

An emerging geopolitics of illegal immigration in the European Union

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Introduction

There is now a wide and ample literature which has explored the relationship between a racialised, ethnicised and xenophobic construction of ‘Europeaness’, an emphasis on security, the absence of proactive human rights legislation, and the development of restrictive immigration policies in Europe (e.g. Balibar and Wallerstein, 1991; Cholewinski, 2003; Huysmans, 2000; Karyotis, 2003; Kostakopolou, 2000; Tesfahuny, 1998).¹ While these critical analyses are absolutely essential as an antidote to current EU policies, few academic studies have explored comprehensively European policy developments with respect to ‘illegal’ immigration² since the Treaty of Amsterdam, preferring to focus on legally resident Third Country Nationals instead (for exceptions, see Cholewinski, 2000, 2003; and Mitsilegas, 2002).³ This paper seeks to redress this lacuna and outlines a new geopolitics of (‘illegal’) immigration that concerns both a re-scaling of *decision-making* (often referred to as ‘communitarisation’ which has been discussed extensively in terms of *legal* immigration), and a little explored re-scaling of *control* to third countries.⁴

In both cases, the evidence of ‘securitarianism’ is strong. As Cholewinski (2003) points out, overall, the bulk of legally-binding measures and ‘soft law’ that has emerged since 1999 has neglected human rights and is mainly concerned with preventing migrants without the necessary documents from entering the EU or facilitating their return or expulsion if they do. Thus, the aim is certainly not to deny this securitarian emphasis – I even reinforce it. Yet, by drawing on some familiar concepts within the migration literature, and a theory of political economy from economic anthropology, I present a new conceptual frame for situating this securitarianism. Specifically, I deploy a set of

¹ In this paper, I shall use immigration and migration interchangeably, except where noted. In the latter case, immigration will refer to temporary or more permanent settlement while migration shall denote movements or intentions to move across international boundaries.

² I use the term illegal between quotation marks because first, of the aversion to the term illegal by many immigrants themselves. Second, because of the claim by critical legal scholars that it is impossible to be illegal, in the sense that if an individual falls foul of national law, that individual becomes a subject of international law. Third, in the US, the term ‘undocumented’ is often used to denote illegal migrants, but this has a precise meaning in EU policy. That is, it refers to those illegal migrants who are without the necessary documents, and this has specific consequences for individuals, especially in terms of potential deportation (for a similar discussion, see Black, 2003). *However*, for the purposes of simplicity, I will cease to use quotation marks around the term illegal after this introduction.

³ Apap, de Bruycker, and Schmitter (2000) discuss regularisation programmes across EU member states, but there is little discussion of EU-level developments.

⁴ For one exception, see Peers (2003).

processes that I shall call the ‘three Vs’: ‘virtualism’, ‘venue-shopping’, and ‘(very) remote control’, in order to understand this emerging geo-politics.

This paper is divided into three parts. The first part of this paper explores the three Vs. I maintain that these three processes have shaped policy-making within the two types of re-scaling alluded to above. I follow in the second section with a selective account of policy developments in the realm of ‘illegal’ immigration, especially since the 2001 Laeken European Council. It charts the gradual communitarisation of the control of illegal immigration (that is, the re-scaling of decision-making), while the third part examines the re-scaling of control to third countries.

Theoretical considerations: the nature of illegal immigration and the three Vs

The nature of illegal immigration

Illegal immigration as an analytical category is somewhat odd because ultimately it is an epiphenomenon of migration and citizenship policy. Or as many observers argue, illegal immigration is *produced*. There can be no illegal immigration without immigration policy, and thus those who are deemed to be ‘illegal’, ‘irregular’, ‘*sans papiers*’ or ‘undocumented’ shifts with the nature of immigration policy (Black, 2003; Cohen, 2003; Samers, 2003). Consequently, illegal immigration has two characteristics: it is intimately connected with the policies of legal migration and citizenship more generally, but precisely because of its epiphenomenal character, it also becomes an explicitly juridical and police matter. But the latter itself assumes two forms: prevention of entry and regulation of settlement.

In this respect, there is considerable conflation within the popular press (if not academic accounts and actual policy) of the various types of ‘illegality’ (e.g. Huysmans, 2000). There are those who ‘overstay’, those who have ‘lost’ their documents, those who falsify their documents, those who enter a national territory clandestinely, rejected asylum-seekers, and more generally, the socio-legal ‘grey area’ between illegal status and asylum-seeking status. These distinctions and the fact that illegal immigration is produced, implies that member states and EU-level institutions are attempting to halt a phenomenon that they themselves produce. Certainly, it could be argued that this is obvious - *any* regulations will therefore produce ‘illegality’, and it is much the work of smugglers and traffickers and informal labour market demand, as it is the product of

state regulations. The response to this should be clear. Without immigration controls, there would be no need for smugglers and traffickers and informal labour markets in certain cities and agricultural regions would shrivel under the absence of what Van Parijs (1992) has called ‘citizenship exploitation’ (exploitation based on the distinction between citizen and non-citizen). And it is for this reason that I turn to the concept of virtualism.

The three Vs

Virtualism

For the economic anthropologist Daniel Miller (1998), ‘Virtualism’ refers to a ‘new political economy’ in which the ‘real’ (economy) is constructed by, and made to fit ‘virtual’ or abstract (economic) models, rather than the other way around. That is, economists are not modelling the real world - the ‘real economy’ is beginning to mirror economists’ models because economic models feed into economic policy. What relevance does Miller’s theory of virtualism have for the study of illegal immigration? In the previous section, I noted the epiphenomenal nature of illegal immigration. That is, if illegal immigration is produced by stricter regulations, then the state is not so much *controlling* it, the popular press not so much *reporting* it, as they are both *creating* it. In other words, illegal immigration is created through popular and governmental arguments such as ‘we need to reduce the number of bogus asylum-seekers’ (i.e. so-called ‘economic migrants’); ‘firm but fair’ immigration policies; the construction of ‘artificial (or indeed virtual) borders’ where once commerce and people routinely crossed with ease; (conventional) conceptions of how labour markets operate (e.g. linear push-pull theories relating to the supply and demand for labour); and the economic evaluation of immigration based on a cost versus benefit rationality (e.g. viewing illegal immigrants and asylum-seekers as ‘scroungers’ burdening restructured and cash-poor welfare systems). One of the many effects of these circulating discourses is that in some European countries, migrants who may actually be entitled to asylum, are entering and staying clandestinely because they believe Europe is indeed a Fortress – a Fortress constructed on the various ‘models’ of the way in which European and third country societies ‘work’ or should work.

Venue-shopping

Virginie Guiraudon (2000) has argued that a security agenda within the EU is pursued by what she calls 'venue-shopping'. In terms of our purposes here, she has argued that security issues are becoming increasingly dominant as a specific form of venue-shopping is taking place. That is, domestic actors involved in the management of migration remove immigration from public debate and policy-making is shifted upwards into inter-governmental co-operative bodies at the European level that are dominated by the security agendas of interior ministers (see also Cholewinski, 2000; Lavenex, 2000).

(Very) remote control

Zolberg's 'remote control' (or very remote control as I call it) refers to at-a-distance control (rather than simply control at the borders of the advanced economies). He has in mind for example, the Dublin Convention's 'first country' and 'third safe country rules' and the stationing of customs agents in Latin American or eastern European transport hubs in order to prevent would-be illegal immigrants and asylum-seekers from ever reaching the shores of northern countries. I maintain in this paper that remote control has become increasingly important because of the apparent rise in smuggling and trafficking. Since smuggling and trafficking networks frequently have their origins in central Asia and Eastern Europe, this has made (very) remote control all the more necessary for the securitarian-minded member governments and specific EU institutions such as the Council and its satellite working groups. Yet, it is not simply EU institutions that are interested in very remote control. Indeed, perhaps the most telling example is the UK government's now defeated (but hardly buried) proposal to move the processing of asylum claims to third countries (e.g. the *Guardian*, 1 March 2003).

Re-scaling decision-making: the communautarization of the control of illegal immigration from the Treaty of Amsterdam to the Thessaloniki Council

Communautarization and intensive trans-governmentalism

For Geddes (2000), the Treaty of Amsterdam has led to the ‘communatarisation’ (and not the supra-nationalisation) of immigration policy. That is, it has brought the regulation of immigration policy closer to the ‘community method of decision-making’. At present, decision-making cannot be understood as truly supra-national, because as numerous authors have stressed, decision-making remains in the realm of the inter-governmental Council of Ministers with ‘unanimity’ the *modus operandi* at least until May 2004. Meanwhile the EP (European Parliament) is marginalised and the ECJ (European Court of Justice) has only limited jurisdiction (see also Kostakopolou, 2000).⁵

Furthermore, the Ministers themselves (especially the interior ministers) are part of what Helen Wallace calls ‘intensive trans-governmentalism’. ‘Intensive trans-governmentalism’ refers to the activities of governmental actors below the levels of chiefs of government such as ministerial officials, law enforcement agencies, and other bureaucratic actors. These officials act with a certain degree of autonomy *vis-à-vis* their chief executives and are free to develop their own policy agenda” (Lavenex, 2001, 854; see also Wallace, 2000, 33-5). This sort of intensive transgovernmentalism is represented in part by the proliferation of inter-governmental cooperative groups such as the Ad Hoc Immigration Group, the Schengen Group, and the JHA EU working groups. They develop outside the Community framework. They are secretive and for the most part do not have to answer to judicial control by for example, the EP or the ECJ. These have proliferated over the last 10 years as national governments have either progressively lost (or perceived to have lost) control over migration flows because of more liberal national-level jurisprudence. That is, they seek compensation for this putative lack of control by fortifying borders through (for example police) cooperation and thus repelling migrants and would-be asylum-seekers even before they can reach the shores of member states. Headed by an agenda of interior ministers, this sort of up-scaled cooperative securitarian approach also provides leverage by providing international legitimacy to domestic

⁵ However, the Convention on a European Constitution has called for changes in decision-making, including the extension of qualified majority voting and co-decision to replace some policies, such as immigration policy which are currently subject to unanimity (Kostakopolou, 2000; CEC, 2003b).

constituencies (Guiraudon and Lahav, 2000; Koslowski, 1998; Lavenex, 2001). No more evident is this than in the Council's SCIFA + (Strategic Committee on Immigration, Frontiers and Asylum) which has replaced the Maastricht Treaty's K4 Committee. SCIFA + appears to have had much more success negotiating agreements with interior ministers than with the Commission, and has arguably eclipsed COREPER (The Committee of Permanent Representatives of the Member States) as the primary broker between the Council and the Commission. But if communautarization is not quite supra-national governance, then this has not precluded a range of proposals and directives, significant measures to be adopted, and considerable *de facto* cooperation between member states by European institutions prior to the May 2004 deadline. In fact, it is in the realm of illegal immigration which the goals of Amsterdam have 'progressed' the furthest (Guild, 2003).

After Amsterdam: the 2001 Action Plan, and its outcomes from Laeken to Thessaloniki⁶

After Amsterdam, the Tampere summit in October 1999 (which aimed to carry out and accelerate the implementation of the Amsterdam proposals) spoke of more efficient management of migration controls and tackling immigration *at its source*. The Council called for more cooperation between member states, and confirmed the requirement that new member states accept the Schengen *acquis* as integrated within the Treaty of Amsterdam. The European Council Meeting in Laeken in December 2001 called for an action plan on illegal immigration. There were 8 points to this plan as outlined in the pre-Laeken document (CEC, 2001c): visa policy, information exchange and analysis, pre-frontier measures, financial support of actions in third countries, border management, improvement of co-operation and co-ordination at the operational level, the advanced role of EUROPOL, aliens law and criminal law (including illegal employment) and finally readmission and return policy. These action points were absorbed into, and their importance confirmed by, subsequent Commission communications. On February 28, 2002, the Council adopted the "Comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union" (otherwise known as the 'Santiago Action Plan').⁷ The Santiago plan identified a similar set of domains where action was deemed necessary either within one year (short-term

⁶ Measures relating to illegal immigration prior to Amsterdam are carefully documented in Cholewinski (2003) and it is not my intention to discuss these here.

⁷ OJ 2002 C 142/23.

measures) or within three years (medium-term measures): visa policy, the exchange and analysis of information, readmission and repatriation policies, pre-frontier measures, measures relating to border management, EUROPOL and penalties.

In June 2003, just prior to the Thessaloniki Council, the Commission produced a communication on a common policy on all aspects of illegal immigration (CEC, 2003a). Here too, the themes were nearly identical to those of the plan set out at Laeken and those of the Santiago Plan. The following discussion then, is organised around the themes of the pre-Thessaloniki document (above), including visa policy, border control policy, key flanking measures, operational co-operation and exchange of information; partnership with third countries, return policy, and financial resources for burden sharing. For the moment however, I will only be concerned to discuss the first 4 of these 7 areas of policy development. Two of the remaining three areas (return policy and partnership with third countries) will be discussed under the rubric of ‘re-scaling control’ in the third part of this paper.⁸

Visa policy

Visa policy is a directly related flanking measure to free movement in terms of external border control, according to Article 61 TEC (CEC, 2001c). However, it is aimed at entry control, and clearly cannot address clandestine entrance or ‘overstaying’. In this context, for the Commission,

“Illegal immigration represents one of the basic criteria for the determination of those third countries whose nationals are subject to the visa requirement, besides other criteria such as public policy and security, EU’s external relations, regional coherence and reciprocity...[.]...” (CEC, 2001c, p. 4).

The above quotation is a reasonably clear demonstration of ‘virtualism’. In other words, particular restrictive immigration policies are applied to specific countries on a case-by-case-basis [often the result of risk assessments based on the profile of both the socio-economic characteristics of their citizens - especially the stock of desirable labour market skills - and whether there is likely to be a ‘mass (illegal) migration’ from these countries]. This restrictionism often lends to ‘overstaying’ or assisted illegal migration (as a market for smuggling and trafficking is created, because how else are the ‘unwanted’ to by-pass restrictions?). This in turn reinforces the list of countries whose nationals require visas

⁸ As burden-sharing falls within the realm of an emergent European *asylum* regime, I do not address this issue here.

for European authorities, and eventually encourages further illegal immigration as most will be unqualified to migrate legally.

If illegal immigration is one of the policy areas in which EU-wide cooperation and legislation has ‘progressed’ the furthest, then within this policy domain, visa policy may be exemplary. Indeed, Council regulation (EC) No. 453/2003/EC of 6 March 2003⁹ listed “the third countries whose nationals must be in a possession of visas when crossing the external borders and those whose nationals are exempt from that requirement” (CEC, 2001c, 12). The Commission saw the adoption of this Regulation as providing for further developments towards a harmonised visa policy and for preventing unauthorised entry.¹⁰ Given that for the Commission, there are considerable forgery and security issues associated with visa formats, the pre-Laeken document points to co-operation in the field of security documents, such as the development of the EU/Schengen visa sticker. In this sense, Council Regulation (EC) No. 1863/95 of 29 May 1995¹¹ stipulated a uniform format for visas and allowed the Commission to further specify the details of this format. A Commission proposal of October 9, 2001 would link the visa sticker to the identity of the migrant more closely, and integrate a high standard photograph, for example. Finally, Tampere conclusions (Nr. 22) stressed that “a common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices” (cited in CEC, 2001c, 12). However, despite their importance for the Santiago Action Plan, the development of common visa issuing offices has stalled for the moment in part because of a failed pilot programme (CEC, 2003a).

There are also numerous discussions and debate around trans-state information exchange in terms of issuing visas. This came as a direct response to the events of September 11, as outlined in the conclusions of the extraordinary JHA Council held on 20 September 2001. The Commission proposed to assess the feasibility of a European Visa Identification System in order to ensure proper admission for short-term stay and return after the expiration of the visas. However, for the Commission, any proposals would have to be evaluated in light of existing information services such as SIS (later SIS II – see below). This came to fruition when, on June 13, 2002, the Council adopted a set

⁹ OJ 2003 L69/10. This amended Council Regulation (EC) No. 539/2001 of March 15 2001.

¹⁰ Indeed, Council regulation (EC) No. 2414/2001 of December 7 modified the previous regulation

¹¹ OJ L 164, 14.07.1995.

of guidelines for the development of the VIS (Visa Information System). According to the Commission, it has been designed to dissuade ‘visa shopping’, improve visa consultation and the delivery of the common visa policy, facilitate the application of the Dublin II regulation and return procedures¹², and enhance internal security and anti-terrorist measures (CEC, 2003a; CEU, 2003). The VIS seeks to provide a common technical platform with SIS II¹³, without delaying the formation of the latter. However, while there is a precedence for funding and development for SIS II, the VIS is an entirely new system, and it is not surprising that while the Commission is committed to both projects, it is prioritising SIS II because it lies at the foundation of Schengen cooperation. The basic elements of the VIS (biometric identifiers such as iris scanning, facial recognition and fingerprints, financing, system architecture and so forth) are scheduled to be outlined by December 2003 at the latest. It is intended that they will include a C-VIS (Central Visa System) and a N-VIS (National Visa system). For both systems, it is estimated that it will cost the EU 130 to 200 million Euros, but much of this will be borne by national governments (CEC, 2003a).

Border control policy

If the ‘three Vs’ constitute one means of understanding the geopolitics of immigration policy, then certainly the reinforcement of *external* borders is also about ‘compensatory measures’ for the liberalization of the EU’s *internal* borders (e.g. Mitsilegas, 2002). Thus, it is not surprising that border policy, like visa policy, is also one of the most highly developed policy domains in the EU. Article 7 and Article 47 of the Schengen Convention implementing the Schengen Agreement called for closer

¹² The Dublin II regulation (adopted by the Council of Ministers on 18 February 2003) replaces the original Dublin Convention (1990). Dublin II is a regulation which will assist in the determination of which member state is responsible for processing an asylum-seekers’ claim, as well as forcing the responsible state to accept the return of an asylum-seeker (within a limited and specified time period) who is residing illegally in another member state. It will be aided by the EURODAC (European Automated Fingerprint Recognition System) regulation, which will fingerprint all asylum-seekers 14 years and older, as well as all those who cross the EU’s external borders illegally. Member states would have the option of sending a record of these fingerprints to a central EURODAC database. The basic idea is to further dissuade ‘asylum-shopping’ and illegal immigration (see OJ L 50/1 2003).

¹³ The Council Meeting of 28 and 29 May 2001 established that SIS II (The 2nd generation of the Schengen Information System) must be developed by 2006. The Commission agreed to assume responsibility for funding this, although in cooperation with member states, the applicant countries, the Council, the European Parliament and the Joint Supervisory Authority (CEU, 2003; ‘Schengen Information System II’, www.europa.eu.int). Council Regulation 2424/2001/EC of 6 December 2001, announced the entry into force of SIS II (OJ L 328/4 2001).

cooperation in the field of border controls. A May 2002 Commission Communication (2000f) focused on integrated management of the external borders, and the Seville European Council of June 2002 supported the findings of this Communication. Consequently, the Commission has funded a range of pilot projects and joint operations. The May 2002 Communication (above) identified five aspects of border management with the view to constructing a European Corps of Border Guards (or 'European Border Guard' as it appeared in previous documents).¹⁴ These five aspects included a common corpus of legislation, a common co-ordination and operational co-operation mechanism, a common integrated risk analysis (especially through upstream liaison with third countries), staff trained in the European dimension¹⁵ and inter-operational equipment, and burden-sharing between member states (EC, 2002f, 12). In particular, the Communication called for the establishment of The Common Unit for External Borders Practitioners which was established in 2002, following the Seville Council recommendations. It meets within the Council under the umbrella of SCIFA + (CEU, 2003). The Commission Communication argued that the continuation of the Common Unit should be reviewed and that more operational tasks could be removed from under the aegis of SCIFA +, and transferred to a position within a 'new permanent Community structure', subject to parameters of Article 62 of the TEC.

Finally, in my earlier discussion of 'virtualism', I suggested how the theorisation and practice of border definition and management leads to 'artificial (or indeed virtual) borders'. In fact, the Commission is not unaware of the limitations of its own external border management, and it has produced two proposals for a Council Regulation on the "establishment of a regime of local border traffic at the external land borders of the Member states" [COM (2003) 502 final, 14 August, 2003]. The idea of this Regulation is, ironically, to lubricate the movement of certain types of commercial and human traffic that the securitisation of external borders has impeded.

Key-flanking measures

¹⁴ This would also include a planned police school (CEPOL). Note that the UK rejected the proposals for a construction of a European Corps of Border Guards (*Migration News*, January 2002). At present, liaison officers from one country are already being posted in others but they are not interfering in the sovereignty of states, they are merely advising and supporting the existing competencies of border guards.

¹⁵For example, carrying out border checks in accordance with uniform principles based on a common standard, although the Commission seeks to develop these further. For the Commission, this in itself should include a common curriculum and training framework.

The key-flanking measures primarily involve the relationship between illegal immigration and smuggling and trafficking, undeclared work, and carrier liability. Let me begin with smuggling and trafficking.

First, in the thinking of European institutions smuggling and trafficking are *not* interchangeable phenomena, the latter usually involving some sort of ‘exploitation’ related to work in the destination country (for further discussions, see Piotrowicz, 2002; Salt, 2000). And while they are actually separate offences under law, they often overlap in practice. Consequently, the Commission argues that the relationship between smuggling and trafficking should be clearly specified, but the two should be part of a *coherent* EU policy. Second, the key flanking measures of the pre-Thessaloniki document (especially smuggling and trafficking) fell under the area of ‘Aliens Law and Criminal Law’ as set out in previous Commission Communications. And it is Aliens Law and Criminal Law that is viewed by the Commission as the ‘classical’ means of combating illegal immigration (CEC, 2001c). Indeed, earlier, Tampere conclusions No. 23 called for severe sanctions against serious crimes, which included illegal employment, smuggling, trafficking, and carrier liability on illegal entry. With respect to police and judicial co-operation, the Commission wishes to enhance the role of the European Judicial network (especially Eurojust)¹⁶ as well as the adoption of the Convention on Mutual Legal Assistance of May 29, 2000¹⁷ (in particular, the area of combating organised crime) in order to tackle smuggling and trafficking. The pre-Laeken document called for the swift ratification of the Convention and its protocols.

In terms of smuggling specifically, Article 27 of the Schengen Implementation Agreement is clear on imposing penalties for smugglers. And in November 2002 a Council Directive (2002/90/EC of 28 November) defined “the facilitation of unauthorised entry, transit and residence”. This directive sought to establish “the precise definition of the infringement in question and the cases of exemption...”¹⁸, and related to this a ‘strengthening of the penal framework’ which was the subject of a Council Framework Decision adopted on the same day.¹⁹ However, as Statewatch observes, the Decision’s ‘overbroad definition’ is likely to threaten ‘support networks and established migrant communities’ (p. 72).

¹⁶ EUROJUST became effective in January 2003, and is a unit of national prosecutors, magistrates or police officers of equivalent competence dealing with issues of security-related matters.

¹⁷ Including its subsequent protocols on improving mutual legal assistance in criminal matters.

¹⁸ OJ L 328, 05/12/2002, p. 0017-0018.

¹⁹ Council Framework Decision of 28 November 2002, OJ 2002 L 238/1.

In terms of combating trafficking, on 21 September 2001, the Extraordinary JHA Council meeting reached a political agreement on a Framework decision on combating trafficking in human beings. It provides a common definition of trafficking which is designed to facilitate law enforcement and judicial co-operation in criminal matters, and it also sets out a common level of penalties – not less than 8 years if it is committed under a particular set of circumstances. However, the Communication stated that criminal punitive measures could not alone hinder smuggling and trafficking since there are considerable financial gains to be made. Thus the confiscation and freezing of assets, as well as forced reimbursement for the cost of repatriating illegal migrants and/or rejected asylum-seekers should be pursued. Furthermore, the Commission adopted a proposal on 11 February 2002 on a “short-term residence permit to be issued to victims of action to facilitate illegal immigration or trafficking in human beings who agree to cooperate with relevant authorities in order to gain information about traffickers” (COM, 2002, 71 final).²⁰ Furthermore, the Council adopted a framework decision on 19 July 2002, on combating trafficking in human beings.²¹ In particular, it viewed “trafficking in human beings as a serious crime which comprises violations of fundamental human rights and human dignity and calls for a multidisciplinary approach tackling all links in the trafficking chain, in countries of origin, transit, and destination” (CEU, 2003b, 3). This led in September 2002, to the ‘Brussels Declaration on preventing and combating trafficking in human beings – global challenges for the 21st century’. For the Commission, the Brussels declaration stands out as a landmark in EU policy, since it aimed to foster European and international cooperation, and the Commission claimed that it is likely to guide future policy at the EU level (EC, 2003a).

For the European Commission, undeclared work appears to be on the increase. It is seen as ‘undermining the financing and delivery of public services’ while it is also viewed as a ‘pull factor’ for illegal immigration (EC, 1998; but see Samers, 2001, 2003). With regard to illegal employment, a Council Recommendation of 27 September 1996 sought to establish measures for combating the illegal employment of TCNs. The Communication of the Commission on undeclared work 1998 sought to build co-operation and debate. And like more recent Commission documents, it argued that

²⁰ However, as of June 2003, this was still awaiting discussion by the Council (EC, 2003a). In any case, Belgium, Italy, and the Netherlands, Spain and Germany already have such a programme, and France and Greece are considering them (EC, 2002b). For a fuller discussion of the limitations of such a European-wide proposal, see Piotrowicz (2002), and for its implications for human rights, see Cholewinski (2003).

²¹ OJ 2002 L 203/1.

sanctions against illegal employment should be harmonised in order to eliminate ‘competitive advantages’, which is an essential principle of Community Law. This includes minimal criminal penalties. In addition financial gains should be diminished. The Commission is examining the tabling of a proposal for a Directive on the employment of illegal residents from third countries that would focus on the specific requirements needed to tackle this issue. With regard to the financial advantages which might accrue to traffickers (the combination of assisted and clandestine entry tied to extremely low-paid employment or even servitude), the Commission seeks more severe and systematic financial penalties (such as the full seizure of any financial assets, and making the employer pay for all the costs of repatriating a migrant which is now borne by social welfare or other public means). Thus, the European Employment Guidelines of 2000 stressed that reducing undeclared work should be a priority, and echoing the above, the Stockholm European Council in 2000 argued for the necessity of tackling the ‘informal economy’ in general as part of the overall European Employment strategy in 2003. For the European Commission, this ‘battle’ can only be won through both preventive actions and sanctions (CEC, 2001c, 2003a).

In terms of carrier liabilities for example, the Council adopted a Directive in June 2001 (2001/51/EC of 28 June 2001)²² supplementing the provisions of Article 26 from the 1985 Schengen accords, which contains three penalty options for carriers who violate existing rules. However, the Commission admitted that the above Directive has not achieved an effective harmonisation at the EU level in terms of ‘carrier sanctions’. The Directive only covers passenger and not goods transport. Rail transport is only partially covered, and there is considerable space for each member state to apply the directive differentially. In addition, many of them are delayed in implementing the provisions of this directive into national law. The Commission is calling for more harmonisation and tri-lateral talks between member states, the transport industry and the Commission, with the added recommendation that enhanced technical advice and support be provided to commercial carriers. Nevertheless, in November 2001, member states, the transport industry, European institutions, humanitarian organisations and related interested groups held a ‘Round Table on Carriers Liability’ to explore possible European avenues. Over the course of 2002, follow up ‘expert meetings’ were held, but they concluded there was no need for further harmonisation, but that the Commission should hold regular consultation meetings (CEC, 2003a). A very recent proposal has emerged from the

²² OJ 2001 L 187/45.

Spanish government which would require carriers to provide a list of passengers coming into the EU as well as a list of all third country nationals who do not return on the date specified by their travel documents (Cholewinski, 2003).

Operational co-operation and exchange of information

The Commission communication of November 2001 and the Santiago Plan repeatedly stressed the importance of the gathering and exchange of information, intelligence and analysis. Given the incompatibility and uneven provision of data on legal and illegal immigration, the Commission presented an action plan for improving common statistics at the European level in 2001. CIREFI (which is a European wide observatory for estimating illegal immigration across the EU) is central to this mission, but the Commission has suggested that it employ new web technologies such as ICONet (Information and Co-ordination Network). The Commission argues that ICONet would be ideal in the realm of collection and dissemination of information in the context of immigration liaison officers and return as well. The Commission is currently preparing a document that would identify its legal basis. In any case, the work of CIREFI, including the potential use of ICONet would have to fit within the framework of SIS II.

The November 2001 communication referred to the creation of an ILO (immigration liaison officers) network. A number of institutions collaborated to create an ILO network in the western Balkans. While member states recognise the importance and effectiveness of ILO networks, they cannot reach agreement on the definition of ILO networks and the precise tasks they should carry out. Certainly, another crucial actor here is EUROPOL (established through Convention on a European Police Office in 1995, and in effective practice since July 1999) which is concerned with preventing and combating serious forms of international crime such as smuggling and trafficking. It is now cooperating fully in the exchange of information and intelligence with INTERPOL and third countries with respect to illegal immigration.

Re-scaling control: virtualism, very remote control (and venue shopping?) after Laeken

In the discussion below, I seek to demonstrate a re-scaling of the control of illegal immigration. It reflects simultaneously a virtual political economy, very remote control, and perhaps a new mode of venue shopping. I focus on the communitarised post-Laeken programmes because incorporating issues of immigration and asylum within the EU's external policy, especially cooperation and development programmes is a rather recent affair originating at Tampere, and accelerated by the Laeken, Seville and Thessaloniki Summits.²³ As the Commission states

“The Seville European Council left no doubt that combating illegal immigration requires a greater effort by the European Union and a targeted approach to the problem, with the use of all appropriate instruments in the context of the EU's *external relations*, while pursuing the constant long-term goal to develop an integrated, comprehensive approach to tackle the root causes of illegal migration” (EC, 2003, p. 12; emphasis added).

Furthermore, Commission proposals have rested on the following premise:

“Bearing in mind that any action to counter irregular migratory flows should take place as close as possible to the irregular migrants concerned, the European Union (EU) is promoting actions in, and support actions of, countries of origin and transit” (cited in “Wide-ranging action plan adopted to combat illegal immigration at the EU level, in <http://www.europa.eu.int>).

Indeed, the last few European Council meetings have introduced and begun the implementation of a range of programmes under the general rubric of the EU's ‘external policy’. The idea is that international coordination will be enhanced both at the preventive level (e.g. exchanges of information) and the reactive level (e.g. joint investigations against smuggling and repatriation of illegal immigrants). The Third Country governments themselves appear to be willing (and even eager) to cooperate, in part because they are beginning to voice concern that their own countries are becoming destination points for ‘transit’ and illegal immigration.

In this respect, considerable financial assistance has been offered by the EU to third countries for “reinforcing their external border and promoting institutional and administrative capacity for managing migration” (EC, 2003, 12), and most of the programmes have been implemented since 2002, or are scheduled to be implemented before 2004 (EC, 2002d).²⁴ A special budget line (B7 –667: “Cooperation with Third

²³ In general, the use of foreign policies to tackle the ‘root causes’ of illegal immigration to the advanced economies is a new phenomenon (Weiner and Munz, 1997).

²⁴ The Council identified nine countries that would require more intensified cooperative measures. These included Albania, China, the former Republic of Serbia and Montenegro, Morocco, Russia, Tunisia, Ukraine, Libya and Turkey, although it also argued that there were a

Countries in the field of migration”) within the general EU budget was established for the first time in 2001 to offer further financial assistance outside the more generic development transfers (EC, 2003e, 2003f). In fact, at Thessaloniki, it was agreed that E140 million would be spent on increased border checks and the creation of a database of EU visas and E250 million for assistance to countries that agree to accept the return of their nationals from EU countries (*Migration News*, September 2003). In light of this, the Commission intends to submit a proposal to the Council that would create a “legal basis establishing a multiannual cooperation programme with third countries in the field of immigration”. This additional financing is designed to provide origin and transit countries with the necessary means to sign future readmission agreements (EC, 2003a, 13). And yet, as Cholewinski (2003) points out, the Action plan from the 2001 Commission Communication on a ‘Common policy on Illegal Immigration’ (CEC, 2001c) insists that the EU should “use its *political weight* to encourage third countries which show a certain reluctance to fulfil their readmission obligations” (cited in Cholewinski, 2003, 14, emphasis by author). Furthermore, Cholewinski writes, “This perniciously ambiguous and open-ended terminology reflects a ‘stick’ rather than a ‘carrot’ approach to cooperation with third countries...” (p. 14)²⁵.

In any case, the development-migration programmes that have emerged include TACIS, MEDA, EUROMED, CARDS, PHARE, ASEM, the INTERREG community initiative, and the Cotonou Agreement among ACP countries. I briefly discuss these programmes below. The TACIS programme (Technical Assistance to the Commonwealth of Independent States – that is the former Soviet Union) focuses on three key issues: the development of comprehensive border management, combating drug trafficking, and the construction of anti-corruption measures in the cooperating states, which the EU argues is likely to have an impact on illegal migration. Similarly, there is The New Tacis Regional Programme (for Central Asia) which is to include co-operation on migration and related issues, in particular improvement of border management capacities; and construction of border crossings in the three border region of the Ferghana Valley (eastern Uzbekistan). MEDA refers to a Justice and Home Affairs

whole slew of other origin and transit countries which demanded attention, particularly the accession countries and neighbouring Mediterranean countries (EC, 2003; EC, 2003d).

²⁵ Indeed, Statewatch notes that adopted EU plans “included detailed statistics showing the size and age structure, life expectancy and infant mortality of the population, imports and exports to and from the EU and the rest of the world, GDP, development aid and existing trade cooperation and readmission agreements – all of which are to be used to cajole those countries into accepting EU readmission policies” (2003, 73).

Regional Programme which involves the Mediterranean region, and is aimed at building a common and comprehensive policy on immigration (especially smuggling and trafficking) in, from, and between that region, while at the same time pursuing the development of joint police enquiries using the EUROMED network, at southern Mediterranean ports. EUROMED is a network of data collection and research on migratory phenomena, and once again is intended to focus on southern Mediterranean ports in order to exchange information on suspected smuggling and trafficking networks, especially from sub-Saharan Africa to North Africa. The CARDS regional programme involves south-eastern Europe,²⁶ and it requires the participation of the relevant countries in the SAP – Stabilisation and Association Process. The aim is to foster *regional* cooperation (as a complement to national CARDS programmes) in the realm of Justice and Home Affairs. Part of the rationale for a regional response is that the problems envisioned (such as illegal migration) are very much cross-border in nature. There will be support for border control, institution building, emphasis on equipment and infrastructure, technical assistance, and twinning type arrangements. In the Draft Programme (CARDS regional programme), the financial proposal totalled 14 million euros for the period December 2001-Dec. 2004, but the total amount available for regional cooperation reached 45 million euros, of which 25 million is aimed at integrated border management (CARDS, 2001). The PHARE programme which set an important precedent for the CARDS and TACIS programme is now complete. For example, the PHARE programme for 2001 and 2002 in Poland has supported the ‘militarisation’ of Poland’s eastern border in time for full accession in 2007-8, and the number of border guards is likely to reach approximately 10,000 from the current 5,300 (Statewatch, 2003).

The ASEM is a trans-Asian dialogue on migration underway, which has led to important Ministerial meetings (e.g. the ASEM Ministerial Conference on Co-operation for the management of migratory flows in April 2002). This resulted in a political declaration on migratory flows (The ‘Lanzarote Declaration’). The Cotonou agreement (which follows on from the Lomé IV agreement) and entered into force on 1 April 2003 contains provisions on co-operation and migration – in particular those related to the prevention of, and ‘fight against’ illegal immigration (Article 13). Migration will be part of a dialogue in the context of the ACP-EU partnership and the ACP-EC Council of Ministers will in the future focus expressly on issues of illegal immigration (CEC, 2002d; 2003i; Development Strategies – IDC, 2003). Yet, the ACP countries protested that the

²⁶ More specifically, Albania, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia

stipulations in Lomé IV (and later the Contonou Agreement) which forced states to readmit migrants, were not legal, but they had little choice but to sign the agreement (Statewatch, 2003).

In short – the EU’s external policy is producing a new geography of remote control, which extends beyond carrier sanctions and placing customs officials in third country airports.

It would be a gross mistake at this stage not to discuss the case of certain Eastern European countries. While the above programmes involve some Eastern European countries, the immediate accession countries (especially Poland and the Czech Republic) involve a different set of issues and priorities, especially the pressure felt from European institutions to apply the Schengen *acquis* and to satisfy the new EU visa directives.²⁷ Indeed, on April 14, 2003, the Council announced that the accession countries would be given special attention (CEC, 2003a). In light of the accession countries’ (partial) integration within the EU and their as yet, incomplete adoption of Schengen requirements²⁸, the accession countries and in particular Poland and the Czech Republic have specific stipulations attached to their integration into the EU. That is, there is a transition period of roughly 7 years in which citizens of these countries will not be allowed to freely migrate into Western European member states. Yet what seems most pertinent here is the way in which the application of the Schengen *acquis* in accession states is the way in which such restrictionism leads to the construction of ‘virtual borders’. In other words, tight borders and visa controls are wreaking havoc with existing cross-border economic ties such as between Poland and the Ukraine. In one Polish region for example, where apparently 30-40% of small and medium-sized firms survive through commerce with the Ukraine, application of the Schengen *acquis* increases transaction costs considerably. Consequently, both governments are seeking ways to modify the Schengen requirements (Mitsilegas, 2002), and it is not surprising that the European Commission has itself presented a proposal for a Council regulation on “the establishment of a regime for local border traffic at the external land borders of the Member states” (CEC, 2003g).

and Former Yugoslav Republic of Macedonia (FYROM).

²⁷ The Polish government has had some reluctance to implement the EU’s visa policies, especially in relation to the Ukraine with which it has a unique relationship. Similarly, the Hungarian government does not wish to impose visa restrictions on Romanians, Ukrainians, and migrants from the former Yugoslav Republics, because of the large number of ethnic Hungarians living in these countries, thus contradicting the emerging EU visa regime (Mitsilegas, 2002).

²⁸ This is somewhat of a moving target, as Mitsilegas (2002) points out so insightfully.

A second aspect of this new geography of control concerns a community return policy. A Council Directive (2001/40/EC) of 28 May 2001 set out the ‘mutual recognition of decisions on the expulsion of third country nationals’.²⁹ In this regard, the Council believed that the “expulsion of third country nationals, cannot be sufficiently achieved by the member states and can therefore, by reason of the effects of the envisaged action, be better achieved by the Community”³⁰. That is, the Directive allows responsible authorities in one member state to enforce the expulsion decisions of another member state.³¹ However, as of June 2003, the Commission (CEC, 2003a) had indicated that no member state had noted how this Directive might be incorporated into national law. In November 2002, the Council adopted a ‘Return Action Programme’ based on the Seville European Council and the Green Paper on a Community return policy. As the Commission stated:

“all efforts to fight illegal immigration are questionable, if those who manage to overcome these measures succeed finally to maintain their illegal residence. The signal effect of a failed return policy on illegal residents cannot be underestimated” (CEC, 2003a, p. 8).

The Commission argued further that

“Only this [the Return Action Programme] will ensure that the message gets across that immigration must take place within a clear legal procedural framework and that illegal entry and residence will not lead to the desired stable form of residence” (*Ibid*).

In any case, the Commission, in its Communication (CEC, 2003a) has called for action in five areas of return policy. First, the Commission seeks to ‘enhanc[e] operational co-operation among member states’. In particular a proposal by the German government has called for assistance with removals by air from the country of transit (in case of non-direct return flights) that would lead to ‘positive’ externalities in the realm of enforcement co-operation. Second, it aims to use the VIS to facilitate the provision of ‘travel documents for undocumented illegal residents’. In this sense, given the difficulties which authorities face in literally placing migrants without documents (the ‘undocumented’), the Commission claims that improved information exchange, a better

²⁹ OJ 2001 L 149/34.

³⁰ OJ L 149 02/062001, para 5, p. 34. In February 2003, the Commission also submitted a proposal for a Council Decision setting the criteria and practical arrangements for the compensation of financial imbalances arising from Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals.

EU-wide handbook, and biometric identifiers (which could be deployed to verify previously scanned documents) would help to locate the nationality of an undocumented migrant. Third, the Commission envisions the development of a ‘clear legal basis for the continuation of the removal operation.’ The Commission believes that this ‘clear legal basis’ is essential, especially where the use of coercive force is ‘unavoidable’, and it has called for common standards and mutual recognition of all decisions on return. As a consequence, the Commission intends to propose a ‘Council directive on minimum standards for return procedures and mutual recognition of return decisions’. Such a proposal is designed to work with, and build upon the existing Directive on ‘mutual recognition of decisions on the expulsion of third country nationals’ (see above). Yet, as of June 2003, no member state had produced any documentation on how this Directive might be absorbed into national law. Finally, the Commission wishes to develop integrated country-specific return programmes, calling especially for improved co-ordination between origin and destination states, ‘reasonable [financial] assistance’ to ensure ‘capacity building’ in the country of origin. In this context, the Commission (after the prompting of the Seville European Council) adopted the first pilot programme in Afghanistan in November 2002 (CEC, 2003a).

Theoretically, this re-scaling of control to third countries demonstrates a number of dimensions of the three Vs. First, the reinforcement of external borders, especially those between the accession countries and states further east, disrupt existing economic, social, and political ties between these countries. Second, notions (or ‘models?’) of how smuggling and trafficking work between distant countries and the European Union, aligned with a ‘safe inside’ and a ‘dangerous outside’ (Mitsilegas, 2002) serve to reinforce not just external borders, but very distant borders. This is quite simply what I am implying by very remote control. Yet, the re-scaling of control to third countries may represent a new mode of venue-shopping as well. It is possible that this very remote control is in turn shifting the less palatable (and less easily legitimated) dimensions of border and visa control onto the candidate countries and far-flung third states where legitimacy may be less of an issue.

Discussion and conclusions

³¹ Although, as Cholewinski (2003) points out, the criteria are rather general so that there is considerable flexibility in the system, which in turn may have a discriminatory effect on the migrants involved.

This paper responds to the dearth of studies that discuss actual policy developments in the EU with regard to ‘illegal’ immigration. In this sense, I sought to outline two different, but related developments. The first is the gradual communitarisation of policies relating to *illegal* immigration. That is, I sought to demonstrate a re-scaling of *decision-making* with respect to the creation of (illegal) immigration since Amsterdam, and to document the substantive nature of the policies that have accompanied this communitarisation. What is clear, as Guild (2003) points out, is that the Council of Ministers has had far more ‘success’ in reaching agreements on illegal immigration, than in other areas of immigration. As a result, there seems to be a deepening and widening of control since the Treaty of Amsterdam, as so many observers of European immigration policy have described and envisioned.

Second, I argued that there has been a re-scaling of *control* to third countries, a spatial extension of control far from the EU’s existing external borders. This is not simply a case of placing police and customs officials in third country airports – as Zolberg so cogently points out, but rather the gradual implementation of a system of migration management aligned with development assistance in third countries. I suggested further that Guiraudon’s notion of ‘venue-shopping’ in terms of migration policy can be expanded from her original meaning (that is an up-scaling of control from member states to the security-obsessed Council and its satellite working groups) to the ‘shipping out’ of the control agenda to third countries. I conjectured that it might be far easier to construct a security agenda abroad far from the watchful eye of Brussels-based NGOs and human rights campaigners, than it is to legitimate it in the EU and its member states. (I am careful though not to exaggerate this claim because, with the exception of critical academics and certain NGOs, there does not seem to be strong opposition from domestic constituencies to ‘securitising’ member state borders).

Nevertheless, the kernel of this paper is my insistence on the usefulness of Daniel Miller’s concept of ‘virtualism’ for moving beyond a now growing (and I would maintain necessary) literature on the discursive construction of immigration as a threat. That is, while Cholewinski claims that an appropriate metaphor for EU immigration policy is “that of an ailing vessel in which sailors work frantically to plug the leak” (2003, 12), virtualism argues that *inter alia* notions of immigration as potentially dangerous feed into policy and practice, which in turn actually creates illegal immigration – not simply the other way around. Like the economist’s model that is argued by Miller to dictate human

behaviour, it is our responsibility as social scientists and legal scholars to create an alternative 'model' of a less repressive world.

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