationals to the West, an examination of this category of forced migrants is likely to highlight key aspects of the relationship between the norm of state sovereignty, implying control over territory and population, the dynamics of European inte-

gration, and the protection of universal human rights which apply to all individuals irrespective of nationality. It is in this intricate interplay of international interdependence, human rights, and national sovereignty that the legal concept of territorial asylum has evolved both internationally and domestically in the course of the twentieth century.

The central argument of this book is that Western European states, fearing large-scale immigration from and through Central and Eastern Europe into their territories, have adopted a preventive stance and have unilaterally incorporated the CEECs into their evolving system of co-operation in asylum and immigration matters, thereby re-introducing significant impediments to East-West migration and leading to a deep-rooted transformation of the international system of refugee protection. These processes are significant in three major ways. The first relates to the field of international relations and law and concerns the transformation of the international refugee regime. I will demonstrate that the extension of the current EU refugee regime, coupled with the general goal of combating illegal immigration, weakens the principles, norms and rules of international refugee protection by impeding the entry of asylum seekers and establishing a system of negative re-distribution for handling asylum claims.

Secondly, these processes are inherently linked to the question of European integration and the prospect of an Eastern enlargement of the Union. By highlighting the complex linkages between national and international developments in the field of asylum and immigration policies, this book provides new insights into the dynamics of 'Europeanisation' and illustrates the impact of member states' interests on the Union's attitude to Central and Eastern Europe. It will be shown that the fields of asylum and immigration, although not originally part of the EU agenda, now play an increasingly important role in the pre-accession strategies and may constitute significant obstacles to swift enlargement and the free movement of persons between the new and old member states.

Finally, the extension of restrictive asylum and immigration policies has important consequences for the CEECs them-



selves. Given that their adaptation to Western European policies has become a central condition for membership of the Union, the candidate countries face the conflicting requirement of sealing their borders against illegal immigration whilst upholding the humanitarian standards of refugee protection. These processes concern not only the approach of the CEECs to aliens and immigration, but also affect the freedom of movement of Central and Eastern European citizens and lead to the erection of new borders in Europe.

This chapter introduces refugee policy as an international relations problem. The discussion of the basic normative and institutional elements of the international refugee regime provides the contextual background for the analysis of the emergence and extension of the EU refugee regime in successive chapters. It will be shown that far from being a given concept, the notion of refugee protection has evolved constantly over time and has at all times been significantly shaped by developments in the economic and political context of international co-operation. Given the focus of this book on the countries of Central and Eastern Europe and their adherence to the international refugee regime today, a special emphasis is placed on the political friction that split the international community into a Western and an Eastern bloc and entailed the subsequent abstention of these states under the lead of the former Soviet Union from participation.

## **THE EMERGENCE OF THE INTERNATIONAL REGIME**

Although the notion of 'asylum' as protection from persecution can be traced back to the times of the Greeks and Romans (Kimminich 1978: 7), its formal foundations were only laid in the first half of the twentieth century when it was generally recognised that the refugee problem was a matter concerning the international community and which needed to be addressed in the context of international co-operation.

## The Early Years of International Co-operation

The international codification of a refugee law must be seen in the context of the introduction of immigration controls in most European countries in the late nineteenth and early twentieth century. In contrast to the earlier open-border policy, refugees and migrants were no longer allowed to cross the borders without permission. The emergence of European nation states went along with the affirmation of a right to control the entry of non-nationals into their territory and the subsequent introduction of selective immigration rules. In the light of massive refugee movements produced by the Balkan Wars (1912–1913), World War I (1914–1918), and the Russian Revolution (1917), this closure of national borders could no longer be maintained. European states realised that some sort of legal status had to be given to these persons in order to allow them to move, stay, or return to their homes, legally.

Thus, initially, international co-operation for the protection of refugees concerned mainly the problem of stateless persons who had fled from their country without documents and who were without legal protection. In the literature, this period is referred to as the juridical or pragmatic phase of international co-operation (Hathaway 1984). At the behest of the overburdened International Committee of the Red Cross and other non-governmental organisations (NGOs), in 1921 the League of Nations appointed a High Commissioner for Russian Refugees in Europe, Fridjof Nansen—a move which constitutes the first formal acknowledgement of an international responsibility for refugees. The central achievement of the High Commissioner was the adoption of the 'Arrangement for the Issue of Certificates of Identity', the so-called 'Nansen passports' first awarded to Russian refugees (1922), and subsequently to Armenians (1924), Assyrians, Assyro-Chaldeans, Syrians, Kurds, and Turks (1928). The first non-group-specific agreement was concluded in 1933 and required the signatory states not to deny refugees access to their territories. However, this agreement was only ratified by eight countries, and with some significant restrictions.<sup>1</sup>

From 1935 onwards, a new perspective on refugee protection took shape, commonly referred to as the 'social' approach (Hathaway 1984). In this period, the earlier purely juridical criteria were supplemented by a factual perspective which established a group determination system based not only on the *de jure* loss of protection but also on *de facto* membership of a specific social group such as refugees fleeing from Germany, Austria or the Sudeten area of Czechoslovakia. At that time, refugees were granted recognition on the basis of group characteristics linked to their national origin and political events without individual status determination procedures. Although this group determination approach was never formally implemented in international refugee law, it has nevertheless continued to shape states' policies and is again gaining increasing importance today with respect to the massive movements of refugees fleeing from situations of generalised violence or civil war.

The foundations for the contemporary system of international refugee protection were laid at the end of the 1930s, commonly referred to as the 'individualist period'. It is important to note that this institutionalisation of the international refugee regime took place in an increasingly politicised environment, in which strategic considerations of security and foreign policy were to play a decisive role.

Tension between the League of Nations and the Soviet Union, which was not a member, was already evident in the 1920s when the latter raised strict objections to international efforts to help the thousands of defeated White Russian Army soldiers in the aftermath of the Russian Civil War (Loescher 1996: 38). At the same time, the need to find international solutions became increasingly evident with the dramatic intensification of the European refugee problem due to the spread of fascism and Nazism on the eve of World War II. While the Soviet Union continued to object to any kind of League protection for the few Russian citizens able to flee Stalin's dictatorship, Western European states were increasingly reluctant to commit themselves to the protection of Jews, in particular those fleeing Germany and its occupied territories.<sup>2</sup> By the end of World War

II, the refugee problem had reached dramatic proportions, relations between the Western powers and the Soviet Union rapidly deteriorated, and the issue of refugees became trapped in East-West controversies.

These controversies became manifest in the framework of the newly established United Nations, the heir of the League of Nations, when it addressed the refugee problem in its first general assembly. It was recognised that the refugee problem was 'international in scope and in nature' (UN quoted in Zarjevski 1988: 9), and led to the creation of an International Refugee Organisation (IRO), subsequently a focus of East-West tensions. The special committee responsible for drawing up a charter for the IRO comprised both refugee-receiving and refugee-sending countries which in 1946 were mainly those of the Eastern bloc.<sup>3</sup> The controversies between the two blocs centred around two questions. Firstly, the East opposed the idea that refugees could refuse repatriation and be resettled in another country. More specifically, the Soviets and the Yugoslavs claimed that persons who were hostile to their governments should not receive support from the other member states of the UN (Kimminich 1978: 54), which constituted a clear denial of the notion of political asylum. The second point of controversy concerned the definition of a refugee. Focussing on Soviet dissidents, the West insisted that the IRO mandate should be broad enough to cover individuals with 'valid objections' to repatriation, including the fear of persecution. In contrast to the earlier practice of refugee status determination guided by group categories and following national or territorial criteria, in this period one can observe a clear shift to an individual determination based on the notion of persecution for specific reasons such as race, religion, or political beliefs which attest an existential conflict between the refugee and his or her government. In the end, the IRO charter was drafted by the Western majority in conscious opposition to the Eastern bloc (Kimminich 1978: 54; Glahn 1992: 70). It is in this context that today's definition of a refugee, based on individual criteria rather than the risk of general violence, must be understood. As a consequence of

this approach, Eastern European countries refused to join the new organisation and started to regard it as 'an instrument of the Western bloc' in its fight against Communism.<sup>4</sup>

The East-West conflict continued to overshadow the construction of the international refugee regime in the United Nations system. The IRO's mandate was initially limited to the consequences of World War II, but this was soon extended to include refugees from Eastern European Communist regimes, as in the case of Czechoslovakia after the Communist coup in 1948. In the West, refugees became a symbol of Soviet repression and were used by governments as instruments of 'cold war' antagonism (Loescher 1996: 51).

It was in this hostile atmosphere,<sup>5</sup> and against the votes from the Eastern bloc, that the General Assembly decided to establish the Office of the United Nations High Commissioner for Refugees (UNHCR) in 1949.<sup>6</sup> Although this office was initially designed to resolve only the problem of residual refugees following the cessation of the mandate of the IRO, contrary to the will of some West European states,<sup>7</sup> it has remained the central international organisation for the promotion of refugee protection. Its statute defines the range of persons who fall under its mandate and the substance of protection. This includes principally the promotion of international conventions for the protection of refugees and the supervision of their implementation and revision. It was under its auspices that the central principles, norms, rules and procedures of the international refugee regime became institutionalised.<sup>8</sup>

## Normative and Institutional Provisions

The term 'international regimes' was developed in international relations theory and commonly refers to a set of 'principles, norms and decision-making procedures around which actor expectations converge in a given issue area.' (Krasner 1982: 185). They can be described as formal and informal interna-