IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

New Asylum Countries?

Migration Control and Refugee Protection in an Enlarged European Union

Rosemary Byrne, Gregor Noll
and Jens Vedsted-Hansen (Eds.)

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NEW ASYLUM COUNTRIES?

IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Volume 4

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New Asylum Countries?

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Abbreviations

CAT	Convention Against Torture
CCP	Polish Code of Civil Procedure
CEBS	Central European and Baltic States
DC	Dublin Convention
EA	European Agreement
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EFTA	European Free Trade Agreement
ERF	European Refugee Fund
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
MIAA	Polish Minister of Internal Affairs and Administration
NIP	National Initiative Programme
NPAA	National Plan for the Adoption of the *Acquis*
NSHF	Nordic Joint Advisory Group of Senior Officials
OJ	Official Journal of the European Communities
PHP	PHARE Horizontal Programme for Justice and Home Affairs
PHPA	PHARE Horizontal Programme on Asylum
Refugee Convention	Convention Relating to the Status of Refugees

	Refugees
TEC	Treaty Establishing the European Community
TEU	Treaty Establishing the European Union

Introduction

Have the Baltic and Central European States turned into the asylum backyard of the European Union? If this is the case, is Brussels to blame, or individual Member States, or even candidate countries applying for membership in the EU? What does this mean for the integrity of the protection system as it has evolved over the past fifty years? And what does this imply in the future for individuals seeking protection in an enlarged EU?

This book is about the *transformation of asylum* in Europe in the context of the enlargement of the EU, and the ways it is affected by the tension between protection interests and the interests of migration control. This transformation involves norms, as well as procedures and resources for their implementation.

Apart from asking *what* the elements of this transformation process are, we shall also analyse *how* this transformation is taking place. In so doing, we shall engage in an analysis of three distinct and interdependent levels of law and policy: the domestic level, the sub-regional level, and the regional level. The domestic level is about how asylum and migration law is formulated by the electorate and legislator of a specific state. The sub-regional level is about how neighbouring countries (e.g., Austria and Hungary) impact each other in the shaping of law and policy. The regional level deals with the accession of present candidate countries to the Union, and their duty to implement the *acquis communautaire*. We shall also ask *when* transformation is taking place, and attempt to identify and delimit critical phases in the overall process.

Finally, what does the transformation process tell us about the current EU asylum *acquis*, and what does it tell us about the prospects for protection in the new frontier states and beyond?

This background of current European developments will be analysed more generally in Chapter 1. In the ensuing chapters, central problems regarding protection within the presently functioning system in Europe will be studied under a structure of sub-regional description and analysis: The central link (Germany, Poland, and the Czech Republic) will be dealt with in Chapter 2; the southern link (Austria and Hungary) in Chapter 3; and the northern link (the four Nordic and the three Baltic states) in Chapter 4. Concluding observations will be presented at the end of these Chapters as a basis for further discussion and analysis. It appears that problems of asylum law and practice

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differ considerably, due to the differences in geographical location, political situations, and legal traditions between the three sub-regions.

Given that burden-sharing, understood as the actual distribution of protection obligations, has been and will be the key to comprehending systems of refugee protection, we shall proceed by presenting various issues of solidarity and distribution of burdens. Thus, Chapter 5 analyses the EU *acquis* on burden-sharing, including the provisions in the Amsterdam Treaty, and reviews the concentration of burdens caused by the Dublin Convention and other safe third country-mechanisms.

More generally, the Treaty of Amsterdam provides the framework for regulatory and institutional reform of the EU, with a significant impact on those policy issues pertaining to asylum and immigration. This Treaty, and more particularly the provisions therein adopted as Title IV of the Treaty on European Communities, is further examined in Chapter 6.

Chapters 7 and 8 analyse a variety of more concrete aspects of the EU accession process. While Chapter 7 provides an overview of current protection problems in Central and Eastern European countries, and discusses strategies for enhanced refugee protection in this region from a UNHCR perspective, Chapter 8 analyses the future prospects of the enlargement process. An important finding in this context is that major elements of the EU asylum *acquis*, as well as its underlying policy assumptions, is being tested through the process of adaptation already taking place in the candidate countries. The experiences gained in these states should therefore inform the entire process of preparing new regulatory measures under the reformed system of EU competences. Finally, Chapter 9 shall summarize the findings of our inquiry into the transformation of asylum in an enlarged EU.

This book has come to be the result of a three year study drawing on the expertise of academics and practitioners in candidate countries and current Member States, as well as individuals from international and non-governmental organizations, to explore the complex evolution of refugee policy and practice in a changing Europe. We would like to express our sincere gratitude for the financial support from the Danish Social Science Research Council, from UNHCR and from the University of Aarhus Law School, as well as for the facilities provided by the Danish Centre for Human Rights, all of which contributed to the research network's realization of Jens Vedsted-Hansen's initial project proposal. Furthermore, the substantial input from Martin Isenbecker, Nina Lassen and Vladimiras Siniovas is gratefully

acknowledged. We would also like to thank Christopher Cassetta and Brenda Porstner for their editorial and layout assistance.

The analysis in this book is based on the law as it stands by January 2001.

It is our hope that this project will contribute to the understanding of the dynamics of regional and sub-regional law and policy shaping the future of refugee protection in Europe.

Rosemary Byrne

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Jens Vedsted-Hansen

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1 Western European Asylum Policies For Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics

Rosemary Byrne, Gregor Noll, Jens Vedsted-Hansen

1.1 The EU Accession Process

Along with the transformation of the political frontiers of Europe after the fall of the Berlin Wall in 1989, came the crumbling of the extensive regime of border controls that had stemmed migration into the west for three decades. Within a short period of time, widening of the European Union (EU) appeared inevitable. Policy formulation in the area of migration would not only need to make the short term adaptation to the weakening of borders spanning the entire eastern frontier of Europe, but the long term adaptation to their ultimate abolition upon the eventual accession of the newly democratised states to the east to the EU. The dual processes of accession and asylum harmonization will lead to a pan-European protection regime built upon the foundation of the EU *acquis communautaire*.[1]

The abolition of internal frontiers within Europe could only be envisioned if the flows of migration from the east, at levels unprecedented since the massive population displacements at the end of the Second World War, could be controlled. The EU *acquis communautaire* in the area of asylum is the product of single market integration in the post cold war era. As legal immigration into Europe

[1] The '*acquis*' encompasses all EU law, both legislation and treaties. It is also interpreted to include non-binding instruments and general guiding norms and rules associated with the achievement and objectives of the EU. For a discussion of the EU *acquis* in the area of asylum see Boldizsár Nagy, *The Acquis of the European Union Concerning Refugees and Law in the Associated States in* UNHCR, 3rd International Symposium on the Protection of Refugees in Central Europe, 23-25 April 1997, Budapest, 3 European Series 2 (UNHCR 1997).

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was effectively phased out by the end of the 1980s, it was the asylum regimes that received the applications of refugees and migrants alike seeking to remain in the west. In the rhetoric of politics, the increase in migration constituted a crisis, and at the crux of the crisis was the institution of asylum. Domestically, European states responded by introducing a range of restrictive asylum practices, which aimed to deter and redistribute asylum seekers, as well as expeditiously render asylum determinations and return illegal migrants.[2] Regionally, the Immigration Ministers of the Member States used these practices as a model for the core framework of the *acquis*.[3]

It is against the backdrop of accession negotiations and the imminent expansion of the EU that the construction and stability of the framework for refugee protection in Europe should be assessed, for it will extend eastward, potentially applying guidelines for protection in over 27 states. Efforts to structure a regional refugee protection regime in compliance with international obligations under the 1951 Refugee Convention required a range of substantive and procedural guidelines viewed by Member States as the minimal administrative safeguards for protection against *refoulement*. Controversially, the minimum threshold of protection standards under the *acquis* leaves the adoption of several fundamental safeguards to the discretion of Member States. For instance, under the *acquis*, asylum seekers can be removed from a state in which they have received protection without the right to an appeal that carries *suspensive* effect in the event that they submitted their claim at the border or had transited through a 'host third country'.[4] Even in the context of the advanced systems of administrative justice shared by current Member States, considerable debate remains over whether elements of the minimum regional protection threshold adopted in the EU *acquis* complies with or erodes international human rights standards. These debates now have an added urgency, as in the aftermath of the Amsterdam Treaty; the creation of second *acquis* is now in progress.

The effects of the EU *acquis* now reach well beyond the frontiers of European current and future Member States. In the early period following the political and economic liberalizations in the east, the influence of the western asylum practice and policies was considerable, albeit indirect. Rather than asylum assuming a

[2] These practices include accelerated and manifestly unfounded procedures, safe country of origin and safe third country policies.

[3] See 'Draft list of the "*acquis*" of the Union and of its Member States in the field of Justice and Home Affairs.' Doc. No. 6437/2/98 REV 3 (20 Mar. 1998).

[4] EC Ministers Resolution on a Harmonized Approach to Questions Concerning Host Third Countries, 30 Nov.–1 Dec. 1992 (SN4823/92) (hereinafter, Resolution on Host Third Countries).

prominent role in pre-accession discussions, the effects of the European asylum policy resulted from a mosaic of bi-lateral and sub-regional approaches to migration control taken independently by both Member and non-member states. As part of the domestic immigration strategies individual states entered into bi-lateral readmission agreements that facilitated the return of illegal migrants and or rejected asylum seekers to the transit states which were aspiring for EU Membership. For a number of these receiving States, the co-operative efforts in the area of migration control were initiated well before the later EU policies directed towards the transfer of funds, technology and expertise to enable the Central East European and Baltic States to develop the immigration and asylum policies, and the administrative infrastructure, which would enable them to cope with the effects of their new roles as transit, and in the foreseeable future, target countries.[5] These co-operative arrangements created the prospect of a reducing the influx of migrants into western states. For eastern states, the prospect of hosting the migrants with failed aspirations of entering Western Europe was balanced (and bartered for) by the relaxation of visa restrictions for their own nationals seeking to enter European states. Successful co-operation in the area of immigration, asylum and border control would have an affirmative effect on their candidacy for membership in the EU. The lengthy road to Europe for applicant countries has been marked with extensive requirements for political, legislative and institutional reforms. Prior to the formal application for accession to the EU, CEEC and Baltic States each concluded a bi-lateral European Agreement (EA) with the European Communities as part of the pre-accession process. In these treaties, applicant states undertook to approximate their legislation to that of the EU.[6] Of the Visegrad Group,[7] Hungary and Poland applied for membership in 1994, followed by Slovakia in 1995 and the Czech Republic in 1996.[8] Each of the states of the Baltic Sea Region,

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[5] The PHARE programme ('Poland and Hungary Aid for Restructuring the Economy) on Economic Aid to the Republic of Hungary and the Polish People's Republic now includes Albania, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Slovakia and Slovenia. 1989 O.J. (L 375) 11.

[6] See for an excellent overview of the complex accession process, Hartnell, H. *Subregional Coalescence in European Regional Integration*, 16 Wis.Int'l L.J. 115 (1997).

[7] The Visegrad Group consists of Hungary, Poland and the Czech and Slovak Republics. Previously known as the Visegrad Triangle, prior to the break-up of Czechoslovakia, it derives its name from a meeting of its member states to co-ordinate their positions with respect to the then, European Community, held in 1991 in Visegrad, Hungary.

[8] BULL. EUR.COMMUNITIES, 1.3.18, 1.3.19(Apr. 1994); BULL.EUR. UNION, 1.4.58, (June 1995); BULL.EUR.UNION, 1.4.75, (Jan.-Feb. 1996).

Estonia, Latvia and Lithuania, submitted their applications in 1995.[9] The underlying principles for the assessment criteria establishing applicants' preparedness for membership into the EU were set forth by the European Council at the Copenhagen Summit in 1993. Under the Copenhagen criteria, membership in the EU requires:

- That the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities;
- The existence of a functioning market economy, as well as the capacity to cope with the competitive pressure and market forces within the Union;
- Ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.[10]

Fulfilling the 'obligations of membership' entails the implementation of the entire EU *acquis* as it evolves. This is particularly relevant in the area of asylum policy, as to date, only a limited number of instruments have emerged in the area and, with the exception of the Dublin and Schengen Conventions, they are non-binding. In the absence of a full-fledged *acquis* in the area of asylum, narrowly, and justice and home affairs, more generally, applicant states are committed in principle to implementing a yet to be constructed comprehensive framework for refugee protection.

The list of instruments under the asylum *acquis*, is a minor part of the broader process of integration that requires applicant states to carefully examine close to a thousand European legal acts. Although the body of the asylum *acquis* was small, refugee policy emerged as an increasingly significant area for co-operation given its links to broader issues of external border control and security issues. Regional recognition of the need to have a coherent strategy with respect to asylum and the accession process was recognized by the 1994 European Council in Essen.[11] This call was met by limited exchanges between EU Ministers of Justice and Home Affairs with their counterparts in applicant states which dealt with a range of issues such

[9] BULL. EUR. UNION, 1.4.60 (Nov. 1995); BULL. EUR.UNION, 1.4.42, (Oct. 1995); BULL. EUR. UNION, 1.4.60 (Dec. 1995).

[10] Conclusions of the Presidency (Copenhagen Summit Conclusions) reprinted in BULL.EUR. COMMUNITIES, 1.1–1.4 (June 1993).

[11] Conclusions of the Presidency (Essen Summit Conclusions) reprinted in BULL.EUR. COMMUNITIES, 1.13 (Dec. 1994).

as visa policies, cross border crime, human trafficking, as well as asylum.[12]

Explicit criteria for applicant states in asylum and refugee matters were set forth by the European Commission in its 1997 communication, Agenda 2000: For a Stronger and Wider Europe[13]. These are:

- Adoption in new Member States of the Refugee Convention and its necessary implementing machinery;
- Adoption of the Dublin Convention (DC);
- Adoption of related measures in the EU *acquis* to approximate asylum measures.[14]

The underlying benefit for Member States identified by the Commission would be to increase 'the pool of states that meet common criteria to act as potential recipients for asylum applicants.' The Commission further emphasized the inter-related obligation with respect to immigration policy and border management that will place the burden of controlling the frontiers of an enlarged EU at the time of their admission upon the new Member States.[15]

A more focused concentration on the fulfillment of the asylum and refugee criteria emerged in the Accession Partnerships agreed by the European Commission in March 1998. In Agenda 2000, the Commission proposed that a single framework be created for pre-accession support through the creation of country specific Accession Partnerships. The Accession Partnerships are designed to prepare applicant countries to fully meet the Copenhagen criteria through the designation of priorities and intermediate objectives to meet in preparation for accession, along with financial assistance targeted to facilitate the realization of the stated objectives. Each Accession Partnerships is accompanied by an annex of recommendations for the relevant country that address the implementation of specific aspects of the entire *acquis*. The recommendations are tailored to the particular stage of progress attained by the respective applicant countries and their political and economic contexts. Asylum, migration or border control issues are highlighted as priority areas for applicant states in

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[12] See for an overview of the activities of the EU in relationship to accession states and the issues pertaining to asylum, S. Lavenex, *'Passing the Buck': European Union Refugee Policies towards Central and Eastern Europe*, 11 J. Ref. Studies, 134-137 (1998).

[13] European Commission, Agenda 2000: For a Stronger and Wider Union, COM (97) 2000 final at 1.

[14] European Commission, Agenda 2000: For a Stronger and Wider Union, BULL.of European Union, Supplement 5/97, p.131.

[15] Ibid, at 131-132.

the annex attached to the Accession Partnerships for each of the Central East European and Baltic States.

The protection of human rights is at the foundation of the political criteria for the accession process as set forth by the Copenhagen Presidency. In a similar vein, the preambles of the instruments of the *acquis* which are the building blocks of a pan-European refugee protection regime rest upon principles of refugee and human rights protection enshrined in the Refugee Convention and the European Convention on Human Rights and Fundamental Freedoms (ECHR). With the ascendance of asylum and refugee matters in the enlargement process, it is the corresponding accession criteria established by the Commission that now is driving the agenda for the new refugee protection regime in an enlarged EU. These criteria are primarily interpreted, prioritized and promulgated through the transfer of funding and technical expertise under the PHARE Horizontal Programme for Justice and Home Affairs (PHP). The immediate effects of the standards and practices embraced by this emerging protection regime are experienced by asylum seekers seeking entry to or traveling through the future and current Member States of the EU. The long term effects of the pan-European regime on development of international refugee law, however, and its underlying norms for protection, potentially will affect refugees and asylum seekers globally well into the century. An examination of the accession criteria in asylum policy, the impact of their implementation in applicant states, and their consequences for refugee protection in the states bordering the new frontiers of a wider Europe, highlights the challenges of advancing human rights standards in the construction of an enlarged EU.

1.II Non-Admission and Non-Arrival Policies

1.II.A Various Types of Deflection of Asylum Seekers

The policy responses by Western European states to the arrivals of spontaneous asylum seekers have, over the last decade in particular, been redesigned so as to assert the notion of 'protection elsewhere' to the maximum extent possible. The increasing role of such policies is

well documented, and can be considered an undisputed fact.[16] In the 1990s the implementation of this notion has even become an object of harmonisation by means of the adoption of international legal instruments dealing with the issue.[17] Since the implications of the 'protection elsewhere' notion and its legal basis have been widely discussed among policymakers and by observers in recent years,[18] we are here going to limit ourselves to providing an overview of the various types of policies based on that notion. In this connection, the more specific practices employed in order to prevent the admission of asylum seekers to the examination procedures of EU Member States will also be highlighted, and the following section will focus on the evolving safe third country practices.

The common feature of what could be characterised as *deflection policies* is their effect of shifting the burden and responsibility of protection towards other states. As it will emerge, not every kind of policy referring to 'protection elsewhere' results in the asylum seeker actually being protected in another country. Here it should be noted that, while the prohibition of *refoulement* is normally considered the cornerstone of refugee protection, a wider scope of fundamental human rights must be taken into account if international protection is to be effective in preventing refugees becoming an unprotected category of persons.

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[16] See ECRE, "Safe Third Countries" Myths and Realities (London 1995); Nina Lassen and Jane Hughes, "Safe Third Country" Policies in European Countries (Copenhagen 1997); Gregor Noll, Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection (Martinus Nijhoff Publishers 2000) (182-211).

[17] See for critical observations on the DC and the similar mechanism under the Schengen Convention as well as the 1992 London Resolution on Host Third Countries, Johannes van der Klaauw, Refugee Protection in Western Europe: A UNHCR Perspective, Europe and Refugees: A Challenge? (J.Y. Carlier & D. Vanheule eds., Leiden 1997) (235-37); Jens Vedsted-Hansen, *Challenges for the EU Associated States with Regard to Asylum and Migration Control in* UNHCR, 3rd International Symposium on the Protection of Refugees in Central Europe, 23-25 April 1997, Budapest, 3 European Series 2, pp. 102-105 (Geneva 1997); Gregor Noll and Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies, in* The EU and Human Rights (Philip Alston ed., Oxford 1999) (394-395).

[18] See generally, Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 IJRL, pp. 383-405 (1995); Rosemary Byrne and Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 Harvard Human Rights Journal, pp. 185-228 (1996); Gregor Noll, *Non-admission and Return of Protection Seekers in Germany*, 9 IJRL pp. 415-452 (1997); Jens Vedsted-Hansen, *Non-admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?, in* Refugee Rights and Realities (Frances Nicholson and Patrick Twomey eds., Cambridge 1999) (269-288).

However, the scope of rights protected does not remain unaffected by deflection policies. Shifting responsibility and burdens may in turn lead to the downgrading of protection standards. First, the scope of substantive rights that have to be protected may be narrowed in order to make the threshold for 'protection elsewhere' lower, and thus shifting of the protection burden more likely to occur. Second, the procedural and evidentiary requirements for the transfer of individuals to 'protection elsewhere' by another state may also be lowered. Thus, while the legal concept traditionally invoked in order to legitimise 'protection elsewhere' practices was 'country of first asylum', along with the evolving deflection policies new terms have come into usage, mainly 'safe third country' and 'host third country'.[19]

This shift in language is indicative of the changing legal criteria, and the corresponding lowering of protection standards to be met by the state to which an asylum seeker may be transferred. Indeed, the policies implementing the traditional concept of 'country of first asylum' are characterised by fundamental differences compared to deflection policies based on the later concepts, and therefore perhaps they should not even be considered a type of deflection. While the former way of refusing asylum will normally be made in a substantive decision-making procedure, establishing the individual's 'first asylum' as a protection possibility, 'safe third country' policies are designed to allow for *pre-procedure* rejections. In other words, the more recent concepts have been introduced and are implemented in order to establish barriers for the *admissibility* of asylum seekers into the examination procedure.

The evolving deflection policies therefore have to be seen in connection with various kinds of *accelerated procedures*. In itself, this phenomenon may be a reasonable response to the arrival of asylum seekers with manifestly unfounded cases, and such procedures can be in accordance with internationally recognised standards of legal safeguards. On the other hand, there is a tendency for accelerated procedures and restrictive criteria to become mutually reinforcing, with the result of undermining legal safeguards at both the procedural and substantive level. This holds true for the 'safe third country' policies which have gradually replaced the substantive 'first asylum' concept described above, and which will normally be implemented through accelerated admissibility procedures, with no appeal or at least no *suspensive* effect of possible appeal. The same seems to be the case for the concept of 'internal flight alternative' that, in spite of its legal nature as a substantive element of the definition of refugee, in

[19] Cf. *infra* section 1.III.

certain countries is being implemented in the context of admissibility decisions.[20] Here there is a risk that the procedural framing may pervert the protective substance of the concept. To the extent that the 'internal flight alternative' becomes an issue addressed in accelerated procedures, more or less similar to 'safe third country' issues, this can be seen as a kind of deflection policy as well.

Given the premise that protection must be accessible to the asylum seeker in the states designated as 'safe', the changes that took place in Central Europe after 1989 have been of crucial importance to the feasibility and the quantitative results of this deflection strategy. Only when neighbouring countries in Central Europe and other newly democratised states in Eastern Europe became parties to the Refugee Convention, so that they could generally be presumed to comply with Convention obligations, did it appear legally viable for EU Member States to return asylum seekers to these countries on the assumption that they would be sufficiently protected there.[21]

Again, it should be emphasised that deflection occurs in very different forms. Distinguishing between the various policies and practices is important not only because we must be aware of their different legal characteristics and logistical design, but also because of their varying impact on those third countries to which EU Member States attempt to shift the protection responsibility. In particular, distinction has to be made between *non-admission* policies that set up restrictive criteria of admissibility of asylum seekers to the examination procedure as well as to the territory, and the less visible *non-arrival* policies aimed at keeping asylum seekers at a safe distance from any asylum procedure and from any possible territory of protection.[22]

While the former policies are, at least in principle,[23] based on the idea that all asylum applications must be examined on their merits

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[20] *Relocating Internally as a Reasonable Alternative to Seeking Asylum, Position Paper,* UNHCR, paragraph 1 (February 1999); see e.g., the case of Lithuania, *infra* Chapter 4.II.C.3.

[21] Cf. Sandra Lavenex, *Passing the Buck: European Union Refugee Policies towards Central and Eastern Europe*, 11 Journal of Refugee Studies, pp. 129-137, (1998); *Asylum, Immigration, and Central- Eastern Europe: Challenges to EU Enlargement*, 3 European Foreign Affairs Review, pp.279-282 (1998); Safe Third Countries. Extending the EU Asylum and Immigration Policies to Central and Eastern Europe (Budapest 1999) (75-95).

[22] See James C. Hathaway, *The emerging politics of non-entrée*, Refugees, pp 40-41 (December 1992). Thus, the term *non-arrival* policies largely covers the same phenomena as have elsewhere been described as *non-entrée*.

[23] In practice exceptions may occur, for example in the form of non-registration of asylum claims in connection with admissibility decisions, or non-rebuttability of

somewhere, even though preferably elsewhere, *non-arrival* policies do not even pretend to ensure such examination. Practices that come under this category basically create initial obstacles that keep potential asylum seekers from ever coming within the formal jurisdiction of EU Member States, for instance by visa requirements and the enforcement of such requirements through carrier liability legislation.[24] In this way asylum seekers are prevented from getting access to refugee status determination procedures in Western Europe. As neither the EU nor other Western states have so far created extraterritorial alternatives to such asylum procedures, this may result in denial of the international protection that the asylum seeker might otherwise have been deemed to stand in need of.

1.II.B Deflection Policies with a Particular Impact on Central European States

Although both types of deflection policies, described above in section A, undoubtedly have detrimental effects on the accessibility of international protection for individuals, such effects may occur in different ways and to various degrees, according to the design of the actual practices employed. In general terms, it is obvious that there is considerable likelihood that *non-arrival* policies may result in the exposure of individual asylum seekers to the risk of persecution, given the fact that such policies basically operate by means of blocking either flight from the country of origin, or onward movement from transit countries, many of which are unsafe and may thus violate human rights, or even forcibly return people in need of protection to their country of origin.

Whether policies and practices of *non-admission* jeopardise refugee protection is less predictable. On the one hand, mechanisms restricting admissibility to the asylum procedures of a given state may well be considered as striking an inadequate balance between immigration control and refugee protection, in so far as they refer

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the presumption of safety in a 'safe third country'. Such occurrences are however not conceptually inherent in these non-admission policies.

[24] Other methods of enforcement, introduced or formalized in recent years, include the posting of immigration officers in third countries in order to prevent exit movements towards EU States, often in co-operation with the authorities of those third countries. See, Joint Position of 25 October 1996 on pre-frontier assistance and training assignments, 1996 O.J. (L 281)1; see also, critical observations in Gregor Noll and Jens Vedsted-Hansen (1999) (384-388).

asylum seekers to another state's jurisdiction merely because of non-compliance with formal immigration control requirements.[25] On the other hand, such mechanisms are nonetheless premised on the notion that all asylum seekers must have access to an examination procedure in one state. From the perspective of the individual, *non-admission* policies can therefore, at least theoretically and in so far as procedures are concerned, are implemented in a manner that is compatible with fundamental protection principles.

Turning then to the impact of deflection mechanisms on neighbouring states to the EU countries of primary destination, we see that differences among the various policies still prevail, yet along quite different dividing lines. An immediate assessment might suggest that *non-admission* based on the notion of 'protection elsewhere' would be likely to affect neighbouring states the most. Conversely, policies of *non-arrival* rather tend to contain potential asylum seekers in their region of origin, if not in the very country of origin. In other words, *non-arrival* policies would generally seem to operate at the farthest distance from the preferred asylum countries. This in itself offers an explanation why such states seem to be more and more inclined towards this strategy of deflection.

As will be demonstrated in the following sections and chapters, this general difference of effects between the two main types of deflection has been modified in practice, owing to geographical and political realities within the European region. This results partly from the fact that *non-admission* policies can only be enforced in compliance with international standards through 'safe third country' returns to the extent that the relevant third countries are actually safe, and willing to readmit asylum seekers being returned from Western Europe. Because certain neighbouring states do not offer adequate guarantees of protection and can therefore not be considered safe enough for the immediate return of asylum seekers from EU Member States, *non-arrival* has become an attractive alternative in some instances even within Europe.

Another reason for the different effects and the policy shifts between *non-arrival* and *non- admission* is the changing pattern of arrivals of asylum seekers. Affected by former policies, in particular the sanctions targeting air carriers, the transportation system has been reshaped with a much stronger emphasis on ground transportation being utilised in the last segments of the route towards Western European borders. In response, destination states and the EU have been reinforcing *non-admission* mechanisms, designed for pre-procedure rejection of asylum

[25] Cf. Gregor Noll and Jens Vedsted-Hansen (1999) (382); see also, Noll *supra* note 16.

seekers and for their readmission to 'safe third countries'. The problem arising from the reality that certain neighbouring states are not safe has been addressed by yet another type of *non-arrival* policy, which however in practice has quite similar impact.

In order to avoid asylum seekers' onward movement from countries to which they would not be returnable on safe third country grounds, because of deficient protection systems in those countries, policies have been devised to prevent such persons from leaving their transit countries in the first place. As a result, asylum seekers may be, and have indeed been, contained within such countries. Thereby the impact of *non-arrival* policies on certain states has probably been more or less the same as that of *non-admission* mechanisms that are being implemented towards safe third countries elsewhere in Central Europe. A possible difference is, however, that containment policies are more likely to create fear of a 'closed-sack' effect in the affected countries.[26]

1.II.C Shifting Responsibility and Creating Safe Third Countries

The modifications in the typical impact of deflection mentioned above, as well as the underlying legal notions and political interests involved, have to a considerable degree created the framework for the policies of the EU and individual Member States concerning co-operation with neighbouring states in Central and Eastern Europe. These same political interests and legal notions have largely inspired the strategy followed under the EU enlargement process, in particular pre-accession initiatives and assistance programmes towards membership candidates.

When democratisation and adherence to human rights principles and protection standards started becoming a reality in Central Europe in the early 1990s, the immediate response by Western European states was the effort to hold these states responsible for protecting as many asylum seekers and refugees as possible. This policy was carried out by returning asylum seekers, normally without having examined their applications, to the neighbouring states on 'safe third country' grounds as soon as this became justifiable on the basis of the

[26] As a clear example, Nordic policies towards the Baltic States can be mentioned, see *infra*, Chapter 4.I.

accession of Central European states to the Refugee Convention, often supplemented by their accession to the ECHR.

In order to legitimise and increase the effectiveness of the safe third country return policies, the EU and its Member States at the same time entered upon a variety of political, legal, and administrative strategies towards the countries to which such returns were now being implemented or, at least, contemplated. In general terms, these Western European strategies may have appeared rational and adequate for the overall purpose of establishing preconditions for the return of asylum seekers to Central European countries. As a means of enhancing the protection capacity of these states, EU Member States have, during the 1990s, carried out numerous multilateral and bilateral co-operation programmes, designed to prepare the neighbouring states to take back returned asylum seekers, or to facilitate their reception in the relevant Central European countries upon such return.[27] At the same time, the EU States have modified protection requirements by virtue of adopting and implementing wide and rather open criteria for 'safe third country' returns as an element of the harmonization of asylum policies.[28]

1.III Safe Third Country Practices

1.III.A The Notion of a Safe Third Country

The safe third country of asylum notion is one of the central inspirations of the blueprint for harmonization undertaken by European immigration ministers.[29] For the practice to be

[27] Cf. *supra,* Section 4.I; see also, *infra* Chapter 7; Lavenex, (1998) pp. 287-9; (1999) pp. 85-90.

[28] Cf., Roel Fernhout and Herman Meijers, *Asylum, in* A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration (P. Boeles et al. eds., 1993) (17-18); *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, 1 European Series 3, pp. 18-20 (UNHCR 1995); Jens Vedsted-Hansen (1999) pp. 279-84; see also, *infra* section 1.III.

[29] The 'safe third country of asylum' notion is also referred to as 'safe third country,' 'first asylum country' or 'host third country.' There is a wide range of divergence as to its legal status under international law. UNHCR asserts that the 'safe third country' remains a notion, rather than an established legal principle or concept. However, the Immigration Ministers of the EU and the European Commission consider its legal status as a 'principle' and 'concept' respectively. The Irish High Court has gone so far as to consider it part of 'customary international law.' See

implemented in compliance with the international obligation of *non-refoulement*, an asylum seeker cannot be removed to a territory where their life or liberty would be in danger. Should a receiving state seek to forego an examination of an asylum seeker's claim by returning them to a 'safe third country' it is necessary that the host state to which the asylum seeker is being returned qualifies as one where the asylum seeker either found protection, or could have found, protection. In its position paper on host third countries, UNHCR interprets such protection as,

> '[involving], at a minimum, protection against return to situations of persecution, serious insecurity or other situations justifying the granting of asylum as well as treatment in accordance with basic human standards. The latter means that refugees must be able to satisfy basic subsistence needs in the country of asylum, if necessary with assistance from the international community. Where enjoying the benefit of protection is conditional upon a positive decision on the asylum claim, the *applicant should also be given access to an eligibility determination procedure with adequate procedural safeguards.*'[30] (Emphasis added)

There remains considerable debate over the substantive criteria necessary to establish whether a third country is indeed 'safe', and the procedural safeguards necessary to ensure that these are properly interpreted by immigration authorities prior to the removal of an asylum seeker from a receiving state. In spite of this, the practice of safe third country returns is now standard within Western Europe. For the CEEC and Baltic States, its implementation is a requirement for accession to the EU.[31] As the applicant states are designated as safe third countries and routinely accept asylum seekers returned from Western European countries, they in turn are introducing similar policies through bi-lateral readmission agreements, national legislation, or informal exclusion procedures at border points with

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An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, 1 European Series 3, pp. 18-20 (UNHCR 1995); European Communities, Conclusions of the Meeting of the Ministers responsible for Immigration, (London, Nov.30-Dec.1, 1992), Doc.10579/92 IMMIG. Paragraph I (a-c); European Commission, Towards Common Standards on Asylum Procedures, Commission Working Document, SEC (1999) 271 Final, 3.3.1999, paragraph 13; *Anisimova* v. Department of Justice, (not reported) (High Court, 18 Feb. 1997).

[30] UNHCR's Position on a Harmonized Approach to Questions concerning Host Third Countries, reprinted in *UNHCR 3rd International Symposium on the Protection of Refugees in Central Europa*, supra note 1.

[31] European Commission, Agenda 2000: For a Stronger and Wider Union, BULL.of European Union, Supplement 5/97, p.131.

their eastern neighbours.[32] Because of the disparity of practices between Member States, and the demonstrated weaknesses in the application of the safe third country concept throughout the EU, it is a central area of the first *acquis* that has been reformulated in the European Commission's proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.[33]

The genesis of the pervasive sense of crisis within the asylum systems of Western European states in the early 1990's was the mounting backlogs and spiralling administrative and social costs resulting from ill-designed asylum systems which were unable to efficiently process the exponential increase in claims. [34] With climbing application numbers, immigration authorities implemented safe third country policies by returning asylum seekers to other states through which they travelled. The absence of an established procedure to determine responsibility for examining the merits of asylum claims gave rise to instances where back and forth exchanges between disputing state officials were accompanied by the actual shuttling of the asylum seeker in question between the airport transit zones; this process ending only when a state was willing to concede responsibility for examination of the claim. The phenomenon, known as 'refugees in orbit', highlighted the need for clarification on criteria for designating responsibility for admitting asylum seekers into determination procedures.

1.III.B The Dublin Convention and EU Member States as Safe Third Countries

Given the dramatically uneven distribution of asylum seekers in Europe, there was a strong perception in some states that they were geographically and legally vulnerable to exploitation by asylum seekers. This was supported by the view that asylum seekers would 'forum shop' by submitting their applications in states which provided comparatively easy access to the jurisdiction, which provided legal

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[32] Nina Lassen & Jane Hughes, "Safe Third Country" Policies in European Countries, (Danish Refugee Council 1997).

[33] Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Articles18-23, Annex I, http://europa.eu.int/eur-lex/en/com/dat/2000/en_500PC0578.htlm.

[34] Kay Hailbronner, *The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective*, 5 IJRL 31 (1993); Morten Kjærum, *The Concept of Country of First Asylum*, 4 IJRL 514 (1992).

guarantees which led more favourable recognition rates for asylum seekers, and which granted extensive rights to remain for all asylum seekers while their claims were processed by elaborate many-layered procedures, regardless of the merits of the applications. Through the adoption of the DC states attempted to establish a procedural mechanism which would eliminate the phenomenon of refugees in 'orbit' and 'forum shopping', while redistributing the burden of hosting asylum seekers among signatory states.

This was to be achieved by allocating responsibility for assessing an asylum seeker's claim based mainly on procedural and technical issues, primarily concerned with travel route.[35] To the extent that some states may have hoped that the DC would deliver effective burden sharing in Europe, the safe third country policy failed. [36] More importantly, as a central mechanism for implementing the 1951 Refugee Convention through the process of harmonization in Europe, it failed considerably. The DC does not provide any obligation upon signatory states to afford the opportunity for an asylum seeker to challenge the designation of a third country as 'safe' prior to their removal to another EU Member State.

This regional policy is legitimated by the assumption that all signatory states provide similar protection to all refugees. The drafters of the DC chose to overlook the most striking feature of the institution of asylum in Europe, which is readily apparent to refugees seeking protection. Significant variations in the recognition of similar asylum seekers in different European states make it clear that there is neither a uniform application of the 1951 Refugee Convention, nor a shared standard of protection against the risk of *refoulement* throughout the region.[37]

In its preparation of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, the European Commission initiated

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[35] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990. (hereinafter Dublin Convention, abbreviated DC). Entered into force 1 September 1997. OJ 1997 (C 254)1.

[36] See Noll, *infra* Chapter 5.

[37] A comparison of European total recognition rates (the rate of combined Convention and humanitarian recognition) of asylum applicants from the Federal Republic of Yugoslavia (FRY) in 1998 reflects the disparity of protection standards. In Germany, the Netherlands and Switzerland, the total recognition rate for FRY applicants was less than 10%, whereas in Bulgaria, Denmark, Greece, Iceland, Liechtenstein, Romania and the United Kingdom, it was over 50%. Asylum-Seekers and Refugees In Europe in 1998: A Statistical Assessment With A Special Emphasis on Kosovo Albanians, (UNHCR, 1999).

discussion with the European Council and Parliament on the future of asylum policy in Europe. Its working document emphasized the current need for a regional safe third country policy between and from EU states that acknowledges the nexus between substantive protections and procedural safeguards. This recognition has yet to be translated into the procedural guidelines under the asylum *acquis*.[38] Western European states have the benefits of considerable experience with developing determination procedures, as well as an accumulation of insights gained from intergovernmental communications in the area. In spite of this, considerable protection gaps remains throughout the region.[39] The mandatory extension of the Dublin system under the accession process to include the nascent asylum regimes in the CEEC and Baltic States is likely to stretch these gaps even wider and may potentially conflict with the obligations of the 1951 Refugee Convention. This is currently the case with returns to these states carried out under bi-lateral readmission agreements with Western European governments which generally apply to all third country nationals, overlooking the unique protection requirements of asylum seekers. Hence, these agreements typically not only fail to guarantee that a returned asylum seeker will have access to asylum procedures in the readmitting state, but they generally do not even require that the readmitting state be notified that a third country national is an asylum seeker and that their claim has not been examined on its merits.

1.III.C Harmonization and Safe Third Country Practices

Yet the transfer of applications between Member States in an expanded EU under the DC is only the secondary objective of the safe third country policy as it has evolved at the regional level. While the 1990 DC specified that states maintain the right to send an asylum seeker to a third state that is not party to the treaty in accordance with

[38] The European Commission refers to the hitherto unfulfilled agreement during the negotiation process for the 1995 Resolution on Minimum Guarantees whereby it was foreseen that the Article 18 Committee established under the DC would set forth procedural guarantees under the Treaty. European Commission, 'Towards common standards on asylum procedures,' Working Document, (SEC 1999) 271 Final, p. 8; EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures OJ 1996 (C 274)13) Section I.

[39] See Steven Peers, *Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measures*, (Immigration Law Practitioners Association and Refugee Council, 1998).

their own national laws,[40] the EU Immigration Ministers transformed this prerogative into a pre-emptory obligation to identify a non-EU host country state to which an asylum seeker can be removed in the 1992 Resolution on Host Third Countries. Hence, under the EU asylum *acquis*, all substantive examinations of asylum claims and their justifications should be, in principle, preceded by the process of identifying a potential host third country. In the event that the asylum seeker has travelled through or had the opportunity to seek protection in a state that qualifies as a safe third country, his application need not be considered and he may be returned to the respective third country.[41]

The safe third country notion provides an attractive solution for receiving states. Provided that common criteria can be established which allow for a clear designation of 'safe third countries' the potential for removing asylum seekers from the EU increases significantly, eliminating the costly obligation of examining a vast number of individual claims. The notion, however, requires both clear substantive criteria that would be in compliance with international legal obligations, and legal mechanisms for the effective transfer of asylum applicants to the territories through which they transited. Both requirements have created considerable challenges.

In response to the heightened trend among European states of integrating the practice of safe third country returns into their asylum policies, the Executive Committee of the High Commissioner's Programme issued guidelines for the return of an asylum seeker to a safe asylum country. This would comply with international obligations only if an asylum seeker:

> (a) Had found protection there;
>
> (b) Can enter and remain safely;
>
> (c) Is not subject to *refoulement* and is treated in accordance with basic human standards;
>
> (d) Will not be subject to persecution or threats to safety or liberty; and has access to a durable solution.[42]

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[40] DC, *supra* note 35, Article 3 (5).

[41] Resolution on Host Third Countries, *supra* note 4, paragraph I (a-c).

[42] Executive Committee of the High Commissioner's Programme, Conclusion No. 58 (XL) (1989), 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection', granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which

Under the Resolution on Host Third Countries adopted by the Immigration Ministers of the Member States of the EU, Member States are obliged to make an assessment in each individual asylum case that the following 'fundamental requirements' are met prior to the removal of an asylum seeker to the third country:

> (a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Refugee Convention.
>
> (b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
>
> (c) It must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country.
>
> (d) The asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention.[43]

While the foundation of the qualifying criteria for host third countries rests on the core protections of Article 33 of the Refugee Convention and Article 3 of the ECHR,[44] in the Resolution on Host Third Countries these protections are 'negative' rights, relying upon the absence of threats to life or freedom, or exposure to torture, or inhuman or degrading treatment. This is only in partial fulfillment of the obligations under the Refugee Convention and international human rights law, excluding the range of 'positive' rights that must be afforded by the safe third country to which an asylum seeker may be returned.[45] As an instrument of harmonization which seeks to raise protection standards throughout the EU by bringing divergent

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he is applying for asylum, *or* that there is clear evidence of his admissibility to a third country. The asylum applicant must be afforded effective protection in the host third country against *refoulement*, within the meaning of the Refugee Convention.

[43] European Communities, Conclusions of the Meeting of the Ministers responsible for Immigration (London, Nov.30-Dec.1, 1992), Doc.10579/92 IMMIG., at para. 2 (a-d).

[44] ECHR, 4 November 1950, ETS No. 5.

[45] Gregor Noll & Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies, in* Philip Alston ed., The European Union and Human Rights (Oxford 1999)(396).

practices into uniformity with each other and international standards, the Resolution frustrates its own objective by setting forth an abridged range of qualifying criteria for 'host third countries' as well as failing to provide scope for common assessments of these receiving states.

The Resolution on Host Third Countries also fails to provide minimal guidelines for the procedures that are meant to safeguard against sending asylum seekers to host third countries where they may be at risk of *refoulement*. There is no requirement that Member States notify the receiving host third country that the returned asylum seekers have not had the merits of their asylum claims examined, nor that Member States receive confirmation from the host third country that an individual will be admitted into asylum procedures in their jurisdiction. Absent also is the requirement that there be an assessment as to whether there are adequate safeguards to prevent the summary return of an asylum seeker to a fourth 'host third country' without the confirmation that their claim will be admitted into asylum procedures which will provide standards of protection in line with international obligations. Likewise, these safeguards also are not applied under the DC for safe third country removals to non-EU states.

Concerned over the DC's failure to provide guidelines for third country removals outside of the EU, and the consequent potential for chain deportations and ultimately, *refoulement*, UNHCR has issued the following guidelines for the implementation of Article 3(5) under the DC which allows for returns to non-Member States:

- The sending State should seek the consent of the third country: (i) to readmit the asylum seeker; (ii) to consider the merits of the claim; and (iii) to provide effective protection as long as required;
- The sending state should inform the third country in writing that the rejection of the application was based purely on formal grounds and that no decision on the substance of the claim had been made;
- The responsible State, in considering removal to a third country, should provide the applicant with an opportunity to request a review of the removal decision.
- Such a review should be normally granted by an independent and specialized judicial or administrative body, in an individual procedure with suspensive effect.[46]

[46] UNHCR, Implementation of the Dublin Convention: Some UNHCR Observations, (1998).

The omission of such criteria under both the DC and the Resolution on Host Third Countries has given rise to 'chain deportations' whereby asylum seekers are serially returned back to the states through which they have traveled, a journey which will end for some in their country of origin. The application of the safe third country notion without UNHCR's recommended safeguards has the effect that some asylum seekers removed from EU Member States may never have their claim considered on the merits in any jurisdiction. Although the 1995 Resolution on Minimum Guarantees for Asylum Procedures requires that the readmitting host third country shall be notified that an asylum seeker's claim has not been examined on its merits, a survey of state practice for 'safe third country' removals reveals a widespread failure of states to comply with even this minimal regional guideline.[47] Again, in 1997, a Recommendation of the Committee of Ministers under the Council of Europe called for the adoption of modalities for informing the readmitting third country that a claim has not been examined in substance. To date, this generally has not been implemented into domestic asylum policies.[48]

Under its expanded powers in the area of asylum under the Amsterdam Treaty, the Commission has echoed concern over the procedural shortcomings of the DC. It has highlighted the failure of the Article 18 Committee, entrusted under the Treaty to establish procedures, to include procedural guarantees among the implementing measures that they have promulgated.[49] In the Working Document 'Towards Common Standards on Asylum Procedures', the Commission asserts the need for such guarantees to be binding upon states.[50] The extent to which this will be achieved by the forthcoming successor to the DC has yet to be seen.

1.III.D Accession, Enlargement and Safe Third Country Practices

[47] Nina Lassen & Jane Hughes, "Safe Third Country" Policies in European Countries, (Danish Refugee Council 1997).

[48] Committee of Ministers Recommendation to Member States Containing Guidelines on the Application of the Safe Third Country Concept, No. R(97)22 (Adopted by the Committee of Ministers of the Council of Europe on 25 November 1997).

[49] European Commission working document, Towards Common Standards on Asylum Procedures, (SEC 1999) 271 Final, p.8.

[50] Ibid.

In the interim period, it is the current Dublin system, absent the requisite safeguards, that Accession States are required to implement. While the Directorate responsible for asylum issues within the European Commission acknowledges the potential protection problems under the Dublin regime, the Directorate responsible for enlargement requires that the Convention be implemented into the asylum policies of applicant states. As with other areas of harmonization in the area of asylum, the premature regionalizing of unrefined asylum practices heightens, rather than reduces, risks of *refoulement*.[51]

While the Resolution on Host Third Countries is not legally binding upon Member States, the Immigration Ministers agreed to ensure that their national laws complied with the principles of the resolution by the time that the DC enters into force. As for states seeking to accede to the EU, the principles of the Resolution on Host Third Countries are 'politically binding', as they constitute a core component of the asylum *acquis*. In the safe third country practices that have proliferated throughout Western Europe, governments or courts have not been inclined to expand their national procedures beyond the minimal criteria adopted in the Resolution on Host Third Countries. The United Nations High Commissioner for Refugees states that the 'safe third country' practice is only in compliance with international obligations under the 1951 Refugee Convention if the asylum seeker has the opportunity to 'rebut the presumption of safety' prior to their removal to the host third state.[52] Likewise, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment asserts that given the gravity of the risks associated with the removal of asylum seekers to other jurisdictions, no removal should occur without the right of an appeal to an independent authority with *suspensive* effect.[53] These calls for states to ensure the minimum safeguard of the right to an appeal which carries *suspensive* effect to an independent authority in order to challenge a removal is absent in the law and policy of virtually every European state.[54]

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[51] For a discussion on procedural and substantive harmonization of safe third country practices, see Rosemary Byrne & Andrew Shacknove, *Safe Third Country Notion in European Asylum Law*, 9 Harvard Human Rights Journal pp. 209-212 (1996).

[52] UNHCR, An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, I European Series 3, p. 19 (UNHCR 1995).

[53] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 7th General Report on the CPT's Activities Covering the Period 1 January to 31 December 1996, CPT/inf (97) 10 at p. 13 (Council of Europe 1996).

[54] Nina Lassen & Jane Hughes, "Safe Third Country" Policies in European Countries, (Danish Refugee Council 1997).

The substantive and procedural shortcomings of the DC are not the only evidence that the Convention was negotiated without a comprehensive understanding of the modern realities of refugee protection. The strongest support for this comes from the practices of the negotiating states themselves since the DC has entered into force.[55] Only a small percentage of asylum seekers who claim asylum in EU states fulfill the documentary and other technical requirements in order for the state responsibility for assessing their claim to be transferred. 1999 statistics on the numbers of transfers actually carried out, however, are even more indicative of the failed promises of the Dublin system. The very low numbers of asylum seekers transferred between DC states within 12 months reveals that, even for Member States, the treaty has brought negligible benefits.[56]

The protection risks associated with safe third country removals, both within and beyond the EU, provide an incentive for genuine refugees and asylum seekers, along with economic migrants, to circumvent the safe third country policies. Frequently coached, many asylum applicants arrive with destroyed documentation and withhold information that would reveal illegal entry into the EU or that would facilitate the identification of another Member State as being responsible for the consideration of their claim. As asylum applicants quickly adapted their behavior to avoid being subject to safe third country practices, respective governments have been slow to establish legal mechanisms for the speedy inter-governmental exchange of information for the application of the DC to be feasible and practical.

Among the deflection policies, safe third country policies are likely to have the strongest impact on the applicant states. This is only in part because of the burden they are asked to shoulder when EU Member States return asylum seekers to their territories on safe third country grounds. It is also because of the protection compromises that they make when they, in turn, introduce their own safe third country policies and return asylum seekers to their neighboring states in the

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[55] For a critical assessment of state practice under the DC, see A. Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, 11 IJRL 4, pp.646-677 (1999).

[56] A study by the Danish Refugee Council indicates that in 1999, the number of applicants transferred from and to Austria represented .3% and 4.7% respectively of the total number of asylum seekers that year, compared to 1.3% and 1.3% respectively in Belgium and 1.8% and 3.5% in Germany and 1.2% and .05% in the United Kingdom. The study argues that even these official figures are inflated, as the statistics do not consider the number of successfully transferred applicants who do not remain in the responsible country, choosing to move on to another state or returning illegally to the first Member State. The Dublin Convention: Study of Its Implementation in the 15 Member States of the European Union (F. Liebaut, ed., Danish Refugee Council 1999).

east. It warrants noting that while applicant states may consider that the *acquis* in its present form requires that a safe third country policy be incorporated into their domestic legislation, they may concurrently, or alternatively, simply find the policy of third country removals an attractive option in light of the climbing number of asylum claims being filed in their jurisdiction.

1.IV Reshuffling Protection Burdens

The export of asylum practices and policies from current to future Member States is one dimension of the long-term trend in Europe to adopt and adapt formulas that maximise deflection and minimise protection. An observer of the dynamics of migration in the candidate countries during this period of enlargement could reasonably conclude that this is the policy preference for prudent states. Why is this is this case, one might ask, when accession, and the attendant promise of burden-sharing and solidarity linger on the horizon?

Most centrally, this is because the ongoing enlargement of the EU will inevitably alter the geometry of protection obligations as well as deflection initiatives among Member States and candidate countries. Highlighted vividly in the accession process, is the awareness that a greater onus of protection will fall on the future Member States. A scenario that has generated pronounced fears in these states that their territory will become a 'closed sack' for illegal migrants, asylum seekers and refugees having failed to enter Western Europe. In response, or defence, candidate countries rapidly reproduce the strategies of restriction.

While the most viable antidote to this fear would be the prospect of an effective burden-sharing scheme, it must be ever so near on the horizon to quash the anxiety created in the east by the deflection policies in the west. With the Amsterdam Treaty, however, the tangibility of a burden-sharing scheme appeared all the more elusive, as unlike the five year ultimatum placed on a common asylum policy, the treaty did not require that the complex and sensitive issues surrounding burden sharing be resolved within any specific time limit. The import of western asylum policies is less of a gamble, perhaps, than the outcome of future solidarity negotiations.

2 The Central Link: Germany, Poland and the Czech Republic

2.I Germany

Gregor Noll

2.I.A Policy

European integration has taught unsuspecting bystanders many intriguing lessons. One of the more recent ones could be squeezed into two sentences: A border is not necessarily a line dividing two state territories. A border can be packed into the pages of a booklet and conveniently moved around to a place where it is most needed.

On 27 January 1999, the German Minister of the Interior, Otto Schily, handed over the Schengen Manual on External Border Control to the ambassadors of six candidate countries.[1] So secretive is the nature of its holy scriptures of exclusion that the Schengen Member States are careful not to let them pass on to outsiders. But the Schengen Executive Committee, taking upon itself the role of the Union's grandmaster, gracefully deviated from its own standards to express its benevolence to the six prospects, while insisting on their subjugation under the scriptures' rigorous demands.

This mockery of a ritual symbolizes quite graphically the eastward migration of boundaries in Europe: the Schengen Manual has been inaugurated as the European meta-frontier. The role of the prospects' initiator fell on Germany, presiding the Schengen Group at the time. Coincidence or premeditation, the choice could not have been more adequate. Was it not Germany that had played the role of the gatekeeper for the Union much too long? Did not all statistics prove beyond doubt that it was the prime goal of migration in Europe and, involuntarily, the largest host as well? Had it not taken upon itself a

[1] Federal Ministry of the Interior, "Bundesinnenminister Schily übergibt Schengener Handbuch zur Außengrenzkontrolle an die Botschafter Estlands, Polens, der Tschechischen Republik, Ungarns, Sloweniens und Zyperns", Press release of 27. January 1999.

R. Byrne et al. (eds.), New Asylum Countries?, 29–99.

pioneer role in the border control co-operation with the accession countries, a matter that should have rightly been a high priority for the whole Schengen Group, and the Union as well, but which the other Member States had shown a limited interest in? And, had not the time come to shift the guards and to start cashing in on years of unilateral investments?

Indeed, Germany had invested considerably into migration and asylum issues, but the results were a mixed bag. True enough, the number of asylum applications had declined after the peak in 1993 and the introduction of restrictive legislation, but they did so in most of the Member States, whose steps towards restriction had been less radical. The Bosnian war left Germany with the brunt of protection seekers. As shown elsewhere,[2] the DC had worked against Germany, both in terms of applications for take-over by other Member States, and with regard to actual transfers, Germany represents the largest recipient state under the DC. And the battle against unauthorized migration at the eastern frontiers could not turn those tides. The massive armament of the German border guards with technologically advanced devices caused the desperate and the unwanted to turn to professionals: increasingly, migrants used the service of smugglers. In the meantime, German cab drivers in border areas dared not to pick up foreigners.[3] What if the alien you happen to give a ride turns out to be an unauthorized migrant? You might be liable of aiding and abetting the trafficking of illegals! Has it ever been clearer that the segregation effected by the outer walls of a fortress proliferates inside those very walls, revealing its discriminatory logic? The spiral of control has started to suck in bystanders.

If anything, Germany represents the role model of a closed sack: as the external border country *par excellence*, it takes the consequences of laxer border controls in the East. Unlike its eastern neighbours, it cannot set hopes to the savouring effects of onward migration. Those who attempt to move on from Germany might be all too soon be returned there under the DC. Therefore, the prospect of enlarging the Union eastward offers unique leverage for the German policies of alleviating the 'imagined or real' pressure on its boundaries. Simplified, accession would allow Germany to take over the position now held by the Netherlands. Is this a realistic expectation?

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[2] G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, The Hague 2000, pp. 317-325.

[3] Roger Boyes, "Refugee wave set to break on German border", The Times (London), 14 January 1999.

The following chapter shall take a detailed look into selected aspects of this interplay between East and West. How do German domestic laws as well as international agreements regulate the arrival of protection seekers from Poland and the Czech Republic? True enough, there are numerous other interesting facets in the German laws and policies that have a bearing on its relationship to other accession candidates.[4] We believe, however, that a closer scrutiny of two bilateral itineraries and relationships might prove most valuable in the present context.

2.I.B Practices

In principle, passing the German land borders in quest for asylum is a contradiction in terms. As will emerge from the following, the German legislator has blocked this gateway by a variety of measures, all aiming at the claimant's forfeiture of asylum protection in Germany and, where possible, her return to a neighbouring transit country. A look at the statistics indicates, though, that the land route still seems to be the most frequently used itinerary for protection seekers heading for Germany.[5] In spite of considerable investments into border infrastructure, the frontiers with Poland and the Czech Republic remain difficult to control. Although the German government has been eager to present its control policies as a success, the result is more accurately described as a massive 'illegalization' of movements in search of asylum.[6] In spite of restrictive laws, Germany remains a

[4] Among the more recent example of closer relations between Germany and other accession candidates in the field of migration, one might name the readmission agreement and protocol with Hungary, concluded on 1 December 1997, and the readmission agreements concluded with each of the three Baltic States on 16 December 1998. All agreements cover the readmission of third - country nationals.

[5] In 1995, the vast majority of asylum applications were made in-country (120.169). This is to be compared to 5,701 applications at airports and 2,067 applications at land or sea borders. Source: Letter of 26 Sept. 1996 by the Federal Ministry of the Interior to the author. Given the much higher control density at airports and the limited migratory importance of German sea borders, it can be assumed that the majority of unauthorized entries take place at land borders.

[6] The government usually referred to the massive decline in applications following the constitutional reform in 1993. As indicated in the preceding note, the vast majority of asylum seekers manage to circumvent border controls and apply in-country. The decline in applications might as well signify that persons who had formerly sought protection would now regard illegal stay as the better option, avoiding any form of contact with authorities. Going underground does not preclude that there is a protection need. It merely signals that the person in question valorizes illegal presence to be the better option. Depending on the background of the case, the alternative offered by the asylum system might be slim

central destination country. In the European context, it still tops the statistics for new applications as well as the statistics for protected persons in absolute numbers.[7]

To understand the cascading dynamics of 'protection elsewhere' in Central Europe, it is indispensable to look into the order created by the German legislator pushing back the protection seeker as well as the responsibility for her eastwards. The pivotal element of this order is a far-reaching safe third country-mechanism, introduced by a modification of the constitutional right to asylum in 1993, doing away with the suspensive effect of appeals against pre-procedure removal decisions.[8] In the following, we will first present the constitutional provision forming the base of the German safe third country-mechanism, and then proceed to tracking its legal extrapolations on the entry, stay and return of protection seekers coming from Poland and the Czech Republic.

With less than one percent of cases affected by the concept of safe third countries,[9] its importance is at best a symbolic one. Keeping in mind the considerable risks entailed by the concept, it should be

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chances of protection and a considerable risk of being returned.

[7] In the late Nineties, Germany received more asylum claims than any other Member State of the EU or European state (1999: 95,110 applications). Only in 2000, it was relegated to second rank by the U.K. (Germany: 78,760 applications, U.K.: 97,860 applications), but a look at statistics from the first quarter of 2001 indicates that Germany might return to its top position again. Sources: UNHCR, Asylum Applications Submitted in Europe, Geneva, 25 January 2001, and UNHCR, Asylum Applications Lodged in 18 Industrialized Countries, January and February 2001, Geneva, 9 April 2001.

[8] This radically formalistic solution had been pioneered by the Danish legislator in 1986. By virtue of the so-called 'Danish clause', asylum seekers could be sent back to safe third countries regardless of appeal. By contradistinction to the German solution, the circle of safe third countries was determined by administrative practice instead of by a list passed in parliament. See Chapter 4.I.A.2.

[9] A look at the 1994 statistics reveal the relatively marginal role of the safe third country-model. On German land and sea borders, 146,845 persons were denied entry or returned from border zones, of which 1,927 persons sought asylum. From this group, 936 persons could be returned to a Safe Third Country. To this number, one must add 160 persons returned to a Safe Third Country from German airports. Accordingly, a group of 1,096 persons of a total of 127,210 protection seekers could be reallocated to Safe Third Countries. Bundesministerium des Innern, *Asyl-Erfahrungsbericht 1994*, A 3 - 125 415/11, Bonn, 20 June 1995, at 15 and Letter of 26 Sept. 1996 by the Federal Ministry of the Interior to the author. In 1998, the situation remained largely unchanged. Totally, 143,429 asylum claims were filed throughout the year. Of those, a mere 1,443 cases could be denied asylum due to the claimant's entry from a safe third country. Bundesamt für die Anerkennung ausländischer Flüchtlinge, Auszug aus der Geschäftsstatistik des Bundesamtes für die Anerkennung ausländischer Flüchtlinge für Januar - Dezember 1998, on file with the author.

scrutinized whether it represents a proportionate means in the quest for migration control.[10]

2.I.A.1 The Domestic Legal Framework

2.I.A.1.(a) The German concept of safe third countries

The German concept of safe third countries at stake here[11] builds on a strong *presumption of safety* stipulated by the German legislator and denies the protection seeker stay of deportation during procedure. Presently, all countries sharing land or sea borders with Germany are covered by this conception. The legal base for this concept is to be found in Article 16 (a) (1), (2) and (5) of the German Federal Constitution which reads as follows:

> (1) Anybody persecuted on political grounds has the right of asylum.
>
> (2) Paragraph 1 may not be invoked by anybody who enters the country from a member state of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. Countries outside the European Communities which fulfil the conditions of the first sentence of this paragraph shall be specified by legislation requiring the consent of the Bundesrat. In cases covered by the first sentence measures terminating a person's sojourn may be carried out irrespective of any remedy sought by that person.
>
> (5) Paragraphs 1 to 4 do not conflict with international agreements of member states of the European Communities among themselves and with third countries which, with due regard for the obligations arising from the Convention relating to the Status of Refugees and the Convention for the

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[10] For an argument questioning the proportionality of the German safe third country rule, see G. Noll, "The Non-admission and Return of Protection Seekers in Germany" 9 *IJRL* 415, pp. 447-450 (1997).

[11] Apart from the concept introduced by Article 16a of the Federal Constition, there is also a less rigid concept building on an *assessment of safety* made by the forum examining the individual case; the protection seeker is allowed to remain pending a final decision of his or her case. This conception is based on para. 27 of the German Asylum Procedure Act (*Asylverfahrensgesetz*). It does not apply in cases falling under Article 16a (2) and is therefore not relevant in the present context. In the following, the usage of the term 'safe third country' refers to the concept introduced by Article 16a of the Federal Constitution.

> Protection of Human Rights and Fundamental Freedoms, whose application must be assured in the contracting states, establish jurisdiction for the consideration of applications for asylum including the mutual recognition of decisions on asylum.[12]

The Safe Third Country rule in the Federal Constitution is developed further in the statutory provisions of the Asylum Procedure Act. Section 26 (a) reiterates *inter alia* the main clauses of the Federal Constitution provision and spells out that a person coming from a Safe Third Country will not be recognized as a person entitled to asylum. This provision refers to Annex I of the Asylum Procedure Act, where Safe Third Countries apart from Member States of the European Community are listed. This entails that all states bordering the Federal Republic of Germany are Safe Third Countries under Article 16 (a) (2) of the Federal Constitution, among them Poland and the Czech Republic. The statutory provision in Section 34 (2) of the Asylum Procedure Act inhibits a decision on stay of deportation in cases falling under Section 26 (a) of the same Act.

By the decision of 14 May 1996, the Federal Constitutional Court (*Bundesverfassungsgericht*) has shed further light on both content and limits of the Safe Third Country legislation in the German Federal Constitution and the relevant statutory provisions.[13] As stated by the Court, the new provisions build on the concept of a 'normative ascertainment' of safety in a third state. The Court developed a number of conditions for the classification of states as safe third countries in the sense of Article 16 (a). A state may be classified as a Safe Third Country by the legislator, if it fulfils the following conditions.[14]

(1.) It must be bound by the 1951 Refugee Convention and the 1967 New York Protocol as well as the ECHR.[15] Furthermore,

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[12] All translations of German law used in this text were made available in REFWORLD database, (July 1996 ed). They do not have official status.

[13] BVerfGE 94, 49. For a brief presentation, see G. Noll, "The Non-admission and Return of Protection Seekers in Germany" (1997a) 9 *IJRL* 415, with further references in note 128. For an extensive commentary on the judgement: Reinhard Marx, *Urteile des BverfG vom 14. Mai 1996 mit Erläuterungen. Ergänzungsband zum Kommentar zum Asylverfahrensgesetz*, Luchterhand, Neuwied 1996.

[14] BVerfGE 94, 49 (89ff).

[15] Reasoning in the abstract, the Court states that a country having chosen the geographical limitation provided for by the 1967 New York Protocol may as a rule not be regarded as applying the named conventions. By way of example, this would exclude Hungary from qualifying as a Safe Third Country. Nevertheless, the Court asserted that Hungary could indeed be qualified as a Safe Third Country, as it did not refoule non-European refugees *de facto*.

it must have accepted the control mechanisms offered by Article 35 of the 1951 Refugee Convention (co-operation with the UNHCR) and Article 25 of the ECHR (individual complaints procedure)[16] in order to assure compliance with the instruments. The state in question must be obliged by its internal legal order to apply the named instruments. This presupposes that a Safe Third Country will not return the alien to a country without establishing whether he or she runs a risk of persecution according to Article 33 of the 1951 Refugee Convention or a risk of torture or inhuman or degrading treatment according to Article 3 of the ECHR. However, individual violations of the named obligations do not call the general safety of a third country into question.

(2.) It is not required that the determination procedure applied in a Safe Third Country corresponds in its essence to the standards of the German asylum procedure. However, a protection seeker must have the legal and factual opportunity to apply for protection. This application must trigger an obligation for the relevant authority to deliver a decision in the matter.

(3.) Time limits stipulated by a third country for the filing of asylum claims do not hinder its qualification as being safe, provided that it will abide by Article 33 of the 1951 Refugee Convention even after such a time limit has elapsed. Exclusion from status is acceptable, exclusion from protection, however, is not.

(4.) A third country which itself has stipulated a Safe Third Country-rule may only be regarded as safe, if its legal order excludes the return of protection seekers to fourth states (*Viertstaaten*) where the application of Article 33 of the 1951 Refugee Convention and Article 3 of the ECHR is not assured.[17]

Establishing whether these criteria are met, the German legislator may take for granted that third state authorities will comply with the named instruments under the precondition that state administration is

[16] It must be recalled that this statement was made in 1996, before the entry into force of the 11th Protocol to the ECHR. At the time, states had to opt into the individual complaints procedure.

[17] Due to this condition, the possible implementation of the Polish safe third country rule is of high relevance for the viability of the German arrangements. If Poland would point out a 'fourth state' not fulfilling this condition as a safe third country, Germany would have to suspend pre-procedure returns to Poland. See Chapter 2.II.B.6.

bound by the rule of law according to its laws or to general practice. Correspondingly, the concept of normative ascertainment entails an abstract presumption of safety.

As to the *effects* of the Safe Third Country rule in Article 16 (a), the following aspects are dealt with in the ruling. Notwithstanding the claimants' allegation that the Safe Third Country rule was part of a European system of organised irresponsibility,[18] the Court perceived it as part of a comprehensive European regulation for the protection of refugees aiming at burden sharing between participating states.[19] The concept of Safe Third Countries reduces the personal scope of the right to asylum laid down in art. 16 (a) (1) of the Federal Constitution as an alien entering from such a country could have found protection from political persecution there. He is not only denied refugee status, but also excluded from any form of *asylum* procedure. What he may claim, however, is a decision on protection from deportation to his country of origin according to paragraph 51 (1) of the German Alien Law. In this context, it must be underscored that the protection seeker can be deported to a Safe Third Country pending the decision on protection from deportation.

At large, the German Constitutional Court has accepted the rule on deportation regardless of appeal (laid down in Article 16 (a) (2) of the Federal Constitution and paragraph 34 (a) of the Asylum Procedure Act) as being in compliance with the constitution.[20] However, it stipulates a number of exceptional cases, in which the alien must be allowed to claim a stay of deportation:[21]

(1) The alien risks the death penalty in the Safe Third Country;

(2) The Alien runs a considerable and concrete risk of becoming a victim of crime in connection with her

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[18] "... *Teil eines europäischen Systems organisierter Verantwortungslosigkeit*", BVerfGE 94, 49 (81).

[19] BVerfGE 94, 49 (85). This perception is clearly flawed. See inter alia, Chapter 5.

[20] In itself, the German Constitution contains a normative hierarchy. Certain of its provisions of the German Constitution are exempted from the reach of the constitutional legislator and therefore immutable. By consequence, the question may arise whether changes of mutable provision may indirectly encroach on the immutable provisions. In the cases before the Federal Constitutional Court referred to here, both claimants maintained that Article. 1 of the German Federal Constitution, guaranteeing the inviolability of human dignity, had been infringed upon. Article 79 of the Constitution prohibits the legislature to make any changes to Article 1. As Article 16a would contain a 'core content' relating to human dignity, Article 79 had been disregarded in their view.

[21] BVerfGE 94, 49 (99).

non-admission or return to the Safe Third Country, which cannot be prevented by the latter;[22]

(3) The circumstances leading to the qualification of a third country as safe have undergone a sudden change and the German government has not yet reacted by suspending its status as a Safe Third Country;

(4) In an exceptional situation, the Safe Third Country itself takes measures amounting to political persecution or inhuman treatment and becomes a state of persecution;

(5) The Safe Third Country detaches itself from its obligations under the instruments and is denying certain aliens protection by deporting them without any procedure. Cases where such problems can be resolved by way of communication between the authorities of Germany and those of the Safe Third Country do not fall under that exception.

Stay of deportation can be granted exceptionally in those cases only if certain facts make the insight mandatory that the present case is a special one not covered by the concept of 'normative ascertainment'. According to the Court, high standards will have to be met by such a claim.[23] If need be, the German authorities may seek to clarify the existence of these exceptional threats by contacting the authorities of the safe third country in question. Provided that existing doubts cannot be eliminated through inquiries and assurances, the protection seeker may request preliminary legal protection (*vorläufiger Rechtsschutz*), which might lead to a stay of execution.[24] This is but an extremely narrow loophole in exceptional situations.

The safe third country concept has given rise to a number of controversies. Firstly, it has been asked whether the safe third country needs to be identified in a concrete manner to preclude access to asylum. According to a decision by the Federal Administrative Court (*Bundesverwaltungsgericht*), the safe third country through which a protection seeker has entered needs not to be identified.[25] To deny asylum, it is sufficient to establish that the protection seeker has

[22] Ibid.

[23] Ibid.

[24] Preliminary legal protection could be granted according to Section 80 (7) of the Act on Administrative Procedure (*Verwaltungsgerichtsordnung*). Compare BverfGE 94,49 (102) and Decision of 23 January 1997, 2 BvR 2816/95 and 2 BvQ 58/95.

[25] Case of 7 November 1995, BVerwG 9 C 73.95, NVwZ 1996, 197.

entered Germany through any of the listed safe third countries. This is always the case when he or she has passed the German land border. In its 1996 decision, the Federal Constitutional Court seems to have made this view its own.[26] Later, the Court has expressly confirmed that the safe third country in question need not be identifiable.[27] Some doctrinal writers have criticised this position and presented alternative interpretations.[28] Secondly, it has been discussed whether a readmission obligation by a safe third country is a precondition for exclusion from asylum. The Federal Constitutional Court has negated this conditionality.[29] However, the Administrative Court of Chemnitz has taken the opposite view.[30] Thirdly, it is still unclear what constitutes entry from a safe third country in the sense of Article 16 (a) (2). This is especially true for the issue of transit.[31]

2.I.A.1.(b) Entry and apprehension in the border zone

In the analysis of legal consequences of the safe third country rule, we have to differentiate between claims made at borders and 'in-country'. As we shall see, the former are subject to a particularly strict legal regulation, which minimise legal safeguards and access to competent authorities or courts.

As a rule, entry into the territory of the Federal Republic of Germany has to be authorised, usually by means of a visa.[32] A further precondition for entry is a valid passport.[33] An alien who is not in

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[26] BVerfGE 94, 95.

[27] Decision of the 1st Chamber of the 2nd Senate of 25 June 1997, 2 BvR 643/94 and 2 BvR2146/94.

[28] See R. Göbel-Zimmermann, *Asyl- und Flüchtlingsrecht*, C.H. Beck, München 1999, pp. 81-82, classifying the relevant statement in the 1996 decision of the Federal Constitutional Court as an "obiter dictum". Based on the telos of the norm, Meierhofer asserts that the safe third country needs to be known to trigger the legal consequences of Article 16a (2). S. Meierhofer, *Die asylrechtliche Drittstaatenregelung*. Regensburg 1998, pp. 138-154. See also, the critical remarks of Marx, supra note 13, at 67, 68, on the position of the 1996 Federal Constitutional Court and the Federal Administrative Court.

[29] Göbel-Zimmermann, supra note 28, at 87.

[30] VG Chemnitz, NVwZ-RR 95, p. 57. Agreeing with this position after an extensive interpretation, Meierhofer, supra note 28, at 154-156.

[31] See further, Meierhofer, supra note 28, at 126-37.

[32] Compare Section 3 (1) of the Aliens Act.

[33] Section 4 (1) of the Aliens Act.

possession of the necessary documents is obliged to seek asylum at the border.[34] However, this obligation is not sanctioned.[35]

A person entering Germany from a safe third country and claiming asylum is subject to a denial of entry (*Zurückweisung*) by the Federal Border Guard (*Bundesgrenzschutz*) according to Section 18 (2) of the Asylum Procedure Act. If the alien is encountered in the border zone in an immediate temporal connection with an illegal entry, she is subject to removal (*Zurückschiebung*).[36] In both situations, the Federal Border Guard handles the case without referral to the competent authority for determining asylum claims.[37] Where the asylum seeker invokes the exceptional cases enumerated in the decision of the Federal Constitutional Court[38], the Federal Border Guard is instructed to request a decision by the Federal Ministry of the Interior.[39]

The very wording of Section 18 of the Asylum Procedure Act precludes the application of the prohibitions of *refoulement* in the German Aliens Act.[40] This reduction of legal protection makes applying for asylum at the border or within the border zone the least favourable alternative.

Both forms of removal dealt with above allow for court-ordered detention pending removal (*Abschiebungshaft*).[41]

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[34] Section 13 (3) of the Asylum Procedure Act

[35] Göbel-Zimmermann, supra note 28, p 149.

[36] Section 18 (3) of the Asylum Procedure Act. The border zone is not defined by law. By analogy to Article 14 (1) of the Act of Custom Administration (*Zollverwaltungsgesetz*), Göbel-Zimmermann delimits this zone as a cordon of 30 kilometres depth.

[37] See i.e., The Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*, abbreviated BAFl.).

[38] See supra note 28, accompanying text.

[39] Letter of 14 June 1996 by the Federal Ministry of the Interior to the Ministries of the Interior of the Länder, the Border Guard Directorate and the Federal Office for the Recognition of Foreign Refugees. Instructions to contact the Ministry of the Interior are given with regard to all exceptions to the concept of normative ascertainment, save for the threat of death penalty. The Ministry motivates this exemption with the fact that the death penalty is no longer implemented in those safe third countries where it has not been abolished.

[40] The construction is somewhat complicated. Section 18 (2) explicitly states that section 60 (5) and Section 61 (2) of the Aliens Act are not applicable. In turn, the latter sections refer to paragraphs in Sections 51 and 53 of the Aliens Act that contain prohibitions of *refoulement*. As Section 18 (2) cuts off this chain of references, the alien is not entitled to invoke these prohibitions. For an alternative interpretation involving duties incumbent on the Federal Border Guard ex officio, *see supra* note 28, Göbel-Zimmermann, p. 150.

[41] This form of detention is regulated by Section 57 of the Aliens Act. Referral to this provision is made in both Sections 60 (*Zurückweisung*) and 61 (*Zurückschiebung*) of

2.I.A.1.(c) In-country application

De facto, most protection seekers attempt to trespass the border zone and make contact with German authorities 'in-country'. The legal regime for such applications is slightly different. In practice, however, the main benefit of in-country application consists of the improved chances to collude the itinerary. Ultimately, this may lead to toleration.

A protection seeker that has entered Germany without authorization is under an obligation to report immediately to a reception facility or to seek asylum with an aliens authority or the police.[42] Save for those cases where the protection seeker arrives directly from countries of persecution, this rule is sanctioned.[43]

If the protection seeker applies for asylum with the police, she can be moved back to a safe third country according to Article 19 (3) of the Asylum Procedure Act. Such decisions are taken by the alien authority, and there is no obligation to refer the alien to a reception facility.

If the protection seeker applies at a reception facility, the application is referred to the Federal Office. Save for the exceptional cases listed by the Federal Constitutional Court, the Federal Office will deny the applicant entitlement to asylum.[44] With respect to removal procedures, the relevant provision is to be found in Section 34 (a) of the Asylum Procedure Act:

> (1) Where the alien is to be deported to a safe third country (Section 26 (a)), the Federal Office shall order his deportation to such state as soon as it has been ascertained that the deportation can be carried out. This shall also apply where the alien has restricted the asylum application to the determination of whether the requirements under Section 51 paragraph 1 of the Aliens Act apply or where he has withdrawn the asylum application prior to the decision by the Federal Office. It shall not be necessary to previously issue a notification announcing deportation not to set a time limit.
> (2) Deportation to a safe third country shall not be suspended pursuant to Sections 80 or 123 of the Rules of the Administrative Courts.

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the Aliens Act.

[42] Section 13 (3) of the Asylum Procedure Act.

[43] Section 92 (1) and 58 (1) of the Aliens Act.

[44] Based on Section 26a of the Asylum Procedure Act, which transforms and elaborates Article 16a (2) of the Federal Constitution.

According to this provision, the protection seeker retains a rather passive role in the execution process without any option to influence its outcome. While she is still entitled to legal redress before administrative courts, such redress cannot inhibit removal. At the most, administrative courts may annul the decision's execution, entitling the claimant to re-enter Germany.[45]

Different are cases where it is clear that the alien has travelled through one of the neighbouring Safe Third Countries, while it remains impossible to prove which one. Lacking a third country to turn to, deportation cannot be carried out. Such circumstances inhibit a deportation order according to Section 34 (a) (1) and allow for a tolerated status according to Section 55 (2) and (4) of the Aliens Act. The value of this status is limited.[46] Toleration does not remove the legal obligation to leave Germany. Further, it can be granted for a maximum of one year, renewable upon expiry. Its validity is restricted to the land where it was issued, and it may contain restrictions regarding the right to work.

To secure removal, the asylum seeker can be detained on the order of a court according to Section 57 of the Aliens Act. Further, it should be noted that a deportation order presupposes the actual possibility of returning an alien to a safe third country. This hinges, first, on the authorities' knowledge on the itinerary and, second, on the efficacy of readmission arrangements with safe third countries. To ensure the latter, Germany has concluded agreements covering the readmission of third-country nationals with all its neighbouring states.

2.I.A.2 *Negotiating the Eastern Border*

Taken together, the German frontiers with Poland and the Czech Republic stretch over 1,264 kilometres. In the mid-1990s, they account for the brunt of unauthorised border passages into Germany.[47] This has changed in later years, during which entries

[45] See supra note 28, Göbel-Zimmermann, p. 183.

[46] See H.-J. Cremer, Internal Controls and Actual Removals of Deportable Aliens, in Hailbronner, Martin & Motomura (eds.), *Immigration Controls*, Berghan, Providence 1998, p. 68.

[47] According to 1995 statistics, these borders account for 80 percent of the total 'illegal immigration' by Non-EU citizens to Germany. It must be recalled though, that high numbers of registered unauthorized entries may be caused by the high control density at the borders in question. Very often, claims on the extent and significance of migratory movements rest on haphazard deductions from an insufficient statistical base. Presently, the data collected by various actors on apprehensions and return of undocumented migrants and asylum seekers in

through other Schengen and EU Member States has gained greater importance. The year 2000 saw 16,513 apprehensions at the Eastern frontiers, while 12,725 apprehensions were counted at the borders between Germany and other EU-neighbours.[48]

As a consequence of the 'high pressure exerted by migration and criminality',[49] the main contingent of the German border guard personnel has been deployed to the borders with Poland and the Czech Republic. Of a total staff of 16,900, 9,900 persons are seized with tasks related to the Eastern borders. According to the Government's 1996 Annual Report on Schengen, 'no other European border provides a higher policing density'.[50] Apart from staffing, massive technological resources have been allocated in the East. Six helicopters, seven boats, heat detection devices and appliances for tracking CO^2 emissions by human beings hidden in trucks or containers are at the disposal of the border guards.[51]

Germany is also eager to improve co-operation with Poland and the Czech Republic in matters of border control. Apart from the readmission agreements dealt with below, bilateral agreements on boarder police co-operation have been concluded with each of the neighbours. Moreover, financial contributions were made available by Germany to facilitate the fortification of the Polish and Czech Eastern borders.[52]

2.I.A.2 (a) Poland

In spite of the continuing decline in the numbers of detected unauthorised entries at the German-Polish border, its importance remains undisputed. In the period between January and November 1998, the number of unauthorised entries had dropped 44 per cent compared to the same period a year ago.[53] In 1999, the numbers dropped further, and amounted to 2,796 apprehensions at the end of

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Europe can be described with a single line: they are an incompatible mess. In the absence of a satisfying pan-European methodology on data collection, statistical arguments retain a limited weight.

[48] Federal Ministry of the Interior, "Deutlicher Rückgang der unerlaubten Einreisen nach Deutschland", Press release of 16 March 2001.

[49] Federal Ministry of the Interior, *Jahresbericht Schengen 1996*, para. 2.2.2.

[50] Ibid.

[51] Ibid.

[52] Ibid., para. 2.2.4.

[53] Federal Ministry of the Interior, "Bundesinnenminister Otto Schily trifft den polnischen Innenminister Janusz Tomaszewski", Press release of 06. January 1999.

the year, which German authorities related to the enhanced patrolling of the Eastern and Southern borders of Poland as well as on joint German–Polish patrols at the border between both countries.[54] However, the year 2000 saw a slight increase to 3,293 apprehensions.[55] To wit, the number of apprehensions was markedly less than the apprehensions at the border severing Germany from its EU neighbour Austria (10,980 apprehensions in 1999 and 7,404 apprehensions in 2000).

Two agreements form the basis of German–Polish co-operation in respect of migration. Both countries have concluded an agreement on bilateral co-operation regarding the effects of migratory movements on 7 May 1993[56] and a readmission protocol on 29 September 1994.[57] The named instruments modify and elaborate the framework laid in the multilateral agreement between Poland and the Schengen Group.[58] The German–Polish readmission protocol allows for the return of nationals as well as third-country nationals under a common external border regime.[59] A ceiling of 10,000 returns of third-country nationals[60] was stipulated for the first year of its application.

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[54] Federal Ministry of the Interior, "Grenzen zur Tschechischen Republik und zur Republik Österreich weiterhin Brennpunkte unerlaubter Einreisen – vermehrt Schleuser festgenommen", Press Release of 20 March 2000.

[55] Federal Ministry of the Interior, "Deutlicher Rückgang der unerlaubten Einreisen nach Deutschland", Press release of 16. March 2001.

[56] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen, 7. May 1993, Innenpolitik Nr. III/1994, p. 4.

[57] Protokoll über die Festlegung der technischen Bedingungen der Übergabe von Personen an der Grenze zwischen der Bundesrepublik Deutschland und der Republik Polen im Zusammenhang mit der Durchführung des Übereinkommens zwischen den Regierungen der Staaten der Schengen-Gruppe und der Regierung der Republik Polen betreffend die Rückübernahme von Personen mit unbefugtem Aufenthalt vom 29. März 1991 und des Abkommens zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen hinsichtlich der Auswirkung von Wanderungsbewegungen vom 7. Mai 1993, BGBl. 1994 II, p. 3,776.

[58] Übereinkommen betreffend die Rückübernahme von Personen mit unbefugtem Aufenthalt zwischen Belgien, der Bundesrepublik Deutschland, Frankreich, Italien, Luxemburg, den Niederlanden und der Republik Polen, 29 March 1991, BGBl. II 1993, p. 1,100.

[59] This regime regards the State Parties as a unit with common external borders. If it is established that an alien has been legally or illegally present in a certain state, readmission may be requested from it by another state whose territory the alien has entered in a secondary move. By way of example, the Schengen and Dublin Conventions as well as the bilateral readmission agreement between Germany and Switzerland employ such a common external border model.

[60] Excluding direct returns at the border (i.e. denial of entry according to Section 60

Within a period of six months after the authorities become aware of the presence of an unauthorised entrant in their territory, they can demand her readmission.[61] It is sufficient to make an external border crossing credible.[62] These provisions clearly favour the requesting state, that is, in practice, Germany.

The protocol contains no transit provisions and does not provide for the special case of asylum seekers. A reference to the 1951 Refugee Convention, the 1967 New York Protocol and the ECHR are made in the preamble of the 1993 agreement.

During an initial phase, implementation difficulties caused a low number of readmissions.[63] Apparently, these problems have been solved subsequently, and numbers started to increase. In 1996, 1,011 persons filed an asylum claim with the German authorities at the German–Polish border.[64] Of this group, 15 persons were denied admission at a border control point. 931 persons were to be returned after passing the border elsewhere,[65] and in 865 of these cases, the return requests were answered in the affirmative by the Polish authorities. From the perspective of German authorities, the readmission protocol works reasonably well.

Interestingly, a rudimentary burden-sharing provision has been inserted into the co-operation agreement. If exceptional circumstances lead to a suddenly increasing or massive inflow of refugees or illegal migrants on the territory of Poland, Germany will allow certain groups of these persons to enter its territory. The existence of such a situation and the measures to be taken are determined by consensus of the State Parties. Other forms of assistance are not excluded.[66] Hitherto, this provision has not been made use of.

2.I.A.2 (b) The Czech Republic

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of the Aliens Law and removal in the border-zone according to Section 61 of the Aliens law). The number of 10,000 return cases was not even approximated, which may serve as an indication for the weight of practical impediments.

[61] Article 1 (3) of the 1993 German-Polish agreement, note 56 above.

[62] Para. 2 (1) and (2) of the 1994 German-Polish protocol, note 57 above.

[63] Bundesministerium des Innern, *Asyl-Erfahrungsbericht 1993*, A 3 - 125 415/10, Bonn 25 Feb. 1994, pp. 66 et seq.

[64] Source: statistics for the year 1996, made available by the Federal Border Police (*Bundesgrenzschutz*). On file with the author.

[65] The legal instrument to be used is "*Zurückschiebung*" according to Section 61 of the Aliens Act.

[66] Article 6 of the 1993 German-Polish agreement, supra note 56.

Between Germany and the Czech Republic, two agreements were concluded on 3 November 1994. While the first was a readmission agreement,[67] the second dealt with bilateral co-operation regarding the effects of migratory movements.[68] According to the latter, Germany granted DEM60 Million as financial support to reinforce the migration infrastructure of the Czech Republic. Furthermore, this agreement contained a rudimentary burden-sharing clause. If exceptional events cause a massive influx of refugees or illegal migrants into the Czech Republic, which cannot be contained with conventional measures of border policing, the government of the Federal Republic of Germany will permit a certain number of these persons to enter its territory.[69]

Precisely as is the case in the corresponding provision of the German–Polish agreement, the number of persons and procedure to be followed is subject to the consensual will of the parties. Other forms of assistance are not excluded.

The readmission agreement covers both nationals and third-country nationals, follows the common external border model and involves return transit arrangements. Within a delay of six months after the authorities learned of the presence of an unauthorized entrant, they may successfully demand his or her readmission. In the case of legal impediments, this period can be prolonged. After one year, however, readmission is no longer possible under the agreement. As is the case with the German-Polish agreement, it is sufficient to make external border crossing credible.

In contradistinction to the German-Polish agreement, the agreement stipulates delays for informal readmission (72 hours), for answering requests under the formal procedure (eight days) and for the

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[67] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Tschechischen Republik über die Rückübernahme von Personen an der gemeinsamen Staatsgrenze, 3 Nov. 1994, BGBl. 1995 II, p. 134. This agreement was supplemented by a protocol: Protokoll zur Durchführung des Abkommens vom 3. November 1994 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Tschechischen Republik über die Rückübernahme von Personen an der gemeinsamen Staatsgrenze, 3 Nov. 1994, BGBl. 1995 II, p. 137.

[68] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Tschechischen Republik über die Zusammenarbeit hinsichtlich der Auswirkung von Wanderungsbewegungen, 3 Nov 1994, BGBl. 1995 II, p. 141. This agreement was supplemented by a protocol: Protokoll zur Durchführung des Abkommens vom 3. November 1994 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Tschechischen Republik über die Zusammenarbeit hinsichtlich der Auswirkung von Wanderungsbewegungen, 3 Nov. 1994, BGBl. 1995 II, p. 143.

[69] Article 3 (2). Translation by this author.

effectuating of return after a positive decision (three months). The transfer of data is regulated in the agreement and a clause giving prevalence to the 1951 Refugee Convention and the 1967 New York Protocol has been included.

While the importance of the German–Polish border as a point of passage has been on the decline since the late 1990s, the focus of trans-border movements has shifted to the border between the Czech Republic and Germany. In 1997, German authorities prevented 14,390 unauthorised entries. In 1998, this number had increased by 40 per cent to 19,329, while it fell to 12,846 apprehensions in 1999.[70] With 11,739 apprehensions in 2000, a further reduction could be noted.[71] In general, the decline at the Polish border seems to have been transformed into a rise at the Czech border.

Precisely as the readmission protocol with Poland, the German–Czech agreement seems to fulfil the expectations on the German side. In 1996, the total number of persons seeking asylum at the border amounted to 246. Of this group, 16 persons were denied admission at a border control point. 143 persons were to be returned after passing the border elsewhere. In 122 cases, the return requests were answered in the affirmative by the Czech authorities.[72] However, it should be recalled that only a small fraction of persons presenting themselves at the border or apprehended there file a claim for asylum with the German authorities. Thus, statistics do not reflect in full the deterrent effect of the agreement in conjunction with the rigid German legislation.

2.I.C Conclusion

Entering Germany overland in quest for asylum is a contradiction in terms. Full-fledged refugee status is out of the question, while tolerated status remains within the realm of the possible only for a few specific cases.[73] It is rational to assume that this state of affairs impacts the behaviour of protection seekers.

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[70] Federal Ministry of the Interior, "Grenzen zur Tschechischen Republik und zur Republik Österreich weiterhin Brennpunkte unerlaubter Einreisen – vermehrt Schleuser festgenommen", Press release of 20 March 2000.

[71] Federal Ministry of the Interior, "Deutlicher Rückgang der unerlaubten Einreisen nach Deutschland", Press release of 16 March 2001.

[72] Letter of 11 July 1997 by the Federal Ministry of the Interior to the author.

[73] It could be argued that Germany is obliged to accord a status equivalent to

Circumventing German border and border-zone controls is a reasonable way of coping with the German legislation. Filing a claim for asylum in-country results in a better position for the applicant. For an applicant entering overland, but willing and competent to convince the authorities that she reached Germany via an airport, refugee status is within reach.[74] Applicants less versed in making up counterfactual accounts can always opt for a collusion of their itinerary. Where authorities do not manage to identify the safe third country, return cannot be carried out. Or, during the course of identification, the time limits imposed by readmission agreements may have elapsed. Ultimately, this might lead to toleration, which is a far cry from a decent protection status, but probably better than the slim chances of protection in an eastern neighbour of Germany. *De facto*, this group of protection seekers is punished by relegation to the lowest possible protection level, irrespective of actual protection needs. Still, it may be deduced that the new regime has made illegal border crossing, applying beyond the border zone and making misrepresentations the better choice for *bona fide* and *mala fide* claimants alike. Such forms of behaviour have their costs for the protection seeker, however. The necessity to collude the itinerary decreases the overall credibility even of those claimants actually in need of protection.

In spite of its rigid mechanisms of deflection and the considerable investments into border control, Germany will continue to play an important role at the crossroads of asylum migration in Europe. Quite indicative, improved policing of the border with Poland merely shifted the problem to the German–Czech and German–Austrian borders. The renewed relevance of Germany's internal borders with EU neighbours as points of entry indicate that enlargement will not bring about any decisive change of Germany's recipient role.

convention refugee status to those who are barred from full-fledged asylum procedures under the safe third country rule. As long as the actual protection need of those persons cannot be determined, they must be treated as if they were refugees; otherwise, Germany risks breaching the 1951 Refugee Convention.

[74] According to a ruling by the Federal Administrative Court (BVerwG), the burden of proof regarding the means of arrival is on the asylum seeker claiming to have arrived by air. Decision of 29 June 1999, BVG 9C 35/98 and 9C 36/98.

2.II Poland

Barbara Mikolajczyk

2.II.1 General Situation and Policy

2.II.A.1. Conversion from Sending Country to Transit

Poland's geographical and political position gives it a unique role on the world's migratory map. Being placed exactly between the West and the East and on the traditional track from the South to the North it is presently exposed, on the one hand, to migration from the East and, on the other hand, to the readmission of illegal migrants from the West and the North. Moreover, international obligations create a considerable challenge for Poland, as it has become a first 'safe country' outside 'Schengenland' and the EU after the social and political transformation that took place in Europe.

The changes in the field of migration and asylum are enormous in Poland. For more than two hundred years, since the partitions at the end of eighteenth century, it was a major migrant and refugee-producing country in Europe. The exodus continued long after World War II. Just between the years 1971–1989, two million Poles left their country.[75] However, the political, social and economic transformations at the end of the eighties and beginning of the nineties diametrically reversed this trend, and Poland not only stopped producing migrants but it also opened its doors to a wide range of aliens. Their arrival and sojourn within the territory of Poland are one of the most representative signs of change. Since the beginning of the nineties the number of aliens coming to Poland has been increasing by 20 per cent annually. The character of their stay has also been changing. Every year larger numbers of aliens apply for residence visas or visas with the right to employment. On the other hand, more and more aliens are risking entering Poland without authorization and staying on to work without permission.[76]

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[75] P.Stachańczyk: *Cudzodziemcy* [The Aliens], Warsaw 1998, p.9.

[76] Ibid.

At the beginning of the 1990s, Poland was recognized only as a country of transit migration. Nowadays, more and more frequently it is a country of destination. This is the result not only from the fact that Poland is becoming an economically attractive place to live in, but also and foremost, migrants decide to stay in Poland by default. This is either because the restrictive immigration policies of the members of the EU systematically prevent their entry into Western Europe[77] or, more specifically, they did not succeed in crossing the Polish–German border, legally or illegally.

Until 1997, the number of aliens asking for refugee status or asylum increased dramatically, while in the next two years the situation became stabilized. However, in 2000, the migratory situation changed once again. Due to the conflicts in the Caucasus, the exodus of Roma people from Bulgaria and Romania, and Poland's new visa policy, the number of applications increased significantly. During the first eleven months of 2000, one thousand more applications were submitted to the Polish Minister of Internal Affairs and Administration (MIAA) than in the whole of the year 1999.

[77] See cases in: ECRE: Safe Third Countries - Myths and Realities. London 1995.See also, D.Bouteillet - Paquet: European Harmonization in the Field of Readmission Agreements,1 *The International Journal of Human Rights* 3, pp.44-58 (1997).

TABLE I. TOTAL APPLICATIONS FOR REFUGEE STATUS OR ASYLUM 1994–2000

Year	Total Applications
1994	598
1995	843
1996	3211
1997	3533
1998	3373
1999	2864
2000 (Jan.-Nov.)	3934

Aliens who arrive in Poland and apply for refugee status as defined by the Refugee Convention come from about sixty countries from all over the world. In 1998, 1999 and 2000, the MIAA received applications from aliens from such distant places as Ivory Coast, Sierra Leone, Rwanda and Nepal. However, in 1998, the largest number of applications came from persons arriving from the East: Sri Lanka, Afghanistan, Armenia, Pakistan, Bangladesh, India and Iraq. In 1999, this source of asylum-seekers seemed to be exhausted (except for Armenia), while, due to the conflict in Kosovo, citizens of Yugoslavia lodged a significant number of applications.

1999 saw the first signs of a change in the nationality and citizenship of aliens arriving in Poland and applying for refugee status. In 2000 the applicants' nationalities changed significantly. The two tables below show these changes according to the country of citizenship.

TABLE 2. TOP TEN COUNTRIES OF ORIGIN FOR REFUGEE STATUS OR ASYLUM APPLICANTS IN POLAND IN 1998

Country of Citizenship	1998 Total Applications
Armenia	992
Sri Lanka	643
Yugoslavia	422
Afghanistan	334
Pakistan	180
Bangladesh	136
Iraq	130
India	94
Somalia	49
Russia	47

Table 3. Significant Changes in Application Totals 1999-2000

Country Of Citizenship	1999 Applications	2000 Applications (Jan.-Nov.)
Afghanistan	555	247
Armenia	868	805
Azerbaijan	**45**	**126**
Bangladesh	32	13
Belarus	**43**	**52**
Bulgaria	**185**	**308**
Georgia	**37**	**67**
India	25	11
Iraq	47	25
Mongolia	**161**	**158**
Pakistan	52	24
Romania	**211**	**864**
Russia	**109**	**879**
Somalia	9	4
Sri Lanka	88	36
Vietnam	**26**	**148**
Yugoslavia	140	9

According to the Act on Aliens of 1997,[78] applications for refugee status are lodged at the border or, exceptionally, at the MIAA. Paradoxically, the applications are not usually submitted at the moment of entering Poland. The largest number of applications is submitted within the country or at the Polish–German border by persons readmitted from Germany according to the bilateral agreement, or by persons captured as they attempted to cross the

[78] *Journal of Laws* [Dziennik Ustaw] 1997, No.114, item 739.

border illegally. For example, in 1998 only 11 applications were lodged at the eastern Polish border, 11 at the southern border, while there were 689 at the Polish-German border. 2621 applications were lodged inside the country, which in practice means at the Ministry in Warsaw.[79]

2.II.A.2 Migratory Pressure from the East and South

The phenomenon presented above of aliens from the East and the South not lodging an application at the eastern and southern borders is to some extent reflected in the first instance of the determination procedure. In the years 1996 and 1997, about six per cent of the total number of applications for refugee status (in accordance with the Refugee Convention) were granted,[80] while roughly 19 per cent were denied. Fully 75 per cent of proceedings were discontinued due to the disappearance of the applicants.[81] This very large percentage of discontinued proceedings was mainly caused by the fact that unauthorized migrants, who had been caught at the border or readmitted from Germany, fearing punishment, readmission further to the East, or deportation, applied for refugee status to the Department for Border Protection, Migration and Refugee Affairs. There were even cases when smugglers of migrants applied for refugee status. Then these migrants disappeared during the pending determination procedure or even earlier, during the journey from the border where they had lodged applications to the Department for Border Protection, Migration and Refugee Affairs in Warsaw. Quite often applicants who have disappeared are stopped at the western border or readmitted from Germany. However, these facts do not affect the pending procedure. Generally speaking, they are still in determination procedure.[82]

The situation changed dramatically in 1998. There were fewer discontinued proceedings (55 per cent) and fewer positive decisions (1.9 per cent). 43.3 per cent of proceedings were concluded with

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[79] Statistical data from the Headquarter of the Polish Border, May 1999.

[80] 136 persons received refugee status.

[81] See UNHCR: *3rd Intrnational Symposium on the Protection of Refugees in Central Europe 23 - 25 April 1997*, Budapest, Reports and Proceedings, European Series December 1997, Vol.3, No 2, p. 281.

[82] Applicants may also withdraw their application any time during the procedure for various reasons. For example, migrants who marry Polish citizens may take steps to obtain Polish citizenship, and therefore are no longer interested in refugee status. However, such cases are rather rare.

negative decisions.[83] The tendency towards decreasing numbers of discontinued procedures was much stronger in the next two years. In 1999, there were 70 per cent negative decisions, 28 per cent of cases were discontinued and only 1.4 per cent positive decisions were taken (which means that only 45 applicants have become recognized refugees). In 2000 (January–November), only 15.3 per cent of procedures were discontinued, 83 per cent of applicants received a negative decision and only 1.8 per cent of asylum seekers were granted refugee status (46 persons).

Table 4. First Instance Positive Decisions for Refugee Status Grantees in 2000

Country of Citizenship of Refugee Status Grantees in 2000 (Jan.-Nov.)	Number of First Instance Positive Decisions
Russia	27
Ethiopia	4
Somalia	3
Georgia	4
Cameroon	2
Sierra Leone	1
Sri Lanka	1
Liberia	1
Sudan	1
Belarus	2
Total	**46**

Even if decisions closing the procedure due to the disappearance of applicants are not taken into consideration, the refugee recognition rate is still dramatically low. In Europe only Poland and Norway have such a low rate of recognition of refugees under the Refugee

[83] See *Asylum - Seekers and Refugees in Europe in 1998: A Statistical Assessment with a Special Emphasis on Kosovo Albanians*. UNHCR, Geneva, March 1999, p.12.

Convention. However, in Norway persons are allowed to remain on humanitarian grounds,[84] while this does not happen in Poland.

In 1998, the recognition rate was more or less the same in the second instance which at that time was also heard by the MIAA: 11 positive,[85] 133 negative and 89 decisions on discontinuing proceedings were issued. The new appellate body, the Refugee Board, which was established in January 1999, has not changed any negative decision issued in the first instance during first year of its existence. In a few cases the decisions were abrogated and the cases were sent back to the first instance owing to formal defects.[86] In 2000 (January–November), about 1900 aliens filed appeals to the Refugee Board. It granted refugee status to 6 applicants (one citizen of Afghanistan, two citizens of Somalia, and three Kurds with Turkish passports). During this time the Board upheld about 1500 negative decisions and it annulled decisions denying the status in 33 cases and returned the cases to the first instance. Worthy of mention is the fact that about 80 per cent of decisions issued in the second instance are further appealed to the Supreme Administrative Court. However, the Court has abrogated only five per cent of them.[87]

The statistics indicate that the groups of asylum seekers applying for refugee status in Poland varied during the last few years. However, the main groups continue to come from the same regions [Asia, the former Soviet Republics, and South and Central Europe (Roma people from Bulgaria and Romania)]. The unstable political and economic situation in the world and the relatively stable economic situation in Poland, among other factors, have determined this situation.

First of all, it is worth mentioning that the largest number of negative decisions was issued in these years to citizens of Armenia. Since the introduction of a visa requirement for them, after quite a long stay in Poland (1-4 years), the Armenians have applied for refugee status in order to legalize their sojourn. There were similar reasons for applying for refugee status in the case of citizens of Mongolia and Vietnam. It is striking that the persons to whom refugee status was granted did not come from those countries whose citizens most frequently apply for that status in Poland.

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[84] Ibid.

[85] Refugee status was granted in the second instance to: 2 persons from Zaire, 2 persons from Sri Lanka, 1 person from Rwanda, 1 person from Palestine, 1 person from Liberia, 1 person from Cameroon, 1 person from Macedonia, 1 person from Afghanistan and 1 stateless person.

[86] It should be mentioned that the Board considered cases of persons coming mainly from Armenia, Mongolia and Bulgaria in first year of its activity.

[87] Information obtained at the Refugee Board.

Moreover, according to the MIAA, more and more organized illegal or unauthorized groups of migrants are captured at Polish borders, where controls are being continually improved. This is why, since 1998, the main flow of migrants has been making its way to Slovakia and the Czech Republic.[88]

2.II.A.3 Pressure from the West

2.II.A.3 (a) Financing and co-operation

After the social and political transformation in Central and Eastern Europe, and the reunification of both German States, the German government declared the expiration of all border agreements concluded by the GDR. This also signified the expiration of the GDR–Poland Treaty of 1969. Consequently, from the legal point of view, the situation at the Polish–German border was unregulated.[89] This increased the numbers of migrants coming from the East, and the perceived threat of 'huge floods' of migrants to follow led to the commencement of negotiations between Poland and States belonging to the Schengen Group. At this time, Western countries began to fear mass migration from the East, especially from the USSR where the State was in the process of disintegration.

Finally, in order to solve the problem of irregular migration, the Agreement on Readmission between Poland and the Schengen States was signed on 21 March 1991.[90] The Agreement includes, among others, an obligation on the part of participating States to readmit third country nationals and stateless people if they crossed the common external border and if they stay in the territory of the contracting party illegally. The 'external border' means the first crossed border that is not an internal border of the party to the Schengen Agreement of 1985 (Article 2), which in practice means the Polish–German border.

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[88] Worthy of mention is that in 1998 German border guards readmitted about 2,700 persons to Poland, while about 16,000 persons were readmitted to the Czech Republic.

[89] In practice, the border officers applied provisions of the expired Treaty.

[90] Schengen – Polish Accord Relating to the Readmission of Persons in Irregular Situations, 29 March 1991. Text available in French: *Basic Documents on International Migration Law* (edited by R.Plender), The Hague/Boston/London 1997, p.863.

When requested, the participating State must take back the returned person within one month. The obligation of readmission does not concern persons who at the moment of entry were in possession of either an entry visa or a residence permit for the country of their stay, nor those who obtained one or the other subsequently. The Agreement does not exclude the possibility of the readmission of asylum seekers (Article 2, paragraph 5).[91] However, Article 5 states that the Agreement does not violate provisions of the Refugee Convention of 1951, the DC of 1990, or other rules adopted by the EC States.[92]

The Agreement of 1991 is a document of rather general character and, in practice it did not limit migration to the Schengen States and particularly to Germany. That is why, on 7 May 1993, Germany and Poland signed the Governmental Agreement on Co-Operation in Matters Referring to Migration Movements, which is a bilateral modification of the Agreement with the Schengen States.[93] It came into force on 1 July 1993 (together with the new German Asylum Law). The Protocol to the Agreement concerning the collaboration on the consequences of migratory movements was signed on the same day.[94]

In Article 1 of the Polish-German Agreement, the parties have confirmed their obligations deriving from the Polish-Schengen Agreement. The parties have also decided that the Agreement will not apply to persons who were on the territory of Germany and who filed an application for asylum before the date of exchange of notes by the parties. However, Article 1 (3) seems to be the most important from the asylum seekers' point of view: According to this provision, the above-mentioned above paragraph 1 is not applicable to persons who do not fulfil the requirements for entry and have been, with knowledge of the respective authorities, on the territory of one of the Parties for a period of more than six months. In practice, this means that the possibility to readmit asylum-seekers is excluded, since determination procedure takes more than six months.[95]

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[91] See also, W.Czaplinski: *Aliens and Refugee Law in Poland - Recent Developments*, 6 IJRL 4, p.641 (1994).

[92] It must be stressed that at the moment of the signing of this Agreement, Poland was not a Party to the Refugee Convention of 1951; Poland acceded to the Convention in September 1991, and it entered into force in 1992.

[93] For further information, see J.Chlebny, W.Trojan: *The Refugee Status Determination Procedure in Poland*. 12 IJRL 2000 2, p.214.

[94] The text of the Agreement is available in English in: *Recueil de Documents. Institut des Affaires Internationales*. Warsaw 1993, no. 2, p. 75.

[95] Only the readmission of asylum - seekers of Polish nationality would be possible

Nowadays the practice of readmission at the Polish western border is well established. There are no doubts that good co-operation with Germany regarding the question of migration has great importance for Poland, because in general Poland's policy towards migrants is strongly determined by the migration policy of the States of the European Union (particularly Germany), and because of Poland's endeavours to become a member of the European Union. This is the main stimulus for rebuilding the system of border control and for changing the rules of the determination procedure. Such reconstruction entails great costs, but the EU countries prefer to help countries like Poland or the Czech Republic to build or strengthen their systems of migration control rather than to be exposed to irregular migration from the East.

According to the Protocol to the above-mentioned Agreement between Germany and Poland on Co-Operation Regarding the Effects of Migratory Movements of May 1993, Germany has agreed to transfer DM120 million DM to Poland. According to Article 1 (3) of the Protocol, this financial aid was transferred to 'the institutions responsible for the realization of tasks which are part of the programme regarding actions in the field of admission and assistance of refugees and asylum seekers, as well as making improvement to the protection of the border area of the Polish Republic'.

Moreover, the EU as such takes similar steps to protect itself against irregular migration. ECU23 million were transferred from various European Union programmes and funds to Poland in 1998 to help in strengthening the Polish borders, particularly for training border guards, buying modern equipment, building watchtowers and creating an information system on aliens until 2002. All these steps follow EU requirements.[96]

It seems that all these endeavours are quite effective. In 1998 German border guards readmitted 44 per cent fewer persons to Poland than in 1997. According to the Main Headquarters of the Border Guard, this tendency has continued in the following years: In 1999 readmission from Germany was about 27 per cent less than in 1998.[97].

The European Commission in its Regular Reports also noticed these significant changes. In the 2000 Regular Report, the Commission noted that the external pressure on Poland's borders in 1999 and 2000

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because they fall automatically under the readmission.

[96] The information obtained at the Main Headquarters of the Polish Border Guard.

[97] 2000 Regular Report from the Commission on Poland's Progress towards Accession.

continues to increase, particularly from the East. However, according to the Commission, a great stride was taken in 1999 in the development of an overall strategy for border management covering all the agencies active at the border. The Border Guard was more efficient as the result of the reform of its structure evidenced by improved operational efficiency and the provision of additional equipment to the eastern Polish border. In these matters support from the EU Member States has been recognized as crucial.[98]

2.II.A.3 (b) The political aspect

It must be also stressed that there are no doubts that the adjustment of migratory and asylum law and policy to EU requirements is one of the conditions of Poland's accession to the EU.

The Opinion of the European Commission, submitted to the Council in July 1997, in accordance with the provisions of Article O of the TEU[99] and the Council Decision of March 1998, contained the document called the Accession Partnership, which indicates the main priorities for Poland.[100] The main provisions include: developing of border management and control systems in particular for the border with Belarus and the Ukraine; the alignment of visa regimes with those of the EU; the implementation of the migration policy as well as the new asylum system; and the completion of alignment to international conventions, particularly in view of the Schengen *acquis,* were indicated as the short-term (1998) and medium-term priorities (for the period 1998–2002).

The National Programme of Preparation for Accession to the EU, adopted by the Polish Council of Ministers on 23 June 1998, [101] was the reaction to the above-mentioned EU documents. The National Programme has established the priorities for Poland's policy in its pre-accession period. In the field of home affairs and justice, apart from fighting the various types of organized crime, the main priorities are the strengthening of borders, better alien control and the introduction

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[98] Ibid.

[99] Article 49 of the Consolidated Version of the TEU.

[100] Annex to the Council Decision of 30 March, 1998 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Poland. OJ L 121/98. See also, Council Regulation No.622/98 - OJ L 85/98.

[101] Original title: "Narodowy Program Przygotowania do Członkostwa w UE", sometimes translated as:The National Programme for the Adoption of the *Acquis*. It was modified by the Government on 4 May, 1999 and 26 April, 2000.

of visas according to the Regulation of the Council of EC 2317/ 95[102] and the new Council Regulation No. 574 of 12 March 1999.[103] In 1997–2000 Poland revoked bilateral agreements on movement without visas with North Korea, Vietnam, Mongolia, Cuba and most post-Soviet States[104] (except for Poland's neighbours). The European Commission, in its Regular Report of 2000,[105] noted that the Polish Minister of Foreign Affairs has now authorized the undertaking of bilateral discussions on cancelling visa-free travel from Russia, the Ukraine and Belarus. It was also noted that new consular offices have been opened in Russia, the Ukraine (three offices), Belarus, Armenia and Mongolia. They are prepared to issue visas for persons interested in travel to Poland. According to the National Programme, bilateral agreements are being planned with the aim of cancelling visa-free travel with Belarus, Macedonia and Russia in 2001, and with Bulgaria, Romania and Ukraine[106] in 2002.

However, the revocation of agreements with Poland's closest neighbours, like Belarus and the Ukraine, is politically problematic. There is concern that such steps may lead to worse treatment of Polish minorities in these States and could likely lead to the bankruptcy of small local business on both sides of the eastern Polish border.[107]

2.II.A.4 Readmission Agreements with the Eastern Neighbours

As was said above, being exposed to pressure from the West (political) and the East (irregular migration), Poland had to take some steps to

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[102] OJ C 262/95.

[103] OJ L 072/99. This Regulation is taken into consideration by the aforementioned modified National Program.

[104] Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgistan, Moldavia, Tajikistan, Turkmenistan.

[105] In previous Reports the Commission reported on the necessity of cancelling visa - free travel from Russia, the Ukraine and Belarus.

[106] These States are on the list of 101 states whose nationals need visas if they want to cross external borders of the EU.

[107] The Belarussian or Ukrainian customers, who are usually owners of small shops or stalls, may not be able to afford the Polish visa, so they will not buy goods in Polish shops or markets. In consequence, they will not have attractive articles in their shops, which may cause them to lose their business. It would also be a great loss for the Polish shopkeepers and other customers who buy very cheap food products on the other side of the border. Such cross - border commerce is often the only source of maintenance for many families.

solve its migratory problems if it did not want to become a 'repository' for all kinds of migrants. For that reason Poland also concluded the readmission agreements with other States.[108]

The situation on the Polish–Russian and the Polish–Belarussian borders is still regulated by the Polish–Soviet Governmental Agreement of 15 February 1961 on legal relations on the Polish–Soviet Border and co-operation and mutual assistance in border matters. A new agreement with Russia has not come into force as this depends on abolishing visa requirements that would permit the free movement of citizens of both States. This is impossible given the visa requirements of the EU and the on-going process of harmonizing Polish law to EU standards.[109] In light of these constraints, this agreement should be renegotiated.

From the perspective of migrants and asylum seekers, the Polish–Ukrainian and the Polish–Lithuanian agreements are the most important because the main migrant tracks to the West lead *via* the Ukraine and Lithuania.

The Agreement between the Government of the Republic of Poland and the Government of the Ukraine on the Transfer and Readmission of Persons Across the Common Border of 24 May 1993[110] refers only to transferring persons who do not or have ceased to fulfil the requirements in force for entry and sojourn, if it has been established or can be presumed that the person is a citizen of a Party State to which they will be transferred. In consequence, the transfer of asylum seekers is impossible on the basis of this agreement.

Contrary to the above-mentioned Agreement, the Agreement between the Government of the Republic of Poland and the Government of the Republic of Lithuania on the Transferring and Receiving of Persons of 13 July 1998[111] refers not only to citizens of both parties

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[108] Apart from the above-mentioned agreement with the Schengen States, and with Germany in 1993–1994, Poland concluded readmission agreements with: Bulgaria, the Czech Republic, Rumania, Slovakia, Ukraine, Croatia, Moldavia, Greece, Hungary. In 1998, agreements with Slovenia, Lithuania and Sweden were concluded. Poland also concluded agreements on movement without visas with: Latvia, Estonia, Austria and Switzerland. They also regulate the transfer and acceptance of persons across borders; however, they refer only to nationals of the Parties.

[109] According to the above-mentioned Council Regulation EC No. 574/1999, OJ L 072/99.

[110] English version published in: *Recueil de Documents. Institut des Affaires Internationales.* Warsaw 1994, no. 2, p. 85.

[111] The text of the Agreement is available at Department for Border Control, Migration and Refugee Affairs of the Ministry of Internal Affairs and

and citizens of third countries, but also to persons who are subjects of a pending procedure for granting refugee status on the territory of the requested State party. This means, for example, that a person who applied for refugee status in Lithuania and then comes to Poland without authorization can be sent back to Lithuania according to the readmission agreement. However, it seems to be impossible to readmit such a person if the person lodged an application in both countries. However, UNHCR is seriously concerned that the clause on asylum seekers 'will facilitate the automatic return of asylum seekers to Lithuania without due consideration for the safety of the asylum-seekers from *refoulement*, or the possibility of their entering the status determination procedure in Lithuania'.[112]

2.II.B Changes in the Law

2.II.B.1 Fundamental Steps

The changing political situation in Europe described above, together with Polish plans connected with its future accession to the EU, resulted not only in migratory policy but also in a fundamental transformation in the law. The relative constitutional provisions and the Act on Aliens of 1963 did not adhere to the European standards of protection of the 1990s. The discrepancy between reality and the law and the obligations arising from the Refugee Convention (to which Poland acceded in 1991) required Poland to change its legislation regarding aliens.

In April 1997, the new Constitution of Poland was adopted by the Parliament.[113] It contains Article 56, which states: 'Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute. Foreigners who seek protection from oppression in the Republic of Poland may be granted the status of refugee in accordance with international agreements to which the Republic of Poland is a party.'

From the perspective of refugee protection, it is also important that the Constitution has finally regulated the attitude of domestic law towards international law. Once ratified by the President (after

Administration in Warsaw, and in the UNHCR office in Warsaw.

[112] *Background Information on the Situation in Poland in the Context of the Return of Asylum Seekers*. UNHCR Geneva, November 1998.

[113] Entered into force on 17 October, 1997.

statutory acceptance by the Parliament), international treaties become a source of law in Poland and they have even higher power than domestic legal acts.[114] They shall constitute part of the domestic legal order and shall be applied directly. This means, *inter alia*, that a refugee may invoke the rights set forth in the ECHR and other international treaties before national courts and administrative bodies.[115]

The Refugee Convention does not require its ratification, so Poland did not ratify the treaty; it became a party to this Convention by accession. However, according to Article 9 of the Constitution, 'The Republic of Poland shall respect international law binding upon it', which means there are no obstacles for direct implementation of the Refugee Convention by courts and administrative bodies. Moreover, aliens may invoke their rights set forth in this Convention in accordance with the above-mentioned Article 56. The Supreme Administrative Court upheld this opinion[116] in its judicial decision of August 1999.[117]

However, the most significant milestone in Polish policy towards refugees is the aforementioned Act on Aliens, which was adopted by the Parliament after lengthy debate in June 1997. A major part of the Act came into force at the end of December 1997. All its provisions entered into force on the 1 January 1999. However, three years after the implementation of the Act it is obvious that it needs to be amended, not only to meet EU requirements, but also for practical reasons. It is very likely that it will be profoundly amended in 2001.

At present, the Act regulates such matters as: definition of an alien, crossing the border, permission to reside for a specified period or to settle, the sojourn of aliens on the territory of the Republic of Poland,

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[114] Article 91 of the Constitution states: 1. After promulgation thereof in the *Journal of Laws of the Republic of Poland* (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly unless its application depends on the enactment of a statute. 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement ratified by the Republic of Poland establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

[115] See also, P. Daranowski, Position of the International Agreements relating to Human Rights in the Polish Legal System and Judgements of Courts, *Fundamental Rights of an Individual and their Judicial Protection*, Warsaw 1997, p. 243.

[116] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 [Constitutions of Poland and the Comments to the Constitution of 1997]* (ed. J. Bocia) Warsaw 1997, p. 33.

[117] Statement of the Supreme Administrative Court of 26 August 1999, Sygn. Akt V SA 708/99.

refugee status, asylum, detention, registration of aliens and liability of the carrier. It also contains penal provisions, and establishes the principles of procedure and competence of agencies.

2.II.B.1 (a) Refugee status and asylum

The Polish Act on Aliens, similarly to the Constitution (above-mentioned Article 56), distinguishes between refugee status and asylum.

According to Article 32 of the Act on Aliens: 'An alien may be granted refugee status in the Republic of Poland within the meaning of the Refugee Convention and the New York Protocol unless he has acquired refugee status in another State which secures factual protection to him/her.' Subsequently, Article 42[118] describes the denial of refugee status in a negative way: 'an alien is not to be granted status if s/he does not fulfil the conditions set forth in both mentioned documents'.

On the other hand, Article 50 states: 'An alien may be granted asylum on the territory of the Republic of Poland upon his/her application if it is necessary in order to secure protection to him/her, or there are important reasons why this is in the interest of the Republic of Poland.' It is obvious that there are significant differences between these two notions. The decision to grant asylum depends not only on humanitarian considerations, but also on the interests of the State. That is why the decision on granting asylum is issued by two ministers, the MIAA and the Minister of Foreign Affairs. Contrary to refugee status, in the case of asylum, which in practice is granted only in exceptional cases, there is no special procedure, and thus the general procedure of the Code of Administrative Procedure is applied. Moreover, if a given person obtains asylum, the person has the right to settle in Poland. A refugee receives only permission to reside for a specified period.

2.II.B.1 (b) Bodies deciding in refugee matters

[118]Article 42 states that: 'An alien shall be denied granting of refugee status if: (1) s/he does not fulfil the conditions laid down in the Geneva Convention and the New York Protocol or s/he has received refugee status in another country which secures factual protection to him/her. (2) The authorities of a foreign State that is a safe country have requested the extradition of the alien on suspicion of his/her having committed a crime.'

One of the main achievements of the Act on Aliens is the establishment of the aforementioned determination procedures. The creation of two separate instances of decision-making bodies, which allows for review of negative decisions by an independent body, is of primary significance in the context of human rights. The Department for Border Protection, Migration and Refugee Affairs issues a decision in the first instance on behalf the MIAA.[119] The newly established independent Refugee Board issues the decision in the second instance. An alien who receives a negative decision in the first instance may complain to the Refugee Board within 14 days from the delivery of the decision issued by the Minister.

According to the Administrative Procedure Code,[120] the Board enjoys the powers of a higher-level agency. It not only acts as an organ issuing decisions on the merits of a case, but it also adjudicates in cases concerning the resumption of procedure, reversal, change and invalidity of its decisions. The Board does not review appeals against decisions rendered by the commanding officers of border checkpoints. In practice, this would be pointless, because these officers are empowered only to start determination procedures; since they are not competent to deny access to the procedures[121], it is unlikely that anyone would appeal to the Refugee Board against a positive decision. The Board considers appeals against decisions on denials of access to determination procedures, which are taken only by the MIAA.

The legality of the final decision of the Board may be further appealed at the Supreme Administrative Court, which has competence to examine the conformity of the decision with the law. The Court should examine the decision of the Board not only in the light of the Constitution and the Act on Aliens, but also in the light of the Refugee Convention and other human rights treaties. This is the consequence of the above-mentioned constitutional regulation on the status of international law within the domestic legal system.[122]

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[119] Before 1 January 1999, re-examination of the case was also possible but examination and re-examination of a case was carried out by the MIAA.

[120] Code of Administrative Procedure, *Journal of Laws*, 1980, No. 9, item 27.

[121] It is regulated in Article 35 para.1 of the Act and MIAA Regulation on certain competencies of commanding officers of border checkpoints of 16 February 1998 (*Journal of Laws* 1998, No.29, item 161). Moreover, the commanding officers are also competent to take steps aiming at identification of applicants (Article 38 para.1 of Act on Aliens) and to issue residence visas to aliens for whom determination procedures have been initiated (Article 39 para. 1 of the Act on Aliens).

[122] See supra, fn. 114.

It is worth noting that access to the Supreme Administrative Court is very easy for asylum seekers. Representation by lawyers is not compulsory and the court fee is virtually symbolic (about DEM5).

2.II.B.2 Access to the Determination Procedure

According to Article 37 of the Act on Aliens, the application for refugee status must be lodged by an alien (not by a proxy) while crossing the national border. An alien who demonstrates that they did not lodge the application at the border because of justified fear for life or health must lodge an application within 14 days after the time of crossing the border.[123] An alien sojourning legally in Poland must also lodge an application within 14 days from the time of receiving information on the existence in their country of origin of circumstances that would justify granting such status. Asylum-seekers who entered without authorization are obliged to lodge their applications immediately after unauthorized entry. However, as it is quite difficult to define what 'immediately' means in this situation, this provision should be made more explicit.

According to the Border Guards, in 95 per cent of situations applications for granting refugee status are lodged in the following situations:

(a) When applicants are caught at the moment of unauthorized crossing of the border; mainly when they want to leave Poland;

(b) When applicants are detained by the police for lack of valid permission to stay in Poland;

(c) When applicants have been readmitted to Poland according to bilateral agreements;

(d) When applicants' visas have expired and there is no other possibility to prolong their stay in Poland but they do not want to go back to their country of origin.

The grounds for application as stated are confirmed by the statistics presented at the beginning of this chapter.

In law and also in practice, with respect to access to the procedure there is no distinction made between persons who applied for refugee

[123] The time limit cannot be applied to an alien who entered Poland before 27 December 1997, the date when the Act on Aliens came into force.

status during entering or leaving the territory of Poland. Individuals who have been readmitted (mainly from Germany) can lodge applications as well. If a person tries to leave Poland illegally during pending determination procedure and is then caught at the border or readmitted, the procedure is continued.

The readmission agreements do not require formal notification to the Polish authorities that a returned person has sought protection in another country and the case was not examined on its merits.

If we take into consideration the above-mentioned paradox of aliens lodging their applications for refugee status either inside the country or at the moment of leaving Poland at its western border,[124] it could seem opportune to amend Article 37 so that it would include the requirement of lodging an application only at the moment of entering Poland. Such an amendment would be understandable if one takes into consideration the above-mentioned statistics. However, it seems to be unacceptable when measured against human rights standards. Such a requirement would deny readmitted persons the possibility of seeking asylum, and in consequence Poland would be in breach of its obligation under the Refugee Convention and could not be regarded as a safe country of asylum.

An alien must be informed about this and other rights at the moment of lodging the application for refugee status. The practice of Polish Border Guards guarantees that full information on the possibilities of obtaining refugee status or asylum in Poland and the rights and duties of a person seeking protection is accessible at all border checkpoints. What is more important, this information has been translated into several languages. The Border Guard is obliged to give this information to each person applying for status. The alien must certify by signing that he has obtained the information. It must be also emphasised that the principle of informing an alien in a language which she understands must be applied throughout the whole procedure.

An alien has the right to contact UNHCR officers, and in particular, may apply for assistance at any time. The representative of UNHCR, upon motion of an alien and with her written permission, has the right to obtain information concerning the course of proceedings and decisions from the institutions conducting the proceedings on granting or withdrawing the refugee status. There are no obstacles for asylum seekers to obtain other legal assistance. Usually, the lawyers working for the Helsinki Foundation help them in legal matters.

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[124] See Section 2.II.A.1.

The time limit of 14 days for lodging the application for granting refugee status raises humanitarian concerns. In practice, the time limit of 14 days may not always be sufficient for the necessary careful consideration of the merits of an application. On the other hand, the argument that if somebody is really persecuted and needs protection, the person will apply for refugee status immediately seems to be reasonable also. This refers mainly to aliens, who apply for refugee status after a long stay in Poland following, for example, the introduction of visa requirements.

The problem may also arise when an applicant fulfils all the requirements of the Refugee Convention, which also means the requirements of the above-mentioned Article 32 of the Act, but submits the application more than 14 days after crossing the national border. Moreover, Article 42, which specifies reasons for denying refugee status, does not mention going beyond the time- limit. This means that proper application of both provisions is impossible. This inconsistency should be eliminated in the new version of the Act. However, if such a situation occurs, the authorities should take into consideration the provisions of the Constitution, whereby the supremacy of international treaties (including the Refugee Convention) above domestic legal acts is declared.

It is worth noting that the Supreme Administrative Court, in its statement of 26 August 1999,[125] quashed the negative decisions on refugee status issued by the MIAA and the Refugee Board based on Article 37 of the Act on Aliens. The Supreme Administrative Court stated that an interpretation of Article 37 of the Act which creates another substantial prerequisite for denial of refugee status violates not only the provisions of the Refugee Convention, but also the Constitution of Poland.

2.II.B.3 The Notion of 'Safe Country'

2.II.B.3 (a) Definitions

Following the legislation of countries of Western Europe, Poland has introduced into its domestic legislation the notion of the 'safe third country' and 'safe country of origin'.

[125] Sygn. Akt V SA 708/99.

According to Article 4 (10) of the Act on Aliens, 'safe country of origin' means a country of origin that in terms of its system of law or the application of this system, or in terms of political conditions prevalent there, is not the scene of persecutions for reasons of race, religion, nationality, membership in a particular social group or for political opinion, and where no one is subject to torture, or inhumane or degrading treatment or punishment. Article 4 (11) defines a 'safe third country' as a State which, while not being the country of origin, has ratified and is applying the Refugee Convention and the New York Protocol as well as the ECHR of 1950 or the ICCPR of 1966, and which in particular guarantees alien access to the refugee status determination procedure.

It is easy to notice that in the case of the safe country of origin the general situation in a given country is taken into consideration. In the case of the third safe country, it should be ascertained that a State has ratified and is really applying the fundamental treaties of human rights, including refugee rights.

The wording of Article 4 (11) is important from a human rights point of view, in that it does not foresee the possibility of recognizing a state as a safe third country only by taking into consideration whether or not it is a party to the above-mentioned treaties. In order to qualify as a safe third country, a state must also guarantee access to the determination procedure. Both these conditions must be satisfied simultaneously.

Other provisions of the Act, especially Articles 32 and 35 and the previously mentioned Article 42, are consequences of these provisions. Article 32 declares: 'An alien may be granted refugee status in the Republic of Poland within the meaning of the Geneva Convention and the New York Protocol unless s/he has acquired refugee status in another State which secures factual protection to him/her'. The subsequent Article 35, regarding procedural matters, regulates the form of the initiation of the determination procedure. Its paragraph two refers to the above-mentioned Article 32, stating: 'If the application was made by an alien failing to comply with the conditions specified in Article 32, the initiation of the procedure shall be denied'. However, in the next paragraph, Article 35 (3) adds other prerequisites for denial of the initiation of the procedure. It declares: 'The initiation procedure shall also be denied if an alien has arrived in the territory of the Republic of Poland from a safe country of origin or a safe third country and the application lodged by him/her is manifestly unfounded'. This means that two conditions should be taken into consideration, simultaneously. The initiation of the procedure shall be denied not only because of arrival from a 'safe

country', but also because the application is manifestly unfounded. The Act does not explain what it means to say that an application is 'manifestly unfounded', however, in their comment on the Act on Aliens the authors state that this notion is well known in Polish law.[126] The Polish Code of Civil Procedure (CCP), Article 116 (2), refers to denial of exemption from court costs due to manifestly unfounded claim. The Code does not explain how the phrase 'manifestly unfounded claim' should be understood, either. However, judicial decisions of the Supreme Court regarding Article 116 of the CCP explain the meaning of this notion. According to the decision of 1984, 'a manifestly unfounded claim'[127] takes place when the average lawyer is able to state without closer analysis and *a priori* that the claim cannot be taken into consideration.[128] Another decision of the Supreme Court, made in 1971, is even more useful for explaining the meaning of 'manifestness' in Polish law. The Supreme Court in this decision stated that 'manifestness takes place when the claim cannot be taken into consideration because the lack of grounds contained in this claim from the plaintiff's statements, and there is no need to check any prerequisites'.[129] These judicial decisions may also be useful in the case of an alien, who in her application for refugee status writes, for example, that she came to Poland only for economic reasons or to renew family ties.

Taking into consideration the EU requirements, the notion of 'manifestly unfounded application' will be understood in a different way under the newly drafted Act on Aliens. It will be harmonized with the resolution on Manifestly Unfounded Applications for Asylum taken by the Ministers of the Member States of the EC for Immigration at the London Meeting on 1 December 1992.[130]

2.II.B.3 (b) Practice

All of the above-mentioned provisions of the Act on Aliens currently in force regarding 'safe countries of origin' and 'safe third countries' remain in practice a dead letter. In fact, while Article 95 of the Act obliges the Council of Ministers of the Republic of Poland to draw up lists of safe third countries and safe countries of origin in the form of

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[126] P.Stachańczyk: *Cudzodziemcy* [The Aliens]. p.64.

[127] This decision may regard not only various claims in civil procedures, but also various types of applications in administrative procedures.

[128] Decision of 8 October 1984, Sygn. II CZ 112/84.

[129] Decision of 1 January 1971. Sygn. I CZ 7/71.

[130] SN 2836/93 (WGI 1505).

a regulation, such lists have not yet been drawn up[131] because the Polish Government is very wary of recognizing Poland's eastern neighbours as 'safe countries'. In fact, only Lithuania may be taken into consideration as a 'safe country'. Ukraine has not ratified the Refugee Convention. The situation in Russia is unstable. Owing to its political situation, Belarus is not taken into consideration as a 'safe country' at all.

The lack of the list in the case of persons applying for refugee status signifies that even if they have come from countries which might be recognized as safe, the initiation of the determination procedure cannot be denied, and these people cannot be sent back to the country of departure according to readmission agreements or customary practice between States. Moreover, at present the arrival from countries that are probably safe cannot be the basis for issuing a negative final decision. It is quite difficult to predict what the determination procedure will look like if the lists of safe countries of origin and safe third countries are elaborated. It is likely that a kind of accelerated procedure will be introduced. However, it does not seem probable that an alien arriving from a country found on the list would be stopped at the border and would not be allowed to enter Poland, if she expressed the intention to ask for asylum or refugee status. It must be remembered that the commanding officers of the border check points do not have competence to refuse initiation of the determination procedure. This should not be changed under the amended Act on Aliens.

2.II.B.4 Detention

Another innovation in the Polish legal system concerns the new provisions regarding detention of aliens. Article 36 of the Act states that if it is necessary to examine the circumstances included in an application to ascertain whether or not the asylum-seeker has arrived from a safe country of origin or a safe third country, or if there is a need to clarify if she has provided false data or circumstances, the decision on initiation of the determination procedure may be postponed and an asylum seeker may be ordered to stay in a designated place for a period not exceeding seven days. In practice, only the need for clarification of data or of the circumstances of leaving the country of citizenship or residence can be a reason for

[131] Situation as of 15 January 2001. There is a proposal to abolish the obligation to create the list in the amendment of the Act on Aliens.

ordering an alien to stay in designated place.[132] Such a decision may be taken by the MIAA or authorized commanding officers at border checkpoints only under special conditions. The time of seven days cannot be prolonged. The reasons for the decision must be presented and the decision may be appealed to the second instance. It is also worth mentioning that, due to executory provisions,[133] Article 36 does not apply to women and children.

Article 68, referring to the liability of the carrier, also contains elements of limitation of liberty. Article 68 states that the alien who has arrived on board an aircraft or sea-going vessel and who does not hold permission to enter the territory of Poland may be forbidden to leave the aircraft or vessel. Implementation of this provision is only possible if the departure of an alien is only a matter of a few hours. Moreover, this provision does not seem to be relevant to the asylum and refugee issue.

Articles 58 (in connection with Article 52), 59, 88 and 89 of the Act regulate detention *sensu stricto*. According to these provisions an alien may be detained:

Before issuing a decision on his/her expulsion, if there are circumstances[134] justifying such a decision;

When the decision on expulsion has been issued but an alien has not abided by the requirement.[135]

The police or the Border Guard may detain an alien for a period not exceeding 48 hours. Within 48 hours, an alien must receive the decision on deportation (issued by the Voivod) or, if an alien has already received this decision, the execution of the obligation of sending her to the border must be initiated; otherwise she must be released. If immediate delivery to the border is impossible and there is well-founded fear that an alien will avoid the execution of the decision on expulsion, the alien may be placed in a detention centre. It is

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[132] See infra, on safe third country and safe country of origin.

[133] MIAA Regulation on particular principles, procedures and documents issued for aliens, *Journal of Laws*, No.1, item1 (1998)

[134] Circumstances justifying expulsion of aliens are described in Article 52. An alien may be expelled if: she is sojourning on the territory of Poland without the required permission to enter or sojourn or does not possess means for subsistence or has taken up employment or engaged in other gainful work without permission. She may also be expelled because considered undesirable on Polish territory due to criminal activity or the fact that she had been expelled from Poland at the cost of the State Treasury in the past (all these instances are specified in Article 13, referring to circumstances justifying denial of issuance of a visa.).

[135] Usually the decision on expulsion orders an alien to leave the country without accompaniment, so aliens do not abide by this order very often.

mandatory that an alien be obligatorily held in the detention centre or in arrest with view to expulsion if she has crossed the border without authorization and does not possess a passport. It is the regional court that issues the decision to place an alien in a detention centre or in arrest with view to expulsion.

The MIAA in Lesznowola runs the main detention centre. The conditions in this centre are not very strict. Families are accommodated together and there are special facilities for mothers and children. Full board, medical care, sanitary facilities and necessary articles of clothing are provided free of charge. Detainees have access to telephones and they may use them at their own expense. They also have the freedom to practise their own religion.

If there is a well-founded fear that an alien will not abide by the rules governing a detention centre, she may be detained in deportation arrest, where the conditions of detention are stricter.[136] If the reasons justifying detention of an alien have ceased, or if within ninety days from the moment of detention the decision on expulsion has not been executed, the alien must be released.[137]

There are no obstacles to keep detainees from applying for refugee status. For example, in 1997 more than one third of detained foreigners applied for refugee status.[138] It is worth mentioning that the Supreme Administrative Court, in its judgements of 7 October 1999, ruled that principles of administrative proceedings relating to the established interest of an alien must take into account that a decision on expulsion or refusal to issue a residence visa should not hinder proceedings for granting refugee status.[139]

2.II.B.5 Humanitarian Status (Temporary Protection)

The Act on Aliens does not contain any provisions regarding humanitarian status alternative to asylum or refugee status. However, Article 53, which refers to all kinds of aliens, states: 'An alien may not be expelled to a country in which s/he could be the subject of persecution for reasons of race, nationality, membership in a

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[136] See also, F.Liebaut, *Legal and Social Conditions for Asylum Seekers and Refugees in Central and Eastern European Countries*. Danish Refugee Council, January 1999, p. 148.

[137] 80% of detained asylum seekers released after 90 days of detention.

[138] Ibid, p.149.

[139] Statement of the Supreme Administrative Court of 26 August 1999, Sygn. Akt V SA 708/99.

particular social group or for political opinion or could be subject to torture or to inhuman or degrading treatment or punishment.' It appears that this Article is *lex specialis* for other provisions of the Act referring to expulsion of aliens. An alien cannot be expelled to a country included in Article 53 even if she has committed a common crime, takes gainful work without permission, or is in the situation of visa revocation, etc.[140] This provision is a consequence of the spirit of Article 3 of the ECHR, which states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. So, the prohibition of expulsion of aliens to countries where they might be exposed to such treatment is not only a moral obligation but also a legal one. This legal obligation derives not only from domestic law, but also from the international treaties on account of their status as sources of law under the Polish legal system.

It seems that this provision may be treated as a particular, though very limited, form of temporary protection, or protection for humanitarian reasons, well known in other countries and strongly urged by human and refugee rights experts.[141] However, Article 53 protects an alien against expulsion only. It does not grant an alien any status allowing him or her to start a new life in Poland.

There is not doubt that a real need exists to introduce into Polish legislation provisions creating an alternative status for those denied refugee status but yet in need of protection by the State or those able to present compelling humanitarian reasons arguing for their right to remain in Poland. This necessity derives not only from EU requirements, but also from the moral point of view. Aliens who apply for refugee status and receive a final negative decision because they do not meet the conditions contained in the Refugee Convention, quite often have remained in Poland for some years (Armenians, for example). Sometimes their children were born in Poland and they do not even speak their mother tongue. They attend Polish schools and kindergartens. They do not know their parents' country at all. Once denied refugee status, all families are legally required to leave Poland; however, in practice they stay on illegally. Sometimes they manage to survive only thanks to NGO's; living underground as they do, they are vulnerable to becoming victims or members of various organized criminal groups. If an alternative status were introduced into the law, these individuals would have an opportunity to lead normal lives.

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[140] It must be stressed that the expulsion of a refugee or person who has obtained asylum is impossible. Expulsion may occur only after prior revocation of status.

[141] See e.g., J. van Selm–Thorburn, *Refugee Protection in Europe. Lessons of the Yugoslav Crisis*, The Hague /Boston/London 1998.

However, in spite of the lack any alternative status, when faced by the crisis in Kosovo, Polish authorities decided to organize the reception of 1000 people who had escaped from that region. These people, who have been evacuated to Poland, are not granted refugee status according to the terms of the Refugee Convention. There is no obstacle to their asking for refugee status in Poland individually, but in this case they cannot enjoy the special financial governmental aid determined by two Resolutions issued by the Council of Ministers on 13 April 1999.[142] The displaced people may obtain a visa permitting a one-year sojourn in Poland. They can also apply for a visa with permission to work. Both documents are issued by the Voivodes (provincial governors).[143]

The dramatic situation in the Balkans has shown that an amendment of the new Act on Aliens introducing provisions for some form of temporary protection would seem to be reasonable. On the other hand it has turned out that even without special statutory provisions for really exceptional situations, the protection of people in need is possible.

2.II.C Conclusions

There are no doubts that Polish law, policy and practice in migration and refugee matters have changed during the last few years. Polish law referring to aliens is gradually becoming more and more similar to the legislation of Western countries. This also means that Poland is increasingly becoming a closed country, and all migration movements to Poland and *via* Poland are better controlled. Taking into account the significant number of various types of migrants on the way to the West and their usually spurious applications for refugee status, all endeavours aiming at limiting irregular migration seem to be reasonable.

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[142] Resolution of the Council of Ministers No.31/99 on granting temporary aid for displaced people from Kosovo on the territory of the Republic of Poland. Resolution of the Council of Ministers; No.32/99 on granting financial sources from the budget reserve to the Ministry of Internal Affairs and Administration for covering the costs of transportation and temporary sojourn of displaced people from Kosovo on the territory of the Republic of Poland.

[143] According to the new administrative system, since 1 January 1999 there are 16 provinces in Poland. The heads of these provinces are officers of the governmental administration.

On the other hand, among the various types of migrants, there is always certain group of aliens who really need various types of protection. It is obvious that refugees must be protected against *refoulement* in accordance with the Refugee Convention of 1951 and other human rights instruments like the ECHR; ICCPR; CAT; the European Convention for Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[144] But there are also other groups of aliens who should obtain the right to legally stay in Poland for humanitarian reasons.

There are several aspects of Polish law that should be highly regarded as effective means of protecting refugee rights. Most centrally, these are the two instances of the determination procedure and the supervisory function of the Supreme Administrative Court over the legality of the procedure. Moreover, such practical things as information booklets for asylum seekers available at the border check points are also to be appreciated.

However, there are also controversial regulations in respect to the protection of asylum-seekers. These controversies and doubts refer to certain provisions of the readmission agreements and the time limit for lodging an application for granting refugee status. The creation of the list of safe countries of origin and safe third countries will probably cause many controversies as well. The other problems are the lack of alternative status, and the social and economic difficulties of persons who have obtained refugee status. Recognized refugees enjoy the same social and economic rights (e.g., right to employment, social security, education, etc.) as do Polish citizens, but in fact their access to jobs is limited owing to language or social barriers.[145] The right to employment does not refer to people during the determination procedure with the result that for months, or in particular cases even years, they cannot work legally which is very undesirable. On the other hand, many applicants intentionally prolong procedures so that they can stay longer and work illegally in Poland. Many applicants see refugee status as the way to legalize their sojourn. It is extremely difficult to find any *modus vivendi* in these matters, but changes in the law are indispensable and inevitable.

However, even the best law will not be effective without proper implementation. On the other hand, all the controversial provisions of refugee law may prove quite safe for asylum-seekers and not result in

[144] Poland is party to these treaties.

[145] F.Liebaut 1999, p.151-155. On integration see also, in: J.Chlebny, W.Trojan: *The Refugee Status Determination Procedure in Poland.* 12 IJRL 2000 2, p.231.

refoulement if and when the authorities interpret domestic law in accordance with the spirit of the Refugee Convention.

2.III The Czech Republic

Dalibor Jílek

2.III.A Transit or Destination State?

2.III.A.1 Political Concerns

Amongst all the changes that have taken place in recent years, irregular migration might have appeared as a secondary or even minor social problem, since highest priority had to be given to the transformation of the economic and political systems, which included the peaceful split-up of the Czech and Slovak federation. The possibility exists, however, that the gradual increase of irregular movement could weaken the security of the state and endanger the fragile equilibrium in Czech society, itself no stranger to the perils of intolerance and xenophobia. The increase of illegal transitory migration across Czech borders inevitably necessarily irritates neighbouring states (Germany and Austria), which are the targets of such migration 'crawls'. Thus, combined internal and external pressures, strengthened by the pressure brought to bear by the EU, made it necessary to adopt measures designed to effectively curb uncontrolled migration.

2.III.A.2 Rising Numbers of Asylum Seekers

In 1998 there was an increase in the number of asylum seekers in the Czech Republic. While in years prior 1998 the number was generally under or just over 2,000.[146] Since that year the number of applicants has continuously increased.

The composition of asylum seekers according to country of origin has also undergone a marked change. Refugees now come from former

[146] For the purposes of comparison, it is possible to present the exact data since the beginning of the independent Czech state: 1993 - 2,207 asylum-seekers (but this number was significantly influenced by constitutional and legal amendments in Germany), 1994 - 1,187; 1995 - 1, 417; 1996 - 2,211; 1997 - 2,109; 1998 - 4,086; 1999 - 7,220; 2000 - 8,787 asylum seekers.

Yugoslavia and Afghanistan, as well as from Asian States such as India or Sri Lanka, far from the centre of Europe. The non-existence of visa abolition agreements between the Czech Republic and these States is another problem. Granting visas indiscriminately on entry does not allow for the adequate regulation of such an influx of persons.

The newly established trend, in which both quantitative and qualitative changes are visible, seems to have stabilised in the first half of 1999, at the same time, as there was a drop in absolute monthly figures.[147] More refugees are coming from further east: as before, the line stretches eastwards, but its roots now reach further into the heart of Asia.[148] The word 'Asia' derives from the Assyrian '*asu*', meaning the country of the East. The etymological origin of the name of the most densely populated continent is in striking coincidence with the refugee flow from East to West.

The idea that the Czech Republic has already become a target country is not supported by available data; known facts do not back this assumption. In this context, a simple question has to be asked: to who has the Czech State become attractive (though not necessarily a promised land)? Undoubtedly, the Czech State could be considered a residential magnet for a certain length of time, by certain groups of migrants, particularly those from eastern countries. We might also ask why this should be so. The attraction of the Czech Republic could be perceived as socio-economical, satisfactory only in relative terms, together with its political stability.

2.III.A.3 Implementing Readmission Agreements with Neighbouring States

That the Czech Republic is still a transit state is evident from the fact that more individuals are readmitted from neighbouring western states than returned to them. This is seen very clearly in the Czech–German readmission agreement. Pursuant to Article 1 (1) of the Agreement and upon the request of the German authorities, approximately 2,730 Czech citizens were returned in 1995–2000 because they did not meet

[147] The statistics of the numbers of applications comprises the following data from January 1998 till December 2000: Afghanistan-4,693; India-1,830; Sri Lanka-1,623; Yugoslavia-1,498 and Ukraine-1,280.

[148] The changes can be seen in comparing the numbers of asylum seekers for a particular period. From July 1990 until December 2000 the most numerous asylum seekers represented the following states: Afghanistan-5,020; Bulgaria-4,700; Romania-3,935; India-1,851; Sri Lanka-1,775; Armenia-1,603; and Yugoslavia-1,590.

the criteria for entry or sojourn in Germany.[149] In the same period Czech authorities returned about 350 German citizens.[150]

The Czech–German agreement is applied much more extensively when citizens from third states are involved. The Czech Republic took back about 54,300 aliens[151] without formalities. Under Article 3 (2) approximately 3,130 citizens of third states were readmitted[152] through the formal procedure. For a proper comparison, data on the readmission of aliens to Germany should be examined. Available statistics show the numbers to be substantially lower: German authorities readmitted 360 aliens upon request without formality and 160 citizens from third states through the formal procedure. From 1995–2000 the Czech Republic refused admission to a total of 5,100 aliens, while Germany refused only ten. In accordance with Article 5 of the Agreement, the Czech authorities accepted 516 aliens for transit, although the Czech Republic was not asked to do so by Germany.

The application of a readmission arrangement with Austria also shows migratory pressure expanding westwards. Czech Alien and Border Authorities readmitted approximately 1,140 Czech nationals and returned 230 Austrian nationals in 1996–2000 in accordance with Article 1 (1). The Czech Republic complied with the readmission obligation set by Article 3 in more than 7,950 cases of third state nationals, and Austria admitted nearly 7,480 aliens[153] informally and 470 aliens[154] formally from the total. The Czech Republic, however, refused to receive nearly 380 citizens from third states in 1996–2000.

The statistics of Czech–Polish readmission as provided for by the treaty show fewer irregular migrants at the common borders. The numbers of Czech and Polish citizens readmitted are higher than those of aliens and stateless persons. In 1996–2000 the Czech Border authorities readmitted approximately 960 Czech nationals; whose

[149] The given data can be roughly specified in accordance with the individual years: 1995 - 490, 1996 - 370, 1997 - 490, 1998 - 510, 1998 - 510, 1999 - 480 and 2000 - 390 citizens of the Czech Republic.

[150] The statistics shows the following numbers: 1995 - 130, 1996 - 60, 1997 - 50, 1998 - 30, 1999 - 30 and 2000 - 50 citizens of Germany.

[151] The following statistical data are given per year: 1995 – 6,190, 1996 – 6,850, 1997 – 8,560, 1998 – 15,300, 1999 – 8,600, and 2000 – 8,800 foreigners.

[152] The following data per year can be taken into consideration: 1995 - 440, 1996 - 520, 1997 - 530, 1998 - 670, 1999 - 390 and 2000 - 580 foreigners.

[153] The statistics includes the following data: 1996 - 620, 1997 - 710, 1998 – 1,550, 1999 – 2,800 and 2000 – 1,800 foreigners.

[154] The greatest number of aliens was readmitted by the Czech Republic in 1990, more than 290 individuals.

numbers do not vary much from year to year. In the same period, Poland readmitted nearly 960 of its own nationals, but in 2000 this number increased.

In accordance with Article 6 (2) the Czech authorities informally took back nearly 1,180 aliens and formally fulfilled their contractual obligation for more than 140 foreign nationals. In the same period (1996–2000) Poland took back over 230 aliens, of whom more than 140 were foreign nationals who were accepted without formalities.

The Czech Republic and Slovakia provide each other with reciprocal favourable conditions for entry and stay of each other's nationals and therefore the readmission agreement regarding Slovakian nationals is applied only in exceptional cases; in fact, only just over 380 returned nationals of both States were recorded in the five-year period 1996–2000. The Czech Republic took back only 80 of its own nationals.

Readmission arrangements are applied predominantly for denying admission to aliens who have made unauthorized entry into the Czech Republic. The border authorities of the Slovak Republic informally readmitted more than 7,040 foreign nationals in the period under examination (1996–2000), and nearly 2,910 aliens by formal procedure. A very simple comparison of the results of application of readmission agreements with Germany on the one hand and Slovakia on the other shows a big difference. But this is not so much caused by the difference in the two readmission agreements, in terms of difference of the temporal conditions of procedural obligations, as the efficiency of police control activity. The effectiveness of readmission agreements as 'negative feedback' reducing uncontrolled migration depends on internal issues such as state border guards and the control of foreign migrants within the state territory.

2.III.B Legislative Practices

2.III.B.1 The Aliens Act

The conditions for the entry of aliens into the territory are fixed in Chapter II of the Aliens Act. The provisions of Sections 7 and 8 of the Aliens Act stipulate as *'lex specialis'* the special conditions for the entry of aliens in distress asking for temporary protection.[155] The

[155] Section 7 of the Aliens Act reads: '(1) During the border control of an alien who

Aliens Act finally fills in the legal lacuna. Temporary protection was granted on the basis of a Government Decree, an administrative act that awarded only *de facto* the same treatment and privileges as those enjoyed by asylum seekers applying for the status of refugees to so-called humanitarian refugees.[156] According to the Aliens Act, an alien seeking temporary protection does not have to submit any particular documents, not even a passport. If such a foreigner has no travel document of any kind, she has to prove her identity by some other official document of the state in whose territory she was habitually resident, or by an affidavit. The alien must also provide fingerprints and photo records.

For their part, the police are obliged to deny entry into the territory to the alien asking for temporary protection if he has committed a crime under international law (crimes against peace, crimes against humanity and war crimes). It is a comprehensible custom under international

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applies for temporary protection of the Czech Republic, the police shall at the alien's request, issue a visa for up to 90 days which gives the alien leave to remain in the territory for the period of 3 business days from the date of issue of the visa, and it shall put this visa in a travel document,issue the alien with a state border crossing report if the alien is unable to submit a travel document, and put the visa pursuant to sub-section (a) therein,c) determine the following:

1. the place where the alien is to stay in the Territory,

2. type of transport to the above destination in the Territory; the cost related to the transfer shall be covered by state funds,

d) in an adequate manner, advise the alien of his right to apply for a visa for the purpose of temporary protection during the validity period of the visa referred to in sub-section (a).

(2) If the alien declares that accommodation has been arranged for him in the Territory or that he has funds to remain in the Territory, the police shall abstain from determining the place or type of transport referred to in sub-section (1) unless such abstention endangers the public order or public health.

For the purposes of providing medical care, the alien shall be considered an alien with a visa issued for the purpose of temporary protection during the validity period of the visa referred to in sub-section (1) (a)

Section 8 (1) An alien who is entering the Territory for the purpose of provision of temporary protection shall not be subject to the obligation to submit a document pursuant to Section 5 (1) (2) to (6) and Section 5 (b).

(2) An alien who cannot submit a travel document during border control shall be obliged to:

a) prove his identity with another, officially issued document of the country in whose territory the persons who were granted temporary protection are staying, or by a statutory declaration stating his surname, name, date and place of birth and country from which he has arrived,

b) to submit to fingerprinting and photographing.'

[156] See e.g. the Resolution of the Government No 353 on humanitarian aid for Kosovar refugees of 14 April 1999 and the resolution of the Government No 378 on the provision of temporary refuge of 21 April 1999.

law to refuse shelter to anyone who has committed these very serious crimes even for comprehensible reasons. Entry is refused also to aliens who have committed a non-political criminal offence with a maximum prison sentence exceeding ten years prior to her entry. According to the Aliens Act, temporary protection cannot be offered to an alien who might jeopardise the security of the state because she had used violence to achieve political aims, or because her activity could endanger the basis of the democratic state. Temporary protection cannot even be granted to an unwanted person registered in the files. This norm strictly enforces rejection.

The conditions of the Aliens Act thus determine both conditions of acceptance and rejection. The purpose of temporary protection is envisaged as a humanitarian act towards someone deemed to be in need. Temporary protection cannot, however, be given in contradiction to the highest interests of the international community protected by the 'hard core' of general international law. This means that protection cannot be extended to a person under national or international criminal jurisdiction. Besides the general interest, there is also the national interest of each state, which may for no reason be jeopardized by humanitarian principles; therefore the Aliens Act excludes other cases from protection.

The Nation's conception of temporary protection can be understood from its humanitarian, refugee and human rights laws and their provisions covering this issue.[157] It aims to provide protection for victims of wars and permanent violence (although not necessarily armed conflict), natural disasters, systematic or mass violation of human rights or persecution on national or religious grounds. Naturally, temporary protection is extended to individual citizens of third countries or stateless persons, as well as asylum seekers.

On the humanitarian law side, there is the provision detailed in Section 41 of the Aliens Act, specifying as reasons war, civil war and permanent violence, along with other reasons irrelevant here. The provision explicitly indicates those people who fall into special categories; prisoners of war, internees who cannot be treated in their own country, victims of sexual violence, persons coming directly from war zones where human rights are abused and where people's lives are at risk.

The progressive dimension of human rights also appears in the domestic concept of temporary protection in the wording 'for the

[157] See D. Perluss & J.F. Hartman, Temporary Refuge: Emergence of a Customary Norm, Virginia Journal of International Law 3, p.554 (1986).

reason of systematic or mass violation of human rights', which deliberately uses the non-excluding word 'or'. The concept of temporary protection in the Aliens Act also considers systematic or mass persecution. The wording of the Aliens Act could give rise to legal confusion, and overlap with the Asylum Act, also applicable to cases of group persecution. This situation will only be resolved by future application. Moreover, the Aliens Act does not contemplate persecution on racial or political grounds.

Specifying natural disasters as a cause for temporary protection implies the temporary impossibility of returning to a state where earthquakes, floods or famine have occurred. The politically inspired 1951 Refugee Convention covers none of these situations.

The national institution of temporary protection respects the principle of family unity, which is, however, formulated restrictively to include the father, mother and children under 18 years. In this respect, the institution fails to take fully into consideration different concepts of 'family' in other cultures.

Section 181 of the Aliens Act, empowers the government to determine the states whose citizens are to be granted temporary protection visas and the terms and numbers of protected persons. The provision awards a great deal of discretionary power to the government as the collective body. The government can therefore, under the Decree, determine the states and the number of protected persons with respect to international solidarity and can regulate the period for providing shelter. Temporary protection, its *ratione temporis*, really implies repatriation from when public order and security are effectively restored in the state concerned.

The Ministry of Interior provides the beneficiary of temporary protection with accommodation and covers all the costs of residence in the centres. Aliens enjoying temporary protection and not living in the centres have to pay for all their own expenses, but they may request financial contribution to guarantee a minimum standard of living.

Through the legal instrument of temporary protection, the Aliens Act is aimed to assist those seeking urgent help in the name of humanity, although it gives them a very cautious welcome.

2.III.B.2 The Asylum Act

For a long time in professional circles there had been lively debate whether or not to adopt a new Refugee Act to substitute *in toto* the first generation legal regime with its subsequent changes and amendments. In spring 1999 the government adopted the full wording of the Asylum Act.[158] The Asylum Act Number 325 of 11 November 1999 on Asylum promulgated in the Official Gazette came into force on 1 January 2000.

2.III.B.3 Multifunctional Character of the Asylum Act

The Asylum Act defines its purpose in Article 1 and thus tacitly implies its specific nature in respect to the Aliens Act. The specific scope of the Asylum Act regards aliens whose particular qualifications allow them to seek and obtain protection. Its special role is seen by the different conditions required for entry and stay of the aliens who express intention to apply for protection by asking for asylum.

While international refugee law has at its core substantive obligations with legal consequences, the character of domestic asylum laws is predominantly procedural. A significant section of the Asylum Act sets forth the rules governing the procedure for granting or refusing asylum that the lawmakers prescribe must be fair, expeditious and effective. The Asylum Act defines the legal status of an actor in the asylum process more exactly. It specifies the concrete rights and duties with the intention of making her legal position clearer and more precise. It distinguishes, according to their purpose, different asylum facilities, i.e. reporting, reception and integration centres; the alien who stays either in the reporting or reception centres is entitled to a wide range of benefits that secure a reasonable standard of living.

The Asylum Act defines and specifies the responsibilities for asylum issues placed on the Ministry of Interior, the Ministry of Education, Youth and Physical Training and the Police of the Czech Republic.

2.III.B.4 A Comparison of the Asylum Act and the Charter of Fundamental Rights and Freedoms

The Charter of Fundamental Rights and Freedoms, that part of the constitutional order of the most highest and most authoritative legal

[158] See The Resolution of the Government, No. 238, 22 March 1999.

standing, in Article 43 obliges the state to grant asylum to aliens persecuted for the assertion of political rights and freedoms.[159] Consequently, asylum must be granted to every alien who meets the substantive requirement of the provision regarding persecution for the assertion of political rights and freedoms. Such rights and freedoms are at the same time described in the Charter as 'political rights'. Thereby the Charter, with the significant assistance of existing international agreements, takes on the secondary role of interpreting human rights cases, in accordance with Article 10 of the Constitution, which includes the obligation to implement norms even though they may not be reciprocally binding.

The provision of Article 43 of the Charter gives an alien the right to asylum in a reflexive formulation. The Article expressly places obligations on the State to thus respect the right of an alien. This particular human right entitles an alien to request and be granted asylum in the case that she complies with the substantive requirement of persecution for asserting political rights and freedoms. Persecution suffered during the asylum seeker's presence in the country of origin is given primary consideration, and the real risk of future persecution is also taken into account.

The etymology of the word 'asylum' shows it to originate from the Greek term '*asylon*' and to mean freedom from seizure.[160] The core meaning of the legal term 'asylum' comprehends freedom in its dual conception, both negative and positive. The right to asylum places an alien in a protected position offering legal advantages so that she may enjoy the full benefits of her liberty.[161] The second sentence of the provision stipulates that asylum can be denied to an individual who has performed actions contrary to fundamental human rights and freedoms. However, even here uncertainty is possible. A completely clear definition of fundamental human rights and freedoms is set forth in Part I, Chapter II of the Charter.

The rule enshrined in Article 43 very much stands out in the Charter. The right to asylum is included under the heading 'General Provisions' in the Charter's Chapter 5. The *Sedes materiae* of asylum is thus very clear. The theory of constitutional law asserts that the right to asylum

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[159] Article 43 of the Charter of Fundamental Rights and Freedoms reads: 'The Czech and Slovak Federal Republic shall grant asylum to citizens of other countries, persecuted for asserting political rights and freedoms. Asylum may be denied to a person who acted contrary to fundamental human rights and freedoms.'

[160] See A. Grahl-Madsen, Asylum, Territorial, R. Bernhardt (ed.), Encyclopaedia of Public International Law, Vol .I, p.284 (1992).

[161] See A.C. Helton, What is Refugee Protection? International Journal of Refugee Law, Special Issue, p.119 (1990).

does not belong there with its content. There was no mention of any normative link in the Charter to its formal source, the former and legally weaker Refugees Act. The Asylum Act has a corrective purpose, since asylum is granted as a result of persecution for asserting political rights and freedoms. The introductory sentence in Section 12 of the Asylum Act establishes the duty of the competent body to grant asylum if it is ascertained during the procedure that the alien is being persecuted. This formulation would seem to imply the alien's right to claim asylum.

2.III.B.5 The Concept of the Safe Country of Origin

The proviso of Section 2 of the Asylum Act echoes the European model, defining a legal notion[162] which was previously unknown to the Czech legal order. The content of the concept and its purpose is distinct in different states.[163]

The Asylum Act provides for four basic characteristics of 'safe country of origin'. The first requires that not only shall the state not intervene in the rights of an individual, but shall actively create conditions guaranteeing their respect, accompanied by action in securing application in compliance with legal regulations. This requirement is of general validity, embracing all groups of inhabitants and thereby prohibiting discrimination. The second requires that

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[162] Section 2, paragraph 1 of the Aliens Act reads: 'A safe country of origin means the country of the alien's nationality or, in case of stateless persons, the country of his former habitual residence:

a) where the state powers respect human rights and are capable of ensuring compliance with human rights and legal regulations,

b) the nationals of which or stateless persons do not leave this state's territory on the basis of reasons stated in Article 12,

c) which has ratified and complies with international agreements on human rights and fundamental freedoms,

d) which allows the activity of legal entities which supervise the status of compliance with human rights.'

[163] See U. Davy, Asyl und Internationales Flüchtlingsrecht. Völkerrechtliche Bindungen staatlicher Schutzgewahrung, dargestellt am Österreichischen Recht, Band II: Innerstaatliche Ausgestaltung. Vienna, 1996, pp.5-6. E. Kjaergaard, The Concept of 'Safe Third Country' in Contemporary European Refugee Law, International Journal of Refugee Law, No 4, p.250; R. Byrne - A. Shacknove, The Safe Country Notion in European Asylum Law. Harvard Human Rights Journal, 1996, Vol.9, p.188. K. Hailbronner, The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective, International Journal of Refugee Law, 1993, No 1, p.57; M. Kjaerum, The Concept of Country of First Asylum. International Journal of Refugee Law, 1992, No 4, pp. 514-516.

individuals should not be obliged to flee the country to avoid persecution. The Asylum Act uses a plural noun in its formulation. The third characteristic regards the international dimension of human rights requiring the state to ratify and observe international treaties on human rights. Here the term 'ratification' is to be interpreted as a state's consent to be bound by such a treaty. The *desideratum* does not expressly mention the international human rights control mechanisms to which the state should be subordinate. Interpretation could be in this spirit or more extensive. The last characteristic requires the state to allow the activity of legal entities to monitor the respect of human rights, with a special status granted to non-governmental organizations as an influential element of civil society.

2.III.B.6 The Concept of the Safe Third Country

The safe third country is portrayed in a positive light, but defined both positively and negatively by the Asylum Act.[164] The main characteristic lies in a real and in no way abstract possibility to return and lodge the application for granting refugee status in accordance with the 1951 Refugee Convention and the 1967 Protocol. The conjunction 'and' expresses the co-existence of both conditions. The whole point is that the alien will in fact be able to initiate the asylum procedure by filing her application, and thus cannot become a refugee *'in orbit'*. In a recognized safe country an alien cannot be exposed to persecution, torture, inhuman or degrading treatment or punishment.

Section 2 (2) of the Asylum Act also establishes when a state is not a safe third country. The Asylum Act does not consider as a safe third country a state whose territory the alien has merely transited. The interpretation of the text can bring surprising results. When transiting the country, the alien does not, as a rule, have any possibility of direct substantive contact with state authorities.

The list of safe countries has not been made public, but it exists in the form of an internal memo issued by the Department for Refugees and

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[164] Section 2, paragraph 2 of the Asylum Act reads: 'A safe third country means a country other than that of the alien's nationality or, in case of stateless persons, the country of his former habitual residence where the alien stayed prior to entry in the Territory and where the alien may return and apply for refugee status pursuant to an international agreement without being subject to persecution, torture, inhuman or degrading treatment or punishment. A country shall not be a safe third country if:

a) obstacles to travel referred to in Section 91 may be applied to it, or

b) the alien only transited through its territory.'

Integration of Aliens of the Ministry of the Interior. These instructions are binding only for the decision-making authorities and not for the special committee established by the Minister under the Administrative Code and courts.

2.III.B.7 The Concept of Persecution

The proviso of Section 2 (4) defines persecution for the purposes of the Asylum Act as actions that endanger life or freedom, the use of measures which cause psychological pressure, or other similar behaviour when perpetrated, supported or tolerated by the authorities of the state towards its citizens or residents, be they aliens or even stateless persons, or the state's inability to guarantee adequate protection from such behaviour.

The interpretation of the word 'persecution' should perhaps use the Latin '*desideratum secundum subjectam materiam*'.[165] This expression might seem to be imprecise in application but the Asylum Act provides a concise legal definition, the nucleus of which is found in the relationship between an individual and the state. The definition hinges on the concept that persecution is attributed to the state whether it commits persecutory behaviour itself or omits to afford adequate protection from such behaviour. At the same time persecution can be perpetrated by *de iure* or *de facto* authorities of the state, as well as by private persons. The last part of the definition of persecution, 'this state is unable to secure protection from such behaviour in an appropriate way', does not differentiate between unwillingness and impossibility to act.

2.III.B.8 The Entry of an Applicant into the Territory and the Institution of Asylum Procedure

The Asylum Act establishes the place and time for declaring an intention to apply for asylum. The intention can be expressed orally, in writing or tacitly. Thus, the applicant's will is decisive. In addition, the provision of section 3 of the Asylum Act covers specific situations that might be caused by language barriers, an applicant's illiteracy, or

[165] See S. Egelund, The Potential of the European Convention on Human Rights in Securing International Protection to Forcibly Displaced Persons, The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons, Colloquy, Strasbourg, p.5 (1995).

by the fact that an alien is dumb, though these situations are interpreted in a restrictive manner, which could impede the right to lodge an application. Declaring intent at the border post is an essential condition for the entry of an alien into the territory. In accordance with Article 14 (1) of the 1948 Universal Declaration of Human Rights, the Asylum Act gives the alien the right to seek asylum, although this right is restricted by the safe country concept. It is therefore the duty of police authorities to permit entry by granting an entry visa. The entry visa entitles the applicant to stay in the territory for 24 hours, a period which begins from the moment when the entry permit is granted. The entry permit can be granted to a person whose identity is proved by a travel document, or affidavit.

The brevity of 24 hours has the sole aim of getting the applicant to appear in the reporting centre. If after 24 hours the applicant does not appear in the reporting centre, she loses the benefits of the Asylum Act, and the Aliens Act will be applied. The Asylum Act provides for the residence permit to be prolonged while the case is under consideration.

The declaration of intention to apply for asylum can be expressed by the alien in the reporting and screening centre if the alien entered the territory illegally, or if the alien does not have valid residence. This conditional permissive rule can also be applied to an alien who legitimately resides in the territory. On the contrary, the Asylum Act requires that a written declaration be made by an alien who is in hospital, detained for the purpose of administrative expulsion, in custody or in prison. This rule governing the declaration of the intention to apply for asylum is very restrictive as to the determination of place and time. The lawmakers use explicit permission as the norm, and this is in fact a conditioned command and thus may even constitute an implicit prohibition.

The Asylum Act imposes an obligation on the competent body to invite the alien to lodge the application for instituting the procedure without delay. This authority has the duty to determine the time limit for filing the application. The provision of section 5 (1) includes the imprecise notions 'without delay' and 'time limit'. The second term especially is open to interpretation. Nevertheless, the competent body has to respect the requirement of reasonableness and give individual consideration to each case. In time, practice will probably create a standard time limit. The Asylum Act also strictly determines the exact place for filing the application as the reporting and screening centre

2.III.B.9 Appeal Options

The Asylum Act delegates the power to grant asylum to the Ministry of Interior. The Department for Asylum and Migration Policies is the part of the Ministry of Interior set up to make first instance decisions on providing protection against persecution. A special commission makes decisions on appeal to the Minister of Interior in the second instance, but it can only make recommendations as to whether to accept the application or refuse the objection. The special commission set up in accordance with the Administrative Code of Procedure is not an independent authority in the recognized sense of the term because it consists of representatives of both the executive and non-governmental institutions, although independent experts constitute the majority in this advisory body. The Asylum Act does not provide for judicial review of decisions in asylum cases until the last instance. The term for bringing an action is 30 days from the delivery of the decision issued by the administrative authority and the decision has a suspensive effect. The court only reviews the case brought before it and it considers the requirements both for formal and substantive legality.

2.III.B.10 Manifestly Unfounded Applications

The Asylum Act follows European asylum law in finally determining manifestly unfounded applications for asylum. The provision of section 16 narrows this concept to the following:

(a) Request based exclusively on economic reasons;

(b) Wilful false declaration of identity or citizenship data;

(c) Flight owing to general poverty;

(d) Repeatedly lodged application for instituting procedure on the basis of similar reasons;

(e) Arrival from a country considered a safe third country or a safe country of origin;

(f) 'Bipolitism', when the applicant has more than one nationality and did not attempt to benefit from the protection of some other state of which the applicant is a citizen.

The concept of manifestly unfounded application has as its objective the abbreviation of asylum procedure. The authority in the first instance rejects such an application automatically, but this does not

necessarily result in the asylum procedure being terminated because an appeal can be submitted within seven days of the delivery of the ruling making this no absolute bar to the procedure. The concept of manifestly unfounded application is, in the Asylum Act, a presumption that can be reversed if the applicant presents new facts, arguments or evidence.

2.III.B.11 Minimum Procedural Guarantees

The Asylum Act includes a coherent set of minimum procedural guarantees deriving from formal justice. Before the institution of the procedure the body of the first instance must inform the applicant properly of her rights and duties in a language which she can understand. In practice, sometimes a suitable interpreter cannot be found and this makes it impossible to determine the facts that are an essential requirement for a fair procedure.

Each participant in the procedure has to be interviewed as a substantive precondition for deciding. The interview of the applicant must be conducted in consideration of the individual (e.g. interviewing a woman can be done by a person of the same gender). The minimum guarantees for asylum procedure consist in providing all services free of charge, including free interpreting services. The proceeding is conducted in the native language of the applicant or in a language that she can understand and in which she can communicate. The applicant also has the right to employ an interpreter of her own choice but at her own expense.

The Asylum Act does not grant UNHCR recognized status as a party to the asylum procedure, but a competent body is obliged to enable the representative of UNHCR to get into contact with the applicant on request, to look into the file and be present at the interview or other discussion. The applicant enjoys the right to be in contact with UNHCR during the whole time of procedure, as well as with other legal entities that provide legal aid and other counselling.

2.III.C Conclusion

In 2000 the Czech Republic had to face a huge wave of asylum seekers (8,787). Of course, the great majority do not intend to remain. At the end of 1999 the Czech Parliament passed the Asylum Act, which

abolished Act Number 498 of the 1990 Official Gazette On Refugees. Therefore, the new statute can be qualified as the second-generation law. The Asylum Act, together with the Aliens Act, expresses Czech political strategy in the field of refugee issues. The Aliens Act enacts temporary protection, while the Asylum Act focuses on refinement of the procedural rights and duties in asylum procedure and extends the grounds for granting asylum. The legal regulation of temporary protection and asylum draws its inspiration from humanitarian ideals. It is the future application of both statutes that will show the value of these ideals.

As an applicant for accession to the EU the Czech Republic finds itself on a tortuous road towards a new institutional identity. Consequently, it is trying to align both statutes to European Law but a comparison of both statutes to the law of the EU reveals that the Czech Republic is only halfway to completion of its journey.

2.IV Conclusions on the Central Link

Gregor Noll

2.IV.A The Proliferation of Strategies and Counter-Strategies

The politics of migration control along the central link are primarily determined by German activism. The link's pivotal element is the bundle of migration treaties concluded between Germany and each of its Eastern neighbours. These treaties trade the return of third country nationals by the West against the erection of migration infrastructures in the East. The structure thus established is reinforced by the Accession Partnership and the substantial investments made under various EU programmes into training, equipment and facilities in Poland and the Czech Republic. However, the importance of domestic policy choices must not be underestimated. The legislation in Poland and the Czech Republic is far from being a streamlined product dictated by the West. Although it is inspired by concepts and approaches used in EU Member States, it refrains from merely replicating them. Moreover, both Poland and the Czech Republic have accorded the grant of asylum a place in their constitution, which far from what all EU Member States have done. For better or worse, it would consequently be wrong to conceive both countries as mere victims of the *acquis* and German migration policies.

Rather than analysing hegemonic structures, one may simply state that the strategies used by host states as well as by asylum seekers proliferate eastwards along the central link. The three countries scrutinized in this chapter have all incorporated the concepts of safe third countries and safe countries of origin into their domestic legislation. Clearly, the process started with the German reform of 1993, spawning one of the most restrictive versions of the safe third country concept and denying the brunt of appeals suspensive effect. The corresponding legislation in Poland and the Czech Republic remains 'dead letter' for the time being, as no lists of safe countries have been drawn up. But the mechanisms are in place, and it cannot be excluded that they will be used in the future.

However, amidst movements towards convergence, the idiosyncrasies should also be observed. If Poland and the Czech Republic actually designate a third country as safe which does not live up to the German standards, the German authorities would be obliged to discontinue referrals to its two Eastern neighbours. Given the difference in concretion between the Polish[166] and German[167] criteria, such a situation is far from unrealistic. This would establish a feedback loop, by which the East would govern practices in the West, which is a precise reversal of the currently existing pattern.

The counterstrategies used by asylum seekers are also converging. As we have seen, applying for asylum in-country is the only viable strategy in Germany, as border applications regularly trigger immediate removal. Thus, the brunt of applications is actually made in-country. The Polish experience parallels the German one: a large majority of all applications are filed in-country or, as a measure of last resort, upon readmission by German authorities. The strategy of applying for asylum upon readmission is even used at the Polish–Lithuanian border.[168]

2.IV.B Numbers

At first sight, the shifting of responsibility seems to manifest itself in statistics: the numbers of protection seekers are going up in Poland and the Czech Republic.[169] However, a closer look casts doubt on any tales of a successful extension of protection capacities. First of all, in Germany, the numbers did not go down in a corresponding fashion. Second, it must be recalled that an important fraction of asylum applications in Poland and the Czech Republic are discontinued[170] as claimants disappear with an unknown destination. It may be reasonably assumed that many of these claimants move westwards. Third, among would-be applicants, the trust in the asylum systems of all three countries seems to be very limited, which is rational against the background of restrictive laws and low recognition rates. It has been shown that the protection prospects for those coming overland

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[166] See 2.II.B.6.(a).

[167] See 2.I.B.1.(a).

[168] See 4.II.B.2.(c). As this case shows, authorities tend to regard upon-readmission applications as less credible. The same is true for in-country applications, which are intrinsically connected to the collusion of travel itineraries.

[169] See 2.II.A.1. and 2.III.A.2.

[170] See 2.II.A.2.

to Germany are frail, which may lead would-be asylum seekers not to apply at all. Fourth, a certain degree of double counting cannot be excluded. It is fully conceivable that persons register as asylum seekers in Poland or the Czech Republic, move on to Germany, just to be registered there once more. Taking these five factors together, it is fair to state that numbers only partially reflect a complex reality of movements. At any rate, those naïvely hoping for an unfolding zero-sum game between the EU and the applicant countries are, for the time being, deceived.

2.IV.C The New Orbiters

Devised to avoid the orbiting of refugees between unwelcoming hosts,[171] the safe third country-mechanisms have brought about a new and more complex form of orbiting, this time between West and East. The coupling of visa requirements to carrier sanctions had markedly reduced the importance of air travel for protection seekers. As a consequence, land routes grew ever more important as flight itineraries. With that shift, a new quality of control problems emerged. Air travel is channelled through various bottlenecks (*e.g.* check-in procedures at points of departures, gate controls and entry controls at points of arrival). These bottlenecks are ideal points of migration control, and are exploited rather successfully by the authorities of potential destination countries. Overland travel is different. Border checkpoints remain the only bottlenecks, which can be avoided with relative ease by entrants. To prevent their circumvention, a tight and costly network of control measures is needed, the efficiency of which remains low.

The gravest problem flowing from the shift from air to overland itineraries emerged at the interface between the DC and bilateral safe third country-arrangements. The number of unauthorized border

[171] 'Refugees in orbit' were a dominating *topos* of refugee discourse and practice during the late seventies and early eighties. The preamble of the DC bears witness of this topos, when retracing the amalgam of individual and state interests militating for the establishment of responsibility criteria. In the fourth recital, the Contracting Parties say themselves to be '[a]ware of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum'.

crossings by asylum seekers at these borders is caused by two dominating factors. First, asylum seekers did not trust the outcome of the system. The prospects of undergoing determination procedures in a central European or Baltic country are simply not considered attractive. Low recognition rates, absence of subsidiary protection and limited integrative capacities indicate that this distrust is a rational form of behaviour. Second, both undetermined and rejected cases do not necessarily leave the region. To wit, candidate countries cannot relieve themselves from their responsibilities by pre-procedure return eastwards. In spite of the introduction of safe third country provisions in the legislation of some accession candidates, there are faint prospects of their functioning. Certainly, it is difficult to envisage Belarus, Russia or Ukraine as safe third countries within the nearer future. Further, post-procedure return by air to the country of origin is a costly affair, which is unrealistic to expect at a large scale. Germany may be able to afford it, but not its Eastern neighbours.

From the perspective of governments bearing the responsibility for the Union's external borders, this is highly problematic. Where rejected asylum seekers as well as undocumented migrants are not removed, they might make further attempts to enter the Union via Germany. Thus, instead of the system leading to a final allocation, resulting either in protection or return, a potential loop is established, in which asylum seekers, both rejected asylum seekers and undocumented migrants flicker back and forth between the Austro–German external border zones and their Eastern neighbours. In some cases, this is true also for those accorded protection in an associated country.[172]

Let us exemplify. In Poland and the Czech Republic, persons readmitted from Germany and lacking a residence permit are usually issued with an order to leave and released. This enables them to make further attempts to enter Germany. If they are apprehended for the second time by the authorities of Poland or the Czech Republic, they can be subjugated to detention. Where the detainee applies for asylum, she is released and moved over to a reception facility, which usually provides a less harsh regime. The relative freedom of movement can be used for a renewed attempt to move over the Western border. For a person seeking protection in the West, and be it only in the unattractive form of an unauthorized *de facto* stay, it is quite rational

[172] By way of example, Poland received a number of Kosovo–Albanians under the Humanitarian Evacuation Programme. Anecdotal evidence has it that a large number of these cases disappeared from the Polish reception facilities, apparently to move on westwards.

not to apply for asylum in Poland and the Czech Republic until the second apprehension.

It must be underscored again that the described behaviour *does not* allow for deducing the absence of a persecution threat at home. Such a deduction would be equal to the simple empiricism to which women suspected of witchcraft were subjugated in former times. Where the suspect survived a drowning test, her guilt was proven. In its modern counterpart, a protection seeker attempting to minimize the risk for return to persecution by secondary migration is proven guilty of being bogus. Rather, the only permissible deduction would be that protection seekers coming via overland routes distrust the legal mechanisms designed to ensure protection in the EU and the associated states.

To please the West, the associated countries consider detaining ever larger groups, sometimes even including protection seekers, for ever longer periods. This entails a risk of compromising human rights,[173] which, in turn, strikes against the status of these states as safe third countries. Such a development would indeed be paradoxical. After all, the EU did not assist in erecting decent protection structures in the accession countries to get these structures undermined by bilateral pressures.

Full EU membership of the associated states does not bring any automatic relief. The Schengen *acquis* will be operational in the future Member States if and only if the Schengen Executive Committee decides that internal border controls can be lifted.[174] At least until that point in time, the eastern borders of Germany will retain their status as a neuralgic interface between West and East. Further, the inequitable distribution of protection responsibilities under the DC will aggravate rather than relieve the problem.[175]

It is often claimed that Eurodac[176] may bring a decisive change, facilitating the control of itineraries. Statistics indicate, however, that even the toughest border checks in Europe only have a limited impact. Given the documented capacity of protection seekers to circumvent

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[173] Detention practices have to be assessed *inter alia* against the background of Article 5 ECHR.

[174] See Article 8 of the Schengen Convention: 'The Executive Committee shall take the necessary decisions relating to the practical procedures for implementing border checks and surveillance.'

[175] See Chapter 5.

[176] The Eurodac system enables EU Member States to exchange fingerprints of protection seekers, thus facilitating the reconstruction of their itineraries and the application of the responsibility criteria under the Dublin Convention.

border controls[177] and, concurrently, registration, it is to be doubted whether the taking and exchange of fingerprints will alter the present state of affairs in a decisive manner. After all, its effectiveness presupposes that some form of contact is established between the protection seeker and authorities at the border. And this contact is precisely what the protection seeker is incited to avoid.

Instead of detention or the pious hopes for Dublin, Schengen and Eurodac, the cure lies in improving the trustworthiness of protection in the associated states. This is a long-term process, requiring considerable legal, material and social investments. However, a superficial fix of the symptoms by enhancing border controls is not necessarily cheaper.

[177] The considerable number of in-country applications illustrate that capacity.

3 The Southern Link: Austria and Hungary

3.I Austria

Ulrike Brandl

3.I.A Introduction

Political changes in Europe in the last decade and their impact on migration, membership in the EU and the gradual implementation of the Schengen *Acquis* were the reasons for fundamental changes in Austria's asylum and aliens law and policy. The legal basis of asylum and refugee law as well as related fields concerning aliens and migration was completely revised twice. Austria's situation changed from that of a State with its own asylum and refugee policy determined by its geographical and political situation[1] to that of a Member State in the Union, now actively promoting the adoption of the 'hard and soft law *Acquis*' in the neighbouring states and increasing pressure on those states to adopt standards which guarantee only controlled, carefully selected access to their territory and then to Union territory. Austria's policy and practice, itself influenced by a number of factors, has had an impact on policy and practice in the present accession candidates, especially in the states with which Austria has a common border.

[1] See for a comprehensive description of the historical development and statistical data Geistlinger, M., Staatenbericht Österreich. Teil: Flüchtlingsrecht, in: Frowein, J.A./Stein, T., (eds.), Die Rechtsstellung von Ausländern nach staatlichem Recht und Völkerrecht, Vol. 2, Berlin et al. 1987, p. 1,117-1,194. Rosenmayr, St., Asylrecht und Asylverfahren in Österreich, in: Konrad, H.-J. (ed.), Grundrechtsschutz und Verwaltungsverfahren, Internationaler Menschenrechtsschutz, Berlin 1985, p. 113-160. See for statistical data also Stanek, E., Verfolgt, verjagt, vertrieben. Flüchtlinge in Österreich von 1945-1984, Vienna 1985.

R. Byrne et al. (eds.), New Asylum Countries?, 100–202.

3.I.B Developments in Domestic Legislation

The period since 1989 can be divided into three phases. The first phase lasted from 1989 to 1991–92 and was characterized by measures designed to restrict access to Austrian territory as well as to bring to an end the sojourn of aliens as part of the 'emergency responses' after the fall of the Iron Curtain. The second phase lasted from 1991–92 to 1997. At the beginning of this second period the laws relating to aliens were completely revised, including the Aliens Act and the Asylum Act. A rigid safe third country concept was introduced, which dominated asylum practice and jurisprudence until 1997. The third phase, which led to the laws still in force, saw an adaptation to the Schengen *Acquis* and an implementation of the obligations of the DC. The safe third country clause was reformulated and a newly created independent Tribunal (Federal Asylum Review Board) was established as the deciding body in the second instance.

3.I.B.1 Amendments in 1990 Justified as 'Emergency Responses'

The major political changes in Europe in 1989–1990 prompted the rethinking and reshaping of asylum and aliens legislation in Austria. Political reaction to the opening of the borders with Eastern Europe called for amendments to existing laws. In the initial phase of adapting the legislation, access to Austrian territory was restricted and the possibilities of terminating the sojourn of aliens were extended with amendments to the Passport Act,[2] the Aliens Police Act,[3] the Act on Border Control,[4] and the Asylum Act[5] in 1990.[6] These changes were the legislators' response to the increasing number of aliens coming to Austria in 1989–1990 after the fall of the Iron Curtain. The

[2] BGBl. (Federal Law Gazette) 422/1969 as amended by BGBl. 510/1974, BGBl. 335/1979, BGBl. 135/1986, BGBl. 190/1990 and 427/1991.

[3] BGBl. 75/1954 as amended by BGBl. 422/1974, BGBl. 141/1986, BGBl. 555/1986, BGBl. 533/1987, BGBl. 575/1987, BGBl. 190/1990, BGBl. 451/1990, BGBl. 21/1991 and BGBl. 46/1991.

[4] BGBl. 432/1969 as amended by BGBl. 527/1974 and and BGBl. 190/1990.

[5] BGBl. 126/1968 as amended by BGBl. 190/1990.

[6] BGBl. 190/1990.

Government Bill's justification for the amendments[7] also referred to aims expressly stated in the Schengen Agreements of 1985[8] and 1990[9] (Schengen I, Articles 7 and 9, Schengen II Article 27 (1)) but made no formal reference to these Agreements. There was no legal obligation to adapt the existing laws; rather, it was a kind of 'parallel legislation'. The aims expressed were the prevention of illegal immigration and 'combating trafficking in illegal immigrants and cross-border crime'. An administrative and criminal offence of trafficking in illegal immigrants was created, in conformity with a similar provision in Schengen II Article 27 (1). Schengen II obliges the Contracting Parties 'to impose appropriate penalties on any person who, for purposes of gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties'. The aim of the amendments was to restrict access to the territory and carefully control the borders to the east. According to the '*travaux préparatoires*' of the amendments, existing readmission agreements with Switzerland (and Liechtenstein) and Germany forced Austria to take back 2,336 aliens from Switzerland and 5,960 from Germany in 1989. As no readmission agreements with eastern or central European states existed at that time, the legislation was the expression of a sort of 'closed sack feeling'. Consequently, Austria began to negotiate readmission agreements with central European States, especially with the neighbouring states.[10]

Plans for these amendments and their consequences led to a politically controversial debate, to criticism from UNHCR[11] and NGOs,[12] as well as from Members of Parliament,[13] the International Law Department of the Federal Ministry of Foreign Affairs,[14] and academics.[15] The critics expressed concerns about the new measures aimed at denying

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[7] 243 BlgNR (Supplements to the Records of the National Assembly) 17. GP. (Period of Legislation).

[8] International Legal Materials, Vol. XXX, 1991, p. 73-83.

[9] International Legal Materials, Vol. XXX, 1991, p. 84-173.

[10] See infra, 3.I.C.2(b) and 3.I.E.3.

[11] Stellungnahme des UNHCR, February 1990.

[12] Stellungnahme der österreichischen Sektion von Amnesty International, Vienna, 7 February 1990.

[13] See 1213 BlgNR 17. GP., dissenting opinion of Mr. Srb, Member of Parliament.

[14] 22 January 1990, 5365c. The first draft did not explicitly refer to the non-refoulement obligation. Expressed criticism led to an explicit obligation not to *refouler* a person to the persecuting state as contained in Art. 33 1951 RC, Art. 3 ECHR, and if the person would be threatened by death penalty.

[15] Grussmann, W.-D., Österreich und die europäische Integration an einem Beispiel der jüngsten Ausländerpolitik, in: Fortschrittliche Wissenschaft, Vol. 26, 1990, No. 2, p. 48-57.

entry to Austrian territory, apprehension in the border zone and subsequent deportation, as well as about increased possibilities of expulsion.[16] In particular, the lack of special provisions on how applications of asylum at the borders should be treated led to an amendment of the first draft, and this possibility was finally included in the Asylum Act.[17] In practice, however, this provision never gained relevance.

A draft for a new Aliens Police Act was presented in October 1990.[18] In 1988–89 a group of experts had elaborated a document on basic principles for a revision of the Aliens Act. According to the Government Bill to the Aliens Act in 1991,[19] the situation in 1989–90 called for immediate response, and the work of the expert group was accordingly interrupted. Neither the draft of the expert group nor the 1990 draft Aliens Act was put into force. However, the controversy that existed concerning the various approaches was revealed by activities in various forums, with a large range of proposals and criticisms coming from different sectors of society. It was a standard formula in all explanations and political response that genuine refugees should be protected in Austria, but law and practice partly failed to guarantee this protection.

According to information given by the Federal Ministry of the Interior in a reply to a written Parliamentary question about actual practice; 5,900 aliens were deported in 1990, a residence ban was issued in 8,100 cases and expulsion orders were issued for 1,020 persons. 7,000 aliens were removed within seven days after entry under Article 10 of the Aliens Police Act, and 110,000 were rejected at the borders in 1990.[20] To intensify border controls was seen as a necessary response to migration pressure.[21]

A further step to 'secure' the Austrian borders to the east was the transfer of responsibility to the Austrian army for the surveillance of the border zone. The surveillance function became operative in

[16] The Austrian authorities had large discretionary power to reject persons at the Austrian border. According to the provisions of the Aliens Police Act, an alien could be forcibly returned without further formalities within seven days of his entry, if this entry had taken place evading regular border control. If a person had entered Austria by evading regular border control, she could be expelled by administrative ruling within four months after entry for a number of reasons enumerated in the law.

[17] Art. 2 (a) Asylum Act 1968, note 5.

[18] Zl. 112 777/39-I/7/90.

[19] 692 BlgNR 18. GP.

[20] II-484 BlgNR 18. GP.

[21] II-2356 BlgNR 18. GP.

September 1990; although originally planned for a period of only ten weeks, it soon became well-established practice. From September to December 1990, the army apprehended 2,340 people in the zone adjacent to the Hungarian border.[22]

Already in the first phase of adaptation of Austrian law and policy, visa requirements for nationals of certain states[23] were reintroduced, and visa policy was adapted to that of the Member States of the EU. In 1990 a bilateral Agreement with Romania on visa-free travel dating from 17 December 1969[24] was revoked for persons who were travelling with an ordinary Romanian passport.[25] The reasoning referred to the massive increase in asylum applications on the part of Romanian nationals (150 to 200 per day). At that time, visa requirements were also reintroduced for Turkish and Polish nationals.[26]

In the following years, Romania often demanded the abolition of visa requirements[27] and also expressed the opinion that these visa requirements discriminated against associated states. Romania confirmed that it would fully co-operate in 'readmitting illegal migrants' and that it would strengthen its border controls.

3.I.B.2 The Phase of Consolidated Restrictionism

Following the 'emergency responses' in 1990, the changing situation resulted in 1991 in a complete revision of the laws relating to aliens; this included the Aliens Act[28] and the Asylum Act.[29] The Asylum Act

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[22] See infra, 3.I.C.2(a) and 3.I.E.2.

[23] Grussmann, W.-D., Die Entwicklung des österreichischen Ausländerrechts vor dem Hintergrund einer zunehmenden Harmonisierung der europäischen Ausländerpolitik, Althaler, K. & Hohenwarter, A., Torschluß, Vienna 1992, p. 61-83, p. 72.

[24] BGBl. 39/1969. See for the Hungarian reaction Nagy, B., Hungary, 3.II.

[25] BGBl. 270/1990. See for certain exceptions of visa obligations BGBl. 948/1994, BGBl. 373a/1990 and BGBl. 394/1995.

[26] Turkey: BGBl. 66/1990 and BGBl. 222/1990. Holders of visa or residence permits from third states were exempted (BGBl. 95a/1990 Germany, Switzerland); reference was made to the fact that 'Turkish nationals tend to transit through Austria to western European states'. Poland: BGBl. 573/1990 (for six months and then prolonged until 31. August 1991 by BGBl. 164a/1991 and BGBl. 398/1991). The mass influx of Polish nationals was seen as a danger to public security.

[27] Der Standard, 17 May 1997 (Interview with the Romanian Ministry of Foreign Affairs, Adrian Severin).

[28] Aliens Act, BGBl. 838/1992 (entry into force on 1 January 1993) as amended by BGBl. 110/1994, BGBl. 314/1994, BGBl. 43/1996 and BGBl. 436/1996.

1968 was replaced by the Asylum Act 1991, which fundamentally changed both substantive and procedural law relating to asylum.[30] The reasoning in the Government Bill referred to an increasing number of asylum applications at the end of the eighties and early nineties and 'abuse of the asylum procedure for economic migration'.[31] The Report of the Parliamentary Committee on Internal Affairs saw the political changes in Eastern Europe as the reason for 'increase of south-east migration to Austria, which led to a tremendous increase of manifestly unfounded asylum applications'.[32] A safe third country concept was introduced, together with provisions for manifestly unfounded asylum procedures.[33] Article 15 (2) (6) of the 1991 Asylum Act, created the legal basis for international data exchange as regulated in Schengen II Article 38,[34] and DC Article 15.[35]

The 1991 Asylum Act and the way it was put into practice again faced severe criticism by NGOs,[36] lawyers, UNHCR[37] and academics.[38] In particular, the safe third country clause and its various legal consequences led to a situation which left nearly no space for well-

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[29] Asylum Act 1991, BGBl. 8/1992 (entry into force on 1 June 1992) as amended by BGBl. 838/1992, BGBl. 437/1993 and BGBl. 610/1994.

[30] See e.g., Brandl, U., Asylrecht und Asylpolitik in Österreich, Asyl - Schweizerische Zeitschrift für Asylrecht und -praxis, 1993, No. 1, p. 3-10. Davy, U., Die Neuordnung des österreichischen Asylrechts, ZAR - Zeitschrift für Ausländerrecht und Ausländerpolitik, 1993, No. 2, p. 70-78. Steiner, J.W., Asylrecht '92, Vienna 1992.

[31] 270 BlgNR 18. GP.

[32] 328 BlgNR 18. GP.

[33] See below, 3.I.D.1. and 3.I.E.1. (for the safe third country concept); and see, 3.I.D.3. (for manifestly unfounded cases and accelerated procedures).

[34] See supra, note 9.

[35] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, O.J. 1997, No. C 254, p. 1.

[36] Caritasverband der Erzdiözese Salzburg, 26. 4.1991. Resolution zur Durchsetzung der internationalen Standards in der österreichischen Asylpolitik und zur fairen Behandlung von Flüchtlingen in Österreich, April 1991, compiled by 16 NGOs.

[37] Stellungnahme zur Regierungsvorlage des Bundesgesetzes über die Gewährung von Asyl (Asylgesetz 1991), 22. 11. 1991. Proposals for a revision of the 1991 Asylum Act in conformity with interntional law, October 1994.

[38] Rohrböck, J., Das Asylgesetz 1991: völkerrechtliche, verfassungs- und verfahrensrechtliche Probleme, Vienna 1994. Rohrböck, J., Asylpolitik und Asylgesetz in Österreich, in: Althaler/Hohenwarter, fn. 23, p. 84-99. Benedek, W., Ist das Recht auf Asyl in Österreich noch gewährleistet? Das Menschenrecht, 1991, No. 1, p. 1-24. Rosenmayr, St., Asylrecht, in: Machacek, R./Pahr, W./Stadler, G., (eds.), Grund- und Menschenrechte in Österreich, Vol. 3, Kehl/Strassburg/Arlington 1998, p. 535-618. Kussbach, E., The 1991 Austrian Asylum Law, IJRL, Vol. 6, 1994, No. 2, p. 227-243, p. 229. See also, supra note 30.

founded decisions on merit, denying asylum simply because the applicant had transited through a safe country.

Five and a half years' practice under the Asylum Act 1991 show that in the most sensitive period, when the surrounding non-EU member states were building democratic structures, improving their legal system and creating new asylum and aliens legislation, Austrian legislation and subsequent practice and jurisprudence provided no space for an individual examination of the safety of the person sent back to a third state.[39]

The Federal Constitutional Court abolished certain provisions of the Asylum Act and the Aliens Act as violating the Austrian Constitution. According to Article 20 (2) of the 1991 Asylum Act, the competence of the appeals instance to review a decision because of an infringement of the duty of investigation by the first instance was restricted to flagrant violations. This restriction was seen as a violation of the rule of law.[40] Secondly, the complete exclusion of the suspensive effect of an appeal against a decision on expulsion was also held to be a violation of Constitutional Law.[41]

From June 1992 (entry into force of the Asylum Act 1991), a significant decrease of new applications was registered. Statistics clearly show that the amendments were successful in reducing asylum applications,[42] since while from January to May 1992, 10,047 new applications were registered, and in the first five months of 1993, only 2,126 applications were counted (79 per cent reduction).

[39] See also, infra 3.I.D.1. and 3.I.E.1.

[40] VfGH (Federal Constitutional Court) 1.7. 1994, Verfassungssammlung (VfSlg.) 13,834. BGBl. 610/1994.

[41] VfGH 1.12. 1995, VfSlg. 14,374. Art. 17 (3) and Art. 27 (3), second sentence, Aliens Act (fn. 28) were abolished. BGBl. 43/1996.

[42] Statistics from 1992 show a decrease after the entrance into force of the Asylum Act 1991. From January to December 1992 the number of new applications decreased from around 2,000 to around 500 per month (January: 1.984, February: 2,008, March: 2,099, April 1,943, May: 2,013, June: 1,811, July: 1,141, August: 795, September: 826, October: 514, November: 565, December: 539).

TABLE 5. AUSTRIAN ASYLUM APPLICATIONS, RECOGNITION RATES AND POSITIVE DECISIONS 1990–1997

Year	Asylum Applications	Per Cent Recognition Rate	Positive Decisions
1990	22,789	6.8	864
1991	27,306	12.6	2469
1992	16,238	9.7	2289
1993	4,744	7.8	1193
1994	5,082	7.6	684
1995	5,920	13.0	993
1996	6,991	10.36	720
1997	6,719	10.4	640

Source: Annual official statistics published by the Ministry of the Interior Statistics:[43]

In 1990, 2,446 (15.2 per cent in comparison to new applications in 1990) refugees resettled from Austria to Australia, Canada, the United States and others.

Austria also introduced visa requirements for citizens of almost all so-called 'third-world countries'. These countries were more or less identical with those for which the Members of the European Community, and especially the 'Schengen States', had imposed visa requirements. This was an adaptation of visa policy without legal obligation at that time.

3.I.B.3 Relaxing Restrictionism: 1997 and Beyond

In order to prepare and accompany accession to the EU, the DC and particularly the Schengen Agreements, further amendments were necessary. These were among the reasons leading to a second revision of the laws on aliens. In 1997, the Asylum Act[44] and the Aliens Act[45] once again fundamentally changed the legal basis for asylum seekers

[43] Annual official statistics published by the Ministry of the Interior. See also, Entwicklung der Zahl der Asylwerber sowie statistische Auswertung der abgeschlossenen Verfahren in der Zeit von 1980–1990.

[44] Asylum Act, BGBl. I 76/1997 as amended by BGBl. I 106/1998, BGBl. I 110/1998, BGBl. I 4/1999, BGBl. I 41/1999 and BGBl. I Nr. 196/1999.

[45] Aliens Act, BGBl. I 75/1997 as amended by BGBl. I 86/1998, BGBl. I 158/1998, BGBl. I Nr. 20/2000 and BGBl. I 34/2000.

and aliens seeking protection.[46] The amendments entered into force on the 1 January 1998, more or less together with the obligations of the DC for Austria.[47] Statistics from 1992 to 1997 showed a constant number of applications from the middle of 1992, when the Asylum Act 1991 entered into force. As shown above, the numbers remained more or less between 5,000 and 6,500 applications a year until 1997, about the same as in the mid–1980s. Consequently, the rationale for the amendments in 1997 did not refer to abuse of asylum or too many manifestly unfounded applications, but rather to the implementation of international obligations, especially the DC and the Schengen Agreements, and conformity with the EU.[48]

Some points of criticism were taken into consideration when drafting the new Asylum Act. The most important changes comprise procedural improvements, a newly formulated safe third country clause and a provision regulating the determination of the state responsible for examining an application for asylum.[49] A newly created independent Tribunal (Federal Asylum Review Board) was established as the deciding body in the second instance.[50] The decision about the applicability of the *non-refoulement* principle has to be issued by the Asylum Authorities and not, as before, mainly by the Aliens Police. If an asylum application is dismissed (in a decision on its merits) the Asylum Authority has to decide *ex officio* if expulsion, forcible removal or deportation to the country of origin is applicable.[51]

In 1997, 6,719 persons applied for asylum in Austria (1,697 from Eastern Europe, among them 1,084 from Yugoslavia, 84 from Bosnia[52]). In 1998 the number increased again to 13,308 new applications, including 6,647 applications from persons fleeing from Kosovo. In 1999 20,129 persons applied for asylum, and in 2000 there were 18,280.

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[46] See for the Asylum Act 1997 Rohrböck, J., Das Bundesgesetz über die Gewährung von Asyl, Vienna 1999. Brandl, U., Das österreichische Asylgesetz 1997: Erwartungen und Realität, eine erste Bilanz, Asyl - Schweizerische Zeitschrift für Asylrecht und -praxis, 1999, No. 1, p. 9-20. Davy, U., Die Asylrechtsreform 1997, ecolex 1997, p. 708-712 and p. 821-826.

[47] The Dublin Convention already entered into force on 1 October 1997. BGBl. III 165/1997.

[48] 686 BlgNR 20. GP (Asylum Act) and 685 BlgNR 20. GP (Aliens Act).

[49] See infra, 3.I.D.1.; 3.I.D.2. and 3.I.E.1.

[50] Art. 38 Asylum Act 1997, fn. 44. Art. 129c Federal Constitution as amended by BGBl. I 87/1997. Federal Act on the Federal Asylum Review Board, BGBl. I 77/1997 as amended by BGBl. I 128/1999.

[51] Art. 8 Asylum Act, see supra, fn. 44.

[52] For most Bosnians a form of temporary protection applied.

The 1997 Asylum Act originally contained a rather short time limit for appeal against a negative decision in the procedure on manifestly unfounded cases, in safe third country cases and in 'Dublin cases'. An appeal had to be filed within two days and the decisions had to be issued within four working days. The Federal Constitutional Court held that these provisions violate Austrian Constitutional Law.[53] These decisions led to amendments of the Asylum Act.[54] The 1998 amendment also included a provision that gave the Federal Ministry of the Interior the possibility to designate, by ministerial order, countries which generally grant effective protection against persecution. However, up to now no such ministerial order has been issued.[55]

The Aliens Act[56] was amended with the main intention of adapting the provisions to the obligations contained in the Schengen *Acquis* and to combine the former Aliens Act and the Act on Residence of Aliens in Austria. The general reasoning in the Government Bill refers to previous amendments, describing them as emergency measures 'to reduce the migration pressure' on Austria.[57] The experience gained during previous years was to be taken into account. Visa regimes and residence permits were to be adapted to the Schengen rules, the possibility to immigrate to Austria (still of solely national competence) was to be reduced and mainly restricted to top managers and cases of family reunification. The integration of aliens already living in Austria was to take precedence over immigration. This is still one of the most frequently used standing arguments in Austrian aliens policy. The Aliens Act of 1997 did not substantively change the provisions on deportation, termination of the sojourn of aliens and detention.

[53] VfGH 24.6. 1998, VfSlg. 15,218 (safe third country cases). VfGH 11.12. 1998, VfSlg. 15,369 (manifestly unfounded applications). VfGH 15.6. 1999, VfSlg. 15,529 (Dublin cases); see also for the reasoning, infra 3.I.D.1. and 3.I.D.3.

[54] BGBl. I 106/1998, BGBl. I 4/1999, BGBl. I 41/1999 and BGBl. I Nr. 196/1999.

[55] See infra, 3.I.D.1.

[56] See supra, fn. 45.

[57] See supra, fn. 48.

3.I.C Building a New Curtain

3.I.C.1 The Multilateral Dimension

3.I.C.1 (a) EU membership

The reasons for the metamorphosis in nearly all areas of the law on aliens are to be found in a complex political matrix. On one hand, the existing laws were, as shown above, deemed unable to cope with the increasing number of aliens coming to Austria from Eastern Europe after this region's political opening. On the other hand, the planned and initiated harmonization of the laws and policies in this field by the Member States of the EC and especially by the Schengen group, which led *inter alia* to the Schengen and Dublin Treaties[58] and subsequent instruments, have been seen to create the need for further co-ordinated adjustments.[59] Austria formally applied for membership to the European Communities in 1989.[60] Adaptation to Community legislation was necessary in the pre-accession period; this also included adaptation to conventions concluded and resolutions adopted through intergovernmental co-operation outside Community Law but embedded into the Union structure by the Treaty of Maastricht.[61] The Austrian intention to intensify border controls met with the aims expressed in the Schengen Agreements.

In the early 1990s, however, no formal adaptation to EC legislation and in particular to the Schengen *Acquis* took place. The background materials only referred to 'non-inconformity' to EC law. The Government Bill to the 1991 Asylum Act[62] referred to German and Swiss legislation and the informal consultations between 13 European States, the USA, Canada and UNHCR. The 1991 Aliens Act regulated the necessary changes to adapt the legislation to the Agreement on the European Economic Area.[63]

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[58] See supra, notes 8, 9 and 35.

[59] See supra, note 23, Grussmann.

[60] By letter dated 17 July 1989.

[61] O.J. 1992, No. C 191, p. 1; O.J. 1994, No. C 241, p. 22; O.J. 1995, No. L 1, p. 2.

[62] See supra, note 31.

[63] See the Government Bill, fn. 19. Agreement on the European Economic Area, O.J. 1994, No L 001, p. 3. BGBl. 909/1993, BGBl. 910/1993 (Protocol) and BGBl. 115/1993 (Constitutional provision).

Only the Government Bills and other parliamentary documents to the 1997 Aliens Act, the 1997 Asylum Act[64] and the Act on Border Control[65] explicitly referred to the aim of adapting Austrian legislation to the EU–EC standards and to the Schengen Agreements.

3.I.C.1 (b) Schengen

According to information given by the Ministry of the Interior, Austrian authorities consulted from 1987 onward with the aim of updating information on the implementation of the Schengen Agreements by the Contracting Parties. From February 1992 Austrian officials attended meetings for experts in the Schengen group. Participation in these meetings influenced the adaptation to Schengen standards in the area of border controls and surveillance, carrier sanctions, visa policy and provisions allowing and facilitating international data exchange. Austria gained formal observer status in the Schengen process on 27 June 1994.[66]

The Accession Protocol to Schengen I and the Accession Agreement to Schengen II were signed by the Austrian Ministry of the Interior in Brussels on 28 April 1995.[67] Austria became a formal Party to the Schengen Agreements with entry into force of the Protocol to Schengen I and the Agreement to Schengen II[68] on 1 December 1997[69] (including access to and participation in the Schengen information system). The Agreements became operative when the Schengen Executive Committee decided that they could be applied to Austria.[70]

Austria originally intended to become a full member in the Schengen process at the latest by July 1997, when it gained the Schengen presidency for the first time. Some Member States, especially Germany, expressed their doubts as to whether Austria fulfilled all criteria at that time. The delay was, in fact, caused by the lack of capacity of the Schengen information system. The technical support

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[64] See supra, fn. 48.

[65] 114 BlgNR 20. GP, BGBl. 435/1996.

[66] Doc. SCH/Com-ex (94) 13. Austria applied for observer status on 23 July 1993. See Hummer, W./Obwexer, W., Österreich in der Europäischen Union, Vol. 3, Vienna 1996, p. 39. Oberleitner, R., Schengen und Europol, Vienna 1998, p. 58.

[67] Ibid, p. 58.

[68] BGBl. III 202/1997 (for Schengen I) and BGBl. III 203/1997 (for Schengen II).

[69] Publication in the Federal Law Gazette: BGBl. III 89/1997 (Schengen I) and BGBl. III 90/1997 (Schengen II).

[70] SCH/Com-ex (97) 28 Rev. 4 corr. Publication in the Federal Law Gazette: BGBl. III 204/1997 and BGBl. III 205/1997.

function in Strasbourg, originally designed for eight members, had to be modified to allow the access of another member and the storage of additional data.[71]

Since the necessary changes to the Schengen information system meant that it was impossible to keep to the original schedule, Austria aimed at the abolition of internal border controls by 27 October 1997.[72] Germany and France - the former for reasons of security, the latter owing to elections and delays in the ratification process,[73] blocked the possibility for the Agreements to enter into force by the end of October 1997.

According to the Government Bill suggesting the ratification of the Agreements,[74] in addition to the Schengen Agreements, all decisions and resolutions and other acts issued by the Schengen Executive Committee since 1 September 1993 (the complete Schengen *Acquis*) were included in the parliamentary ratification process. While preparing for ratification, the Committee on Internal Affairs acknowledged that decisions and conclusions by the Schengen Executive Committee could have a direct effect on individuals in the Member States, but concluded that so far no such effect had derived from the decisions.[75] The content of some decisions, however, shows that at least a certain part of them may have a direct effect on individuals. The provisions of the Agreements and conclusions have to be interpreted in order to examine their potential 'self-executing' character. A further adaptation in legislation was prepared parallel to the entry into force of the Agreements.[76] Amendments of the Act on Border Control[77] contained adaptations to Schengen terminology and Schengen border control standards.

Border controls and border surveillance with the necessary efficiency, intensity and other prerequisites specified in the Schengen *Acquis* prepared Austria's accession to the Schengen Conventions.[78] During consultations with the Schengen Executive Committee, a gradual abolition of internal border controls was agreed on, mainly upon

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[71] See supra, fn. 66, Oberleitner, p. 83, Die Presse 26 June 1997; Der Standard 26 November 1996.

[72] Die Presse 25 June 1997; Der Standard 25 June 1997.

[73] Die Presse 24 September 1997.

[74] 501 BlgNR 20. GP.

[75] 542 BlgNR 20. GP.

[76] According to the Government Bill suggesting the ratification of the Agreements, see fn. 74.

[77] BGBl. 435/1996.

[78] See for the technical adaptations also Oberleitner, fn. 66, p. 86-91.

Germany's request. Following the decision taken at the Lisbon meeting,[79] a detailed schedule was negotiated in autumn 1997. In implementing this compromise, provisions for the abolition of internal border controls were put into force step by step (first for smaller border posts and successively for the main border posts with Germany and Italy), and for flights within Schengen by 1 December 1997.[80] The abolition of internal border controls started on 1 December 1997 and was completed by 31 March 1998. For Greece, the Agreement came into force on 8 December 1997, but the internal border controls were not abolished until a later date.[81]

In implementing the Schengen *Acquis*, the visa regime in Austria had to be adapted and Austria had to accept the Schengen list.[82] The 1997 Aliens Act contained the adaptation to Schengen terminology and made a distinction between visa (for entry into Austria) and residence permits (either for a certain period or permanent). There are four categories of entry visa; (a) for airport transit, (b) for transit, (c) for entry allowing a maximum sojourn of three months and (d) entry for immigration (restricted to Austrian territory). Furthermore, some bilateral agreements allowing visa-free travel had to be revoked.[83]

3.I.C.2 The Bilateral Dimensions

3.I.C.2 (a) Border control and apprehension in the border zone

Austria has borders of; 466 kilometres with the Czech Republic, 107 with Slovakia, 330 with Slovenia and 356 with Hungary. In 1997 and early 1998, Germany and the Bavarian government expressed their doubts as to whether the Austrian external border controls as yet fulfilled the Schengen criteria.[84] In this period, an extraordinarily high number of illegal entries from Austria to Germany were discovered

[79] Der Standard, 25 June 1997.

[80] Die Presse, 19 July 1997.

[81] BGBl. III 209/1997. See for, the abolition of border controls: O.J. 1999, No. L 327, p. 58; BGBl. III 247/1999.

[82] Hummer/Obwexer, fn. 66, p. 41 and p. 49-51.

[83] See supra, fn. 74, the Government Bill with Barbados, the Seychelles, Trinidad and Tobago, and the Bahamas.

[84] Die Presse, 19 July 1997 and 21 July 1997; Der Standard, 13 March 1997; Der Standard 25 June 1997.

either at the borders themselves or in the border zone.[85] These attempts to cross the borders illegally were reported daily by the media.[86] Germany especially pressured Austria to intensify controls and surveillance along the borders and to improve the technical standards and equipment for control and surveillance at the external borders. In order to meet German demands, Austria, in addition to the gradual abolition of border controls, agreed that pursuit by German police organs could be extended to the whole territory. Austria also confirmed that it would carefully control the zone of the border with Italy.

Strict controls caused long delays at the external borders. For citizens from eastern European states, this new curtain built by the Schengen external borders hindered their freedom to travel.[87] As they had to strengthen controls[88] on their eastern borders, cross-border trade (e.g. between Poland and Belarus or Poland and Russia) declined.[89] Accordingly, a feeling of being 'second class Europeans' was expressed on the occasion of bilateral contacts.[90]

Austria strongly supported and initiated collaboration with its eastern neighbouring states,[91] especially when it held the Schengen presidency in the second half of 1997. Hungary particularly, as a geographical buffer between Austria and other eastern European states, received support from Austria.[92] Poland's border control standards have also been gradually adapted to Schengen standards, with the help of EU and German financing.[93]

According to press reports, the cost of border control and surveillance and the necessary technical equipment was approximately ATS2,733 billion from 1996 to 2000. The Report by the Committee on Internal Affairs contained a figure of 4,826 officials (1,855 border police and 2,971 customs officers) fulfilling border control functions at the end of 1996 (in addition to 1,550 members of the army responsible for border surveillance functions). 2,100 officials were internally transferred to work in the area of border control, among them 1,707

[85] Der Standard, 3 March 1997.

[86] Der Standard, 3 March 1997; Die Presse, 18 July 1997.

[87] Der Standard, 15 March 1998.

[88] See Mikolajczyk, Poland, 2.II; Nagy, Hungary, 3.II.

[89] Der Standard, 16 February 1998.

[90] Der Standard, 15 March 1998; Der Standard, 16 March 1998.

[91] Die Presse, 20 June 1997.

[92] See infra, 3.I.E.4.

[93] Die Presse 13 February 1998; Der Standard, 16 February 1998.

customs officials and 419 police officials.[94] By the end of September 1998, a total number of 5,500 officials were on duty in the border control area.[95] In order to assure effective control of trucks, carbon dioxide measuring instruments were used to permit the discovery of hidden persons.[96]

Following the 'emergency responses' in 1990, the newly created provisions on rejections at the borders, apprehension within a certain period with subsequent rejection, plus the measures to terminate the sojourn of aliens were transferred to the Aliens Acts 1992 and 1997.

The mandate of the surveillance function of the Austrian army at the border with Hungary was prolonged and has been constantly expanded over time in order to support the border control authorities.[97] This surveillance function started on request of the Federal Ministry of the Interior and became operative in September 1990. To fulfil the obligations of the Schengen Implementation Convention, the army was provided with helicopters with night sight equipment and forward-looking infrared lights. The necessary intensity of control outside regular border posts was reached between September 1997 and the end of March 1998. In September 1999 the army was asked to extend its control and surveillance functions to the Slovak border. Seventy-four kilometres of border with the Slovak Republic are under surveillance by approximately 170 soldiers.[98] In 2000, 700 persons were apprehended in this area.

In addition to the functions of 'securing' the borders, the presence of the Austrian army in the border zones was seen as a preventative measure to restrain people from attempting illegal entry.[99]

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[94] See supra, fn. 75; Die Presse, 18 July 1997, Der Standard, 3 March 1997 reported a figure of around 2,000 officials on 26 border control posts and 35 surveillance posts. Der Standard, 25 June 1997 reported that around 2.4 to 2.6 billion ATS had already been invested. 2,500 officials are on duty to maintain control for non-Schengen States. Finally 3,000 officials should be responsible for border controls.

[95] Der Standard, 3 January 1998.

[96] See for a detailed description of the technical equipment and the costs for this equipment and also the costs for personnel working in the area of border control a.s.o.: Der Standard, 1 April 1998. According to that source, expenses were: 46 million ATS membership fee for the Schengen Secretariat and the operating expenses for C-SIS, costs for electronic data processing total 590 million ATS and 394 million ATS for technical equipment.

[97] See supra 3.I.B.1.; see also, infra 3.I.E.2.

[98] http://www.bmlv.gv.at/archiv/a1999/990923-asse-slowakei.shtml viewed on 7.2. 2001.

[99] Der Standard, 4 September 1998.

In 1995 a total of 6,400 persons attempting illegal border crossing were apprehended in the border zone by the army, customs officers and border police, while in 1996 there were more than 10,000. Border control organs in Bavaria apprehended 11,000 persons in 1996, which was a reduction compared to 1995, when the figure was around 19,000.[100]

In 1997, 13,173 apprehensions after illegal border crossings were counted and from January until the end of September 1998 there were 11,000.[101] Slightly different figures were reported with 11,434 cases dealt with by police officials in 1997 (31 per cent increase in comparison to 1996 with 8,759 cases).[102] In 1998, 19,653 apprehensions were counted, as against 13,137 in 1997.[103] A total number of 36,687 apprehensions by the army and 13,858 by the police had been counted by the end of 1998.[104]

3.I.C.2(b) Readmission agreements

Before 1990 Austria had concluded Readmission Agreements with the Benelux countries,[105] Germany,[106] France,[107] Italy,[108] Switzerland[109] and Tunisia.[110]

In the course of the abolition of internal border controls in the Schengen system, an adaptation of the Readmission Agreements with Italy and Germany was deemed necessary in order to improve bilateral collaboration and facilitate the transfer of persons for readmission. Under the Readmission Agreement concluded in 1963,[111] readmission between Italy and Austria was only possible following apprehension in

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[100] Der Standard, 3 March 1997; Die Presse, 6 March 1997.

[101] Die Presse, 1 October 1998; Salzburger Nachrichten 14 September 1999 (apprehensions from 1 January to 25 August 1998); (total apprehensions including borders to Italy and Germany, and also to Liechtenstein and Switzerland, 10,238, and for the same period in 1999, 24,405).

[102] Der Standard, 3 January 1998.

[103] Migration News Sheet, February 1999, p. 3.

[104] Der Standard, 22 January 1 1999.

[105] BGBl. 51/1965.

[106] BGBl. 227/1961.

[107] BGBl. 337/1962.

[108] BGBl. 111/1963.

[109] BGBl. 80/1955. The Agreement also applied for Liechtenstein.

[110] BGBl. 255/1965. The Agreement was restricted to the readmission of nationals of the Contracting Parties.

[111] See supra, fn. 108.

the border zone. The new Agreement[112] does not restrict readmission to any particular apprehension zone. According to Article 6, informal readmission is possible upon request (without a formal application for readmission) within 24 hours after illegal border crossing.[113] The Agreement with Germany[114] regulates informal readmission of third country nationals within four days after entry. Illegal entry shall be defined according to local legislation in force in the Member State. In 2000 a new Readmission Agreement was concluded with Switzerland and Liechtenstein.[115]

From 1990 Austria started to negotiate readmission agreements with eastern European countries[116] in order to support the provisions in the Aliens Act allowing entry refusal, forcible return, expulsion and deportation. In 1991 an Agreement with Poland was concluded, but was restricted to the readmission of nationals of the Contracting Parties.[117] In 1992 Austria concluded an Agreement with the Czech and Slovak Federative Republic.[118] This Agreement also covered third country nationals. Informal readmission (without a formal application for readmission) within seven days after illegal border crossing is also covered by that Agreement. A Contracting Party is obliged to informal readmission only if the border control authorities submit facts proving illegal border crossing. After the *dismembratio* the Agreement was upheld with both states.[119] A Readmission Agreement with Slovenia containing provisions for readmission of third country nationals was concluded in 1993.[120]

The common denominator of these Agreements is that they can only be applied in cases where an alien illegally enters the territory of a Contracting Party from the other Contracting Party. The Readmission Agreements specify the time limit within which a request to readmit a person can be made by a Contracting Party. The time limit starts either with the entry into the country concerned or with the authorities' knowledge about the illegal entry or sojourn. The periods vary from ninety days (Italy, Czech and Slovak Republic, Slovenia) to six months (Germany, the Benelux countries, France and Switzerland).

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[112] BGBl. III 160/1998.

[113] See also, Die Presse 26 March 1998.

[114] BGBl. III 19/1998.

[115] BGBl. III 1/2001.

[116] For Hungary, see infra, 3.I.E.3.

[117] BGBl. 462/1991.

[118] BGBl. 667/1992, Government Bill: 451 BlgNR 18. GP.

[119] For the Slovak Republic see BGBl. 1046/1994; for the Czech Republic BGBl. III 123/1997.

[120] BGBl. 623/1993.

If the time limit starts with the authorities' knowledge about the illegal entry, the Agreements also specify a maximum period starting with illegal entry.

Since 1992, the Agreement with the Czech and Slovak Federative Republic has also covered the informal readmission of third country nationals upon request of a Contracting Party within seven days after illegal entry. In conformity with the content of this time limit, Article 35 of the 1991 Aliens Act allowed forcible return within seven days after illegal entry or forcible return to another state if the person had to be readmitted by Austria upon a readmission agreement. According to press reports dated August 1999, the Czech authorities increasingly refuse to take back illegal immigrants, presumably for financial reasons. Only if a passport has been stamped do the Czech authorities agree upon readmission.[121] Other reports said that these agreements function very well, but 'problems' occur with Slovenia and Slovakia.[122]

For the first time in 1998, Austria negotiated and concluded readmission agreements with non-neighbouring states, covering the readmission of third country nationals. The first agreement of this kind was the Agreement with Croatia.[123] This Agreement contains a time limit of ninety days and obliges the Contracting Parties to readmit third country nationals who illegally stayed on the territory of the Requested Party. In 1998 an Agreement was also concluded with Bulgaria,[124] which obliges the Parties to readmit third country nationals who stayed in or transited through the territory of the Requested Party. In 2000 Readmission Agreements were concluded with Latvia[125] and Lithuania,[126] covering the readmission of third country nationals within one year after the authorities' knowledge of the illegal entry or sojourn.

[121] Migration News Sheet, September 1999, p. 2.

[122] Migration News Sheet, July 1999, p. 3.

[123] BGBl. III 177/1998.

[124] BGBl. III 189/1998. A request for readmission is possible within one year after the authorities' knowledge about illegal sojourn.

[125] BGBl. III 144/2000. The Preamble expresses the Agreement's aim to combat illegal immigration in the spirit of European constraints to reach this goal.

[126] BGBl. III 12/2000.

3.I.D Transposing the *Acquis*

3.I.D.1 The Safe Third Country Concept

A safe third country notion, with various legal consequences in aliens and asylum proceedings, was introduced by the Asylum Act 1991.[127] This concept held a special significance in Austrian asylum law and practice; first, with respect to the asylum seeker's entry, second as a criterion for provisional residence during the proceedings, and third as a reason for denying asylum (material exclusion clause). On the one hand, the practice of issuing decisions in a rather short period while the applicants were detained raised the 'efficacy' of the proceedings and thus met the legislators' aim. On the other hand, the complexity of the rules and the parallel asylum and aliens proceedings also caused a backlog of work for the asylum authorities, the aliens police authorities and especially the Federal Administrative Court,[128] as well as a deficiency of legal protection for asylum seekers and other aliens concerned.

At that time safe third country provisions were introduced in a number of European states and they were harmonized in 1992 by the Resolution on the harmonized approach to questions concerning host third countries[129]. The '*travaux préparatoires*' to the 1991 Asylum Act stated the legislators' intention to formulate the safe third country clause in conformity with German legislation.[130] They also expressed the intention to avoid refugee movements ('nomadic refugee flows') and 'undesired multiple applications for asylum'.

Only asylum seekers who were regarded as coming directly from the state where they claimed to fear persecution were allowed to enter Austria without complying with the formal entry requirements defined in the Aliens Act.[131] All the surrounding countries, which until a few years ago were among the main countries of origin in Austrian

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[127] The Asylum Act 1968 (supra note 5) only restricted the right to obtain a residence permit to refugees who had not found safety from persecution in a third state.

[128] See supra, fn. 38, Rosenmayr: in 1994 1,924, in 1995 1,389 and in 1996 1,961 complaints were counted.

[129] Resolution on the harmonized approach to questions concerning host third countries, Meijers, H., (ed.), A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration, Dutch Centre for Immigration, Utrecht 1993, p. 73-75.

[130] See supra, note 31.

[131] Asylum seekers whose deportation was disallowed because it would have been a violation of the *non-refoulement* principle had to be granted access to the territory according to the wording of Art. 6 (2) Asylum Act 1991 (supra note 29).

statistics, were regarded as 'safe third countries' and a transit through one of these countries was a reason for the denial of access to Austrian territory. There was a somewhat theoretical possibility to file a complaint, lodged from abroad, to the locally competent Independent Administrative Tribunal.[132] There were no provisions regulating the possibility to apply for asylum at Austrian border posts.

As a second consequence only asylum seekers entering directly from the persecuting state that submitted their asylum application within one week after entry had a provisional right of residence during the asylum procedure'.[133] Since over 80 per cent of asylum seekers reached Austria by land[134] and, according to the above-mentioned practice, via a safe third country, they enjoyed no provisional right of residence during the asylum procedure.[135] Typically, the asylum proceedings ran parallel to aliens law proceedings, in which the asylum seekers were detained[136] and deportation was prepared.[137] According to the Aliens Act, they had no possibility to regularise their sojourn by obtaining a residence permit or a visa in Austria.[138]

Thirdly, the safe third country concept was an exclusion clause in asylum proceedings. Asylum must not be granted to persons who were already safe from persecution in a third state according to Asylum Act Article 2 (2) (3). The wording of the exclusion clause ('were already safe in another country') and subsequent practice showed that only safety in the past had to be and was taken into account, regardless of whether the person could re-enter that state and apply for asylum

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[132] VfGH 16.6. 1994, VfSlg. 13,774. According to this decision by the Federal Constitutional Court, a mere statement of a threat of persecution in the sense of Art. 3 ECHR in the country of origin is no reason for an obligation to grant entry to Austrian territory. The possibility of filing a complaint to the Independent Administrative Tribunal was seen as an effective remedy in the sense of Art. 13 ECHR to prevent a violation of Art. 3 ECHR.

[133] Art. 7 Asylum Act 1991, note 29. UNHCR, Flüchtlingsalltag in Österreich: Eine quantitativ-qualitative Analyse der Vollzugspraxis des Asylgesetzes 1991, Vienna 1995, p. 41-49 and p. 85-98.

[133] See UNHCR, supra at 3.I.D.4.

[134] Ibid.

[135] VwGH (Federal Administrative Court) 29.2. 1996, 94/18/0746; VwGH 8.10. 1997, 96/21/0390; VwGH 27.9.1995, 95/21/0005.

[136] This was and still is one of the most pressing problems of Austrian asylum and aliens law and has been analysed in a study conducted under the auspices of UNHCR by Hofbauer, H./Netzer, A./Suntinger, W., Internationale menschenrechtliche Normen und österreichische Schubhaft, Ludwig Boltzmann Institut für Menschenrechte, Vienna 1995. Dayy, U., Asylverfahren und Schubhaft, Journal für Rechtspolitik, Vol. 1, 1993, No. 1, p. 41-62.

[137] See supra, note 30, Davy, p. 71-72.

[138] VwGH 2.10. 1996, 96/21/0599; VwGH 8.10.1997, 96/21/0390.

there or otherwise find safety from persecution there.[139] This decision could be issued in a special procedure on manifestly unfounded applications.[140]

The asylum authorities did not have to make a prognosis decision considering present and future security in a third country, but only one based on safety in the past.[141] They did not have to take into account whether the state in question would take the person back or grant access to the procedure or guarantee *non-refoulement* in the future. The following reasoning of the Federal Asylum Agency with respect to entry from a neighbouring State can serve as an example: 'Austria is surrounded by states party to the 1951 Refugee Convention and members of the Council of Europe. There is a UNHCR branch office in each of these states. You could have applied for asylum, at the latest, in any of these neighbouring countries, where you had no reason to fear *refoulement* to your state of origin without examination of your request'.[142] In a great number of decisions, the Asylum Agency also added that if a country was considered to be safe, such safety was given from the point of time when the person entered this country.[143] The Asylum Agency (in contrast to the second instance) often ruled not only on the existence of the 'safety in a third state' exclusion clause, but also on the fulfilment of the criteria of the refugee definition.[144]

All neighbouring states were also regarded as safe countries according to the jurisprudence of the Federal Administrative Court. There was a standard formulation in the reasoning in these decisions. This standard reasoning saw safety from persecution in the past, on the one hand, as safety in that country (in the sense of not being persecuted there) and, on the other hand, as safety from being *refouled* to the persecuting state.[145] The Court ruled that if a state was a signatory to the 1951 Refugee Convention and the Convention was applicable for

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[139] Wiederin, E., Drittstaatsklauseln im Asylrecht, JAP, Vol. 6, 1995/96, No. 3, p. 153-162.

[140] See infra, 3.I.D.3. This procedure never gained practical relevance; see supra, note 30, Davy, p. 77.

[141] See e.g., VwGH 26.1. 1995, 94/19/0416; VwGH 25.5. 1994, 94/20/0188.

[142] See for a detailed description and examples: UNHCR, fn. 133, p. 99-126, cited decision p. 105, Federal Asylum Agency, 16 November 1993, 93 04.093.

[143] See UNHCR, fn. 133, p. 106 with further examples.

[144] See UNHCR, fn. 133, p. 101. According to the jurisprudence by the Federal Administrative Court (VwGH 24.1. 1995, 95/01/0030) it was up to the authorities to rule on both criteria.

[145] See for many VwGH 24.11.1993, 93/01/0357.

the person in question, the authorities could *prima facie* assume safety in that state and did not have to make further inquiries.[146]

Generally, mere transit, even short transit hidden in a truck, through one of the (neighbouring) states was deemed sufficient,[147] because it would have been possible to apply for asylum in that country (e.g. Hungary).[148] According to this reasoning, the applicant could have stopped the flight itinerary in the third country.[149] In any event, it was possible to contact the authorities in the third state and it was up to the applicant to initiate the demand for protection by contacting the authorities.[150] The real situation in the country concerned had to be taken into account - not the applicant's subjective view concerning safety.[151] The previous length of stay in the third country or the possibility to apply for asylum there and the authorities' knowledge of the person's sojourn in the country concerned were not taken into account.[152]

According to the Federal Administrative Court, the obligation not to *refouler* to the state of persecution had to be taken into account in the aliens' proceedings and not in the asylum procedure.[153] This was

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[146] VwGH 28.3. 1995, 94/19/0960: The authorities however, could not assume e.g., safety in Bulgaria in 1991 without further investigations, because Bulgaria only became a member of the 1951 Refugee Convention in May 1993. VwGH 25.4. 1995, 94/20/0250: If the applicant's sojourn in the country dated back before the country's membership to the 1951 Refugee Convention, further investigations had to be made by the authorities. VwGH 12.9. 1996, 95/20/0288; VwGH 19.6.1997, 95/20/0763: The authorities had to investigate whether safety assumed on the basis of a report from July 1994 was already given at the time of the person's transit in 1991. VwGH 22.5. 1996, 94/01/0676: The same applies for a case where the authorities assumed safety in Slovenia for January 1992 and referred to UNHCR' s report from April 1994.

[147] VwGH 27.5. 1993, 93/01/0256; VwGH 9.9. 1993, 93/01/0340; VwGH 16.9. 1993, 93/01/0761; VwGH 9.9. 1993, 93/01/0572; VwGH 29.10. 1993, 93/01/0274. The decisions also conclude that safety from persecution was given at the time when the applicant left his country of origin. VwGH 30.6. 1994, 94/01/0225; VwGH 7.10. 1993, 92/01/1118; VwGH 24.11. 1993, 93/01/0357; VwGH 24.11. 1993, 93/01/1139.

[148] VwGH 22.2. 1995, 94/01/0539.

[149] VwGH 24.11. 1993, 93/01/0357; VwGH 26.1. 1994, 93/01/0021, 93/01/0022; VwGH 25.5. 1994, 94/20/0045; VwGH 25.5. 1994, 94/20/0188.

[150] VwGH 24.11. 1993, 93/01/0357; VwGH 15.12. 1993, 93/01/0679; VwGH 22.2. 1995, 93/01/0518; VwGH 18.11.1995, 94/01/0799; VwGH 18.11.1995; 94/01/0674; VwGH 8.11.1995, 94/01/0501; VwGH 31.1.1996, 94/01/0755; VwGH 24.4. 1996, 96/01/0253; VwGH 22.5. 1996, 96/01/0330; VwGH 19.6.1996, 96/01/0303; VwGH 19.6.1996, 95/01/0488; VwGH 25.9. 1996, 96/01/0539; VwGH 25.9. 1996, 96/01/0367; VwGH 19.3.1997, 96/01/0797.

[151] VwGH 4.7. 1994, 94/19/0260.

[152] See for many VwGH 27. 5. 1993, 93/01/0256.

[153] VwGH 5.4.1995, 94/01/0506.

confirmed by a decision of the Federal Constitutional Court. The danger of future human rights violations, such as a violation of ECHR Articles 2 or 3 in the country of origin, must not be assessed in the course of asylum proceedings. Since the authority's decision not to grant asylum in no way obliges the asylum seeker to leave Austrian territory, it apparently does not impose an obligation on him or her to return to the home country.[154]

As mentioned earlier, the safe third country clause was reformed by the 1997 Asylum Act. According to Article 4 of the 1997 Asylum Act, an application for asylum is inadmissible if the alien is able to find protection against persecution in a country with which no treaty exits concerning the determination of responsibility for the examination of asylum applications (presently only the DC). Protection in such a safe third country shall exist for aliens if a procedure for the granting of refugee status in accordance with the 1951 Refugee Convention is available in that country, if they are not exposed to the danger of *refoulement* in that country (including expulsion via other countries) and if they are entitled to reside in that country during such a procedure. According to Article 4 (3), these requirements are seen as being fulfilled if the country has ratified the 1951 Refugee Convention and has established an asylum procedure incorporating the principles of the 1951 Refugee Convention and has also ratified the ECHR and its' Protocol 11 . Administrative decisions rejecting an application because of the safe third country clause shall be accompanied by a statement to the effect that the claim has not been examined on its merits.[155] If an alien whose application for asylum has been rejected because of the safe third country clause cannot be deported to that country, the decision shall cease to be valid.[156]

The reformulation of the safe third country clause improved the situation, mainly because it is now a prognosis decision about safety in the third country in the future. The authorities examine whether the applicant can find protection in the third country in the future. The decision has to be based on an examination of the real possibility of returning to a safe country at the time when the decision is delivered.[157]

The 1998 amendment of the 1997 Asylum Act also included a provision to designate, by order of the Federal Ministry of the Interior, countries that generally grant effective protection against

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[154] VfGH 16.12. 1992, VfSlg. 13,314.

[155] See supra, fn. 44, Art. 29 (2) Asylum Act 1997, as amended by BGBl. I 4/1999.

[156] See supra, fn. 44, Art. 4 (5) Asylum Act 1997, VwGH 11.11. 1998, 98/01/0284.

[157] UBAS (Federal Asylum Review Board) 18.8. 1998, 204.538/0-VII/19/98.

persecution.[158] The criteria for determining such a safe third country are:

> (1) Authorities must be able to grant access to an asylum procedure, without restriction, to aliens who have been rejected at the border, forcibly returned or deported from Austria;
>
> (2) Authorities must examine asylum cases on an individual basis (including a personal interview in the presence of an interpreter, when necessary);
>
> (3) Authorities must provide the possibility to appeal against the first instance decision;
>
> (4) Asylum seekers must be entitled to remain in that country during the procedure and the appeals procedure.

Up to now the Ministry has not made use of this specific competence, and no decree has been passed. The criteria, however, are taken into account in the jurisprudence of the Federal Administrative Court and the Asylum Review Board.[159]

The 1997 Asylum Act stipulated that the summary appeals process also applied to safe third country cases.[160] Originally the appeal had to be filed within two days and the decision had to be made within four working days. The Federal Constitutional Court ruled that this violates Constitutional Law, arguing that legal remedies have to guarantee an irreducible minimum of factual efficiency. Concerning the time limit to file an appeal, the applicant must have the possibility to make use of the legal remedy in a manner correspondent with the content of the decision and the given realities of the procedure. The Court declared that the complexity of the legal situation combined with a lack of knowledge of the German language meant that the time allowed was not sufficient to file an appeal. In addition to this, the applicant usually needs legal advice in order to cope with the complex legal situation.[161] These criteria are also taken into account in decisions where Austrian authorities rule on the efficiency of legal remedies in asylum procedures in third states.[162]

According to the jurisprudence of the Federal Administrative Court, the authorities have to make inquiries about the legal situation in the third state with a view to the situation of the individual asylum

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[158] See supra, fn. 44 and 54.

[159] VwGH 20.10. 2000, 99/20/0406.

[160] See supra, fn. 44, Art. 32 Asylum Act 1997; see also, infra 3.I.D.3.

[161] VfGH 24.6. 1998, VfSlg. 15,218; see also, supra fn. 53.

[162] VwGH 24.2. 2000, 99/20/0246.

seeker.[163] The assumption in Article 4 (3) of the Asylum Act is not sufficiently established merely by reference to a third state's legislation. The actual implementation of the law in the country concerned has to be examined.[164] Safety in the third state requires constant practice by the authorities there.[165] The asylum authorities also have to state if the applicant is admitted to the asylum procedure in the third state.[166] They have to make sure that updated reports and other sources are available about the situation in the countries concerned, and that all decisions are based on the most recent information.[167] Further inquiries have to be made if there are reasonable doubts about the situation in the third state (e.g., if the applicant affirms concrete facts concerning her personal situation or if reports of 'notable NGOs' express doubts about the real situation[168]).

An overview of the decisions also shows that according to this jurisprudence the deciding authorities examine the real situation in the country concerned and do not stick solely to formal arguments as to membership to the 1951 Refugee Convention and the establishment of an asylum procedure.

The Administrative Court has ruled that not all criteria applying to Austrian asylum procedures have to be fulfilled in asylum procedures in third states. These criteria, however, are taken as a basis of comparison.[169]

Asylum seekers must be entitled to stay in the third state during the asylum procedure, including the appeals procedure.[170] The safe third

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[163] VwGH 23.7. 1998, 98/20/0175, VwGH 25.11. 1999, 99/20/0162. VwGH 24.2. 2000, 99/20/0246.

[164] VwGH 23.7. 1998, 98/20/0175 (Slovakia); VwGH 11.11. 1998, 98/01/0284; VwGH 8.3. 1999, 98/01/0364; VwGH, 24.3. 1999, 98/01/0313 (all Hungary); see infra, 3.I.E.1.; see also for many UBAS 3.5. 1998, 208.609/0-VIII/22/99.

[165] VwGH 25.11. 1999, 99/20/0162.

[166] VwGH 16.2. 2000, 99/01/0299.

[167] VwGH 11.11. 1998, 98/01/0284.

[168] VwGH 21.4. 1999, 98/01/0400.

[169] VwGH 20.10. 2000, 99/20/0406.

[170] VwGH 24.2. 2000, 99/20/0246; VwGH 11.11. 1998, 98/01/0284; VwGH 22.12. 1999, 99/01/0094; VwGH 20.10. 2000, 99/20/0406. The decision makes a difference between a regular appeals procedure (either administrative or judicial) and an extraordinary remedy. The asylum seeker must be entitled to stay in the third country during the regular procedure. The procedure e.g. allowing a complaint to the Federal Administrative Court in Austria is seen as an example for a remedy, which does not entitle automatically to suspensive effect. Suspensive effect however may be granted upon request.

country rule in the country considered as safe must fulfil standards comparable to those in Austrian legislation and jurisprudence.[171]

From the very outset, in the majority of decisions based on the 1997 Asylum Act, Slovakia was not seen as a safe country. The Asylum Review Board has constantly declared[172] that Slovakia does not grant effective protection against *refoulement* via other states (chain *refoulement*). If the alien does not apply for asylum within 24 hours after entry to Slovakia, the application is regarded as being manifestly unfounded and dealt with in an accelerated procedure for manifestly unfounded claims.[173] This practice is regarded as contradicting 'European standards', because in such a fast-track procedure it is not possible to examine whether or not a person fulfils all the criteria to be defined as a refugee. Furthermore, the Slovakian safe third country clause allows deportation to other states.[174] An appeal against a negative decision in the accelerated procedure has to be filed within three days. The Administrative Court also holds that this contradicts the effectiveness of a legal remedy (reference was made to the Federal Constitutional Court decision in Austria [175]).

Initially after the entry into force of the 1997 Asylum Act in the majority of decisions rendered by the Asylum Review Board, the Czech Republic was regarded as a safe third country.[176] *In February*

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[171] UBAS 28.10. 1999, 210.218/16-II/04/99.

[172] See e.g. UBAS 16.3. 1998, 202.107/0-VI/17/98; UBAS 9.4. 1999, 207.485/11-II/04/99; UBAS 18.6. 1999, 209.943/0-VII/20/99; UBAS 26.2. 1999, 207.664/0-VII/19/99; UBAS 28.6. 1999, 210.007/0-V/15/99; UBAS 28.6. 1999, 210.168/0-IX/26/99; UBAS 16.12. 1998, 201.749/0-VII/19/98. UBAS 12.12. 1998, 206.792/0-II/04/98; UBAS 29.4. 1999, 208.843/0-VII/19/99; UBAS 19.5. 1999, 209.733/0-VII/19/99. See in contrast UBAS 2.12. 1998, 205.774/0-VIII/22/98. Slovakia guarantees effective protection against refoulement also via third states.

[173] UBAS 19.5. 1999, 209.733/0-VII/19/99.

[174] UBAS, 19.5. 1999, 209.733/0-VII/19/99; UBAS 29.4. 1999, 208.843/0-VII/19/99.

[175] VwGH 24.2. 2000, 99/20/0246; VwGH 8.6. 2000, 99/20/0077.

[176] UBAS 21.4. 1998, 202.689/0-I/01/98; UBAS 29.4.1998, 202.884/0- IV/10/98; UBAS 10.6.1998, 202.689/2-II/04/98; UBAS 19.11. 1998, 206.025/0-VII/19/98; UBAS 19.1. 1999, 207.274/0.VI/18/99; UBAS 20.1.1999, 207.019/0-VIII/24/98; UBAS 7.4.1999, 207.483/3-XII/37/99; UBAS 7.4.1999, ZI 208.347/0-VII/20/99; UBAS 7.4.1999, 207.810/0-V/15/99; UBAS 9.4.1999, 207.482/7-XI/33/99; UBAS 9.4.1999, 208.603/0-IV/11/99; UBAS 14.4. 1999, 208.346/0-VII/19/99; UBAS 15.4.1999, 207.700/0-VI/16/99; UBAS 15.4. 1999, 207.701/0-VI/16/99; UBAS 27.4.1999, 207.615/0-VI18/99; UBAS 28.4.1998, 202.886/0-IV/11/98. According to these decisions the Czech Republic guarantees *non-refoulement*, also because Art. 10 Czech Constitution determines the precedence of international law obligations, including the *non-refoulement* obligation, over local law. Furthermore, according to a report compiled by UNHCR dated 5 March 1999, the Czech Republic does not violate the *non-refoulement* principle. In contradiction to this opinion, decisions from June 1999 (UBAS 24.6. 1999, 208.195/11-II/04/99 and 207.773/18-II/04/99) saw the Czech Republic as an unsafe country because asylum seekers are

2000 the Federal Administrative Court held that safety in the Czech Republic could not be assumed because asylum seekers returned to the Czech Republic could only apply for asylum at the border posts and then had to submit the written application within 24 hours. Furthermore, it was not sufficiently established that asylum seekers are entitled to stay in the Czech Republic during the asylum procedure[177].

Slovenia is mostly regarded as a safe third country.[178] Occasional deficiencies in administrative practice in a third state may not lead to the conclusion that this state does not on the whole guarantee protection as specified in Article 4 of the Asylum Act.

3.I.D.2 Implementation of the Dublin Convention

One aim of the amendments in Austrian legislation was the implementation of international obligations elaborated in the EU inter-governmental forums, especially the implementation of the obligations contained in the Conventions of Schengen and Dublin. The DC[179] establishes the criteria for determining which Member State is competent to deal with an asylum claim. The Resolution on safe third countries,[180] however, allows and even places a certain pressure on the individual Member State to apply the safe third country concept first and to transfer the competence to a third country if this is possible, according to the domestic legislation. The Resolution regulates the relationship between the Convention and the application of the concept of the third host country. Austria has implemented this system. The sequence clearly implements the aim of the London Resolution. Consequently, the decision on whether a safe third country exists is taken first. If no such country can be identified, the Asylum Agency has to check whether a Dublin case is involved and whether another member state of the Convention could be responsible. When another Dublin state is responsible, the decision

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not entitled to residence during the procedure before the Appeals Court.

[177] VwGH 16.2. 2000, 99/01/0299.

[178] UBAS 28.6. 1998 (Slovenia also guarantees access to the asylum procedure for asylum seekers readmitted from Austria.) UBAS, 204.678/0-IX/25/98; UBAS 10.7. 1998, 203.975/0-III/09/98 UBAS 24.7. 1998, 204.205/0-III/09/98; UBAS 13. 8. 1998, 204.500/0-IX/26/9; UBAS 26.8. 1998, 204.678/0-IX/25/98. In other decisions (see e.g., UBAS 25.5. 1999, 208.615/0-VIII/24/99) the Asylum Review Board ruled that in Slovenia there is no protection against *refoulement* via a third state and access to the procedures is restricted.

[179] See supra, fn. 35.

[180] See supra, fn. 129.

must be declared in conjunction with an expulsion order in which the Asylum Agency must state which country is responsible.[181]

3.I.D.3 Manifestly Unfounded Cases and Accelerated Procedures

For the first time in Austrian legislation, a procedure for manifestly unfounded asylum claims was introduced in Article 17 of the 1991 Asylum Act. If a claim was considered to be clearly unfounded, the decision could be taken without further inquiries. Objections (a certain kind of appeal, remonstrative remedy) against this decision could be filed with the Asylum Agency within one week. The decision on this appeal again had to be delivered by the Federal Asylum Office. Therefore, the provision never gained great practical relevance. Official statistics show that; between June 1992 and December 1997, only 1,676 Article 17 decisions were rendered, in 1993, 86, and in 1997, only 'one' decision.[182] An asylum request was defined as being manifestly unfounded if the nationality or identity or, in cases of statelessness, the former habitual residence could not credibly be determined. Other reasons for manifestly unfounded cases were the existence of an exclusion clause (including safe third country), the fact that the request was qualified as being solely based on economic motives, and the fact that the asylum seeker was a national of a state, where, on the basis of general experience of the state's legal system and its application, it could be assumed that generally no persecution takes place (safe country of origin).

This definition of manifestly unfounded applications implemented the London Resolution of 1992 on manifestly unfounded applications.[183] According to this Resolution, an application for asylum shall be regarded as manifestly unfounded when it clearly raises no substantive issue under the Convention for one of the following reasons; there is clearly no substance to the applicant's claim to fear persecution in her own country, or when it falls within the provisions of the Resolution on host third countries, and for other reasons enumerated in section 5 (e.g. if the grounds are outside the scope of the Refugee Convention).

Article 6 of the 1997 Asylum Act similarly stipulates that an asylum claim is manifestly unfounded when it clearly lacks any substance.

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[181] See supra, fn. 44, Art. 5 Asylum Act 1997.

[182] Ministry of the Interior, statistics, December 1997.

[183] See supra, fn. 129, Meijers, Resolution on manifestly unfounded applications for asylum, pp. 69-72.

This shall be the case if, in the absence of any other indication of a risk of persecution in the country of origin, it clearly cannot be concluded from the allegations that the person is in danger of being persecuted; if the claimed risk of persecution is clearly not attributable to the reasons set forth in Article 1 (A) (2) of the Refugee Convention; if the allegations do not correspond with reality, if the asylum seeker does not co-operate in the establishment of the material facts of the case, or if based on the general political circumstances, legal system and application of the law in the country of origin, there can be no well-founded fear of persecution. The 1997 Asylum Act regulates the procedure for manifestly unfounded claims with a summary appeals process in Article 32.

Originally the appeal had to be filed within two days and the decision had to be rendered within four working days. The Federal Constitutional Court ruled that this violates Constitutional Law, because applicants must be given sufficient time in the legal process. The Constitutional Court then referred to the reasoning in the decision about the unconstitutionality of the appeals term in Section 4 of the Asylum Act (safe third country clause) stressing that legal remedies have to guarantee an irreducible minimum of factual efficiency.[184]

3.I.D.4 Airport Transit and Applications for Asylum at the Airports

In conformity with Schengen and EU legislation, special provisions in the 1991 and 1997 Aliens Acts regulate airport transit.[185] A person alleging to be a transit passenger shall be refused entry to the transit area if this alien's subsequent exit does not appear to be guaranteed or if the alien does not hold the necessary transit permit or transit visa. This person shall be transferred to a special part of the transit area until departure. The person may be prohibited from leaving the aircraft or may be required to board a specific conveyance to leave the territory.[186]

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[184] VfGH 11.12. 1998, VfSlg. 15,369, see also fn. 53.

[185] Art. 34 Aliens Act 1991, fn. 28 and Art. 54 Aliens Act 1997, fn. 45. Art. 6 (1) Aliens Act 1997 defines the airport transit visa as visa A); see supra, 3.I.C.1.(b). Already in Art. 23 (4) Passport Act (supra note 4 and 6) a similar provision regulated airport transit.

[186] See supra, fn. 45, Art. 23 (4) Passport Act; see also, Art. 33 Aliens Act 1991 and Art. 53 Aliens Act 1997.

The Ministry of the Interior together with the Ministry of External Affairs are entitled to decree that certain nationals need an airport transit permit.[187] Airport transit regulations, including transit permits, also aim at preventing 'entry enforced by spectacular public actions'[188] and applications for asylum at the airports. Citizens of Iraq, Sri Lanka, Libya, Bangladesh and Pakistan and the former Yugoslavia,[189] had to apply for such an airport transit permit unless they entered via a Member State of the EFTA or EEC, USA , Canada, Australia or New Zealand. In 1990 and 1991 these were the main countries of origin from outside Europe, with 147 and 951 applications from Iraq, 1,815 and 1,587 from Iran, 408 and 1,392 from Pakistan, 210 and 683 from Bangladesh and 156 and 442 from Sri Lanka. In 1995 the list was amended and included the following countries: Afghanistan (1992: 80, 1994: 181 applications), Bangladesh (1992: 301, 1994: 170 applications), Ghana (1992: 198, 1994: 14 applications), Iraq (1992: 1,026, 1994: 899), Iran (1992: 652, 1994: 425), Liberia (1992: 48, 1994: 60), Libya, Nigeria (1992: 544, 1994: 31), Pakistan (1991: 1,310, 1992: 269, 1994: 88), Somalia (1992: 94, 1994: 67), Sri Lanka (1992: 133, 1994: 19) and Zaire (1992: 56, 1994: 43).[190] Figures show that since 1992, applications from nationals of states whose citizens needed an airport transit permit have been reduced considerably, and thus the provisions seem to have achieved their aim. The fact that recognition rates for nationals of these states were higher than average recognition rates contradicted the constantly stressed intention of the legislator to protect persons really in need of protection. In 1996 and 1997 further amendments included Ethiopia, Eritrea and the Democratic Republic of Congo.[191]

In 1998 around 1,200 persons applied for asylum at Vienna Airport; the main countries of origin were India, Pakistan, Somalia, Congo and Palestine.[192] According to Article 17 of the 1997 Asylum Act, aliens who arrive at an airport or arrive directly from their country of origin and who file an application for asylum at the border control post shall be brought before the Federal Asylum Agency (unless they possess authorization to reside, or their application is to be rejected by reason of *res judicata*). The Office of UNHCR has to give its consent when an

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[187] See Art. 12 Aliens Act 1991; see also, Art. 26 Aliens Act 1997.

[188] See supra, fn. 6, The Government Bill to the amendments in 1990, BlgNR II-9754 17. GP.

[189] BGBl. 840/1992.

[190] BGBl. 121/1995.

[191] BGBl. II 517/1996 (Libya was removed from the list), BGBl. II 418/1997.

[192] Der Standard, 17 June 1998.

application for asylum lodged at the airport is dismissed as manifestly unfounded or rejected because of the safe third country clause.[193]

3.I.D.5 Carrier Sanctions

A further consequence of the adaptation of Austrian legislation to 'harmonized European standards' was the introduction of special provisions for the duties of carriers. Since the amendments to the Passport Act in 1990,[194] carriers transporting aliens to the Austrian border are obliged to ensure their immediate departure and to bear the costs in case they are not admitted to Austrian territory. The companies, however, were not fined at that time.

The 1991 Aliens Act 1991,[195] and also the 1997 Aliens Act,[196] include similar provisions about the duties of carriers; the former included carriers of vessels, the latter also motor coaches in international scheduled transport. The carriers have to give details at the request of the authorities about identity particulars and travel documents of passengers who are not allowed visa- free travel. If the border control authorities cannot readily establish an alien's identity or if the alien has no documents and the carrier fails to submit her particulars to the authorities, the carrier has to reimburse expenses at a flat rate of ATS20,000.[197]

3.I.D.6 Applications at the Borders

The 1991 Asylum Act did not contain special provisions about applications for asylum at the borders.[198]

According to Article 17 of the 1997 Asylum Act,[199] an applicant arriving at an airport or directly from the country of origin has to be transferred to the Federal Asylum Agency. Aliens who file an application at the border and do not arrive directly from the state of

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[193] Supra fn. 44, Art. 39 (3) Asylum Act 1997.

[194] See supra, fn. 2 and 6.

[195] See supra, fn. 28, Art. 33 Aliens Act 1992.

[196] See supra, fn. 45, Art. 53 Aliens Act 1997.

[197] See supra, fn. 28, Art. 79 Aliens Act 1991; see also, supra fn. 45 Art 103 (3) and (4) Aliens Act 1997.

[198] See supra, 3.I.B.1.; see also, supra note 17; and see, supra note 6, for the procedure under the Asylum Act 1968 as amended in 1990.

[199] See supra, fn. 44.

persecution shall be refused entry and informed that they should make an application in the country in which they are currently resident or with an Austrian diplomatic or consular post. If however, such aliens request to make their application at the border, the application is referred to the Asylum Office and the Office considers the application. The alien has to await the decision abroad. These aliens are to be provided with a certificate of their application, to be used in the country where they are currently residing as proof that their request for entry is being considered. Entry shall be permitted if the person is likely to be granted asylum. An appeal against a negative decision to the Asylum Review Board is possible.

3.I.E Austrian Policies Targeting Hungary

3.I.E.1 Hungary as a Safe Third Country

In 1989 Hungary became party to the 1951 Refugee Convention and within a rather short period its role changed from a country of origin to a refugee receiving state.[200] Since the early 1990s Austrian policy and practice has seen Hungary as a receiving state with a functioning asylum system. This attitude found its expression principally in the decisions on safety in Hungary as a third country after the entry into force of the 1991 Austrian Asylum Act.

According to the jurisprudence of the Federal Administrative Court, all neighbouring states were regarded as safe countries. The standard formulation in the reasoning of the decisions on safety from persecution ('safety in that country, in the sense of not being persecuted there, and safety from being *refouled* to the state of persecution"[201]) was also used for Hungary.[202]

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[200] See infra, Nagy, 3.II.

[201] See supra, 3.I.D.1.

[202] VwGH 27.3. 1996, 96/01/0095; VwGH 15. 3. 1995, 94/01/0309; VwGH 27.4. 1995, 94/01/0405; VwGH 27.4. 1995, 94/01/0405; VwGH 17.5.1995, 95/01/0085; VwGH 31.1. 1996, 94/01/0768; VwGH 20.5. 1994, 94/01/0191; VwGH 21.9. 1994, 93/01/0270; VwGH 27.4. 1994, 93/01/1521; VwGH 27.4. 1994, 94/01/0205, 94/01/0206, 94/01/0207, 94/01/0208; VwGH 27.4. 1994, 94/01/0231; VwGH 23.2. 1994, 93/01/0177; VwGH 23.2. 1994, 94/01/0038; VwGH 27.1. 1994, 93/01/1110; VwGH 26.1. 1994, 93/01/0021, 93/01/0022; VwGH 26.1. 1994, 93/01/0036; VwGH 26.1. 1994, 93/01/1083; VwGH 15.12. 1993, 93/01/1177; VwGH 15.12. 1993, 93/01/1244, 93/01/1245; VwGH 24.11. 1993, 93/01/0357; VwGH 24.11. 1993, 93/01/0743; VwGH 29.10. 1993, 93/01/0257; VwGH 29.10. 1993, 93/01/0952; VwGH 7.10. 1993, 92/01/1118;

Hungary originally ratified the 1951 Refugee Convention in the version of Article 1 (B) (a), which meant it was applicable only to refugees from European states; some decisions differed according to the applicant's provenance (i.e., whether it was a European or a non-European state). The Federal Administrative Court decided, for example, that for Kurds from Turkey the authorities could not automatically assume safety from persecution in Hungary, but had to make further investigations.[203] The same goes for applicants' allegations that the former USSR was seen as a non-European country in Hungarian practice.[204] On the other hand, the Court ruled that the fact that Hungary had not yet established an asylum procedure or a procedure to implement the *non-refoulement* obligation did not in principle exclude safety from persecution, reasoning that the UNHCR procedure combined with *de facto* protection would have been available to the applicant.[205] Thus, UNHCR procedure and protection for refugees from outside Europe in Hungary was deemed sufficient for safety in that country.[206]

After the reformulation of the safe third country clause in the 1997 Asylum Act, decisions based on this provision show that even after 1998 it was questioned whether Hungarian practice fulfilled the criteria for being a safe third country. They also reveal that during the 'transition period' asylum seekers, refugees, and in general persons in need of protection were sent back to Hungary without the guarantee that they really could find protection there. This contradicts not only Austria's intent to ensure 'that people in need of protection and genuine refugees are guaranteed protection in Austria', but it also amounted to violation of obligations under international law, especially the obligation not to *refouler* a person to a persecuting state by chain *refoulement*.

Since the coming into force of the 1997 Asylum Act, the Asylum Review Board has often decided that Hungary is a safe third country.[207] These decisions made reference to Hungarian Asylum Act

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VwGH 16.9. 1993, 92/01/1074; VwGH 16.9. 1993, 92/01/1115; VwGH 27.5. 1993, 93/01/0256; VwGH 9.9. 1993, 93/01/0572; VwGH 9.9. 1993, 93/01/0371.

[203] VwGH 16.12. 1992, 93/01/0230.

[204] VwGH 15.12. 1994, 94/19/1314, 94/19/1315.

[205] VwGH 20.9. 1995, 95/20/0369.

[206] VwGH 94/20/0892, 94/20/0893, 20.9. 1995. 'Informal' agreement between Hungary and the Office of the High Commissioner for Refugees about the recognition of refugees from states outside Europe. See detailed, Nagy, 3.II.

[207] UBAS 15.4.1998, 202.669/0- V/13/98; UBAS 16.10.1998, 205.430/0-XI/34/98; UBAS 24.6.1998, 203.710/0- III/09/98; UBAS 24.6.1998, 203.714/0-IV/29/98; UBAS 5.8. 1998, 204.039/5-IX/26/98; UBAS 6.8. 1998, 204.426/1-III/08/98; 1998UBAS 11.8. 1998, 204.456/0-IX/25/98.

Number CXXXIX of 1997 (in force since 1 March 1998). According to this Asylum Act, there is no time limit for an application for asylum. Applications of aliens who have been sent back by Austria are accepted. There is right of residence during the procedure, and applicants are protected against *refoulement*. An appeal against a negative decision can be filed to the Court.[208] However, in other decisions, the Asylum Review Board has expressed doubts about the actual implementation of the legal obligations in Hungary, finding shortages in the Hungarian asylum procedure. Furthermore, the Board has ruled that the first instance did not make adequate inquiries about the safe third country clause in Hungarian law and practice.[209]

In November 1998, the Federal Administrative Court ruled that the authorities could not assume safety in Hungary because they did not sufficiently establish the asylum seekers' right of residence during the appeals procedure in Hungary. Furthermore, applicants produced significant documents about the situation in Hungary. These reports (UNHCR report dated 10 June 1998 and a report by Asylkoordination Austria about a fact-finding mission in Hungary dated 20 May 1998) combined with the opinion of the deciding authorities, as stated in the first and second instance decisions, about the lack of first-hand knowledge concerning the situation in Hungary, contradicted the assumption that applicants could find protection in Hungary.[210]

Other decisions by the Asylum Review Board have again seen Hungary as a safe country. These decisions have referred to bilateral contacts between experts of the Hungarian and Austrian Ministries of the Interior, and the confirmation by Hungarian authorities that aliens readmitted from Austria have access to the procedure. Furthermore, these aliens are not covered by the Hungarian safe third country clause, because there was no decision on the merits of their applications in Austria.[211] Asylum seekers do have a right of residence during the procedure and the appeals procedure before the Court.[212]

A judgement by the Federal Administrative Court of October 2000 again denied that there was safety in Hungary, because the short track procedure reduces the time limit to file an appeal to three days,

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[208] UBAS 30.3. 1998, 202.330/0-III/09/98.

[209] UBAS 14.8. 1998, 204.455/0-X/31/98.

[210] VwGH 11.11. 1998, 98/01/0284; VwGH 8.3. 1999, 98/01/0364; VwGH, 24.3. 1999, 98/01/0313.

[211] See. e.g., UBAS 27.10. 1998, 205.399/0-VIII/24/98.

[212] UBAS 6.4. 1999, 208.467/0-III/07/99. Reference was made to Hungarian expertise.

arguing that this overly short time limit does not fulfil the criteria of an effective remedy.[213]

3.I.E.2 Border Control and Apprehension in the Border Zone

The Austrian border with Hungary is 354 kilometres long and it is along this border that the greatest number of people is stopped (about 50 per cent of all those who try to enter Austria illegally).[214] The surveillance function is carried out by the army, presently with around 1800 personnel, and by police and customs officials. The surveillance function became operative in September 1990. According to a press release by the Federal Ministry of Defence, about 199,000 newly recruited members of the army have been on surveillance duty along the Austrian border with Hungary in the last ten years.[215] The army discovers approximately 73 per cent of illegal border crossings amounting to a total of more than 40,000. Statistics show the number of total apprehensions registered in the surveillance area (by the army, police and custom officers) in the border zone to Hungary; September to December 1990: 2,193, 1991: 11,355, 1992: 7,101, 1993: 4,650, 1994: 3,986, 1995: 4,196, 1996: 4,922, 1997: 6,129, 1998: 3,658, 1999: 5,194.[216] The highest number of apprehensions was counted in 1991, with more than 11,000. In the following years, the average ranged from 5,000 to 6,000 a year.[217]

In Austrian practice and in political intentions, Hungary is considered to be a geographical buffer between Austria and other eastern European states. In reaction to Austrian pressure, to demands by the EU, and to avoid an increase of persons staying in Hungary because they are not admitted to Union territory, Hungary announced that it would fulfil the Schengen criteria concerning border control standards with its eastern neighbours as from June 1997.[218] This was seen to lead

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[213] VwGH 11.10. 2000, 99/01/0408. In an earlier decision in 2000 (VwGH 19.1. 2000, 99/01/0080). The Federal Administrative Court held: 'If the criteria enumerated in Art. 4 Asylum Act are fulfilled the authorities may assume practice corresponding to the legal situation and do not have to make further inquiries without concrete allegations by the applicant.'

[214] Der Standard, 8 October 1998.

[215] http://www.blmv.gv.at/presse/ (7.10.1999).

[216] http://www.blmv.gv.at/presse/1998/archiv (7.10.1999).

[217] http://www.bmlv.gv.at/archiv/a1998/archiv_980908.shtml (7.2.2001) (data not updated since October 1999).

[218] Die Presse, 12 June 1997.

to a lessening of the burden of Austria's function as a border state. Austria strongly supported and initiated collaboration with its eastern neighbour states,[219] especially when it held the Schengen presidency in the second half of 1997. In an interview given in December 1998, the security officer responsible for border controls in the Austrian Federal State Burgenland (the border to Hungary) ascertained a certain technical deficit in Hungarian border control standards.[220] In August 1999, however Hungary announced that it would start border checks fulfilling all Schengen criteria. It was reported that these controls would start at the border with the Ukraine and Romania. Also, access to the SIS would work from that time via police headquarters in Budapest.[221] It was also reported that a new unit would be set up there to 'combat the increasing presence of illegal migrants'.[222] From 2000, all 56 Hungarian border posts should be equipped to provide controls as specified in the Schengen *Acquis*. The border zones with Romania and the Federal Republic of Yugoslavia should be under permanent surveillance.

3.I.E.3 The Readmission Agreement[223]

Negotiations for a readmission agreement with Hungary began in 1990. In October 1992 an Agreement was signed.[224] This Agreement was to enter into force upon notification that the local conditions for the application of the Agreement had been fulfilled. It entered into force in 1995. The Contracting Parties restricted the readmission of third country nationals who were allowed visa-free entry to the territory of the Requested Party, regardless of whether a residence ban was issued for the alien or whether the presence of that person was lawful or unlawful. Also, third country nationals who were not allowed visa-free entry, but who had been granted a residence permit or were recognized as refugees according to the 1951 Refugee Convention, had to be readmitted. An informal readmission of these third country nationals within seven days was regulated, but depended on facts and particulars disclosed by the Requesting Party about the illegal crossing of the Austro-Hungarian border. In practice, Hungarian authorities

[219] Die Presse, 20 June 1997.

[220] Die Presse, 7 December 1998.

[221] Die Presse, 25 August 1999.

[222] Migration News Sheet, September 1999, p. 3.

[223] See detailed, Nagy 3.II.

[224] Agreement between the Government of Republic of Austria and the Government of the Republic of Hungary, signed on 9.10.1992, in force since 1995, BGBl. 315/1995.

refused to take back aliens without documents who were not apprehended in the immediate border zone.

In 1998 the Agreement was amended to extend the readmission obligation to all third country nationals who crossed the border illegally.[225]

3.I.E.4 Austria's Capacity-building Measures in Hungary

In UNHCR's ExCom meetings, Austria promoted granting financial aid and resources to Hungary to cope with its refugee problems.[226]

In addition to EU programmes aiming at strengthening the capacity of eastern and central European countries,[227] Austria aimed at bilateral programmes and capacity building measures in Hungary.

Austria urged that the accession candidates must accept and implement the Schengen *Acquis*, and especially the Schengen border control standards, before being granted membership in the EU.[228] Under its presidency in the second half of 1998, Austria proposed the conclusion of 'pre-accession agreements' regulating visa policy as well as migration and asylum issues.

[225] BGBl. III 25/1998.

[226] II-6125 BlgNR 18. GP.

[227] Announcement by the European Commission on 22 February 1999. Migration News Sheet, March 1999, p. 9.

[228] Der Standard, 25 June 1998.

3.II Hungary

Boldizsár Nagy

3.II.A Introduction: Notes on the History of Migratory Movements in Hungary

Hungary's standpoint on legitimate and illegitimate migration has undergone change. While this paper concentrates on coerced migrants, a brief introduction should set the frame of reference.

Large-scale migration has always been a feature of Hungarian society. The devastation wrought by the Ottoman Empire, whose jurisdiction or control extended to two-thirds of the Hungarian Kingdom between 1526 and 1686, led to the formal resettlement policies of the Hapsburgs. These, and spontaneous migration, left the population of the territories belonging to the Hungarian Crown with a mere 39 per cent of Hungarians. Of the 9.3 million inhabitants, 1.5 million were Romanians, 1.25 Slovaks, 1.1 Germans, 0.8 Croats, 0.6 Serbs, 0.3 Ukrainians and Russians, 0.3 Armenians, Greek and other nationalities, and only 3.5 million were Hungarians.[229]

In the nineteenth century, over 2 million citizens left Hungary legitimately, 1.35 million of which went to the US between 1873 and 1913.[230] After the First World War, Hungary's territory shrank to one-third of its pre-war size and approximately 350,000 people from the territories who found themselves under new Romanian, Czech–Slovak and Serb–Croat rule opted to live in Hungary and resettle there. Similarly, the post-Second World War period saw inward migration: 190,000 people moved in from Romania, the Soviet Union and Yugoslavia. Coerced emigration and population exchanges also had a major influence on the migration phenomenon. Roughly 250,000 Germans were forced to emigrate to Austria and Germany, and 70,000 Slovaks chose to leave Hungary at the same time as a similar number was expelled from Czechoslovakia.

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[229] *Kosáry Domokos*, Újjáépítés és polgárosodás 1711 - 1867, (Budapest Háttér Lap- és könyvkiadó, 199O) p. 59.

[230] Source; *Andorka Rudolf:* Bevezetés a szociológiába, 259 (Budapest: Osiris, 1997).

In terms of legitimate population movement, the net balance of small-scale migration (less than 100,000 for the whole period in either direction) was approximately zero. After the Second World War there was one large wave of roughly 100,000 emigrants and another after 1956 of twice that number. Legitimate emigration between 1949 and 1989 was minimal (approximately 50,000) and the loss due to illegitimate departures between 1963 and 1989 is estimated at 71,000.[231] The total inward migration between 1949 and 1989 was less than 100,000.

Summing up this brief preview the following conclusions can be drawn. Legitimate migration has had a continuous, far-reaching influence on Hungarian society that is characteristically open. Indeed its culture and way of life was moulded significantly by the mixture of different immigrant ethnicities, and up until the last third of the 19th century immigration exceeded emigration. From the 1870's onwards, however, not only the politically persecuted left, so did simple peasants, farmers and skilled workers. By contrast, Hungarian migration between 1918 and 1989 was typified more by escape from violence, political persecution and other forced population movement (such as coercive population exchanges) than legitimate migration.

Two per cent of Hungary's population left within six months of the failed October 1956 uprising. Later, between 1963 and 1988, a yearly average of 2,700 Hungarian travellers chose not to return to Hungary,[232] and most applied for refugee status in the country where they had gone. Asylum seeking in Hungary was rare and not regulated by law: a few thousand Greek communists and approximately 100 Chilean communists were accepted on a Party decision outside any formal legal framework.[233] Illegal immigration was practically non-existent.

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[231] All the data in this and the preceding paragraph from: *Andorka Rudolf:* Bevezetés a szociológiába, (Budapest: Osiris, 1997) 259

[232] *Dövényi, Zoltán:* Zeitliche und räumliche Aspekte der Migrationswellen in Ungarn, 1918-1995, in: *Seewann, Gerhard (ed.):* Migrationen und ihre Auswirkungen Das Beispiel Ungarn 1918-1995 (München, Oldenburg, 1997) 7-33 (20).

[233] *Tóth Judit*: Menedékjog - kérdőjelekkel (Budapest Közgazdasági és Jogi Könyvkiadó 1994) 72

3.II.B Challenges Shaping Hungary's Role and Policy over the Last Decade

Three major challenges have faced Hungary in the last decade. The first is the general pressure caused by migrants coming from or through Eastern and Southern Europe. The second is its specific geographic position neighbouring two conflict zones; Romania and former Yugoslavia. The third challenge concerns links to the EU and is twofold; firstly Hungary is the EU and the Schengen area's external border, and secondly there is the perceived requirement for Hungarian legal and political harmonization with the EU.

3.II.B.1 The General Pressure of Migrants

Central European States, in common with Western Europe, are the destination choices for asylum seekers and illegal migrants coming from the CIS and the Balkan countries and from further a field in the East and South. Since public debate (if any) on migration regulation and control makes no distinction between legitimate, illegal and coerced migration, the usual suggestion is to monitor the legitimate and eliminate the illegal without addressing the specific reasons or merits of the coerced. This brings about the all too familiar result of legal and policy tools (not to mention the physical barriers erected at borders) aimed at keeping migration in check but producing negative side effects for asylum seekers.

The fears raised by the idea of 200 million Soviet citizens clutching a passport and voting with their feet[234] (together with the rest of the COMECON population) did not materialize, and the large wave of emigration expected in the early nineties from Central and Eastern Europe (implying legal departure from the country of origin and illegal entry or stay after legal entry) came to nothing.[235] Generally speaking this was also the case in Hungary. The number of legal immigrants (including simple long-term stayers like entrepreneurs) from the Soviet Union and its successor States rose only slightly in the years between 1990 and 1991 and then dipped below the 1988 level. Their aggregate

[234] See *Larrabee, Steven:* Down and Out in Warsaw and Budapest: Eastern Europe and East-West Migration, in: International Security 16 (1992 Spring) 5 - 33 (8 - 12).

[235] See e.g., *Salt, John:* Current Trends in International Migration in Europe (Strasbourg Council of Europe, 1997 [CDMG (97) 28]) 22 - 24; table 23.

number for the years 1988–1994 was 8,934.[236] Immigration from other Eastern and Southern European States, as well as from the rest of the world, was also very small (15.2 per cent of total immigration), if we exclude the two main countries of origin of immigrants that feature so prominently in the 1988–1994 period (Romania: 67.3 per cent and Yugoslavia 9.4 per cent).[237] The reasons for such high numbers from these two countries are discussed below.

The total number of settled immigrants and long-term sojourners on 31 December 1997 was 115,953,[238] and three years later 114,941.[239] Both numbers are lower than those for the mid-1990s.[240]

The number and trends of illegal migrants are more difficult to assess.[241] There are several indicators. One of the most reliable is the number of people caught at the border trying to cross it to enter Hungary illegally, or to leave.

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[236] *Tóth Pál Péter:* Haza csak egy van? Menekülők, bevándorlók, új állampolgárok Magyarországon (1988 - 1994) (Budapest, Püski, 1997) 84

[237] *Tóth Pál Péter:* Haza csak egy van? -- Menekülők, bevándorlók, új állampolgárok Magyarországon (1988 - 1994) (Budapest, Püski, 1997) 72

[238] Of this Romanians (38 810) and citizens of former Yugoslavia (14 071) together make up 45.3%.

[239] Of this Romanians (47,515) and citizens of former Yugoslavia (12,869) together make up 52.5 % Data directly communicated to the author.

[240] The stocks of foreign population in Hungary were (on December 31): 1994 - 137,900; 1995 - 139,900; 1996 - 142,500. SOPEMI, *Trends in International Migration, Annual Report on Migration, 1998*, Continuous Reporting System on Migration (Paris, OECD, 1999)

[241] See for, a recent effort, Migrant trafficking and human smuggling in Europe A review of evidence with case studies from Hungary, Poland, and Ukraine, IOM (*Franck Laczko & David Thompson*, eds.) Geneva (2000), especially pp. 29-38.

TABLE 6. ARRESTS BY THE BORDER GUARD FOR ILLEGAL BORDER CROSSINGS 1991–2000

Year	Inbound Arrests	Outbound Arrests
1991	8,348	13,904
1992	5,318	9,061
1993	2,814	8,051
1994	2,219	7,087
1995	2,100	6,081
1996	1,705	5,081
1997	3,045	5,896
1998	2,205	7,896
1999	1,978	4,347
2000	2,186	3,472

Source: http://www.b-m.hu/hatarorseg/hatarorizet.html and direct communication to the author

The difference between the numbers inward and outward is explained by the fact that many people have the right to enter Hungary legally and therefore do not commit an offence by doing so, but on leaving, do not possess the required documents (e.g. Schengen or national visa, or means of subsistence) to enter Austria, Slovenia or Slovakia, and so try to leave illegally.

Interestingly enough, statistical data does exist on illegal crossings and attempts to cross. Assuming that the majority of would-be crossers are apprehended, the difference between the numbers below and those above is a rough indicator of successful crossings. This indicator is perforce approximate because some attempts are thwarted by the police and not included in the following table provided by the National Border Guard.

TABLE 7. COMBINED BORDER CROSSING STATISTICS 1991–2000

Year	Combined Successful and Unsuccessful Border Crossing Attempts
1991	29,092
1992	20,358
1993	15,021
1994	12,988
1995	12,028
1996	10,579
1997	12,432
1998	18,020

Source: http://www.b-m.hu/hatarorseg/hatarorizet.html

In an attempt to stop people trying to cross the border illegally towards Austria, Slovenia and Slovakia on their way to the West, the Border Guard introduced a preliminary filter at entry points to check that would-be immigrants fulfil requirements for stay in Hungary or for entering a neighbouring country if that is their stated purpose. As the web page of the National Border Guard states, this practice, launched in October 1991, 'initiated from an order of the chief of the Border Guards and later [from 1 May 1994] as provided by the Act on Foreigners'.[242] As a result of this monitoring of incoming foreigners, a significant number of aliens have been denied entry.

[242] Source: http://www.b-m.hu/hatarorseg/hatarorizet.html (9 January 2000).

TABLE 8. TOTAL DENIALS OF ENTRY (RETURN AT THE BORDER) 1991–2000

Year	Denials of Entry at Border
1991	236,323
1992	855,997
1993	723,669
1994	268,546
1995	328,028
1996	252,242
1997	54,672
1998	32,854
1999	31,881
2000	25,798

Source: http://www.b-m.hu/hatarorseg/hatarorizet.html and data directly communicated to the author

These figures include all kinds of reasons including the bad mechanical state of repair of a vehicle and other causes not related to this study. Nevertheless the very high figures for 1991–1992 are a source of concern if one bears in mind the Serb-Croat and the Bosnian wars taking place in neighbouring (former) Yugoslavia![243]

A more precise indicator of migration-related offences may be seen in the number of expulsion orders issued by the border guards.

[243] Author assumes some inconsistency in the data. Probably, the very large figures are based on guesses of unrecorded events. Whereas, the smaller figures for the more recent years, on the one hand, indicate the learning process by potential entrants and also the disappearance of certain types of movements giving rise to frequent denials of entry (e.g., petty trade across the border involving several crossings per day.

TABLE 9. EXPULSION ORDERS ISSUED BY THE BORDER GUARD BY COUNTRY OF ORIGIN 1995–2000

Origin	1995	1996	1997	1998	1999	2000
Romania	4,275	4,787	6,291	3,154	6,679	7,621
Yugoslavia	2,569	2,011	2,309	6,944	2,301	767
Turkey	1,034	738	270	267	172	163
Ukraine	183	181	229	219	108	200
Africa	0	248	53	448	96	25
Asia	40	252	369	1,244	427	144
Total	**10,053**	**9,259**	**9,521**	**15,981**	**11,673**	**12,016**

Source: Data provided by the Border Guards to the author and http://web.b-m.hu/ and data directly communicated to the author

Of the nationalities not mentioned in the above table, only Afghanistan, Algeria, Bulgaria, China, Egypt, Iraq, and Moldavia had more than a hundred citizens per year turned away by the border guards.

The last pointer towards a greater understanding of the size and trend of illegal border crossings is the number of proceedings initiated by border guards for the crime of human trafficking.

TABLE 10. CRIMINAL LAW PROCEEDINGS INITIATED AGAINST SUSPECTS IN HUMAN TRAFFICKING 1996-2000

Year	Number of Criminal Proceedings
1996	227
1997	305
1998	558
1999	543
2000	588

Source: Data provided by the Border Guards to the author

The data refers to the number of proceedings. Most involve several individuals and several acts of trafficking (the number of victims of these traffickers was 6,467 in 1999 and 4,158 in 2000).

The increase in number of traffickers against whom proceedings were initiated, and the number of expulsions involving non-Europeans leads to the analysis of the movement of those applying for refugee status. The major challenge of the last three years has been that faced by the Hungarian refugee organization[244] with an unprecedented number of asylum seekers from non-European countries.

3.II.B.2 Hungary as a Country of Asylum

The period since 1988 can be divided into four phases by origin of would-be immigrants and the state of the relative norms. The first period lasted from 1987 until mid-1991 with mainly asylum seekers from Romania. The second includes the Serb-Croat war and the early

[244] The generic term 'Hungarian refugee organization' means the formal government entity entrusted with status determination and assistance to refugees and all other elements of the state system (from border guards to municipalities) performing legally designated roles in taking care of asylum seekers and refugees. The formal entity's name and position has changed over time. An inter-ministerial committee was first replaced by the Refugee Office of the Ministry of Interior in April 1989 and renamed as the Office for Refugee and Migration Affairs in 1993. It existed as a semi-independent organization under the aegis of the Ministry of Interior until 1 January 2000 when it became incorporated as a directorate into the Office of Immigration and Nationality Affairs of the Ministry of Interior.

phases of the Bosnian conflict until the end of 1992. The third was the relatively calm half-decade until 1998, dominated by the arrival of asylum seekers from Bosnia–Herzegovina and Yugoslavia. The fourth phase is the present, typified by an explosion of asylum seekers mostly non-European that the Hungarian refugee system is called upon to absorb.

In the first three periods, two parallel systems of refugee status determination were in force. Besides the Hungarian Government's refugee determination procedure, the UNHCR Budapest Office, set up in 1989, ran a parallel determination system and granted asylum-seekers protection under the UNHCR. This was provided for by Hungary's signature of the 1951 Refugee Convention and its 1967 Protocol with geographical reservations, allowing the Convention's application to asylum seekers fleeing European events.

3.II.B.2 (a) The first phase

The implementation of the Refugee Convention and other legislative acts regulating refugee procedure and status[245] was preceded by the gradual involvement of the Hungarian political leadership in the issue of escapees from Romania. The Communist Party[246] and the Government allied themselves with, and, with increasing openness, took over responsibility from NGOs and religious institutions declaring their intention to aid both Hungarian national asylum seekers from Romania and also GDR citizens seeking an escape route to the West through Hungary. The first indicator of these intentions was a Government Decree on the 'Settlement Fund' passed on 28 June 1988, allocating resources from the budget to care for asylum seekers, euphemistically avoiding the term 'refugee', referring instead to 'foreigners staying in Hungary for a longer duration'.

In the first period of influx, up to the summer of 1991 (when the Southern-Slav asylum seekers started to arrive) incomers were almost exclusively Romanian citizens, frequently crossing the 'green' border illegally. Seventy to ninety per cent of those were ethnic Hungarians

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[245] The Convention and the Protocol together became Law-Decree No. 15 of 1989 (1989. évi 15. tvr.), see Magyar Közlöny (Official Gazette) 1989 No. 60, p. 1,022, entering into force on 15 October, 1989. The Cabinet Decree (101/1989. Mt. rend.) on the and the Law-Decree on the status of refugees (1989. évi 19. tvr) entered into force on 15 October 1989. The 1989 Law, No. XXXI radically reshaping the Constitution and enacting the new rules on asylum was promulgated on 23 October 1989.

[246] The Hungarian Socialist Workers Party.

who spoke the language of the country they were coming to, were familiar with its customs and frequently had relatives and family members there. The attitude of the Hungarian Government was also simple: it treated these people as potential immigrants, Hungarian citizens who had lived as a minority in Romania but had then chosen to 'return' to their motherland. Hence, the authorities' priority was to speed up their integration and did not limit state action to protection and temporary solutions. Asylum seekers were granted residence and work permits without preconditions, they could move freely within the country and were exonerated from many bureaucratic formalities such as the need to supply documentary evidence of professional qualifications or formal conditions to obtain credit from a bank.

TABLE 11. THE NUMBER OF ASYLUM SEEKERS IN THE FIRST WAVE

Year	Cumulative	Romanian Origin	Formal Refugee Recognitions
1988	13,173	13,098	0
1989	17,448	17,171	185
1990	18,283	17,416	2,561
1991 1 Jan.-1 Jun.	2,629	2,103	149
Total to 1 Jun. 1991	**51,533**	**49,788**	**2,895**

Source: Authors calculations based on data of the Office of Refugee and Migration Affairs[247]

3.II.B.2 (b) The second phase

The second phase lasting from the summer of 1991 until the end of 1992 saw a completely different type of asylum seeker. By the end of 1991, out of 54,693 asylum seekers the percentage of Yugoslav citizens had reached 87 per cent while the percentage of Romanians had dropped to 10 per cent. The arrival of Croats, Serbs, Bosnian Muslims, Albanians and Russians meant that for the first time State organs were faced with a real refugee flow calling for swift action and courageous emergency solutions.[248] Contrary to the ethnic Hungarians who had come from Romania with the view of settling, refugees from Croatia and Bosnia did not intend to integrate but were waiting for the hostilities to end, at which point they could return voluntarily. The only alternative in their eyes was resettlement in the West.

[247] Unfortunately there is a lack of consistency in the data provided by the Office of Refugee and Migration Affairs. Figures for the same period may differ in subsequent communications. Even interviews with the person compiling the statistics could not entirely clear up the inconsistencies.

[248] Interesting details are revealed in Ágnes Ambrus' Backround Notes to Z. Hajtmanszki & B. Nagy, Honvágyók, (Longing for Home) Pelikán Budapest, pp.112-113 (1993).

TABLE 12. THE NUMBER OF ASYLUM SEEKERS IN THE SECOND WAVE

Year	Yugoslavian Origin	Romanian Origin	Formal Recognition	Cumulative
1991	48,000	1,791	285	52,064
1 Jun.- Dec. 31	(estimate)			
1992	15,021	844	472	16,204
Total	**63,000 (estimate)**	**2,635**	**757**	**68,268**

Source: Data of the Office of Refugee and Migration Affairs

3.II.B.2 (c) The third phase

As the fighting moved down to Bosnia in 1992 and the situation in Croatia stabilized, the stream of asylum seekers slowed and a change in its make up could be observed. Of the 5,366 people entering Hungary in 1993 seeking protection and some sort of status, 4,321 were ethnic Hungarians.[249] This showed that inhabitants of Serbia, especially from the Vojvodina region where most of the 450,000 ethnic Hungarians live, wished to flee either individualized persecution whether committed or tolerated by the state authorities, or the threat of being drafted into the Yugoslav army. These threats faded after 1995 and only reappeared in connection with the Kosovo conflict in 1998.

[249] Office of Refugee and Migration Affairs, Menekültügyi Statisztika (Statistics on Asylum), Budapest, 1994, (mimeo, without page numbers).

TABLE 13. THE THIRD PHASE IN HUNGARY'S RECEPTION OF ASYLUM SEEKERS

Classification	1993	1994	1995	1996	1997	Total
Yugoslavia (Serbia and Montenegro)	4,050	2,016	1,251	421	221	7,959
Bosnia-Herzegovina	377	324	3,610	116	86	4,513
Romania	548	661	523	350	131	2,213
Recognition Procedure Started	468	207	130	152	177	1,134
Formal Recognitions	361	239	116	66	27	809
Formal Denials	45	29	32	42	106	254
Cumulative	5,336	3,375	5,912	1,259	698	16,580

Source: Data of the Office of Refugee and Migration Affairs as compiled by the author (The number of recognitions in a given year may exceed that of the proceedings, because of the pending cases from the previous year. The figures refer to individuals not applications)

3.II.B.2 (d) Role of the UNHCR until 1998

A brief description of UNHCR activity is called for in addressing the issue of asylum seekers. It was very active and generous in the first two large influxes from Romania and Yugoslavia with contributions both financial and in terms of its accumulated experience in handling such situations. During the third phase, its role in status determination became increasingly important and was accompanied by a new pattern in financial support.

TABLE 14. STATISTICS CONCERNING STATUS DETERMINATION PROCEDURES AND RECOGNITION BY THE UNHCR BUDAPEST OFFICE IN RELATION TO NON-EUROPEAN ASYLUM SEEKERS.

Year	Applicants	Recognitions
1990	450	12
1991	380	15
1992	401	17
1993	261	35
1994	231	15
1995	460	62
1996	515	106
1997	1,411	132
1998 (Jan.–Mar.)	268	77
Total	4,377	471

Source: UNHCR Branch Office data sheets on file with the author

As the data in the above table shows, UNHCR had more procedures conducted after 1994, and in 1996 and 1997 more persons recognized as refugees, than the whole Hungarian administration. It is worth recalling that the UNHCR Office only had one or two people available to do the status determination whereas the Office for Migration and Refugee Affairs was operating through six 'local organs' usually with more than one determination officer.

3.II.B.2 (e) The fourth phase

The fourth phase matured after an extremely long gestation period. As far back as 1989 the Government decree on status determination procedure and the very summary executive decree on refugee status rights were adopted so as to have provisional legislation in place until the complete and final rules could be adopted in Parliament, expected within one or two years thence. However, the new Asylum Act (Number CXXXIX) only became law on 9 December 1997 and entered

into force on 1 March 1998 together with the two government decrees (Numbers 24 and 25 of 18 February 1998) regulating details of procedure and conditions of support to those protected.[250] The size of the challenge was seen in the growing number of asylum seekers ringing the doorbell of the UNHCR Office in Budapest. What would happen if the Government abolished geographical reservation, and gave the state organs exclusive responsibility for the upkeep of asylum seekers and the prompt decision on their status? Preliminary and unpublished analyses produced by Ministry staff warned against lifting the geographical limitation and spoke of enormous costs and insurmountable problems, such as the lack of data concerning conditions in the territory of origin.

Nevertheless combined UNHCR, European Union and domestic NGO sector pressure could no longer be resisted and the Government finally decided to give way to Parliament and adopt, with opposition support, the new regulations mentioned above allowing asylum applicants from all over the world to apply to the Hungarian refugee institutions.[251] UNHCR ceased determination procedures after March 1 1998.

As the following statistics show, the fears of the Hungarian government were partly justified. Indeed both the size and make up of asylum seekers has radically changed creating new and still unresolved problems.

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[250] The Law was published in Magyar Közlöny (Official Gazette) 1997 No. 112, at p. 8359, the two implementing Decrees in Magyar Közlöny (Official Gazette) 1998 No. 10, at p 698 and 705 respectively. Small but substantive amendments have occurred since which will be discussed in Section 3.III.

[251] The removal of the geographic reservation was adopted with a vote; 287 in favour, 4 against, (two independent MP-s one from the /then/ coalition one from the opposition) and 6 abstentions. (2 independent, 4 opposition MP). The Law itself had 271 supporting votes, 21 against and 3 abstentions. (Opponents were 17 members of the presently governing force [FIDESZ-MPP], 3 independent MPs and the Minister responsible for the intelligence services).

TABLE15. THE FOURTH PHASE IN HUNGARIAN INFLOW AND RECEPTION OF ASYLUM SEEKERS

Classification	1998	1999	2000	Three Year Total
Total Asylum Applicants	7,118	11,499	7,801	26,418
Yugoslavia (Serbia and Montenegro)	3,306	4,783	692	8,781
Afghanistan	1,077	2,238	2,185	5,500
Iraq	542	543	889	1,974
Bangladesh	337	1,314	1,656	3,307
Algeria	314	179	95	588
Sierra Leone	190	149	147	486
Turkey	153	91	116	360
Pakistan	127	322	220	669
Romania	124	16	36	176
Nigeria	102	130	94	326
Sri Lanka	81	174	249	504
Somalia	78	65	152	295
Armenia	51	189	123	363
India	61	121	235	182
Ghana	25	90	22	137
China	10	120	198	328
Bosnia-Herzegovina	3	322	5	325
Total Recognition Procedures Started	7,118	11,499	7,801	26,418
Total Formal Recognitions	362	313	197	872
Total Formal Stay Authorizations	232	1,776	680	2,688
Total Procedures Terminated	1,174	5,766	4,916	11,856
Total Formal Denials	2,790	3,537	2,978	9,305
Ratio of Protection (Status/Authorization) to Denial	1:4.9	1:1.7	1:3.4	1:2.6

Source: Data of the Office of Refugee and Migration Affairs as compiled by the author[252]

The table shows those groups that had at least 80 applicants in one of the three years. In order to realistically assess these figures, it should be borne in mind that after the entry into force of the 1997 Law on

[252] See also, Asylum Trends in Europe, 2000, Part II United Nations High Commissioner for Refugees (UNHCR), 30 January 2001, Table 10, p. 28.

asylum, whoever had been recognized earlier by the UNHCR in Budapest and were still in the country had a right to refugee status under the new Law. Therefore the 362 recognitions in 1998 include 193 who had been mandate refugees before, thus reducing 'new' recognitions to 169 in 1998.

It would be hard to exaggerate the extent of the challenge. Kosovo Albanians and the Hungarians from Vojvodina and other parts of Yugoslavia practically represent the whole of the Yugoslav asylum seeker group. Europeans made less then ten per cent of the remaining applications. This shows that Hungary has become a permanent fixture on the global refugee scene and therefore must seek adequate responses to this, in other words, beyond an unjustifiable idiosyncratic response promoting nationalistic interests only. This is certainly a change from the early period (1988–1991) when the system handled a large caseload, but with very specific goals in mind.[253] Since the characteristics of the period will be the subject of the subsequent analysis one may stop here, not without however an important note concerning the use of the data.

3.II.B.2 (f) Problems with the data (where have all the new arrivals gone?)

There are enormous problems with data reliability. A glance at the statistical overview published by the UNHCR in July 1998[254] showing zero asylum applications in Hungary before 1995, and even for later years, numbers much lower than those in use within Hungary is sufficient confirmation. The problem is not Hungary specific. John Salt, a leading expert on European migration issues bitterly complained in 1997 about the patchy availability of migration data in Europe, its ambiguity and inconsistency and the specific Central and East European difficulties with the statistical systems.[255]

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[253] See *Fullerton, Maryellen*, Hungary, Refugees, and the Law of Return, 8 International Journal of Refugee Law 4 pp. 499-531 (1996). Fullerton thought that the system in essence worked as a disguised immigration regime promoting the 'return' of Hungarians from the neighbouring countries, with the help of the international community.

[254] UNHCR 1998 Refugees and Others of Concern to UNHCR Statistical Unit, UNHCR, Geneva, July 1998, at p. 89 (Table 17) (The 1997-78 State of the World's Refugees' statistical annex does not even list Hungary, or Poland, among the industrialised states which received applications in the period 1987-1997).

[255] *Salt, John*: Current Trends in International Migration in Europe (Strasbourg Council of Europe, 1997 [CDMG (97) 28]) (5-6).

Caution is called for especially regarding data relative to the early phases. They are certainly grossly inflated: any person that made contact with the refugee authorities immediately appeared in the 'new arrival' register. An analysis of what happened to new arrivals supports this caution.

TABLE 16. OUTCOME FOR NEW ARRIVALS BETWEEN 1987–1997

Refugee Status Determination Started	6,069	4.49 Per cent
Temporary Protection Granted	73,985	54.7 Per cent
No Trace of Further Move	55,023	40.7 Per cent
Total	**135,077**	

Source: Data of the Office of Refugee and Migration Affairs Yearly statistics for 1997 (in Hungarian, mimeo) p. 5

Another indication that the figures in the new arrival register are inflated is the stock data. Examining the main ways asylum statistic registers fail to include arrivals gives some idea of the size of distortions.

Most asylum seekers from Romania (showing up as 'new arrivals') never entered any procedure but went through an (informal) immigration procedure. Therefore by late 1991 very few were still maintained by the refugee system. Practically everyone who stayed in Hungary has in the meantime achieved permanent immigrant status or become naturalized.

Asylum seekers fleeing the Serb–Croat war either returned home in 1991–1992 or managed (legally or illegally) to get to the West. By the end of 1992, 3,800 were living in reception centres and a further 19,100 in private accommodation and receiving a regular allowance from the Refugee Office paid through the local administration.[256] In December 1993 of those who had come from Yugoslavia and were in possession of a temporary protection certificate, 2,327 lived in

[256] 'Összefoglaló adatok' Mimeo by the Refugee Office of the Ministry for Interior, 20 January 1993.

reception centres and 7,211 outside.[257] By the end of the following year the numbers dropped to 1,693 and 6,045 respectively.[258]

Despite the lack of exact figures on voluntary return and resettlement of people temporarily protected from the Bosnian war, it is fair to assume that most of those who came managed to get back (if not to their homes, at least to Bosnia-Herzegovina), and a smaller number either resettled within the organized framework in the West, for example in Canada or Australia or simply crossed the (Western) border illegally. Several hundred Bosnians entered the immigration process in Hungary and have since achieved long-term or permanent immigrant status. Weeks before the entry into force of the new regulation in January 1998 there were 428 living in the reception centres[259] and another 2,573 still carrying the 'temporary protection' identity card. Of these, 1,567 were of Hungarian ethnic origin, 520 Croat, 760 Bosnian, 113 Serb, and 41 other.[260]

In recent years, especially since 1998, there has been a rise in another way of 'leaving the statistics'. The person is stopped by the border guards or the police as a foreigner without right to stay or attempting an illegal border crossing, then subjected to a police alien procedure prosecuting the minor offence of attempting to cross the border or stay in Hungary illegally, usually leading to expulsion. During this process the foreigner applies for refugee status and during the determination procedure just disappears, presumably across a Western European border. It was precisely this phenomenon that caused consternation first to Austria, then as Austria became a member of the EU and later the Schengen area, to other participating EU Member States.

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[257] 'Menekültügyi Statisztika' Data of the Office of Refugee and Migration Affairs Yearly Statistics for 1993 (in Hungarian, mimeo) unnumbered page.

[258] 'Menekültügyi Statisztika' Data of the Office of Refugee and Migration Affairs Yearly statistics for 1994 (in Hungarian, mimeo) unnumbered page.

[259] Debrecen, Békéscsaba and Bicske. (In a small village in Southern Hungary called Vése there was also a facility hosting temporarily protected persons, although formally not qualifying as a reception centre).

[260] Data of the Office of Refugee and Migration Affairs in a mimeo (dated 4 February 1998).

3.II.C The Challenge Posed by the EU

3.II.C.1 Bordering Austria and the European Union

Over the last decade the perception of Hungary and her refugee-related activities has changed. Letting East German escapees through the Hungarian–Austrian border in 1989 and not sending back tens of thousands of Romanian citizens in 1988–1989 was seen as a courageous move by a socialist state breaking with camp discipline. The only problem was that many of the souls saved tried to move into Austria who, in response, was swift to introduce visa requirements for Romanian citizens on 14 March 1990[261] thereby thrusting the hero's mantle on to Hungary.

Up to then, these were national decisions with no repercussions on the European Community whose Member States were happy to note that Hungary was no longer producing asylum seekers, their only worry.[262]

The Serb–Croat war that started in 1991 was the first link in the chain of events that led Hungary to have a direct influence on interests of the West European States. It was in the interests of the European Community as well as the non-member Western European states, such as Austria, that Hungary took in as many asylum seekers as possible and offer a level of protection and upkeep that would ensure that only a few of those who arrived in Hungary would migrate further, whether legally or in an irregular fashion. This was a happy coincidence of intentions, because in those years Hungary's priority was to prove that it deserved acceptance as a developed, democratic, and human rights respecting nation.[263] Most asylum seekers agreed with this: they insisted on staying in reception facilities in the south of Hungary, next to Croatia, so that voluntary return could be easy and informal.

One of the consequences of Western Europe not recognizing asylum seekers from the Yugoslav conflicts as Convention refugees, or even securing them access to the determination procedure, was that the Hungarian government followed suit. In a wholly non-legal manner

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[261] *International Helsinki Federation for Human Rights, Österreichisches Helsinki Komittee:* Asylland Österreich: Zutritt Verboten? Wien, Juni 1990

[262] *Salt, John, Singleton, Anne, Hogarth, Jennifer,* Europe's International Migrants, Data, Sources, Patterns and Trends, London: HMSO1994, 213, Figure 10.20.

[263] See e.g., for further details *Nagy, Boldizsár,* Changing Trends, Enduring Questions Regarding Refugee Law in Central Europe in: *Pogany, Istvan ed* Human Rights in Eastern Europe Edward Elgar, Aldershot, 192 - 194 (1995).

most asylum seekers fleeing the Serb–Croat war, and later the Bosnian inferno, were *de facto* prevented from initiating a Convention-status claim. They received instead a legally non-existent status: that of the temporarily protected. Hungary abdicated independent policy-making on incoming persecuted people and aligned itself with West Europe without checking whether or not this was in conformity with international law, or Hungary's own legal requirements.

Hungary's 356-kilometre border with Austria became an increasing source of concern to Austria after the removal, in 1988, of the technical devices preventing illegal border crossing. Austria wished to send people back who had crossed the border illegally. While Hungary was obviously ready to take its citizens back and Austria was all to ready to oblige, the problem of third-country citizens, primarily Romanians, remained, who after the introduction of the visa requirement had no choice but to cross the 'green' border or try other methods of clandestine entry. Austrian pressure led to the conclusion of the readmission agreement discussed below, but that did not enter into force until the readmission agreement with Romania was also operational.

With Austria becoming an EU Member State on 1 January 1995 and its implementation, from 1 December 1997, of the 1990 Schengen Convention,[264] the border between the two countries became an issue of importance between the EU and Hungary and between the Schengen States and Hungary.

3.II.C.2 Legal and Policy Harmonization with the EU

The underlying aim of Hungary over the last decade has undoubtedly been the wish or need to harmonize its laws and policies with those of the EU.[265] As the Commission recalled in Agenda 2000, published in 1997:

'As stated in the April 1994 Memorandum accompanying Hungary's application for EU membership, "Since the formation of an independent Hungarian State 1,000 years ago, this country has been closely linked to Western cultures and values...Within the newly established democratic institutional framework the political conditions

[264] International Legal Materials, vol. 30, pp. 84 - 147, (1991).

[265] See e.g., Zellner Wolfgang/Dunay Pál: Ungarns Ausenpolitik 1990-1997, Zwischen Westintegration, Nachbarschafts und Minderheitenpolitik, Baden-Baden, Nomos, pp. 129-137 (1998).

for reintegration into the main trend of European development are now fulfilled. For Hungary, joining this process and using the achievements of European integration to carry out fully its social and economic modernisation is a historical necessity. It is also a unique possibility, for which there is no real alternative." Successive Governments since 1990 have maintained this as the essential objective of Hungary's foreign and domestic policy.'[266]

Early contacts with the EU did not cover justice and home affairs. These issues, especially illegal migration control, were left to other forums, such as the Budapest Group, and bilateral cooperation.[267] The Europe Agreement concluded between Hungary and the European Communities and its Member States in 1991[268] related to the first pillar and did not directly regulate issues under the third pillar. Only at the Essen European Council held on 9–10 December 1994 was it decided that the structured dialogue between the EU and the associated countries should cover the second and third pillar as well. The fairly unsuccessful structured dialogue was replaced with the accession partnership. At its meeting in Luxembourg in December 1997 the European Council decided that the Accession Partnerships would be the main feature of the enhanced pre-accession strategy. The Hungarian Accession Partnership[269] called for 'more effective border management systems, especially on the future borders of the European Union. [Attention] needs to be paid to visa policy. The fight against organized crime, including drug trafficking, trafficking in human beings, money laundering, counterfeiting, false documents and fraud must be intensified'.[270] The revised version[271] reiterated these priorities and stressed the need to increase capacity of the asylum system. In addition to the accession partnerships, the European Conference was meant to be a forum to discuss justice and home affairs.

Pressure to harmonize law and practice is continual. Even Agenda 2000 that incorporates the Commission's view on Hungary's accession called for the abolition of geographical reservation and stressed the

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[266] Commission Opinion on Hungary's Application for Membership of the European Union Brussels, Doc /97/13 (15 July 1997).

[267] See *Nagy, Boldizsár*, Migration between the European Union and Hungary and the Regulating Law: A Case Study, 3 European Public Law 3, pp. 381 – 386 (1997) (describes this cooperation in more detail).

[268] Signed on 16 December 1991, entered into force on 1 February 1994, OJ 1993 L 347/2.

[269] 29 June 1998 O.J. C 202/33.

[270] Accession Partnership, (29 June 1998 O.J. C 202/33) point 3.7 at p. 41.

[271] http://europa.eu.int/comm/enlargement/report_10_99/download_1999.htm (3 March 2001)

need to ensure sufficient provision to support refugees of non-Hungarian origin. It also called for substantive capacity building.

The same *leitmotiv* is seen in other documents. Article 8 of the Protocol incorporating the Schengen *Acquis* into the framework of the EU[272] adopted in 1997 together with the Amsterdam Treaty is clear:

'For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded *as an acquis which must be accepted in full by all States candidates for admission.*' (emphasis added)

The Joint Action Plan of the Commission and Council, adopted on 3 December 1998 in Vienna[273] reminds countries applying for membership, that 'Justice and Home Affairs will have a special significance for their application' even if JHA *acquis* could change 'over the pre-accession years'.[274]

Justice and Home Affairs negotiations within the framework of accession were started on 26 May 2000,[275] and, at the time of writing are still undefined. The Hungarian negotiating position[276] does not include the word 'derogation', but expresses diplomatically the wish to introduce a special visa regime for Romania, if by the time of accession, it is still on the list of countries whose citizens need a visa to enter the Union's territory. 'Historical necessity and unique possibility' argued in the Hungarian application for membership is still the prevailing view for Hungary's future. The question now is how heavily the burden of historic necessity will fall on the shoulders of the nation and the incomers and what it means in relation to the refugee scene.

3.II.D The Practice in its Changing Form

Mindful that this is not a historic study,[277] I shall make only brief reference to the past activities of those involved in the making of

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[272] *Duff Andrew* (ed.) The Treaty of Amsterdam Text and Commentary, pp. 280-284, (Federal Trust, London 1997).

[273] OJ C 19/1, 23.1.1999.

[274] Ibid, at p. 5, point 21. (This footnote should also pay tribute to the bureaucratic poets who invent such horrifying gems as this 'pre-accession years'.)

[275] http://www.mfa.gov.hu/euanyag/szi/eu/csatlstrategész.htm

[276] http://www.mfa.gov.hu/euanyag/szi/eu/csatlstrategész.htm

[277] For descriptions of the early period see: *Nagy, Boldizsár*, Before or After the Wave.

Hungarian refugee policy and will focus more on the developments leading to the adoption of the current regulation and its practice.

3.II.D.1 Impact of Non-Domestic Actors Including Western European States and the EU

The international factors that influenced formation of Hungarian refugee policy and practice in the early period was generally free of the restrictive tendencies of Western European States and, in particular, of the EU. Back in 1988–89 those systems were themselves much more liberal, being prior to the London Resolutions.[278] However, the roles played by the UNHCR and the Council of Europe in the early 'imprinting' period was a more important reason.

UNHCR brought posture, standards, money and experience to Hungary. UNHCR's message was clearly formulated: refugee treatment should not be subject to socialist-state politics within the bloc, but be non-political and humanitarian. Of course this broached politics proper, since it entailed the break down of bilateral relations with Romania, breaching (unpublished) bilateral agreements that obliged Hungary to forcibly return Romanian citizens unwilling to return to the oppressive regime and also stop them from trying to cross into Austria. UNHCR gave moral, political and financial support[279] to

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Thoughts about the Adequacy of the Hungarian Refugee Law, in: International Journal of Refugee Law, Special Issue, 3 (1991) No. 3; *Baehr Peter R/Tessenyi Géza (eds)*: The New Refugee Hosting Countries: Call for Experience - Space for Innovation (Utrecht SIM Special No. 11, 1991); *Fullerton, Maryellen*: Hungary, Refugees, and the Law of Return, in: International Journal of Refugee Law, 8. (1996) No, 4. 499 - 531; *Adelman, Howard/Sik Endre/Tessényi Géza (eds.)*, The Genesis of a Domestic Regime: The Case of Hungary (Toronto, York Lanes Press, 1994); *Szabó Máté*: From 'Catacomb' to 'Civic' Activism: Transformation of Civil Right Movements in Hungary after 1989 in: *Fullerton, Maryellen/Sik Endre(Tóth Judit:* From Improvisation toward Awareness? Contemporary Migration politics in Hungary Yearbook of the Research Group on International Migration of the Institute for Political Science of the Hungarian Academy of Sciences, 1997, Budapest, 1997, pp 40 - 54; A thoughtful and well informed retrospective is offered by: *Piotr Kazmierkiewicz:* Integration of Hungary into the European Migration and Asylum Policy Framework: Actors and Strategies, presentation at the conference: Between the Bloc and The Hard Place: Moving towards Europe in Post-Communist States? 5-7 November 1999 School of Slavonic and East European Studies, University of London (unpublished manuscript).

[278] Adopted at the London meeting of Ministers responsible for Immigration, 30 November and 1 December 1992 Reproduced in UNHCR: Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons Volume II. Regional Instruments, Geneva, 1995, at p. 455.

[279] In the first four years (1989-1993) UNHCR spent 1,752 million HUF in Hungary that at that time corresponded roughly to 10 million USD.

break away from the past cooperation line involving support for other oppressive regimes.

Material support by the UNHCR had three priorities; assistance to help victims of the Yugoslav crisis,[280] settlement (integration) of protected persons,[281] and care and upkeep provided by implementing agencies to non-European refugees.[282]

Money is not all. UNHCR's intellectual, political and moral influence was and still is equally important. The four successive representatives[283] had different agendas, but the last three certainly were important actors in the political field, pressing the Government to lift the geographical reservation and adopt a new asylum system. During Mr. Philippe Labreveux's term in 1994, UNHCR decided to challenge the Hungarian government's policy of keeping temporarily protected persons in limbo, and set up its own 'small business' programme to get people on the road to integration.[284] He also acted as a catalyst and spiritual mentor to the Hungarian non-governmental sector. Since 1995, UNHCR has provided substantial grants enabling the function of a nation-wide, free legal-aid service and also a refugee counselling and integration project run by social workers.

UNHCR has been the authentic interpreter of the 1951 Refugee Convention in three ways; firstly by the practice in status determination cases it followed until 1998. This may have been the least impressive aspect because office decisions to grant or deny protection were extremely short, unmotivated, and the procedure itself (especially by appeals being handled by the same office) could not be taken as a set pattern. However, that almost 500 non-European asylum seekers were recognized as refugees under the UNHCR mandate[285] together with UNHCR's tireless efforts to improve their chances of finding private housing and work played an important role in educating and preparing Hungarian bureaucracy (and to a lesser extent society) to a substantive, non-exclusionary response to the arrival of

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[280] The amount spent in this program between 1991 and 1997 was above 2.2 billion Hungarian Forints. See UNHCR Branch Office Workshop With Hungarian Delegation (sic) Geneva, 17-18 February 1997, UNHCR Programmes in Hungary.

[281] Ibid, (spending approximately 500 million HUF between 1989 and 1993).

[282] Ibid, (amounting to 170 million Forints between 1991 and 1997).

[283] Mr. Huang (1989 - 1991) Mr Thomas Birath (1991 - 1994), Mr Philippe Labreveux (1994 - 1997), Mr Stefan Berglund (1998 - current).

[284] Philippe Labreveux: Jegyzetek a kisvállalkozói támogatási programról, avagy hogyan lehet az önállóvá válást elősegíteni. in: *Sik, Endre/Tóth, Judit:* Migráció és Politika, Az MTA Politikai Tudományok Intézete Nemzetközi Migráció Kutatócsoport évkönyve, 1996, Budapest, 1997, 11-16.

[285] See supra, Table 14 for detailed figures.

asylum seekers from the developing world. Secondly the Convention was interpreted in formal educational settings. Thirdly, in legislation, UNHCR has been involved deeply and successfully in legislation efforts on stay and immigration of foreigners,[286] and in the long process leading to the adoption of the Asylum Law.[287]

The Council of Europe was the first Western European institution that opened its doors to Hungary. [288] Interest between the two was sincere and keen. Membership of the Council of Europe was soon followed by the entry into force in Hungary of the ECHR,[289] which had a twofold impact. Firstly, human rights were reawakened from the lethargy they had been in under the 1966 UN International Covenants of Human Rights hitherto unimplemented despite being part of domestic law since 1976. Secondly, Hungarian presence in the Parliamentary Assembly and in the CDMG and CAHAR from 1992 onwards contributed to the non-parochial approach of those who regularly attended these meetings.[290]

The fundamental EU influence on the process up to the screening and the accession negotiations have been outlined above.[291] Here a few general remarks are necessary. The Union as such (as distinct from its Member States) had little direct impact on the Hungarian refugee policy. No serious negotiations on Justice and Home Affairs were held until 1996, and even afterwards attention was focused on prevention of illegal border crossings, cooperation against organized crime and harmonization of visa policies.[292] A non-reciprocal cooperation agreement with CIREA was probably the highest profile asylum issue. However, the shadow of the Union and its *acquis* started to loom large after prospects for accession became real. The image was distorted: it concentrated on restrictive techniques, on host third-country concepts and safe country of origin approaches, on carrier sanctions and enhanced physical border controls. Schengen is frequently viewed as if embodying Union requirements. The 1995 Resolution on minimum

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[286] Act No LXXXVI of 1993.

[287] Act No. CXXXIX of 1997.

[288] 6 November 1990.

[289] 5 November 1992.

[290] E.g., one might think of Ms Zsuzsa Szelényi who presented a report (Doc 6633, 12 June 1992) in the Parliamentary Assembly on migratory flows in Czechoslovakia, Hungary and Poland and was instrumental in securing the inclusion of a proper *non-refoulement* clause into the Hungarian Aliens' Law, or Ms. Judith Tóth, a long time-member of CAHAR and leading expert on the Hungarian refugee scene.

[291] See 3.II.C.2.

[292] *Masyka, Edit/Harmati, Gergely (eds):* Egységes belbiztonsági és jogi térség Európában (Budapest, ISM, 1999) 359-360.

guarantees of asylum procedures[293] or the argumentation of the Commission suggesting a fairly liberal regime for the temporary protected were hardly ever mentioned outside liberal NGO circles. The EU's role in the formulation of the new Hungarian refugee policy was like that of a wealthy, threatening and exacting aunt. Hopeful relatives seeking her goodwill and approval carefully measure her words and intentions because conforming to her customs, values and unspoken desires are the preconditions of enjoying the benefits her wealth may bestow on the poor expectant relative. Without ever pointing to the precise source of restriction in the norms formally adopted within the Union or identifying how a proposed Hungarian norm would correspond with the loose, divergent and inconsistent practice of the EU Member States, frequently presented as if they were consistent and settled, government officials and MPs repeatedly referred to the 'EU practice' and the requirements of accession as justification for the proposed move.[294]

The influence of individual States like Germany and Austria cannot be overstated. In the eyes of many Hungarian politicians who emerged from the non-political world in 1989–1990, Germany had been and still was the trail-blazing nation whose practice ought to be emulated.[295] Even seasoned politicians, like Prime Minister Horn, who led the government between 1994–1998, had 'special relationships' with their German counterparts after the opening of the border between Austria and Hungary for GDR citizens escaping to the FRG in 1989. The state bureaucracy incorporated many (elderly) people who spoke German and not English and therefore promoted official links with German-speaking countries. The 1993 amendment of the German Constitution and the 1996 judgement of the Constitutional Court on the legality of introduction of restrictive categories and the practice of their application[296] were closely followed in Hungary and seen as a confirmatory licence to introduce safe country rules. It is remarkable that, long before the new asylum law containing references to the third countries was adopted (let alone implemented), the Hungarian Constitution was changed and Article 65 on asylum was supplemented with an exclusion clause denying protection for anyone

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[293] OJ C 274/13, 19.9.1996.

[294] See e.g., the speech of Mr Pozsgai Member of Parliament, *rapporteur* of the commission on self-government and police issues on 21 September (Records of the House, 21 September 1997 - in Hungarian).

[295] In fact there have always been strong links to the 'German' law and legal institutions going back the Holy Roman Empire of which Hungary was a part.

[296] BVerfGE 94, 49 - Sichere Drittstaaten at: http://www.uni-wuerzburg.de/rechtsphilosophie/ glaw/bv094049.html (27 February 2000).

who either in his or her own country of origin or in 'another country' enjoyed protection.[297] Germany (being the primary destination of those going through Hungary) was also ready to offer education, technical tools and visits by officials involved in migration control. Recently EU and German involvement became more closely linked. Germany is the lead 'twinning partner' (together with Denmark and the Netherlands) in asylum related issues. The project, which started in October 1999 with a cost factor of 475,000 euros aims at adapting the Hungarian substantive law, procedure and institutions to the EU *acquis* and developing comparable standards linking the technological and legal capacities and training the trainers. Another broad-based project, envisages the language training of 1,620 trainees with a budget of Euro 850,000.[298]

Likewise, the role of foreign NGOs and professional organizations in influencing Hungarian actors was fundamental. The 1991 conference on the new refugee hosting countries featuring eminent speakers such as Howard Adelman, Guy Goodwin-Gill, Leon Gordenker and James Hathaway serves as an example.[299] Such leading figures of academia and practice[300] together with experienced organizations such as ECRE, Interights and AIRE not only had access to their counterparts in the NGO and academic sectors, but also were, and still are frequently invited by State organs to take part in formal training sessions or conferences.[301]

Caritas, the Maltese Charity Service, Interchurch Aid and foreign Red Cross organizations also indirectly influenced the viewpoint of policy makers. Their Hungarian branch fieldwork (including sometimes running autonomous reception centres) showed how assistance and integration could be promoted in a more tactful, less bureaucratic way with efficient use of much fewer resources.

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[297] See infra, note 327.

[298] The source of information on the current PHARE projects in the field was a communication from the Commissions Delegation in Hungary

[299] See their contributions and further details on the conference in: *Baehr Peter R/Tessenyi Géza (eds)*, The New Refugee Hosting Countries: Call for Experience - Space for Innovation (Utrecht SIM Special No. 11, 1991).

[300] Other eminent scholars and activists whose imprint on the patterns of the Hungarian system is visible include; Elspeth Guild, Arthur Helton, Daniéle Joly, Nuala Mole and several authors of the present volume.

[301] See e.g., *3rd International Symposium on the Protection of refugees in Central Europe, Report and Proceedings* UNHCR, European Series, Volume 3 No. 2, Geneva (1997).

3.*II.D.2* *The Effect of Bilateral Treaties*

Hungary was active in building a network of re-admission agreements. Although the Austrian pressure to conclude one was fairly strong, it had to wait until the continuity of the chain in the direction of the countries of origin was assured, and the re-admission agreement with Romania, was signed. At present Hungary has re-admission agreements and in some cases executive agreements for their implementation with all its neighbours except Yugoslavia, and also with several non-neighbouring States.

TABLE 17. RE-ADMISSION AGREEMENTS CONCLUDED BY HUNGARY IN THE ORDER OF THEIR ENTRY INTO FORCE AS OF 1 JANUARY 2001

Partner	Date of Signature	Entry Into Force	Law Number
Romania	1 September 1992	30 October 1994	1995 XXV
Austria Original	22 October 1992	20 April 1995	1996 V
Austria Extension	17 April 1997	12 February 1998	1998 LIII
Slovenia Old	20 October 1992	22 May 1996	1996 XXIII
Slovenia New	5 February 1999	29 July 1999	1999 XXXI
Ukraine	26 February 1993	5 June 1994	1995 XXIV
Switzerland	4 February 1994	8 July 1995	1996 IV
Slovakia	5 August 1994	20 April 1995	1996 VIII
Czech Republic	2 November 1994	5 August 1995	1996 VII
Poland	25November 1994	5 August 1995	1996 IX
Croatia	9 December 1992	2November 1996	1998 LII
Bosnia-Herzegovina	21 April 1996	No Promulgation	
France	16 December 1996	30 December 1998	No Promulgation
Italy	20 May 1997	9 April 1999	1999LXXIX
Moldova	4 June 1997	2 January 1998	2000 XXIV
Germany	1 December 1997	1 January 1999	1999LXXVIII
Bulgaria	11 November 1998	16 July 1999	1999 LXXVII

Source: Ministry of the Interior, and collection of Hungarian laws in force

Further re-admission agreements are sought by the Hungarian Government with Belgium, Greece, Luxembourg, Pakistan, Portugal, Spain, Russia, Turkey and Yugoslavia.[302] February 2001 saw the

[302] *4th International Symposium on the Protection of Refugees in the Central European and the*

signature of the agreement with Portugal, the conclusion of expert negotiations with Greece, the start of negotiations with the Benelux countries aimed at a single agreement and the preparation for signature of an agreement with Albania. After the late 2000 landslide and the consequent political changes in Yugoslavia, negotiations on a readmission agreement with that country could finally start in March 2001. The theoretical implications of the re-admission agreements are well known.[303] They may serve two purposes in the asylum context: either to enable the application of the safe (host) third country rule and transfer the asylum seeker (and the responsibility for the status determination) to another country, or enable the return of the rejected asylum seeker to the country of origin. In the EU–Central European context re-admission agreements have a more specific but no less important function. They are the means of avoiding application of the DC by relieving the responsible partner EU State from the determination procedure. The DC Article 3 (5) grants the right to the Parties to 'send an applicant for asylum to a third State' and the London Resolution on host third countries clearly instructed them (in point 3 (a)) 'to examine whether or not the principle of host third country can be applied. If that State decides to apply the principle, it will set in motion the procedures necessary for sending the asylum applicant to the host third country, before considering whether or not to transfer responsibility...pursuant to the DC'.

The idea of subsuming asylum seekers under the broader group of illegal migrants who can be returned to another country met criticism. UNHCR clearly articulated its requirements:

> 'To ensure that one of the State parties will give the asylum application due consideration within its own status determination procedure, the provisions of such agreements should, furthermore, explicitly relate to the responsibility of that country to examine asylum requests and of the sending State to advise the authorities of that country of the basis of removal decisions. The latter responsibility is intended to avoid the possibility that the receiving state believes the application to have been rejected on the merits.[304]

Baltic States, Report and Proceedings, Vienna, UNHCR 1999.

[303] In the Central and Eastern European Context, see e.g., *Sandra Lavenex:* Safe Third Countries Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, Budapest, CEU Press, 78-82 pp. (1999).

[304] 'Re-Admission Agreements, "Protection Elsewhere" and Asylum Policy,' August 1994, reproduced in: *3rd International Symposium on the Protection of Refugees in Central Europe, Report and Proceedings*, UNHCR, European Series, Volume 3 No. 2, Geneva. 1997, cited from p 467.

Neither the 'first generation' of the readmission agreements concluded by Hungary nor subsequent ones took heed of this requirement. The shift that can be seen after the EU Council recommendation on specimen bilateral re-admission agreements to be used between EU Member States and third States adopted on 30 November 1994 and published in 1996[305] was an explicit effort to reflect the desires of the EU Member States to open re-admission gates only as wide as they alone wished, even at the price of creating a bottleneck in Hungary with the neck pointing East thus restricting many more than coming from the West.

The Austro-Hungarian re-admission agreement is a case in point. Article 3 of the 1992 text only required re-admission of third country nationals who had; illegally crossed the Austrian-Hungarian border, *and* either had a legal title to enter the readmitting country (visa-free regime, visa, stay permit or refugee status) or could be sent on to a third state in accordance with a treaty in force.

The 1997 amendment altered this Article alone. It only maintained the requirement that the border have been crossed illegally and dropped all others, expressly stating that it was immaterial whether the third country national was legally or illegally on the territory of the Contracting State before illegally crossing the border. The new text also declares that even an entry ban (usually following an expulsion order) is no obstacle to re-admission! No need to stress (as the numbers will show) that the formal symmetry hides a grave asymmetry: it is Hungary who re-admits the third country nationals and Austria, who sends them out.[306]

Why this generosity? The explanatory memorandum submitted by the Hungarian government to Parliament when suggesting ratification of the amendment was clear enough. After making reference to the 1994 November Recommendation of the Council concerning the specimen agreement and the EU Member States' efforts to conclude agreements corresponding to its content, the memorandum recalls that the 1992 agreement sets 'serious constraints to the re-admission of third country nationals who had illegally crossed the state border.' Then comes the plain confession: 'Since Hungary has declared its intention

[305] OJ No. C 274, p. 20, 19.09.1996.

[306] Ironically this was envisaged by the Austrian Government's explanatory memorandum when submitting the amendment to the *Nationalrat*. In relation to costs incurred by the legislative proposal the Austrian government assured the members of Parliament that 'It is expected that expenditures of the Federation will be saved through the agreement.' Regierungsvorlage, 895 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX GP http://www.parlinkom.gv.at/pd/pm/XX/I/texte/008/I00895_.html

to become a full member of the EU as soon as possible, it was necessary to amend [the 1992 agreement] in order to bring it into harmony with the EU recommendation.'[307] This necessity pervades in the Government Resolution of April 1997[308] that uses a strange language when it declares that:

'The Government agrees to the amendment of the treaties on return and re-admission of persons who have crossed the state border illegally or who stay illegally within the state territory, concluded between the Government of the Hungarian Republic and governments of the European States [sic] in accordance with the rules of the EU.'

Who elicited such approval by the Government is question unanswered in the text of the resolution.[309]

Nevertheless the momentum is there, as the replacement of the old Hungarian–Slovene re-admission agreement of 1992 with the new 1999 version confirms. The pattern is identical: the old agreement had the same double requirement as the old Austrian one, (illegal entry into the requesting country plus either a right to stay or a treaty entitling to further removal in the readmitting country). The new one reduces it to illegal entry.[310]

At the same time the re-admission agreements with Romania and Ukraine are restrictive. They do not provide for re-admission of the third country national unless the national is a permanent resident in the country (Ukraine) or legally stayed in the country (Romania). A quick look at the statistical data confirms the expectations.

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[307] The text of the explanatory memorandum is available in the electronic collection of the Hungarian laws, KJK-Kerszöv, monthly publication on CD ROM.

[308] 2094/1997. (IV. 18.) Korm. határozat on the amendment of readmission agreements concluded with the governments of the European states.

[309] Note that the reference to 'European states' embraces agreements concluded with non-EU member states, which means that the Government binds itself to enforce EU norms in a fully non-EU context.

[310] See Article 2 of the old and the new agreement as identified in the table of the main text.

TABLE 18. PERSONS RE-ADMITTED M AND RETURNED TO NEIGHBOURING COUNTRIES UNDER RE-ADMISSION AGREEMENTS IN 1998–2000

Year	Re-admitted from Neighbouring Country under Re-admission Agreement			Returned to Neighbouring Country under Re-Admission Agreement		
Relation	Total	Citizen of Hungary	Third Country National	Total	Citizen of the Partner Country	Third Country National
Austria 1998	3,764	72	3,692	28	14	14
1999	3,261	104	3,157	13	2	11
2000	3,490	60	3,430	31	2	29
Slovenia 1998	1,163	0	1,163	4	3	1
1999	926	0	926	4	1	3
2000	1,115	0	1,115	18	0	18
Croatia 1998	27	0	27	37	31	6
1999	57	0	57	5	1	4
2000	23	1	22	9	6	3
Romania 1998	1	0	1	784	769	15
1999	0	0	0	1,546	1,539	7
2000	2	2	0	2,163	2,098	65
Ukraine 1998	4	2	2	566	27	539
1999	0	0	0	734	67	667
2000	0	0	0	394	46	348
Slovakia 1998	602	17	585	33	14	19
1999	112	10	102	25	8	17
2000	238	14	224	27	18	9
Germany 2000	5	5	0	0	0	0
Total	**14,790**	**287**	**14,503**	**6,421**	**4,646**	**1,775**

Source: The Return of Irregular Migrants: The Challenge for Central

and Eastern Europe IOM, 30 September 1999, at p. 66. (for 1998) and direct communication to the author (for 1999 and 2000)[311]

It is striking that whereas from Austria and Slovenia most re-admissions are third country nationals, those returned to Romania are 97 per cent Romanian citizens and Ukraine seems to be a transit gate. Since the re-admission agreement with Ukraine has several limitations, those returned there must have been persons entitled to visa-free entry into Ukraine or having entitlement to stay there. A more detailed look sheds some light on these procedures.

TABLE 19.READMISSIONS FROM AUSTRIA WITHIN THE COMPETENCE OF THE GYŐR BORDER GUARD DIRECTORATE[312]

Year	Readmitted Persons	Readmittance Denials
1995	123	18
1996	1,158	115
1997	1,658	948
1998	2,790	213
1999	2,210	58
2000	2,164	25

[311] There was no movement at all on the basis of the other agreements in force.

[312] These data were specifically collected by the Directorate for this analysis. There are no comparable data available covering the whole Austrian-Hungarian border section. Nevertheless they are typical because the Directorate in Győr handles the majority of the cases being competent in respect of the major transit routes, including the Budapest–Vienna connection.

TABLE 20. BREAKDOWN OF RE-ADMITTED PERSONS BY NATIONALITIES WITH AT LEAST TEN PERSONS[313].

Nationality	1997	1998	1999
Romania	1,124	1,200	1,231
Yugoslavia	378	1,190	570
FYROM	25	37	47
Turkey	21	39	40
Bulgaria	20	32	23
Bosnia-Herzegovina	13	10	16
China	11	52	75
Iraq	2	49	28
Moldavia	7	29	21
Algeria	9	29	18
Afghanistan	0	21	38
Iran	2	16	17
Ukraine	6	14	8
Syria	0	10	5
Bangladesh	0	3	35
The Philippines	1	0	10
Other	64	62	28
Total	**1,658**	**2,790**	**2,210**

Source: Communication of the Border Guard Directorate to this author[314]

A comparative examination of the above data leads to the following observations. Romanians returned from Austria are probably not asylum seekers, an opinion confirmed by the fact that the same directorate has not registered a single application for refugee status by a Romanian citizen in 1998. However, in connection with the other groups one may wonder how many of them were seeking protection in Austria in vain. There are no statistics showing the number of those who either managed to launch an asylum procedure in Austria but were nevertheless removed, or were denied access to procedure on the basis of the safe third country rule. Interviews with employees of the

[313] Detailed statistics are only available for the period 1997-1999.

[314] Data include those who were returned in the 'short procedure' which is a practice based on non-published agreements of Border Guard Commanders and probably eminating from Article 3 paragraph (3) of the Hungarian-Austrian readmission Agreement which envisages 'readmission without any specific formalities' if requested within 7 days from the illegal border crossing.

refugee directorate's local department and activists of the Hungarian Helsinki Committee working with those detained in border guard community shelters (where most of those returned persons, who cannot be transferred to a third country end up) suggest that a high proportion (probably the majority) have tried or would have tried to seek protection in Austria.

One dramatic figure calls for explanation. Whereas in 1997 Hungary successfully held out against the Austrian request for re-admission of 948 cases within the area of the Győr Directorate the corresponding figure dropped to 58 by 1999 and 25 by 2000. The reason is that on 18 February 1998, six days after the entry into force of the extended re-admission agreement, a meeting took place in Vienna leading to an unpublished *aide-memoire* entitling the Austrian authorities to return people merely on their personal observation at the border crossing. So, the earlier requirement of substantiating with evidence the claim that the person had in fact illegally crossed the Hungarian–Austrian border has been reduced to a mere statement by the Austrian authorities. According to anecdotal but reliable evidence, those authorities were sometimes inclined to assume that arrival was from Hungary, even in cases in which subsequent interviews, for example during the asylum procedure in Hungary, clearly revealed that the person 're-admitted' to Hungary had never set foot there before but had come to Austria by way of Italy.[315]

It is interesting to compare this data with that for Slovenia, a non-EU country. In that respect Hungary refused Slovenian requests relating to 2,249 persons in 1999 and 1,224 persons a year later, numbers almost twice the Austrian refusals meaning that almost every second person offered by Slovenia for readmission is not taken back to Hungary whereas with Austria a mere one in a hundred offered persons is not taken back.[316]

Summarising the conclusions on the re-admission agreements the following picture emerges. Both the extended Hungarian–Austrian and the new Hungarian–Slovenian re-admission agreement open the gate to large scale re-admission of third country nationals, and indeed out of all such re-admissions to Hungary in 2000, 99 per cent came from these two countries. Since neither re-admission agreement contains the guarantees called for by the UNHCR, it is justified to assume that

[315] Since return to Italy entails no guarantee against the re-appearance of the removed person, Austrian authorities prefer to remove the undesired foreigner through an external 'guarded' Schengen border.

[316] In 2000, 3,490 persons were readmitted, whereas in 17 cases the readmission of 34 persons was denied (data provided by the Border Guards to this author).

they are used for the removal of asylum seekers to a safe third country[317] without a clearly established responsibility of that country to proceed with the refugee status determination procedure. That is why the most recent warning of UNHCR should guide those implementing the re-admission agreements:

> 'UNHCR is of the opinion that re-admission of an asylum-seeker based on his/her transit through Hungary should only be carried out in cases where, be it under bilateral re-admission agreements or any other return arrangement: the concerned person possesses documentary evidence of his/her identity; formal assurances from the Hungarian authorities have been obtained that they agree to re-admit the persons in question and allow them access to the refugee status determination procedure ... and that, for non-recidivist (repeated illegal exits) and non-criminal cases, confinement into Border Guard Community Shelters will not be applied.
>
> In addition to informing the Hungarian authorities that the returnee is an asylum-seeker, whose claim has not been heard, returning countries should inform the claimant of his/her right to apply for asylum in Hungary should he/she so wish and of his/her obligation to do so at the time of arrival back in Hungary. UNHCR would caution against indiscriminate return of asylum-seekers pending a satisfactory solution to the problems detailed above, particularly those concerning conditions of accommodation, as it is felt that a significant number of return would overburden a still fragile asylum system.'[318]

3.II.D.3 Unique Features of Hungarian Law and Practice

This chapter will not provide a description of the refugee law as it existed before the entry into force of the new Asylum Act on 1 March 1998,[319] but will concentrate on the specific critical elements of the old

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[317] Whether Hungary was, or is indeed safe is subject to debate. See supra, Brandl, 3.I.; see also, Background information on the situation in the Republic of Hungary in the context of the return of asylum seekers, UNHCR, Geneva, 31 December 1999.

[318] UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum seekers, UNHCR Geneva, p. 9 (31 December 1999) (mimeo).

[319] For a description of the old regime see, *Nagy, Boldizsár,* 'Hungarian Refugee Law'

system which, together with pressure from Europe overall, led to the new regulation. Subsequently, it will turn to points critical at present.

3.II.D.3 (a) The road to the new act

As described above, the law in force became largely irrelevant fairly soon after its adoption in 1989. There were two major shortcomings to be overcome besides the abstract aspiration to emulate Western trends. The first was the lack of status regulation for 'temporarily protected' victims of the Southern Slav conflict. There was no such legal category in the Hungarian law books, so there was no set procedure for granting or revoking the status. Government regulations established material support forms and conditions of sojourn within the reception centres,[320] but practical aspects of a human's life (birth, death, job, marriage, acquiring real estate, education) were the source of almost insuperable difficulties. Treating refugees from the Serb-Croat war or the Bosnian conflict as 'normal' foreigners was obviously not an option, but offering to the temporarily protected a more favourable treatment was not possible either because it had no legal basis. However, as we saw, 73,985 persons enjoyed temporary protection from 1991 to 1996 when, following the Dayton agreements, the possibility of recognizing someone as temporarily protected was abolished by an 'oral' instruction.[321] All in all, the issue of the temporary protection and subsidiary form of protection had to be regulated by a statute.

The other shortcoming was the maintenance of the geographical limitation. Although probably never legally valid,[322] it was tolerated for a while, merely because after Yugoslavia, Hungary was the second state from the socialist bloc to become a party to the 1951 Refugee Convention and its 1967 Protocol. However, constant pressure from UNHCR, the Council of Europe and the Hungarian NGO sector, reinforced by the Government's desire to impress the EU,[323] finally led

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in: *Howard Adelman/Endre Sik/Géza Tessényi (eds.)*, The Genesis of a Domestic Regime: The Case of Hungary Toronto, York Lanes Press, 1994, 49-64.

[320] See especially, Government Decree 129/1996. (VII. 31.); Decree of the Minister for Interior 19/1996 (VII.31).

[321] The final revocation of the protected status of those who had been granted it before 1996 came in 1999 with Government Resolution 2153/1999 (VII. 8.), terminating the protection and inviting the protected persons to regularize their position according to the general rules on foreigners by 1 July 1999.

[322] See, *Nagy, Boldizsár* 'Hungarian Refugee Law' (fn. 319), p. 52.

[323] See the Hungarian response to the questionnaire sent by the Commission in 1996 laying the foundation of the *acquis*.

to the abolition of the geographical limitation.[324] It was more than due because the UNHCR branch office, which carried out status determination on asylum seekers fleeing non-European events, had a larger caseload in 1997 than the Hungarian authorities.[325]

More than two-dozen 'conceptual drafts' preceded the 1996 version that then became the backbone of the bill laid before Parliament in 1997. The debates leading to the formulation of the Bill and the adoption of the Act included substantial involvement of UNHCR, the Alliance of the Free Democrats,[326] the Hungarian Helsinki Committee and the 'Menedék' Hungarian Association for Migrants and Refugees. Let us now look at the critical elements of the outcome!

3.II.D.3 (b) Critical elements of the new Hungarian legislation concerning asylum seekers and refugees

In addition to Article 65 of the Constitution,[327] five laws have particular relevance. The Aliens Act and its implementation Decree[328], and the Asylum Act of 1997 and its two 1998 implementation Decrees[329] subsequently amended in 1999 by Act LXXV against

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[324] Parliament's Resolution 113/1997 (XII.17).

[325] See supra, 3.II.B.2.(d).

[326] The Alliance of Free Democrats was the smaller member of the then ruling biparty coalition led by the Hungarian Socialist Party. The Minister for Interior, Mr. Kuncze was representing the Alliance as well as the most active speaker in the debate, Mr. Kőszeg, who is also chairman of the Hungarian Helsinki Committee.

[327] Act XX of 1949 as amended by Act LIX of 1997, Article 65 (in force since 30 July 1997): '(1) The Republic of Hungary, in accordance with conditions determined by law, if neither their country of origin, nor any other country provides protection, shall grant the right of asylum to those non-Hungarian nationals, who in their home country or at their usual place of residence are persecuted on account of their race, nationality, membership in a particular social group, religion, or political opinion, or have a well founded fear from such persecution. (2) The adoption of the Act on the right of asylum requires the vote of two-thirds of the Members of Parliament present.' (translation by the author).

[328] Act LXXXVI of 1993 on 'The entry, stay in Hungary and Immigration of Foreigners' (Aliens Act) as amended by act LXXV of 1999, regulates confinement in a detention-like situation of illegal aliens, including asylum seekers, into Border Guard Community Shelters. Government decree 64/1994 (IV.30) as amended describes the details.

[329] See supra, section 3.II.B.4., for the details about their availability. Obviously there are many other (approximately 200) regulations from the Act on Nationality through customs rules to those governing education or health care that incorporate specific provisions for asylum seekers and refugees, but they are not subject of this study. For a good description of the legal and social conditions see, *Fabricie Liebaut (ed.)*, Legal and Social Conditions for Asylum Seekers and Refugees in Central and eastern European Countries, Copenhagen, Danish refugee Council,

organized crime. The norms themselves as well as the experience gained in the first three years of their application have triggered criticism and second thoughts that will be reviewed below.

3.II.D.3(b)(1) Substantive law: protection categories, restrictive tools

(i) Protection categories

There are three basic protection categories and one auxiliary form of protection recognition. The definition of 'refugee' is, for all practical purposes, that of the Refugee Convention.[330] A 'temporarily protected person' is 'a foreigner who has arrived from an area from which *en-masse* flight consequent to foreign occupation, war, civil war or ethnic clashes, or the massive and large-scale violation of human rights has taken place and, as a result of their flight, refugees fleeing that country are granted temporary protection in the Republic of Hungary by Government decision, and recognized as temporarily protected persons/asylees by the refugee authority'.[331] 'A person authorized to stay' is 'a foreigner who cannot, for the time being, be sent back to his/her own country because he/she would there be subjected to capital punishment, torture, inhuman or degrading treatment, provided that he/she has been recognized as a person authorized to stay by the refugee authority'.[332] The law provides for a fourth, auxiliary form of recognition: the Minister of the Interior is entitled to exercise special consideration of equity for humanitarian reasons leading to convention status in individual cases.[333] The Minister has never exercised this right even though requests to this effect have been made.[334]

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pp. 79-101 (1999).

[330] Although for the purposes of the implementation of the Act, someone is only a refugee if recognized as such by the authority. This is not extraordinary, Art. 2 of the Austrian Law on Asylum (BGBl Nr. 76, 14 Juli 1997) provides in the same way.

[331] This translation is provided by the author. Translations normally used are correct, but seem to make no sense. (The text used by UNHCR is the following: 'a foreigner who arrived from an area, from where the members of the group fleeing en masse due to foreign occupation, war, civil war or ethnic clashes, or the massive and large scale violation of human rights going on in their country, were granted temporary protection in the Republic of Hungary on the basis of the decision of the Government and were recognized as temporarily protected persons/asylees by the refugee authority.' That is because the text of the Act in Hungarian is simply grammatically and logically wrong. The translation offered here reflects the intended content removing the original mistake.

[332] All three definitions appear in Art. 2 of the Act.

[333] Art. 3, para. 3.

[334] Personal communication of Mr. Erdélyi, Deputy Director of the Refugee

The introduction of temporary protection status regulated by a statute (and not by circulars or government decrees as in several EU States) is certainly a great leap forward that the EU has still to make, but no progress has been made in a half-decade.[335] The rights of the temporarily protected are significant: they have residence rights and the right to unrestricted employment. Accommodation and maintenance and care must be provided to them by the State if they are unable to maintain themselves. Furthermore they are entitled to a travel document allowing them to leave and return to Hungary,[336] an important tool in 'visit and see before returning' situations. The temporarily protected person is not barred from initiating a convention refugee status determination procedure or taking the road leading to immigration. There is no time limit set to this type of protection: it terminates when the Government decides that the reasons that caused flight have ceased to exist.[337] This represents a significant change for the better from the previous practice, which until 1997, denied victims of the Southern Slav conflict the right to work and kept them in a mainly *ex lex* situation.

There is one snag though: this provision has never been applied. The Government has not yet designated a single group as being liable for temporary protection. It is obvious that, at least during the Kosovo conflict (1998–1999), this provision should have been used as several Hungarian NGOs demanded and UNHCR hinted.

The 'authorized to stay' status was meant to be one of *non-refoulement* with more rights than generally accorded to anyone denied refugee recognition but who cannot be returned to their country for fear of torture or inhuman or degrading treatment or punishment. It entails a right to accommodation and care. However, the person authorized to stay is only allowed to work according to the conditions generally applicable to foreigners and must live in a reception centre or any other place designated by the refugee authority. The entitlement to the status is subject to a mandatory annual review.

Two problems of a practical nature emerged in implementing the law. Firstly, the status became used as a subsidiary form of 'protection', a kind of 'limited asylum' for those the authorities did not wish to recognize as (Convention) refugees. The following small table tells the story.

Directorate of OIN, 23 February 2001.

[335] See the repeated proposals of the Commission, COM(98)372 final, OJ C 268, 27 August 1998 and COM (2000) 303 final, 24 May 2000.

[336] Art. 20.

[337] Art. 10.

TABLE 21. NUMBER OF REFUGEES RECEIVING SOME FORM OF PROTECTION IN 1999–2000

Country of Origin	Refugees		Stay Authorizations	
Year	1999	2000	1999	2000
Afghanistan	127	82	223	176
Iraq	60	37	52	47
Yugoslavia	37	10	1,408	357
Somalia	17	2	12	16
Total	**241**	**131**	**1,695**	**596**

Source: Office of Immigration and Nationality Affairs

Secondly, a tricky and highly criticized expression of the implementing decree regulating recognition procedure grants the authority the right to recognize a foreigner 'whose identity has been clarified'[338] as authorized to stay. This was interpreted as excluding those whose documents were withheld by the traffickers, because 'clarified identity' was understood to be an identity proved by written evidence, preferably official identity documents. As a consequence of repeated requests by the Hungarian NGOs representing asylum seekers and others in need of protection,[339] this been relaxed somewhat and now a driver's licence, military identity papers and witness testimony of close relatives are also accepted.[340] Nonetheless, most of those who should benefit from 'authorized to stay' status have to make do with mere 'protection from expulsion and deportation' as guaranteed by Article 32 of the Aliens Act.

(ii) Restrictive tools

Safe third country and safe country of origin regulation

As already mentioned[341] the asylum rule of the Constitution was modified in 1997 to limit asylum to cases when 'neither their country of origin nor another country provides protection'. This came as part of a comprehensive amendment to the Constitution, and the

[338] Art. 29, para. (1) of Government Decree 24/1998 (II.18).

[339] In a recent decision the Metropolitan Court has challenged this approach of the authority. (Case No. 2 Kpk. 45963/1999 1-1, unreported, on file with the author).

[340] Letter of the Director of the Refugee Directorate of OIN to the Hungarian Helsinki Committee, dated 4 December 2000, on file with the author.

[341] See supra, 3.II.D.1. (text accompanying footnote 297).

explanatory memorandum that the Government submitted to Parliament did not give any reason for introducing the safe country rule. Surprising as it may appear, none of the leading speakers of the parties in the general debate mentioned the appearance of the safe country rule! They all gave the nod to the Government explanation of only wishing to remove language-based persecution harassment from the causes, thereby aligning the Constitution with the Geneva Convention. One would have expected that at least the fall 1997 parliamentary debate leading to the adoption of the new Act on Asylum would have had some effect on the rules concerning safe countries, now appearing in the refugee law itself. Nothing of that sort happened. It remained a total non-issue.

So the present regulation includes both the safe country of origin and the safe third country rule.[342] Comparison of the Hungarian regulation with that of Austria, Germany and the London Resolutions reveals that not only the EU norms, but also the laws of these two States have been an inspiration for the pattern to follow. With respect to the safe third country, both national laws refer to the 1950 Rome Convention for the Protection of Human Rights and Fundamental Freedoms, and so does the Hungarian Act thereby excluding any non-European country from qualifying as a safe third country. This was certainly 'not' the intention of the London Resolution on host third countries that does not mention the ECHR. Moreover, the Act demands that the third country be as safe as the safe country of origin, which is an unusually high demand as the next paragraph will show.

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[342] Art. 2 (d) Safe Country of Origin: 'the presumption relating to the country of nationality, or in the case of a stateless person, to the habitual residence, of the person seeking recognition as refugee, according to which presumption that country observes/implements the International Covenant on Civil and Political Rights, the Geneva Convention, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Protection of Human Rights and Fundamental Freedom signed in Rome on 4 November, 1950, and where because of the characteristics of the legal order and the guarantees of legality there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion; or torture, inhumane or degrading treatment and which country allows independent national and international organisations to control and supervise the enforcement of human rights; (e) Safe Third Country: a country which satisfies the conditions of a safe country of origin with regard to the applicant and where, prior to arrival at the territory of the Republic of Hungary, the foreigner had already stayed, resided, transited or resumed travelling in such manner that the applicability of the Geneva Convention for his claim had been recognised in respect of him, or he had had the chance to lodge a claim for the recognition of the applicability, but did not take advantage of that; provided that according to the rules and regulation of that country the foreigner cannot be sent back to the country where he would be exposed to persecution, torture, inhuman or degrading treatment.'

Hungary's ill-conceived zeal to outdo its great idols shows itself in full in its definition of safe country of origin. Austrian legislation does not have the same category and Germany requires the adoption of an Act designating countries 'where the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment of treatment takes place there'. It is known that the London Conclusion on 'Countries in which where is generally no serious risk of persecution' recommended four factors to consider before deeming safe the country from where the asylum seeker came (i.e.: previous number of refugees and recognition rates, observance of human rights, democratic institutions and stability). So how does the Hungarian Act determine a safe country of origin? Hungary's definition is more comprehensive than any of those mentioned above. It not only requires the implementation of the ECHR together with the ICCPR, but also that there may not be persecution on Refugee Convention grounds and that independent national and international organizations be allowed to control and supervise the enforcement of human rights. It logically follows that none of the non-European states may qualify as safe according to the Hungarian law, and the exclusion of the possibility of persecution ('there may not exist a threat of persecution') excludes many European States from being potential safe countries of origin.

This conclusion may be painful for the law-enforcer, but it can hardly be denied. The safe country of origin rule will have no role to play and will not ease pressure on refugee authorities, because it is, in practice, inapplicable, since only those European countries from which asylum seekers never come to Hungary would qualify. Since the safe third country must meet the same criteria as the safe country of origin, it shares its fate of being without any practical use.[343]

This is underlined by the safe country rules 'not' being linked to the fast track procedure, so unable to contribute to the reduction of the register. The fact that the asylum seeker comes from a safe country (third or of origin) leads to a denial of refugee status according to the Act. However, the safety of the country is only a 'rebuttable' presumption, a praiseworthy possibility offered by the law, and thus must be investigated in a non-fast track procedure. Consequently denial of refugee status on the basis of the safety of the country transited or of origin can only be ascertained in a normal full procedure involving investigation of the safety factor *vis-à-vis* the specific claim. The difference between ordinary status determination

[343] The lesson seems to be learned, see infra, 3.II.D.3.(c).

procedure and that involving rebuttal of presumption of safety lies in the burden of proof. In the ordinary procedure the asylum seeker does not have to prove that she has a well-founded fear of persecution but it is enough to substantiate (in Hungarian: make it plausible) that the Refugee Convention must be applied in his respect. However, in the rebuttal of the safety debate the asylum seeker must 'prove' that the presumption of the safety does not apply.

It should be noted that it is hard to say anything about Hungarian decision making because it is not in the public domain. First instance (administrative) decisions never get to the public, and of the thousands of court decisions, less than a dozen have been published in summarized form in the collection of judicial decisions. Therefore, statements on interpretation or use of terms have to be viewed with caution. My own remarks stem from my interviews with the decision makers of the refugee authority, the wealth of experience of the Hungarian Helsinki Committee's legal service and on observations of the UNHCR Budapest Branch Office that receives all first instance decisions.[344]

These sources confirm the UNHCR conclusion on this issue, according to which: 'In practice this [the safe third country] concept has not been frequently applied.'[345] The only significant exception may be the airport procedure that, by definition, presupposes arrival from or through a safe country 'and' the lack of adequate identification documents.[346] In 2000 there were 30 cases of applications refused in an airport procedure (37 in 1999 and 66 in 1998).

Exclusion and cessation grounds

As is the case for many other countries in the region,[347] the Hungarian Act contains exclusion and cessation clauses that do not harmonize with the Refugee Convention. UNHCR has repeatedly reminded that

[344] The Deputy Director of the Refugee Directorate has recently remarked that they intentionally do not provide reasoning in the (few) recognizing decisions, because when they gave explanation the same facts soon appeared in other applications. One should fear drawing the consequences of this argument because too many words related to Kafka; abuse, maze, etc., would come to mind.

[345] UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum seekers, UNHCR Geneva, 31 December 1999, point 16.

[346] Art. 42 (see further infra).

[347] *Nagy, Boldizsár:* The Acquis of the European Union Concerning Refugees and the Law of the Associated States, 3rd International Symposium on the Protection of refugees in Central Europe, Report and Proceedings Geneva, UNHCR, European Series, Volume 3 No. 2, p. 69 (1997).

the Convention is 'taxative' and no additional grounds should be invoked.[348] Nevertheless, departure from the designated place of stay, non-cooperation with the authority, or non-submission to health screening and compulsory treatment are grounds for the authority to deny refugee status.[349]

In practice this has had relevance for asylum seekers trying to enter another country illegally while the procedure in Hungary was in progress. Absence led to the denial of status until the summer of 1999 when this procedure was amended. Now, it is only suspended for those who have not been interviewed. However, unjustified departure after the interview still leads to a denial of status.

Potential grounds for interruption ('status recognition may be revoked') include factors above and beyond the Refugee Convention. Status may be revoked if recognition has been granted because facts material to the decision were withheld.[350]

3.II.D.3(b)(2) Procedural rules and practice

(i) Access to territory

Since Hungarian law specifies that no application for refugee status may be submitted to Hungarian representations abroad, access to Hungarian territory is the precondition to access to the procedure. However, tools of 'non-arrival' applied in the alien law context are being increasingly used.

Visa policy

By 1995, the Hungarian Government had already adopted a resolution on visa policy,[351] calling on the government to reinstall visa obligations for all the CIS States except for Belarus, Russia, and Ukraine.[352] This was a radical change from the Soviet Union era when all Federation citizens could, in principle, visit Hungary without a visa.[353] Roughly 75

[348] See e.g., PHP National Action Plan of the Republic of Hungary in the Field of Asylum, 21-22 June 1999, point 2; see also, remarks on the new asylum amendment bill, 22 February 2001, (mimeo on file with the author).

[349] See Art. 4 (2) (b) (together with Article 16).

[350] Act on Asylum Art. 7 (a).

[351] 2259/1995 (IX.8) Korm hat.

[352] As it is known, the Baltic States are not CIS states and with them the visa-free travel has been retained.

[353] Most ironically the Hungarian-Soviet treaty on visa-free travel *has never been*

million citizens of nine countries (some of them in fact already producing refugees) were barred during the last ten years.[354] In 2000 even Russia could not avoid this fate. A 'provisional auxiliary protocol'[355] whose preamble speaks of the parties' efforts to 'perfect the mutual conditions of travel for the citizens of the two States' abolishes visa-free travel in most contexts and limits it to a maximum of 30 days making it dependent on the strict conditions of either having a letter of invitation issued (and approved) by the police or another state agency, or having a confirmed reservation in a hotel. Transit is only allowed if the traveller can prove that entry conditions in the destination country are met. Nationals of other countries were also subjected to this condition. China and Albania, who lost their preferred status during the nineties, come to mind.[356] It also contained a remarkably lenient provision towards the EU, declaring that the Government intended to establish completely visa-free travel with Indonesia and Thailand 'provided that this would not contradict the visa policy of the EU'![357]

Since then, visa policy has been a recurrent theme in Hungarian politics. The EU's expectation is more than clear cut: 'The Commission underlined the necessity of adopting a new law on foreigners and a visa policy suited to the requirements of the EU', said the Regular Report in October 1999.[358] The report a year later was no less explicit: 'Additional efforts are needed to align with the 'visa *acquis*', in particular as concerns the visa exemption for citizens of

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published in the official journal. Millions of comrades travelled year by year, without individually knowing how that could happen.

[354] The significance of this may be assessed with the knowledge that asylum applications in Europe submitted by citizens of these countries were rising between 1999 and 2000 (except for Armenia and Azerbaijan). UNHCR data showed the following increase: Moldova-37%, Kazakstan-131%, Uzbekistan-98%. See Asylum Applications Submitted in Europe, 2000, Geneva, 25 January 2001, mimeo, Table 4.

[355] Published as 135/2000 (VIII.3.) Government decree.

[356] Four years after its introduction in 1988, visa-free travel for ordinary citizens was abolished with China in an agreement signed in Beijing on 28 April 1992 which in its preamble refers to the purpose of 'enhancing mutual interaction between their citizens' and then restricts visa free travel to diplomats, their family members and others travelling on an official duty passport. [See Government Decree 128/1992 (IX.1)]. The latest shape of the (unpublished) Hungarian–Albanian visa-agreement was formed by a *note-verbale*, which in turn was published and reveals that visa-free travel only extends to diplomats and others on duty. [See 1993/24 Szerződés a Külügyminisztertől (Treaty made public by the Minister for Foreign Affairs)].

[357] Government Resolution 2259/19995 (IX.8), point 5.

[358] http://www.mfa.gov.hu/euanyag/Hungary 201.html. See also, Accession Partnership OJ C 202 29 1998, at p. 35, on justice and home affairs priorities: 'to align visa policy with that of the European Union'.

Belarus, Cuba, FRY, Moldova, Russia and Ukraine. The agreements on simplified formalities for border crossing signed with Ukraine and FRY will also need to be amended as they exempt citizens living permanently near the border from the obligation to carry passports. The regulation on a uniform visa format and the rules of the Common Consular Instructions also need to be further aligned. There is a need to strengthen the Consular System and Hungary's capacity to detect forged documents.'[359]

The dilemmas facing Hungary are just as clear. On the one hand, fulfilment of expectations involves giving up one of the most important foreign policy priorities: smooth and friendly links with neighbouring countries, especially concerning the Hungarian minorities who live there. Opposing them, on the other hand, hinders the accession process and may be futile, anyhow. The Government is hoping that two things will happen. Firstly that Romania and Slovakia become members together or (relatively) soon after Hungary and/or they may be removed from the visa-list adopted under Amsterdam as proposed by the Commission early January 2000.[360] That would solve the visa dilemma with respect to the largest Hungarian minority group (altogether about 2.6 million people). Secondly that accession to the EU will not lead to immediate lifting of the border control with Austria. If that happens at the request of the EU, then Hungary, in exchange, may demand derogations from the EU visa regime.[361] The most recent formal position[362] indirectly hints at such derogation '[the] Hungarian Government believes that maintaining visa requirements towards a country cannot be compatible for long with that country's status as a partner negotiating accession. If nationals of Romania remain subject to visa requirements at the end of year 2000, the Hungarian Government would like to return to this issue in the final stage of the accession negotiations. Should this happen, the Hungarian Government will propose a solution which will not constitute a security risk to the Member States of the EU'. To allay fears that Hungary may request too much it swiftly adds 'In the period up to accession, Hungary will continue to align its visa policy with that of

[359] Regular Report From the Commission on Hungary's Progress towards Accession, 8 November 2000, see e.g., http://www.mfa.gov.hu/euanyag/hu_en.html.

[360] Proposal for a council regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Document 500PC0027).

[361] This option is hinted at in an interview with the Hungarian prime Minister, Mr. Orbán, given to the Polish Weekly Wprost (1999.08.12.) and reproduced in Hungarian at *www.meh.hu* (September 1999).

[362] The Negotiating Position of the Government of the Hungarian Republic (CONF-H 61/99) available at www.mfa.gov.hu.

the EU and the Schengen States...If nationals of neighbouring countries and Bulgaria are subject to a visa requirement in the year preceding accession, full alignment will be effected on the date of accession.'[363] A further facet of the Hungarian visa policy was the introduction of airport transit visas in 1998.[364]

Carrier sanctions

The obligation of air carriers to return people to their place of departure in accordance with Annex 9 of the Chicago Convention on International Civil Aviation of 1944 has been part of Hungarian law since 1969–70,[365] but no specific penalties were applied before 1999 when the amendment of the Aliens Act introduced the rule[366] according to which the air carrier must pay not only board, lodging and the return trip of the document-less passenger, but it is also liable for a penalty of up to HFT1,000,000 (approximately USD3,500) per flight with document-less passengers, irrespective of their number.[367] It is hard to assess how many asylum seekers are prevented from reaching Hungary as a potential country of asylum, but general considerations undoubtedly apply[368] especially since the Hungarian national airline has links with countries that are sources of, or on the route of refugees, such as China, Egypt, Lebanon, Russia, Syria and Turkey.

Crossing the border

Most asylum seekers cross the border illegally. It follows that border control efficiency is immensely important. Reinforcing the control of the border with Romania and Ukraine deters illegal crossers or turns them back before entry. Enhancing surveillance capacities at the Austrian border relieves the EU from the responsibility and shifts it to

[363] Ibid.

[364] 82/1998 (IV.30) Government decree amending 46/1994 (IV.30) Government Decree on the implementation of the Aliens' Act.

[365] The Convention since 1969, the amendments since 1970, see Law-Decree 25 of 1971. Remarkably Annex 9 on 'facilitation' was only published in 1997, and even then not in the Official Journal, but in the Bulletin of the competent Ministry.

[366] Act LXXV of 1999 on organized crime amending Article 60 of the Aliens Act (LXXXVI of 1993).

[367] The speaker for the Border Guards in an interview spoke of 'problems with papers' in 10-15 cases per week at Ferihegy (the only international airport in Hungary), Magyar Hirlap, (20 November 1998).

[368] See e.g., The Effects of Carrier Sanctions on the Asylum System, *Danish Refugee Council, The Danish Centre of Human Rights*, Copenhagen, 1991.

Hungary. The EU's preference is clear: 'Hungary *must* develop more effective border management systems, *especially on the future external borders of the European Union*' (emphasis added) .[369] The implied meaning obviously is that until accession, this reinforcement must go to the present external border of the EU. One can only surmise where the 70 night vision appliances donated by the German Ministry of Interior to the Hungarian Ministry will be operated.[370]

There is a particularly worrying aspect to denial of physical entry. The Parliamentary Commissioner for Human Rights (the ombudsperson) published a report in December 1999[371] describing the behaviour of border guards at the only international airport with regular flights. According to that report if foreigners without documents arrive on a non-Hungarian air carrier, they are not even allowed to leave the plane, which obviously implies the risk of *refoulement*. Flights affected by this practice come from Cairo, Damascus, Istanbul Moscow, Prague, Saint Petersburg, Sarajevo, Skopje, Tirana and Tunis.[372]

(ii) Access to a fair and efficient procedure meeting minimum standards

Having finally got over all these hurdles, the asylum seeker can turn his attention to the status determination procedure. The time limit for submission the application has been abolished by the new Act.[373] That one piece of good news, however, comes with a lot of bad ones.

Detention of asylum seekers

The most strongly criticised aspect of the new asylum regime that interaction of the Aliens Act and the Refugee Act (together with the implementing rules) has brought about is the detention of asylum

[369] Accession Partnership OJ C 202 29 (1998) p. 41. Indeed, if the off-road cars of the border guards can only drive 30 km per day (1.3 km per hour) because of the lack of finances to purchase gasoline, as reported by the (then) head of the border guard in 1998 July, then the EU must feel forced to stress that point (Népszabadság, 22 July 1998).

[370] Népszabadság, 14 January 2000.

[371] Az állampolgári jogok országgyűlési biztosának jelentése az OBH 1222/1998 számú ügyben. (Mimeograph).

[372] Ibid, at p. 15.

[373] Previously, the asylum seeker should have indicated the intention to apply for status recognition within 72 hours after crossing the border, and another three days was given to formulate the application.

seekers at border guard so-called community shelters[374] or other closed institutions.[375] Contrary to what their name suggests, no community spirit is present in these institutions.[376] Buildings are specially constructed or refurbished on the compounds of the border guard directorates to accommodate illegal foreigners including asylum seekers, in circumstances with the same level of unauthorized departure prevention as a police detention facility including common features like fences, locks, barriers within buildings, and continuous closed-circuit TV surveillance. However, asylum seekers who cannot meet Hungarian legal-stay criteria do not necessarily end up in those prison-like institutions. If after their (legal or illegal) arrival they approach the police or the border guards formally applying for recognition status, then they will be sent or transported to a refugee reception centre. These centres are open institutions and the asylum seeker may leave them after the medical quarantine period. However if he is caught when crossing in an outward direction or in connection with regular alien-police checks and only applies after alien-police procedure has been set in motion, then he is transferred to one of these community shelters.

Before 1 September 1999 this could have meant unlimited restriction or deprivation of liberty, and today, for a period of up to eighteen months! This certainly exceeds any conceivable time limit as set out in the ECHR. The role of Austria and the EU here is obvious: before August 1998 foreigners at community shelters had a right to leave during day-time which led to many of them just disappearing. Since the border guards only re-caught a limited number of them as they tried to leave, and in any case they kept on trying until they were successful, political pressure led to the adoption of a joint order to

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[374] See e.g., UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum seekers, UNHCR Geneva, 31 December 1999, or repeated appeals of the Hungarian Helsinki Committee (on file with the author). Even the EU Commission found that in 'some community shelters, hygiene and living conditions are sub-standard' and noted that '[r]ecommendations made by the Ombudsman for Civic Rights led to the closure or up-grading of a number of community shelters.' 1999 Regular report from the Commission on Hungary's progress towards Accession, October 1999 at http://www.mfa.gov.hu /euanyag/ Hungary%201.html. The report was published in October 2000 after hunger strikes that took place at these shelters. The report observed that in those shelters 'living conditions are often quite difficult'.

[375] So called 'aliens policing detention' can be imposed upon those repeatedly violating aliens' law. They are forced to stay at police detention cells or at a state penitentiary institution (separated from criminals in the latter).

[376] As of February 2001 community shelters were in operation in the following towns; Szombathely, Nagykanizsa, Győr, Pécs, Budapest, Kiskunhalas Balassagyarmat Orosháza, and Nyírbátor, with a simultaneous capacity of 862.

border guards and the national police headquarters[377] practically prohibiting them leaving the community shelter. However there was no maximum time limit to detention which, for persons under asylum procedure or simply unable to get a travel document from the notoriously uncooperative representations, means detention could last years. This detention practice has been challenged in court, in some cases successfully, and has been replaced with a rule incorporated in the Aliens Act itself, which, no doubt, will also be challenged and end up before the ECtHR after all local instances have been exhausted.

Criticism of the shelter conditions does not mean that the asylum seeker has no access to the procedure. Although there were reports of asylum seekers being removed before the interview with them on the merits of their case,[378] this is not a real danger. Far more worrisome is the difficulty the asylum seeker has in gaining access to professional assistance in these shelters, which is restricted inwardly as well as outwardly.[379] There, NGO lawyers offering free legal consultation cannot get into the community shelters and so cannot meet potential clients except with the help of other inmates who inform newcomers about the possibility of their contacting the visiting shelter lawyer.

Airport procedure

As already mentioned, this procedure has so far had little practical impact but it affects a very vulnerable group threatened with direct removal and therefore *refoulement*. One of the significant achievements of the concerted criticism of the 1997 asylum regulations was that the otherwise more restrictive 1999 Act on organized crime brought improvement. Before 1 September 1999, appeal against the airport procedure (involving a document-less foreigner from a safe third country) had no suspensive effect on removal after refugee status had been rejected. Since that date, appeal, which must be submitted within three days, does have suspensive effect.

Accelerated procedure

According to the Act an applicant's application for refugee recognition shall be assessed in fast-track procedure if the application is

[377] 46/1998 együttes intézkedés (joint measure) issued on 12 August 1998.

[378] See e.g., UNHCR Background information on the situation in the Republic of Hungary, point 19.

[379] Practice varies among different shelters, and over time, much depends on the personal relationship of the lawyer and the commander.

manifestly unfounded.[380] It is not surprising that the definition of 'manifestly unfounded' resembles that of the London Resolutions but differs inasmuch that it makes it almost useless,[381] since the following cases qualify as manifestly unfounded 'if the applicant:

> (a) Makes no reference in his application to persecution or fear of persecution in his country;
>
> (b) Refuses to make a statement regarding his identity or citizenship and the reason for seeking asylum in the course of the proceedings;
>
> (c) Deliberately gives false or misleading information on his/her identity and citizenship: deliberately uses a false or forged document and insists on the false content thereof.'

Non-bona fide refugees, who should be screened out by the accelerated application, hardly ever commit the mistakes of (a) and (b). Cases involving (c) do occur but are very difficult to prove. 1998 saw 138 cases decided in fast-track procedure (of which 100 were Romanian), in 1999, 52 and in 2000, 48.

The 'manifestly unfounded' nature of an application can be rebutted, enabling return to normal procedure. In any case the only difference is that the procedure should be completed in seven days (compared with the normal 60 days) and the appeal period is three days instead of the usual five.

The procedure itself and the quality of the first instance decision

On 1 March 1998 the new system of refugee status determination was set up with an all civilian staff and one central office to determine all the cases through its departments located next to the three reception centres plus those in Nyiregyháza, Szeged, Győr and Budapest. Most of the interviewers were new and had no legal training, a fact apparent in the early decisions. Since then an improvement can be seen, but decisions are still grossly simplified. Some decisions have been less than two pages, essentially arguing that the applicant has not 'substantiated' the claim, usually because her credibility was not accepted, however without actually denying the facts given by the asylum seeker. An unpublished report[382] reviewing all decisions taken

[380] Art. 43.

[381] *Bíró, Csaba*: "A nemzetközi helyzet egyre fokozódik" menekültügy Magyarországon. L.L.M. thesis, ELTE University, Budapest, p. 29 of the manuscript, (1999).

[382] Written by Imre Papp, on file with this author.

in the first six months has found countless inconsistencies and minor or major breaches of procedural rules.[383] The pool of interpreters who speak the required languages (frequently little or not-at-all known in Hungary) is not yet fully established, again influencing the quality of the decisions.[384]

In order to convey a realistic picture, the merits should also be briefly mentioned. UNHCR has unhindered access both to procedure and decisions. Lawyers representing asylum seekers face no obstacles on the part of the refugee authorities and they have access to clients who have already appointed them. Great efforts are being made to improve the country of origin database of the system, both the German and the Swiss authorities providing substantive informal assistance in this respect. Many interviewers are very open to discussion and willing to engage in professional debates with the NGO sector in academic and training set up. Refugee department representatives regularly attend training sessions held by NGO lawyers at that substantive discussions take place on the various interpretations of the law, and not infrequently the agreement reached there has bearing on subsequent implementation by the authorities.[385]

Appeal rights

One of the major steps backward the new regime made is the curtailment of the appeal procedure. Before 1998, two levels of administrative proceedings were followed by two levels of court proceedings. The new Refugee Act has abolished the administrative review. This means that after the 60 days plus 30 days available for the refugee authority decision, appeal must be submitted to the Metropolitan Court in Budapest.[386] The Act provides that the court will decide within fifteen days after the appeal that must be submitted in five days. Experience has confirmed how unrealistic this is, because even though a hearing is not compulsory (and the court rarely holds one), the non-litigious procedure frequently lasts several months, a troubling reality, especially for those who have to endure the closed community shelters. However the major flaw of the system is hidden

[383] E.g., frequently, one cannot establish the time spent between arrival and the first hearing.

[384] MENEDÉK has developed a curriculum with UNHCR for the training of interpreters that has been officially recognized by the refugee authority.

[385] One might think of the extension of the means to prove one's identity for example.

[386] The Metropolitan Court usually acts as a second level court (appeals court). However, for legal-technical reasons in refugee cases, it is the solely competent first instance court.

in the next phase. Appeal against the court order is to be made to the Supreme Court of Hungary but the Supreme Court reviews the mere legality of the first instance decision: it does not have the power to decide on the appeal's merit. This is obviously an anomaly, since this most prestigious of courts cannot deal with hundreds of individual cases. There are no time limits set for its procedure meaning recognition procedures to can be dragged to unbearable lengths and threatens the system with collapse.[387]

3.II.D.3 (c) The 2001 bill: the EU acquis *as a pretext or a guiding tool?*

After a relatively short preparatory period and half-hearted consultations with the parliamentary parties (but total exclusion of the civil sector), the Ministry of the Interior prepared a bill on amending the asylum law.[388] It formed part of a package consisting of four proposals altogether, the other three relating to the aliens law, the border guard law and the law on nationality. This exclusion of the academic and NGO sector was in sharp contrast with the preparation of earlier acts when those players on the refugee scene could see and comment the drafts early enough for substantive changes to be still possible (i.e. before Government approval). It is not easy to tell whether this new exclusion is simply the attitude of the new administration that came to power in 1998 or the result of closer co-operation with the EU and the wish of the drafters not to be subjected to pressure from two opposing sides.

The brief justification accompanying the Bill had one theme: the need for harmonization with EU *acquis*. The Bill itself listed eight documents that (the drafters claimed) established harmony.[389] Critical

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[387] The fact that prevented it from total implosion was that asylum seekers still managed somehow to irregularly depart before the final decision. In 1999, from the open reception centre in Debrecen, approximately 85% of the applicants departed before the final decision arrived. The case of community shelters is more complicated, but it seems that many of the 'exceptional leaves' granted for a visit in the town are frequently used to contact the helpers and not return.

[388] Bill No T/3708 submitted on 2 February 2001.

[389] These were: the Dublin Convention, (OJ No C 254 19 08 1997); the three London decisions of 1992, (WGI 1281, WGI 1282 Rev 1, WGI 1283); the 1995 Council Resolution on the minimum guarantees of the procedure, ((OJ No C 274 19 09 1996); the 'burden sharing' with regard to the admission and residence of displaced persons on a temporary basis (OJ No C 262 07 10 1995; the joint position on the harmonized application of the definition of the term refugee in Article 1 of the Geneva Convention (OJ No L 63 13 03 1996); and the 1997 joint position on unaccompanied minors.

voices were quickly raised: some claimed harmonization was premature since the Single European Asylum system was not yet consolidated pointing to the scoreboard[390] with its long list of tasks still to be accomplished in the coming years, showing also that the rules proposed were neither in harmony with the *acquis* that already existed nor with the one taking shape as existing or planned Commission proposals made public by early 2001.[391] Others noted that the claim of harmonization was probably an effort to maximize the domestic power of the Office of Immigration and Nationality.[392]

The most important amendments incorporated in the Bill following this criticism[393] of the asylum system were the following:

> (a) The removal of the 'authorized to stay' status from the Asylum law and introducing it, with a more limited protection, as a humanitarian stay permit in the aliens law;
>
> (b) The reformulation of the temporary protected category, to mean;
>
> > 'a foreigner who is a member of such a group of people arriving *en masse* in the territory of the Republic of Hungary that has been designated eligible for temporary protection by the Government or by the competent institution of the European Union, because its members were obliged to flee their country because of armed conflict, civil war, ethnic clashes in course there, or because of the general, systematic or brutal violation of human rights, in particular torture, inhuman or degrading treatment, causing *en masse* [flight]';
>
> (c) The possibility of increasing the number of those who can benefit from temporary protection;
>
> (d) The reformulation of the definition of the safe third country to mean a country where;
>
> > 'prior to arrival in the territory of the Republic of Hungary a foreigner had stayed, travelled through or wherefrom he/she continued to travel so that the applicability of the Geneva Convention had been

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[390] COM (2000) 782 final, Brussels 30 November 2000.

[391] See for details, *Nagy, Boldizsár*, Utoléri-e a magyar Akhilleusz az Unió teknősbékáját? Megfigyelések a menekültügyi jogharmonizáció körében, *Magyar Jog*, April (2001).

[392] *Kőszeg, Ferenc*Az ember attól ember, Népszabadság, March (2001).

[393] See supra, 3.II.C.2.

recognised at his/her request, or he/she had the chance, but did not take advantage of submitting an application for recognition; provided that the legal rules and the actual practice of this country guarantee the examination of the merit of the asylum claims and the foreigner is not exposed to persecution, torture, inhuman or degrading treatment there and may not be returned to such a country';[394]

(e) The changes in the regime of detention of the asylum seekers appear in the new law relating to the entry and residence of foreigners.[395] They are beneficial, since community shelters will be open institutions once again and the maximum duration of detention for asylum seekers who do not violate any rules (for example who illegally cross the Western border) is no more than one month.

(f) The extension of the airport procedure to everyone arriving by air and applying for status recognition, even if she does possess identity documents and does not arrive from a safe third country.

(g) The reformulation of the 'manifestly unfounded' criteria of applications and the deadlines in the fast-track procedure. The reasons envisaged as grounds for deeming applications manifestly unfounded are;

(i) There is clearly no substance to the applicant's claim of persecution in the country of origin or to the well-founded fear thereof,

(ii) The application is based on deliberate deception or on the abuse of the asylum procedure,

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[394] The bill did not affect the definition of the safe country of origin that is not in harmony either with the London conclusion or with the 2000 Commission proposal. The valid Hungarian definition is: 'the presumption relating to the country of nationality, or in the case of a stateless person, to the habitual residence, of the person seeking recognition as refugee, according to which presumption that country observes/implements the ICCPR, the Refugee Convention, the CAT, the Convention on the Protection of Human Rights and Fundamental Freedom signed in Rome on 4 November, 1950, and where because of the characteristics of the legal order and the guarantees of legality there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion; or torture, inhumane or degrading treatment and which country allows independent national and international organizations to control and supervise the enforcement of human rights.'

[395] Bill submitted on 2 February 2001.

(iii) There is a safe third country, which is obliged to readmit the applicant,

(iv) The applicant is the citizen of a Member State of the European Union.'

(h) The appeal rights and the whole asylum system will undergo fundamental change if the bill is adopted. The single level administrative procedure will be replaced by a two level one, with genuine appeal on facts, and law between the two levels having suspensive effect. That presupposes that the Office of Immigration and Nationality will acquire local organs to decide at first level and the Office itself would be the appeal authority whose decision would be subject to judicial review, starting at the local court with one appeal to the county court.

Without going into detail[396] one may note[397] that most of the new rules are neither in precise conformity with the, mainly 'soft law', documents of the present *acquis*, nor with the Commission proposals that try to learn from the functioning or 'malfunctioning' of this *acquis*. Although abolishing the Supreme Court's involvement in every appeal procedure and the limiting of detention of innocent asylum seekers would certainly be positive developments like the new rules on family unification and unaccompanied minors, the general tendency is to tighten and expand the regime and its institutions, get a stronger grip on any irregularity of migration and squeeze it to fit whatever is thought to be the EU *acquis*, at least to the extent that it promotes the bureaucratic aims of the Ministry of the Interior, and its Office for Immigration and Nationality Affairs.[398]

3.II.E Conclusion

[396] At the time of writing this footnote, the bill sits at the Parliament's desk awaiting the general debate and the proposals for its modification. Since its approval requires a two-thirds vote of the MPs present, it cannot occur without the votes of the opposition. Therefore, one can only guess whether it will be adopted and with what changes.

[397] For detailed comments see supra, Nagy note 391.

[398] Limitation of space does not permit further discussion and the uncertainty of the fate of the bill makes it inadvisable to comment on the aliens' law changes. However, it is clear that the proposed new statute would seriously curtail the rights and opporttunities of foreigners in general by alleging it is so required by Schengen and the EU *acquis*.

There are two ways to describe the past decade of forced migration affecting Hungary. The optimistic view can refer to the elements to be appreciated:

(a) The country indeed did offer protection to victims of the regimes in Romania and the former Yugoslavia and has essentially obeyed the principle of *non-refoulement* with respect to all asylum seekers, including the non-Europeans;

(b) A comprehensive legal system respecting human rights was built up with a well-defined asylum segment including functioning institutions both in the governmental and the non-governmental sector;

(c) The country does not oppose outside influence calling for higher standards in both legislation and implementation. This is exemplified, *inter alia*, by the 1998 revocation of the geographical limitation to the Refugee Convention.

The pessimistic description reminds us of the shortcomings and dangers:

(a) Most of those who would have qualified had, in practice no access to Convention status, and the asylum seekers from the Serb–Croat, Bosnian and Kosovo wars were denied access to a clearly defined temporary protection status;

(b) The fear of becoming the State responsible for recognizing and integrating too many refugees led to the introduction of the same restrictive techniques in substantive and procedural law introduced by the much criticised West European States;

(c) Incongruity in self-perception, and hypocrisy prevail because political forces in Hungary are reluctant to realize that presenting Hungary as a developed European State, a member of OECD and NATO qualifying it soon to be full member of the European Union is incompatible with turning away its share of global and regional forced migration and the consequences thereof;[399]

(d) The present asylum system, elaborate as it is, does not function well as evidenced by detention, the extreme length of the procedure, the inappropriate adaptation of the EU principles relating to fast-track procedures and minimum guarantees must be corrected.

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[399] One might see this tendency e.g., in the country's *non-participation* in the effort to receive the 'air-lifted' Kosovo Albanians during the height of the conflict in 1999.

The fate of the Hungarian system will be linked, within less than a decade, to that of the EU. One should hope that by then the Union would indeed strive towards what it promised itself in Tampere in 1999:[400]

> 'The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.'

[400] DOC/99/14, Presidency Conclusions, Tampere European Council, 18 October 1999.

3.III Concluding Observations on the Southern Link

Gregor Noll

Comparing developments in Austria and Hungary, one is struck by the quite similar role EU Membership plays in the formulation of policies in both countries, albeit at different points in time. Consequently, both countries were compelled to start rehashing their domestic migration control and refugee protection systems, *prima facie* to satisfy the exigencies of the *acquis*. But the *acquis* was not the sole factor causing change: both Austria and Hungary were exposed to repercussions caused by restrictive reforms in neighbouring destination countries, as well as direct political pressure by those countries. Both dimensions interact, and policy formulation is a product of Membership adaptation, bilateral pressures and autonomous domestic choices.

In the area of border control, bilateral pressures and the Membership pull seemed to have been the most straightforward and efficient external factor impacting on policies. Schengen standards seem to be a forceful argument, regardless of whether invoked by Germany *vis-à-vis* Austria, or by Austria *vis-à-vis* Hungary. An indicator of the concessions following unto Western lobbying is that the Hungarian border police prioritise patrolling of the border with Austria over the surveillance of other borders.[401]

But neighbouring countries also have an indirect importance on the formulation of migration and protection norms. This stream of influence follows a common pattern, featuring some or all of the following elements; (a) real or prospective receipt of asylum seekers from neighbouring countries, (b) more or less drastic restrictions in aliens and asylum legislation to reduce the burden of processing and protecting incoming cases, (c) the securing of outgoing readmission obligations, and, at best, (d) a certain relaxation of the restrictive legislation.

Both Austria and Hungary reproduce this pattern. With regard to Austria, it is evident that the dismantling of borders from 1990 onwards and the German reform of 1993 were among the factors

[401] See 3.II.D.3.(b).

triggering a bundle of restrictionist measures. Between 1991–97, Austria conducted an extremely formal 'safe third country' policy,[402] while the asylum system in Hungary and was still rather frail and the country upheld the geographical limitation under the 1951 Refugee Convention. After 1997, the Austrian policy appears to have softened in important respects,[403] which coincides with the renegotiation of the Austro–Hungarian readmission agreement, facilitating the removal of non-Hungarian asylum seekers from Austria to Hungary. Under this agreement and as a consequence of informal agreements, Hungary is compelled to take back increasing numbers of pre-procedure removals by Austrian authorities, probably even those that did not pass through its own territory.[404] However, as the Hungarian example reminds us, lobbying by neighbouring states also brought gains for the cause of protection; one graphic example being the lifting of the geographical limitation to the 1951 Refugee Convention in 1998. Due to these factors, the number of applications filed in Hungary started to increase considerably. Given that this was foreseeable to a certain extent, it comes as no surprise that domestic legislation was reformed in a restrictionist spirit in 1997.[405] The buck had passed, as Austria started to relax, Hungary began to mould its anxiety into legal norms.[406]

While pressure by neighbours and the desideratum of EU membership certainly explain part of the developments in Austria and Hungary, the degree of autonomy enjoyed by domestic legislatures should not be underestimated. After all, both country studies showed how the required adaptation to the *acquis* was used as a legitimising device to justify reform and restriction in the domestic asylum system. Thus, harmonization had attained the character of a legislative *carte blanche*, saving the domestic legislator from tricky questions on the necessity and usefulness of the measures introduced. The *acquis* itself was, and

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[402] See 3.I.

[403] See 3.I.

[404] See 3.II.D.2.

[405] Nagy describes the conceptualization of safe third countries and safe countries of origin in Hungarian law as having much more in common with the corresponding Austrian and German norms than with the relevant norms of the *acquis*. It is somewhat ironic that the Hungarian legislator went to such extremes in copying the Western neighbours that the concept of safe third countries became practically useless. (See 3.II.).

[406] However, the chain of causalities does not stop here and the overall picture could be further completed by looking eastward. After all, the extension of the Austro–Hungarian readmission agreement to third country nationals 'had to wait until the continuity of the chain in the direction of the countries of origin was assured'. See 3.II.D.2. and 3.I.E.3.

still is, sufficiently malleable to be filled with a rather different content, which can be illustrated by the comparison of the extremely prudent conceptualisation of safe third countries in the Hungarian legislation, and the much more rigid use of the concept in Austrian law and practice. Therefore, blaming Brussels, or for that matter, Vienna, Berlin or Copenhagen would be to oversimplify the complex causalities behind the making of laws.

4 The Northern Link

4.1 Nordic Policy Responses to the Baltic Asylum Challenge

Jens Vedsted-Hansen

4.I.A Strategic Aspects of the Nordic–Baltic Relationship

4.I.A.1 Diverging Interests: Political Support vs. Self-Protection

Traditionally the Nordic countries have been seen, by themselves, and probably by Estonia, Latvia and Lithuania too, as allies and supporters of the Baltic States in their struggle for independence. At the same time, however, Nordic policies throughout the 1990s toward the Baltic States on the question of asylum have not been motivated by pure altruism. As appears in further detail below, it is beyond doubt that self-interest has underlain both the overall strategy and the concrete policy initiatives undertaken by the Nordic States on asylum matters in the Baltic context. Consequently, while those policies may, on a more general level, still be considered appropriate in the context of both human rights and Baltic integration into the European political structures, official rhetoric was not always free from ambiguity.

On the Soviet Union's dissolution in 1991 and the regained independence of the three Baltic States, fear in the Nordic countries of a probable increase in asylum seekers, and refugees arriving from the Baltic countries and Russia, was widespread. Initially there was concern that the threatened collapse of political and economic structures in Soviet and post-Soviet societies could lead to a mass exodus of citizens from Russia and the Baltic States. At a certain point in time it was especially feared that such refugee movements could be the result of civil unrest and increased repression consequent to the struggle for independence in the Baltic States. Against this background, the Nordic governments drafted various emergency plans

R. Byrne et al. (eds.), New Asylum Countries?, 203–303.

in order to prepare for the possibility of mass influxes of asylum seekers to one or more of the Nordic countries.

As early as in 1992, when Baltic independence had been achieved, the asylum challenge took on another dimension, and the Nordic States became more concerned that people from third countries might utilise Russia and the Baltic countries as transit stops *en route* to Western Europe. In the context of this development, the following discussion will focus on policies towards *third country* asylum seekers. The problem of asylum seekers originating from Estonia, Latvia and Lithuania, though attracting a good deal of political attention in 1994–95, has significantly diminished in recent years, and arrivals of Baltic asylum seekers is now hardly an issue in the Nordic countries.

The possibility of asylum seekers from third countries moving westwards through the Baltic territories represented a problem in so far as they could not be sent back to these transit countries without breaching international legal standards, given the incomplete or inadequate system for refugee protection in all three of these States. Thus, the Nordic States were bound to tackle the problem of preventing such arrivals in the short term, while at the same time contributing to long-term development inside the Baltic countries in accordance with human rights commitments and the tradition of Nordic-Baltic cooperation.

More specifically, as a result of this asylum challenge, the dilemma confronting the Nordic countries and their relations with the Baltic States now included the following issues:

(1) how to keep their borders with the newly independent neighbouring States open, while at the same time avoiding attracting unwanted refugees;

(2) how to tighten border controls in order to prevent irregular westward movements from the Baltic countries, i.e. containing asylum seekers within their transit country, while insisting that containment as such was not an appropriate solution for the Baltic States; and consequently,

(3) how to enhance refugee protection and contribute to building asylum capacity in the Baltic States while, at the same time, indirectly allowing asylum seekers to be kept in conditions far below international standards as a result of Nordic pressure for containment and ensuing detention of 'illegal migrants'.

This first part of Chapter 4 aims at providing an overview of the ways in which the Nordic States met the asylum challenge that followed the

changes in the East Baltic area. After outlining the legal standards and mechanisms framing the Nordic responses to this challenge, section A will go on to describe some of the specific events that triggered this type of policy response and point out the underlying rationale of those responses. Section B discusses the various interests and factors that eased implementation of the Nordic policy responses towards the Baltic States. In section C, the main elements of the programmes for cooperation between the Nordic and the Baltic States will be described. Finally, section D attempts to draw some conclusions from the policy responses and programmes implemented by the Nordic States with particular emphasis on the overall objective of Nordic policies in the area of asylum. Since these policies cannot be understood in an international vacuum, this study could also suggest broader West European policy objectives for this sub-region.

As will be seen, most of the information on Nordic countries and their strategies and policies slants toward a Danish point of view. It must be stressed though that this should be seen merely as a practical matter of delimiting the study and the sources drawn upon and does not imply that Danish policies are more important or relevant than those of other Nordic States. On the contrary, from the material studied it may be inferred that policy considerations and initiatives have been quite similar in Denmark, Finland, Norway, and Sweden. Furthermore, there was and still is a high degree of inter-Nordic coordination, allowing generalizations based on a more focussed study of Danish policy initiatives.

4.I.A.2 Safe Third Country Criteria and the Ensuing Containment Policy

Even though there were variations between the 'safe third country' provisions and practices of Nordic countries, the legal obstacles to the direct return of asylum seekers to the Baltic countries were more or less common to all Nordic States. Not only were the basic prerequisites for return on 'safe third country' grounds (quite similar in all the Nordic countries' domestic law), clearly not fulfilled in the East Baltic States,[1] but it was also beyond doubt that the direct return of asylum seekers without their claims being examined would contravene international obligations to protect refugees and persons

[1] Cf. Nina Lassen & Jane Hughes (eds.), *'Safe Third Country' Policies in European Countries*, 1997, pp. 51-55 (Denmark), pp. 56-60 (Finland), pp. 112-15 (Norway), and pp. 146-49 (Sweden).

seeking asylum.[2] These legal standards, mandating the *non-returnability* of asylum seekers in the case of potential arrivals from the Baltic countries, provided the framework for Nordic initiatives prioritising a *non-arrival* policy as the main response to the Baltic asylum challenge.

Since Denmark was one of the first West European States to adopt the 'safe third country' concept as early as in 1986, the relevant legal provision, which was often termed the 'Danish Clause', could serve as an example. In addition to the allocation of responsibility for examining asylum applications under the DC, and the transfer of asylum seekers to other EU Member States in observance with the criteria laid down therein,[3] Denmark applies the 'safe third country' principle to undocumented asylum seekers. Pursuant to the Aliens Act, an asylum seeker may be denied access to the asylum procedure and deported to a non-EU country where he or she has previously resided or stayed in transit, on condition that the country in question is deemed to fulfil certain basic criteria relating to the presumed safety of asylum seekers and refugees. Any alien who does not comply with the prevailing passport and visa requirements is officially and technically considered an aspiring 'illegal entrant'. For asylum seekers, however, the question of admissibility must be resolved with due regard to protection obligations under international law, as reflected in the provision setting out certain limitations on the deportation of persons claiming to be refugees.[4]

Under this provision, asylum seekers will be denied admission to the territory and the examination procedure if they can be deported to a 'safe third country'. This notion is understood to comprise countries having ratified the 1951 Refugee Convention or the 1967 Protocol with no geographical limitation, and complying in practice with the obligations under these instruments, first and foremost the principle of *non-refoulement*. The 'safe country' principle is thus based on the presumption that Convention States can in general be considered sufficiently safe. This presumption can be rebutted in so far as clear and strong evidence resulting from previous deportations or other sources of information may show that the presumed 'safety' does not,

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[2] On the international legal standards pertaining to the denial of admission to asylum seekers on 'safe third country' grounds, see supra, 1.II and 1.III with further references.

[3] Cf. Danish Aliens Act sections 29 (a) and 48 (a-c), referring to Dublin Convention provisions.

[4] Aliens Act section 48 a (2).

or no longer, exist in reality in a given country. Significantly, though, any such rebuttal must take place at the level of general safety in the country concerned; asylum seekers have no right to enter an examination procedure in order to rebut the presumption of safety based on the particular circumstances of the individual case.

With regard to connections to the relevant third country, administrative practices were strict during the first years after the introduction of the 'Danish Clause' in 1986. Any form of connection to a country of transit, including very short 'direct transit' stops and even a flight stop for merely technical purposes, would suffice as the basis for return to that country. Following a number of documented cases where this led to *refoulement* or *orbit* situations,[5] this practice was modified in 1989. By then 'direct transit' became in principle insufficient to make the transit country responsible for examining the application; hence, deportation should not in principle take place in such situations.

The 'transit' criterion, however, appears to be narrowly understood to the effect that staying in a country *en route* to Denmark for just a few hours may nonetheless fall outside the notion of 'direct transit'. That may also be the case for asylum seekers who have only been in the designated 'transit zones' in international airports. In addition, evidence of contact with immigration officers in the airport, even within the formal duration of a 'direct transit' stay, may, according to Danish criteria for responsibility, establish the presumption that the transit state is responsible for examining the case and, correspondingly, the basis for non-admission to the Danish procedure and the consequent deportation of the asylum seeker to the transit country. To that extent, it can be concluded that Denmark does not in reality apply the 'direct transit' rule.[6]

When implementing the 'Danish Clause', the means of arrival may affect the right to admission to determination procedures. Asylum seekers arriving by boat or plane may in some circumstances be quite difficult to return to the country of embarkation. Thorough police investigation of travel routing may occur but not exceed the three-

[5] See in, particular cases reported in Danish Refugee Council, *Contemporary Asylum Policies and Humanitarian Principles*, 1987.

[6] Cf. Nina Lassen & Jane Hughes (eds.) 1997 (note 1), pp. 51-52. For a more detailed account of Danish administrative practices, see Kim U. Kjær in *Udlændingeret*, 2. ed. 2000, pp. 108-10 and 117-20.

month limit that applies to denial of admission.[7] In addition to such practical difficulties, return to the Baltic States was also difficult in legal terms because of their non-accession to the Refugee Convention and the absence of asylum procedures and other mechanisms of refugee protection in these countries. Thus, in its first official report to the Parliament on the Baltic asylum challenge, the Danish Ministry of the Interior concluded that neither the above-mentioned 'safe third country' provision, nor the substantive and more demanding 'country of first asylum' rule under national legislation,[8] would be applicable in cases of third-country citizens arriving from the Baltic States seeking asylum in Denmark.[9]

4.I.A.3 The Episodic Approach to Policy-making

Although actual arrivals across the Baltic Sea were relatively few, it was feared that large numbers of asylum seekers might attempt to move into the Nordic countries via Estonia, Latvia or Lithuania from their intermediate stops in neighbouring countries further east. Many more in search of protection were known to be stranded in Belarus, Ukraine, and particularly Russia, in the early and mid-1990s. The perceived risk of an increase in arrivals from, or rather via, the Baltic States was indeed the main propellant to the various Nordic policy initiatives in these years, despite the appearance that more concrete events were pushing these initiatives on to the political agenda. Policy-making might therefore be characterized, in Denmark at least, as somewhat 'episodic' in the sense that such episodes had a quite significant impact on the policy discourse and initiatives contemplated.

The most significant type of events that attracted media-political attention, and thus gave rise to the policy initiatives mentioned above, were the groups of 'boat people' arriving in Swedish and Danish

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[7] Cf. Aliens Act section 28 (2).

[8] Cf. Aliens Act section 7 (3).

[9] Report from the Danish Ministry of the Interior to the Parliament on the potentially increasing number of arrivals of asylum seekers and refugees from the Baltic countries and Russia (human trafficking), or through these countries, and initiatives in response thereto, 26 April 1994 (hereinafter *First Baltic Report*), pp. 19-23, and 40. The Report is summarized in *Nyhedsbrev om Danmarks udlændinge* (Newsletter from the Aliens Department of the Ministry of the Interior, hereinafter *Newsletter*) No. 23, April 1994, pp. 14-30.

coastal areas on a number of occasions; the people on board were asylum seekers assumed or proven to have arrived from one of the Baltic States through intermediaries who were, to a greater or lesser degree, professional refugee traffickers. In response to the perceived risk, the Nordic countries became very active in multilateral and bilateral initiatives and programmes for assisting countries on the eastern side of the Baltic Sea in establishing border controls, refugee legislation and asylum procedures.

The first incident in Denmark took place on Bornholm in October 1992. Around 200 Kurdish refugees arrived on this Baltic island by boat from Estonia; after the passengers had landed, the boats and their crew managed to leave Danish territory before the authorities could take action against them. As a result of this event, representatives of the National Commissioner of Police visited the three Baltic States in the spring of 1993 with a view to strengthening cooperation to prevent such trafficking.[10]

This event was probably one of the factors that stepped up inter-governmental cooperation on asylum and migration issues in the Baltic sub-region. Thereafter, a Conference on Uncontrolled Migration across the Baltic Sea was held in 1993 with a view to heightening awareness of the situation, and promoting and coordinating the various initiatives taken by States and international organisations in order to solve the problems within this area.

As a result of Nordic police cooperation, the Danish National Police Commissioner received information from the Swedish police in March 1993 to the effect that approximately 1,500 Kurdish asylum seekers were waiting for transportation from Latvia to either Sweden or Denmark in order to apply for asylum in these countries. As the Kurds were exempt from visa obligations in Latvia, and thus were staying there legally, the Latvian authorities were in no position to interfere with the situation or prevent or prohibit the onward movement of these people. Danish immigration authorities were also informed by the Swedish police that there had already been five major 'illegal landings' of a total of 623 asylum seekers in Sweden in 1993. The Swedish authorities feared that such movements might continue, especially in view of the large number of potential asylum seekers in

[10] *First Baltic Report* p. 15. Remarkably, the purpose of the visits was here officially described as 'cooperation against illegal immigration, etc.'

Russia and the Baltic States, where they were just waiting for opportunities for further transportation towards Western Europe.[11]

Three similar episodes in February 1994 seemed to trigger more policy initiatives. On 2 February, 52 asylum seekers, mainly Iraqis, arrived on the Swedish island of Gotland on lifeboats from a Latvian ship; and later the same month 15 asylum seekers were smuggled into Stockholm hidden in a truck on board the ferry from Estonia.[12] In Denmark, 36 Sri Lankan Tamils were dropped off in lifeboats from an unidentified containership in a bay area south of Copenhagen on 4 February.[13]

With this last episode very much in mind, the risk of an increase in the numbers of irregular arrivals of asylum seekers and refugees from or through the Baltic countries was discussed at the subsequent meeting of the Danish Government's Committee on Refugee Matters. Here it was decided to carry out a comprehensive analysis of the problem and this resulted in two reports being submitted by the Minister of the Interior to the Parliament, the first in April 1994[14] and the second in January 1996.[15] Detailed information about recent 'illegal landings' of asylum seekers to Denmark was provided in both 'Baltic Reports'.[16] The various policy initiatives put forward in these reports will be further discussed below in section C.

Additional developments in the sub-region at this time that also spurred policy initiatives were the tightening of Germany's border checks following the 1993 amendment of the German Constitution,[17] as well as information made available on the still more restrictive policies against 'illegal immigrants' adopted by the authorities in north-western parts of Russia.[18] Taken together, these developments

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[11] Ibid., pp. 15-16. See also Newsletter No. 23, April 1994, pp. 22-23.

[12] Ibid., pp. 12-13. Newsletter No. 18, February 1994, pp. 30-31.

[13] Ibid., pp. 10-11. Newsletter No. 19, February 1994, pp. 44-46.

[14] Ibid.

[15] *Second Baltic Report*, submitted by the Ministry of the Interior to the Parliament on 22 January 1996; summary in Newsletter No. 53, February 1996, pp. 50-56.

[16] Ibid., pp. 14-17. See also Newsletter No. 46, August 1995, pp. 27-34, on a specific disembarkation case raising complex legal problems of state jurisdiction and responsibility.

[17] *First Baltic Report* (note 9), p. 9. See also Chapter 2 D, supra, on the developments of asylum law and policy in Germany.

[18] *First Baltic Report*, p. 6, and *Second Baltic Report*, pp. 9-11.

seemed to amount to a clear indication that a large part of the third-country refugees stranded in Russia would still attempt to move onwards to Western Europe via the Baltic States as soon as they got the chance.

4.I.B Political Self-Interests and Dependencies

4.I.B.1 Conditionality in Migration Policies

As pointed out in section A.1 above, the newly achieved independence of Estonia, Latvia and Lithuania caused major and rather complex dilemmas for the Nordic countries in their immigration and asylum policies. On the one hand, their political willingness to support the Baltic States and develop contacts with them favoured openness and easing of travel opportunities for their populations. On the other, the fear of increases in asylum seekers from or via the Baltic States motivated some constraint on this openness.

A logical balance therefore seems to have been the establishment of a more or less explicit strategy of *conditionality* within this policy area: privileges for the Baltic States and their citizens would be contingent on the preparedness of these States to cooperate on asylum and immigration issues in general; trans-border movements could only be made easier if the Baltic States proved themselves capable of preventing irregular onward movement of asylum seekers to Nordic and other Western European countries. Such a strategy was then actually adopted, partly directly in the form of open conditionality consisting in visa-free travel agreements (see section B.2), and partly indirectly by way of more covert subservience to the objectives of Western European immigration control (see sections B.3 and C below).

The rationale for this strategy became generally accepted within the framework of the Council of the Baltic Sea States. As a follow-up of the Visby summit of the heads of government of the 11 Member States in May 1996, at which no conclusion had been reached on refugee issues,[19] the CBSS foreign ministers met in July 1996 with the

[19] Cf. UNHCR Information Notes on Refugee Issues in the Baltic Countries (hereinafter *Information Notes*) No. 16, May 1996, p. 1: 'Refugee issues were debated, but no specific language could be agreed on.'

participation of the EU Commission and Presidency in order to discuss, *inter alia*, the integration of the Baltic countries into the EU. The Action Programme adopted at that meeting can be seen as endorsing the overall strategy of cooperation on immigration and asylum. Under the heading 'Free Travel whilst Fighting Abuse' it was stated:

'The speedy, accurate and safe processing of travellers and goods at border crossings is essential for business and tourism... *Abuse, including illegal migration from third countries and the illegal trafficking of migrants*, must, however, be prevented.

All Governments are obliged to fully respect the right of everyone to seek and enjoy in other countries asylum from persecution. In implementing this right, all Baltic Sea States will endeavour to bring their practice into conformity with recognised international instruments. *Principles of first safe country of asylum* and *non-refoulement of refugees* should be respected, as should pertinent rules of the Law of the Sea on the general duty to render assistance to any person found in danger at sea.

Those of the Baltic Sea States which are already parties to the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol will continue to *support others among them in their efforts to fulfil their expressed ambition to accede* as soon as possible, so that all Baltic Sea States will be parties to these instruments without delay. In relation to this Convention and its Protocol, it is essential for all the Baltic Sea States to *conclude readmission agreements* with each other in line with international [law]'[20]

From the standpoint of the three Baltic States, the achievement of visa-free travel was the ultimate goal in this respect. In order to achieve this, they had to prepare themselves for allowing the *returnability* of persons who had moved in an irregular manner to one of the Nordic (or other Western European) countries; hence the simultaneous emphasis on accession to the Refugee Convention and the conclusion of readmission agreements, as quoted from the CBSS Action Programme above.

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[20] Action Programme for the Baltic Sea States' Co-operation, Fifth Ministerial Session, Kalmar 2-3 July 1996, para. 1.5 (quoted from UNHCR *Information Notes* No. 20, July 1996; italics added).

This obviously implied the risk of a 'closed-sack' effect developing in the Baltic states,[21] in so far as they might become obliged to take asylum seekers back who had moved irregularly to the Nordic countries, while not having the possibility to send such persons further back along the transit route towards the East. Therefore Estonia, Latvia, and Lithuania all became even more concerned about their eastern borders, and initiated negotiations on the demarcation of borderlines and the establishment of efficient border controls, as well as towards concluding readmission agreements with the neighbouring states of Russia, Belarus, and the Ukraine.[22] The seriousness and duration of this inevitable concern was reflected in frequent news reports on various border problems, including unauthorized arrivals of 'illegal immigrants', and policy measures taken by the Baltic States in their attempt to avoid becoming a 'closed sack'.

4.I.B.2 Abolition of the Visa Regime

The most direct form of conditionality was to make visa-free travel for citizens of the Baltic States conditional on their countries' conclusion of readmission agreements with the respective Nordic States. In some instances an additional condition was the Baltic States' accession to the Refugee Convention, as was made clear in the Swedish government's explanation of its requirements to the Baltic countries in this regard: they must, *inter alia*, accept 'the concept of first country of asylum', thus having to readmit asylum seekers who arrive in Sweden through their territories.[23]

The message was undoubtedly understood by the governments of the Baltic States eager to gain access to this privilege, at once very practical and highly symbolic for their citizens.[24] For instance, in

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[21] See infra, in this Chapter for country-specific examples, most notably in section 4.II.C.2 (Lithuania) and section 4.IV.C.1 (Estonia).

[22] Concerns and initiatives relating to the eastern borders of the Baltic States were reported in almost every issue of UNHCR's *Information Notes*, published from September 1995; see, for example, Nos. 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 20, 21, 22, 23, 24, 25, 26, 29, and 30.

[23] Swedish Deputy Foreign Minister Pierre Schori at a news conference on 28 January 1997, as quoted in *Information Notes* No. 32, January 1997. See also No. 33, February 1997, quoting the Swedish Prime Minister Göran Persson's statement of conditions for visa-free travel agreements with Estonia and Latvia.

[24] Thus, the prospect of abolishing visa requirements seems to have been a

response to the Swedish requirements as explained on the occasion of signing the visa-free travel agreement, the Lithuanian Prime Minister was quoted as promising that his country would monitor its border properly so as to avoid an exodus of refugees to Sweden via Lithuania.[25] Similarly, it was claimed (in support of the subsequent proposal to lift this limitation), that the Latvian Parliament's decision to ratify the Refugee Convention with geographical limitations covering only refugees from Europe[26] would in fact obstruct the visa-free regime with Finland and Sweden.[27]

Even when accession to the Refugee Convention was not formally made a precondition for visa-free travel, it may still have been of some indirect relevance to the viability of such agreements whether or not the State in question was moving towards implementation of the Refugee Convention by establishing an asylum system. For Denmark this seems to be reflected in the order in which agreements on the abolition of visa requirements were concluded and on the corresponding obligation to readmit people. Clearly, however, other foreign policy considerations also played a role in the process of negotiating visa-free travel agreements, demonstrated by the fact that the first agreements between Denmark and Lithuania, and Denmark and Estonia were signed and implemented long before these two Baltic States acceded to the Refugee Convention.

The first Danish-Baltic visa-free travel agreement was made with Lithuania in 1992, and included the following readmission provisions:

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predominant issue in contacts between the Baltic and the Nordic governments throughout a longer period until this objective was finally fulfilled. UNHCR's *Information Notes* reported regularly about the developments on the issue, cf. Nos. 1, 2, 4, 9, 12, 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 48, and 49.

[25] *Information Notes* No. 33, February 1997. In the same issue an Estonian commentator is quoted as having expressed concern about the financial implications of the proposed Refugee Law while recognizing the advantages of its adoption in the sphere of foreign policy by the following slightly euphemistic statement: 'Estonia would have proved one more time that it exists as a State and perhaps we could more flexibly break the multi-aspect thoughts of our Northern neighbours regarding visa-free regimes.'

[26] Cf. *Information Notes* No. 43, July 1997.

[27] Cf. *Information Notes* No. 48, September 1997. Indeed, both Sweden and Finland made it a precondition for the coming into force of the already signed agreements with Latvia that this State should ratify the Refugee Convention *without* geographical limitation, see *Information Notes* No. 51, October 1997.

> 'Article 5 - The authorities of each country undertake to readmit without formality, into its territory, any of its citizens. The authorities of the Republic of Lithuania undertake to readmit without formality, into its territory, any permanent resident of the territory of the Republic not necessarily being a Lithuanian citizen.
>
> Article 6 - At the request of the immigration authorities of one of the parties the other party undertakes to readmit into its territory citizens from third countries who have entered illegally from the territory of the first country into the territory of the requesting party or otherwise been rejected by the latter.
>
> Article 7 - Either Government may temporarily suspend the foregoing provisions in whole or in part, except Articles 5 and 6 thereof, for reasons of public order. Such suspension shall be notified immediately to the other Government through diplomatic channels'.[28]

While there was no express conditionality in terms of accession to the Refugee Convention in these early instances, it seems beyond doubt that Denmark's reluctance to conclude an agreement on readmission with parallel visa requirement abolition with Latvia until 1996 was partly related to the problems in the field of asylum and immigration control in that country. In a broader perspective, it may be worth noting that this readmission agreement was formulated quite differently from the two earlier ones reported above. The provisions concerning third country aliens read as follows in the Danish–Latvian agreement:

> 'Article 3 - Readmission of an alien on the basis of an advance notification;
>
> A Contracting Party shall readmit without any formality an alien who has entered the territory of the other Contracting Party directly from its territory, on the basis of an advance notification by the competent authority of the other Contracting Party, if no more than seven days have passed since the entry.

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[28] Agreement between the Republic of Lithuania and Denmark concerning the abolition of visas, 31 July 1992, in force on 1 September 1992. Almost identical readmission rules were included in the Danish–Estonian Agreement of 19 April 1993, in force on 1 May 1993.

Article 4 - Readmission of an alien on the basis of a request;

1. The Contracting Party shall at the request of the other Contracting Party, readmit an alien who has arrived in the territory of the other Contracting Party directly from the territory of the Contracting Party and the entry or residence of whom does not meet with the provisions in the legislation of the other Contracting Party. However, this shall not apply if the alien has been granted a residence permit by the other Contracting Party after his/her entry into the country in question.

2. The Contracting Party shall, at the request of the other Contracting Party, readmit an alien who resides illegally in the territory of the other Contracting Party and who is in possession of a valid residence permit, a visa other than a transit visa issued by the Contracting Party, or who has previously stayed for a period exceeding three years in the territory of the Contracting Party.

3. The Contracting Party shall, at the request of the other Contracting Party, readmit also a stateless alien who has entered the territory of the other Contracting Party by means of a travel document issued by the Contracting Party, entitling the return to the territory of the Contracting Party which issued that document, or who has immediately before his/her entry into the territory of the other Contracting Party resided in the territory of the Contracting Party and arrived directly from the territory of the Contracting Party'.[29]

4.I.B.3 From Sub-regional Conditionality to EU Accession Pressures

The cooperation on asylum and immigration issues between the Nordic and the Baltic States has gradually changed in recent years

[29] Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Denmark on the readmission of persons entering a country and residing there without authorization, 18 December 199, in force on 1 January 1997. According to an official Danish source quoted in *Information Notes* No. 31, January 1997, the main reason for the later conclusion of such agreement with Latvia was that it took a long time for Latvia's naturalization law to go through Parliament; however this does not necessarily contradict the above assumption.

following the process of preparation for the accession of Central European and Baltic States to the EU. Thus, from a predominantly sub-regional level of multilateral cooperation, often combined with a certain degree of bilateral conditionality, the Baltic-Nordic relationship has gradually turned into an element of the pre-accession process for Estonia, Latvia, and Lithuania.[30]

This change has been reflected in both bilateral contacts and agreements between these three States and other EU Member States and, more importantly, in the direct involvement of EU institutions in policy initiatives on immigration and asylum in the Baltic area.[31] Some EU activities in the area are being implemented in the sub-region by EU Member States, who can draw on their expertise and experience in previous cooperation programmes with these accession-candidate States. For instance, in addition to continued bilateral capacity-building projects, the Danish Immigration Service has become involved in various PHARE projects in asylum and immigration control, including the Horizontal Programme on Justice and Home Affairs in the Field of Migration, Visa and Border Management, launched in January 2001.[32]

The strong desire for EU membership common to all three Baltic States is likely to create even stronger pressures on them to implement the Refugee Convention and live up to international protection standards in general. The prospect of accession is likely to act as both carrot and stick; hence the EU asylum *acquis* may become the international standard the Baltic States have to comply with. At the same time, it may also reinforce the move by these States to subordinate themselves to perceived western interests regarding migration control. Their 'sometimes reluctant' attitude in applying the principles and responsibilities of international refugee protection could lead to an incomplete implementation of obligations undertaken at European level.[33]

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[30] See, for example, Newsletter No. 76, March 1998, pp. 32-36, and more generally Danish Immigration Service, *Dansk bistand på asylområdet i Estland, Letland og Litauen*, 1998.

[31] As a rather early example, the participation of the EU Presidency and the Commission in the CBSS Foreign Ministers' Kalmar meeting in July 1996 could be mentioned; see text accompanying note 20 above.

[32] See Newsletter No. 96, March 2001, pp. 14-15.

[33] Cf. Chapter 8, providing analysis of these legal mechanisms and development tendencies.

CHAPTER 4

4.I.C Cooperation and Coordination on Asylum and Migration Issues

4.I.C.1 Cooperation Forums and Division of Responsibilities

The main patterns of Nordic-Baltic cooperation seem to have been already established in the period of 1993–94. It is both interesting and illustrative to note that it was police authorities that first established worthwhile contacts with Baltic States on asylum and migration control. For instance, police cooperation between Denmark and the Baltic States increased considerably as a result of the Danish National Police Commissioner's to the Baltics as early as May 1993.[34]

As a result of this initial police cooperation, a general division of responsibilities towards the three Baltic States was decided by the Nordic Commissioners of Police. Later, the immigration authorities decided to follow the same model of cooperation in offering support for the introduction and implementation of refugee legislation in the Baltic countries. The Nordic Joint Advisory Group of Senior Officials on Asylum and Immigration (NSHF) approved this division of responsibilities at its meeting in December 1995. Accordingly, Denmark took over responsibility for coordinating programmes and activities in Lithuania, Sweden became the coordinator for activities in Latvia, and Finland for Estonia. For each of the three Baltic States the coordinator in charge was to establish working groups comprising members from the other Nordic countries, as well as representatives of UNHCR and IOM.[35] This structure was apparently used also as the organisational framework for the preparation of donor meetings on asylum and migration activities in the Baltic countries.

In addition to this coordinated yet still predominantly bilateral structure of cooperation and assistance programmes between Nordic and Baltic States, the Nordic countries set up a multilateral programme in collaboration with IOM, the so-called Comprehensive Programme of Migration in the Baltic Sea Area, between 1994 and 1996. The main purpose of this programme was to strengthen the immigration authorities and reinforce border control in the Baltic

[34] *First Baltic Report* (note 9), p. 32. On the background of these visits, see section A.3.

[35] *Information Notes* No. 7, December 1995; see also, Newsletter No. 77, April 1998, p. 15, and Danish Immigration Service (note 30), p. 12.

States and Belarus.[36] Among the elements included in the programme were:

(1) Training of border control officers on issues such as interviewing, use of modern technology, and policies and structures relating to migration, including measures against illegal migration;

(2) Staff exchange and study visits, aimed at a common approach to migration issues within the region;

(3) Technical support in the form of modern technology to facilitate handling of individual cases at borders, as well as expert advice on the development of legislation, administrative structures, reception facilities, etc.;

(4) Enhanced public awareness of migration issues, and cooperation with private organisations.[37]

Certain elements of the bilateral or multilateral Nordic-Baltic programmes were coordinated, or even partly overlapping, with the activities of other international organizations involved in asylum and migration issues. Finnish and Danish experts in asylum administration were thus seconded to the UNDP missions in Estonia and Latvia, respectively, in order to act there as UNHCR liaison officers. In addition, the Nordic initiatives towards the Baltic States and the Baltic Sea area as a whole were seen as closely connected with other international forums and their activities to combat 'illegal immigration', such as the 1991 Berlin Conference and the ensuing Budapest Group, and the 1994 meetings on 'human trafficking' within the framework of the Inter-Governmental Consultations in Geneva.[38]

At sub-regional level, three conferences on uncontrolled immigration from the Baltic Sea countries were held in April 1993, January 1994 and May 1995, with the participation of the four Nordic States, the three Baltic States, plus Belarus, Russia, and Poland, as well as

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[36] On this programme, see *Second Baltic Report* (note 15), pp. 18-23.

[37] Ibid. While IOM proposed a major new project for the Baltic Sea Area as a continuation of the 1994-96 Comprehensive Programme, this appears to have been less attractive for donor States; in addition to some unofficially reported scepticism towards the performance of this programme, these States preferred a more flexible approach allowing the selective support of specific project elements, cf. Newsletter No. 67, February 1997, pp. 47-50.

[38] Cf. *First Baltic Report*, pp. 28-30, and Newsletter No. 26, June 1994, p. 60.

UNHCR and IOM; Germany and the USA participated as observers in the first two conferences respectively.[39] There also seems to have been some overlapping, though perhaps not much coordination, with the 1996 Regional Conference on Refugees, Returnees, Displaced Persons and other Forms of Involuntary Displacement in the CIS and Relevant Neighbouring States.[40]

Last but not least, the Council of the Baltic Sea States Commissioner on Democratic Institutions and Human Rights played an active role in the question of treatment of asylum seekers in the Baltic countries; one of his most important contributions was to raise the often controversial issue of detention practices towards 'illegal migrants'.[41] As a follow-up to these initiatives, the Danish Ministry of the Interior held consultations with the CBSS Commissioner on various policy initiatives in the asylum field, including promotion of accession to and implementation of the Refugee Convention by the Baltic States, as well as the possibilities of cooperation within the CBSS framework on asylum issues.[42]

4.I.C.2 Influential Cooperation: Containment and Capacity-building

As already mentioned, one of the most important objectives of Nordic cooperation programmes on asylum and migration issues in the Baltic area was to prevent or hinder 'illegal immigration' from or via the three Baltic States. This seems to have underpinned two different policy positions towards these States: Firstly, it was considered necessary to *reinforce border control* both in the Baltic and the Nordic countries. Secondly, it was considered appropriate to help the Baltic States *establish effective asylum procedures* in accordance with international standards; this in turn required the adoption of domestic asylum

[39] Cf. Newsletter No. 18, February 1994, pp.46-48, and No. 43, May 1995, pp. 59-60.

[40] Cf. *Information Notes* No. 17, May 1996, and *Second Baltic Report*, pp. 25-26.

[41] Cf. Commissioner of the CBSS on Democratic Institutions and Human Rights, *Report of First Mandate Period* October 1994 - September 1997, p. 59; *Annual Report* May 1995 - June 1996, pp. 46-49 and 51-53; *Annual Report* June 1996 - June 1997, pp. 36-37; *Annual Report* June 1998 - June 1999, p. 67. See also reports on such initiatives in *Information Notes* No. 3, October 1995; No. 15, April 1996; No. 33, February 1997; and No. 39, May 1997.

[42] Newsletter No. 50, November 1995, pp. 24-25, and *Second Baltic Report*, pp. 30-31 and 53.

legislation to implement the Refugee Convention, establish asylum procedures at both first instance and appeal level, and set up facilities and organizational structures for the reception of asylum seekers.

Crucial to the achievement of these policy objectives was the establishment of working contacts with police and immigration authorities in the Baltic States.[43] This is well in line with the significant emphasis that seems to have been placed on border-control activities in the Baltic Sea States' cooperation on asylum and immigration issues.[44] Not only were the first contacts between Nordic and Baltic authorities in this field apparently established between police officials but reinforcement of migration control also seems to have been an issue that consistently underlay the more wide-reaching aims of the cooperation programmes. It is important to realise that the aim and content of control-oriented cooperation have been less transparent and publicly debated than other aspects of the programmes dealing with asylum administration and human rights related issues.

The key point to remember concerning border control is that training and equipment to strengthen border control in Estonia, Latvia, and Lithuania were not just aimed at supporting the Baltic States' capacity to safeguard their sovereign status and protect their recently achieved independence against potential threats at their eastern borders. They clearly had the additional purpose of reinforcing these States' capacity and preparedness to control *exit movements* from their territories as well, in order to prevent people moving towards Western Europe with the intent of applying for asylum. In other words, the overall strategy aimed at containing potential asylum seekers within the Baltic States, thereby preventing these countries from developing into a transit area *en route* to the Nordic and other Western European countries.[45]

Among the factors pointing to this conclusion are the equipment for implementing sea-border control donated to the Baltic States and the content of police training activities carried out by donor states. For instance, in connection with the posting of a Nordic police *liaison officer* in Vilnius in Lithuania, whose task it would be to support the prevention of illegal immigration, the Danish National Commissioner of Police offered to train the staff of the airlines of the three Baltic

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[43] Cf. *Second Baltic Report*, pp. 18-26.

[44] Cf. Sandra Lavenex, *Safe Third Countries. Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, 2000, pp. 82-85.

[45] Ibid., pp. 153-54.

States. This offer obviously must have been related to the role of these transport companies in carrying out exit control of passengers.[46] Further initiatives of a quite draconian nature were also contemplated, in particular Danish naval operations in the Baltic Sea more or less tantamount to interception of potential refugee transports, without any clarification of the legal status of such operations.[47]

Despite evidence supporting the conclusion that *containment* of asylum seekers was a central element of the Nordic asylum programmes and activities in the Baltic countries, it should not be ignored that these programmes also included significant capacity-building elements for the protection systems that were hitherto incomplete, if not totally lacking, in Estonia, Latvia, and Lithuania. Legal, procedural and logistical forms of protection capacity were, until the EU accession programmes took over most of them in the late 1990s, to a large extent initiated and financed by Nordic governments. While some would tend to consider these efforts as a way of justifying the containment policy, they nonetheless had humanitarian effects, thus enhancing the general capacity of the recipient states to tackle their immediate refugee problem, as well as future protection needs.

4.1.D Protection vs. Exclusion as the Objective of Cooperation

Nordic country policy responses to the Baltic asylum challenge developed through somewhat contradictory manifestations of popular sentiment. On the one hand there was political demand for reinforced immigration control to prevent arrivals; on the other, certain although not always constant, expressions of humanitarian concern and solidarity with the disadvantaged Baltic States.

While the Nordic governments must have been well aware of the consequences of the *containment* strategy, it is also clear that it attracted

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[46] *Second Baltic Report*, pp. 39-40. See also p. 24 concerning a Nordic police delegation to Russia in April 1994 that introduced airport staff from Aeroflot to the entrance rules and documentary problems of the Nordic countries, and carried out negotiations with Aeroflot representatives and airport authorities.

[47] *First Baltic Report*, p. 42, and *Second Baltic Report*, pp. 41-43. In July 1997 Danish media reported that naval vessels from various states actually did carry out coordinated and secret operations in order to combat 'human trafficking' and 'illegal refugees'.

a good deal of support from UNHCR. At least at regional level, the rationale of the UNHCR appears to have been on the whole parallel to the policy objectives of the Nordic governments: partly to motivate the Baltic States to accede to the Refugee Convention and establish their own asylum procedures, partly to avoid the pull factor that would ensue from the Baltic States being mere transit stops in asylum seekers' move onwards to Western European countries. Thus, a 1996 UNHCR note identified the problems inherent in the situation, for example that asylum seekers who manage to reach the Nordic countries would not be returned because the Baltic countries' detention policy towards asylum seekers was incompatible with human rights standards and constituted lack of fair procedures, and because of the limited possibilities of returning the asylum seekers to their countries of origin or of previous transit. The various solutions were assessed in this manner:

'Resettlement to countries in the West, not a current practice, would solve the immediate problem for the asylum seekers benefiting from this measure. However, only a small number are likely to be offered this opportunity, while it raises false hopes for others. Experience shows that *resettlement tends to encourage irregular movements* and therefore *cannot be advocated as a solution in other than exceptional, individual cases.* However, long-term detention without the prospect of any solution, combined with harsh, inhumane conditions, could become the justification for this type of solution...The best option remains the reception of asylum seekers in the Baltic countries at a level that corresponds to minimum standards of treatment. Only that would make it *possible for the Nordic countries to return asylum seekers to the Baltic countries.* This in turn would *remove a major incentive for people to travel to the Baltic countries, except where genuine protection needs compel people* to accept, perhaps reluctantly, the lower standard of living in the Baltic Countries'.[48]

This UNHCR policy became rather clear in connection with plans to transfer detained 'illegal immigrants' from Estonia and Latvia to the Nordic countries. Finland's offer in 1994 to resettle 89 Kurdish refugees from Estonian prisons was understood as being conditional to a forthcoming UNHCR request; resettlement, however, did not take place until the following year, when Finland accepted the refugees

[48] UNHCR Regional Office for the Baltic and Nordic Countries, Note on Developments Regarding Asylum Seekers and Refugees in the Baltic States, January 1996.

without such request.[49] It appears that the UNHCR position shifted somewhat in subsequent years, perhaps as a result of the progress made towards implementation of the Convention in all Baltic States. Thus in December 1996 the Nordic immigration ministers agreed on a plan, in cooperation with UNHCR, to receive 108 refugees who had spent almost two years in the Olaine detention centre in Latvia.[50]

Nordic *containment* policy was influential and successful, in so far as it used a variety of factors to motivate Baltic States to step up exit control to stem irregular movements of asylum seekers towards the West. At the same time, Nordic influence on the emerging asylum systems in the three Baltic countries was probably exercised more indirectly and discreetly. There is however no doubt that the assistance in building capacity for asylum procedures as well as other elements of refugee reception and protection has had a considerable impact on the structures and the legal characteristics of the asylum administrations in Estonia, Latvia, and Lithuania.[51]

Furthermore, the monitoring of the situation by Nordic governments, media, and non-governmental organizations may have had a mitigating influence on the reaction of the Baltic States to arrivals of asylum seekers. The perception of such people as 'illegal migrants' could not have been helpful to the efforts of these States to comply with basic standards for the treatment of those seeking international protection.[52] Although detention and other forms of treatment not up to international standards may to some extent be seen as a result of the

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[49] Newsletter No. 41, April 1995, pp. 45-46.

[50] Newsletter No. 67, February 1997, p. 46; see also Danish Immigration Service (note 30), pp. 29-30. In March 1996, the UNHCR Regional Representative in a public statement suggested that, in view of the prolonged detention of the asylum seekers in Olaine, the Nordic countries should on an exceptional basis consider the transfer of the detained asylum seekers to asylum procedures in the Nordic countries; cf. *Information Notes* No. 12, March 1996. It cannot be ruled out that this solution could have occurred earlier had UNHCR shown it clearer support for it *vis-à-vis* the Nordic governments.

[51] See, especially concerning the last-mentioned state, information provided by the Danish authorities in Newsletter No. 68, April 1997, pp. 47 and 49; No. 70, June 1979, p. 19-20; No. 73, November 1997, p. 12; and No. 74, December 1997, pp. 27-28.

[52] Reports on harsh conditions in detention centres or similar institutions for 'illegal migrants' were quite frequent; as a controversial example, events in the Olaine prison centre in Latvia were reported in *Information Notes* Nos. 1, 2, 3, and 4, September-November 1995.

policies of Nordic and other Western European States,[53] their current dialogue with the Baltic governments is likely to have resulted in less restrictive responses than might otherwise have occurred. This raises the question, however, whether the *containment* strategy as such was in reality counterproductive, in the sense that by increasing the number of asylum seekers present in the Baltic States, this policy may, at the same time, have increased the perceived magnitude of the refugee problem and thereby have negatively affected these governments' willingness to accede to the Refugee Convention.

A kind of conceptual justification of the *containment* policy was the rather ambiguous language applied in official papers dealing with these refugee issues. They often referred to the potential asylum applicants as 'illegal immigrants', describing the phenomenon as 'organized trans-border criminality', 'illegal transport' and 'preventing illegal transit'. Even if such descriptions may have been accurate to a certain extent, they failed to take into account the demands and the need for protection of these cases, in particular with regard to containment of asylum seekers in the somewhat unsafe and difficult conditions in the Baltic States.

Such an ambivalent approach may also have adversely affected the already sceptical attitudes within Baltic governments and the populations towards refugees and asylum seekers.[54] The following sections of this Chapter may give some indications as to how this is reflected in actual refugee legislation and practice of the three Baltic States. Against this background, whether there is a chance that EU accession will change Baltic priorities and perceptions shall be discussed below in Chapter 8.

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[53] Some local government officials even seem to have considered the detention of asylum seekers in Baltic countries as a response on behalf of states in Western Europe. Thus, *Information Notes* No. 48, September 1997, quoted an adviser to the Lithuanian President for expressing his expectation of EU financial support for a centre for asylum seekers 'since by detaining the illegals in the country, Lithuania is protecting the EU countries from being flooded'.

[54] For a similar account see Sandra Lavenex (2000) pp. 86-87 and 122.

4.II Lithuania

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4.II.A Factors which Prompted Establishment of Asylum Systems

4.2.A.1 Background and Context

One of the effects of the dissolution of the former Soviet Union has been the emergence of a considerable transit migration through the territories of the former USSR towards Western Europe. These movements have been composed of different categories of persons. Since 1992 tens of thousands of potential asylum-seekers have entered the Russian Federation, Ukraine and Belarus in search of an asylum country. Some of these persons reached Western and Northern European countries by irregular travel through the territory of Lithuania.

Being at the crossroad of migratory processes, Lithuania has become a kind of 'waiting room' for hundreds of foreign nationals on the way to their final destination, the EU countries. Membership in the European Union is one of the most important aspirations for Lithuania as well as other central and eastern European countries. Nevertheless, adoption of refugee legislation was not explicitly articulated as *conditio sine qua non* to enter the EU at that point in time. It was rather interpreted by legislators in terms of 'better earlier than later' as a prerequisite for fully-fledged participation in the life of the international community.[55] As far as is known, this was also due to the fact that the EU did not demonstrate clear institutional interests in monitoring refugee policies and practices in Lithuania at that time. However, its interest gradually intensified and even resulted in substantial financial assistance channelled to strengthen Lithuania's eastern border and improve reception facilities for asylum seekers within the Foreigners' Registration Centre of the State Border

[55] Interview with V.Grazulis, Head of the Secretariat of the Council of Refugee Affairs, Ministry of Social Security and Labor, 26 February 1999.

Protection Service at the Ministry of Interior (Foreigners' Registration Centre)[56] in the town of Pabrade.

The first official data on irregular transit migrants detained in Lithuania dates from mid-1992. Within the space of only a few years, there has been a significant increase in the number of irregular migrants detained in Lithuania or at its borders who originally come from developing countries outside the former Soviet Union. During 1995, some 1,630 irregular migrants were detained in the Republic of Lithuania, of whom 87 per cent came from Afghanistan, India, Pakistan, Sri Lanka and Bangladesh. Most of them (85 per cent) transited through Russia or Belarus, where they had been living for a considerable period of time. In comparison with 1994, the number of irregular migrants had increased ten-fold. Out of the 1,630 irregular migrants, 369 were expelled, the others were detained at the Lithuanian-Polish border regions (Lazdijai, Marijampole, Vilkaviskis) and a few of them in the Lithuanian-Belarus region.[57]

The Migration News Sheet gives different numbers:

TABLE 22. IRREGULAR IMMIGRANTS DETAINED IN LITHUANIA

Year	1992	1993	1994	1995
Total	378	1,109	1,998	2,073

Source: Migration News Sheet, April 1996

The main factors increasing transitory migration through Lithuania were: insufficient border controls; comparatively inexpensive flights from Asian and African countries to CIS;[58] the virtual non-existence of demarcated and guarded borders between CIS countries, making them a homogenous, easy-to-cross, geopolitical space; the absence of effective legal or administrative human trafficking prevention measures that provided ample opportunities for further migration via eastern European countries to western Europe.[59]

[56] This Centre is designed for accommodating foreigners who come to or stay in Lithuania illegaly.

[57] Virgilijus Bulovas, Minister of Interior of the Republic of Lithuania, answer to DG IV's questionnaire, May 1996.

[58] 'The Baltic Route: The Trafficking of migrants through Lithuania', IOM, January 1997.

[59] Ibid.

Not surprisingly, the Lithuanian Government was unprepared to deal with the incremental flow of irregular transit immigrants in a legitimate and effective manner because it lacked normative and legal regulations, administrative procedures, institutional capacities, human resources and financial means. Within this uncertain and unpredictable situation, genuine asylum seekers from third countries often found themselves totally marginalized, or even in protracted detention. Furthermore, claimants were not only treated as ordinary 'illegals', but they were even exposed to danger of *refoulement* since a 'refugee regime' did not exist either in Lithuania, or in the other Baltic countries.

4.II.A.2 Trading Rights with Nordic States: Visa-free Travel and Refugee Protection

The Nordic countries, specifically Denmark, Finland, Norway and Sweden, contributed substantially to turning Lithuania into an asylum country. Primarily, manifold assistance was given to Lithuanian authorities to build up a refugee reception system during bilateral visits at various levels from 1993-1995. This created a feeling that the international community was truly concerned about the refugee situation in Lithuania and, moreover, was ready to offer its support. Clearly, this argument was taken into account in the course of the entire debate on the pros and cons of the implementation of national refugee legislation in Lithuania.[60] Furthermore, the pragmatic argument was brought to bear that Lithuania could be the first Baltic country to make progress in the area of refugee protection, which would not only give political benefits to a maturing democracy *vis-à-vis* the international community in general, and the EU in particular, but would also create a sort of 'first mover's advantage' in the Baltic region in terms of attracting financial and technical resources from the donor community. Interestingly, the Seimas (Lithuanian Parliament), having adopted national refugee legislation on 4 July 1995,[61] on the basis of the parliamentary resolution concerning implementation of the law, conditioned the implementation of the law on the creation of a legal and institutional basis indispensable for it to take effect.

On the basis of a resolution on the implementation of the law, the Parliament requested the Government of Lithuania to ask for

[60] Interview with V.Grazulis, 26 February 1999.

[61] Law on Refugee Status in the Republic of Lithuania of 4 July 1995, No. I-1/1004, Parliamentary Record Nr.10 (official translation) enforced on 27 July 1997.

technical and financial assistance from international organizations and governments for activities like the purchase of computers and software, the creation of an appeals' institution and reception centre, and the training of specialists to work with refugees. Obviously, the adoption of refugee legislation gave political credit to Lithuania, although the conditioning of the law to the setting up of legal and institutional infrastructures allowed the government to delay its implementation until 27 July 1997. The aforementioned resolution did not set up any specific time limit for the refugee law to become effective; rather, it sent a subtle message to the interested parties that they could begin mobilizing resources. In fact, this pragmatism proved to be a successful strategy that translated into approximately US2 million, given by the Nordic countries and the UNHCR in continuous concerted efforts to assist Lithuania in the creation of the institutional capacities necessary for refugee reception, and provide training for governmental and non-governmental bodies.

In the political rhetoric of 1994-1996 one could also find a sceptical assessment of the Nordic promises to assist the Lithuanian government to build up a refugee system in the country. These alleged disclosures, warning that Lithuania could become a *dumping place* or *cordon sanitaire*, were, to a certain extent, a reminder of a spirit of classical 'realism' in international relations, assuming the primacy of national interests or, in other words, self-interests of the Nordic governments. The interests of the Nordic governments, traditionally explained in terms of 'burden-sharing', were interpreted as 'burden-shifting' by Lithuania, who interpreted them as intended to keep irregular migrants inside the Baltic area.

Secondly, the introduction of visa free agreements with such Nordic states as Sweden and Finland (Denmark concluded a visa free agreement with Lithuania on 31 July 1992,[62] and Norway on 15 December 1992[63]) was related to the adoption of national refugee legislation in Lithuania and ratification of the 1951 Refugee Convention. For example, Sweden unconditionally made the signature of a visa-free agreement contingent upon ratification of the Refugee Convention. This was an unequivocal message. As proof, it suffices to remark that the Lithuanian Government signed a visa free agreement with Sweden on 10 February 1997, which took effect on 1 May 1997, and with Finland on 4 August 1997, which took effect on 2 November 1997; while the Refugee Convention was ratified by the Parliament on 21 January 1997, and became effective on 27 July 1997.

[62] Entered into effect 1 September 1992.

[63] Entered into effect 15 January 1993.

4.II.A.3 Pressure from International Organizations

Since 1991, when the mandate of the UNHCR was extended to the Baltic region through its Regional Office in Stockholm, this UN agency had formally observed irregular migratory developments with 'growing concern' in the light of the absence of a decent refugee protection system in Lithuania as well as in other Baltic states.[64]

UNHCR continually attempted to change this unsatisfactory and unacceptable status *quo*. In fact, the first inter-ministerial discussion about the necessity to implement refugee legislation in Lithuania was initiated in summer 1992 during a visit of the UNHCR Regional Representative for the Baltic and Nordic countries which finally resulted, in January 1993, in the setting up of a working group to draft refugee legislation.[65] In the course of the drafting process, UNHCR constantly supplied legal expertise to the working group in the field of international refugee obligations. In spring 1994, a draft Refugee Law was submitted to the Government's Cabinet for discussion, approval and submission to the Parliament. In spite of considerable progress during the drafting process, a debate on the draft was deadlocked for more than half a year, since the adoption of the Refugee Law was not considered by the Lithuanian Government as a national priority.[66] The legislative process was put into motion again after the meeting of the UNHCR Regional Representative with the Chairperson of the Lithuanian Parliament, who promised to speed up the adoption of the law. Subsequently, the UNHCR Regional Representative took part in the meeting of the Government Cabinet in December 1994, which finally endorsed the draft Refugee Law and forwarded it to the legislature for eventual adoption on 4 July 1995. When the Lithuanian Law on Refugee Status (1995 Refugee Law) was passed, the Lithuanian Government, in co-operation with the UNHCR Stockholm and UNDP Vilnius, initiated a resource mobilization process in order to build up institutional capacities in Lithuania to protect asylum seekers and refugees.

UNHCR interest in seeing Lithuanian legislation and practice in line with international standards of refugee protection did not cease with the adoption of 1995 Refugee Law and its enforcement in 1997. The organization took part in the work of the Working Group officially approved by the Government and vested with the competence to draft a new version of the Refugee Law. The draft, prepared by the Working

[64] Letter of UNHCR Regional Representative H.Thoolen to UNDP Resident Representative J.Lissner, Vilnius 5 July 1994.

[65] Interview with V.Grazulis, 26 February 1999.

[66] Ibid.

Group, was passed by the Lithuanian Parliament on 29 June 2000 (2000 Refugee Law).[67]

4.II.B Legislative Practice: Balancing Refugee Protection against Exclusion

4.II.B.1 Access to the Territory

The vast majority of asylum seekers[68] coming to Lithuania travel via the Russian Federation and subsequently via the Republic of Belarus. The Lithuanian border with Belarus seems to be of paramount importance to the Lithuanian Government because of the flow of asylum seekers through it. The Lithuanian Government's legitimate interest undoubtedly lies in controlling the flow of migration across its borders, while at the same time putting great emphasis on the need to combat illegal entry into its territory.[69] Foreigners in need of international protection also have a legitimate interest to freely exercise their right to seek and enjoy asylum from persecution.[70]

The State border is the first point where asylum seekers' physical access to Lithuanian territory may be limited. According to the 1995 Refugee Law, persons seeking asylum in Lithuania as a general rule were required to express their intention to seek asylum while at the border. However, until 2000, there were very few recorded cases of such applications (only 3 in 1999). In the great majority of cases, foreigners sought asylum only after being physically present on the territory, either when apprehended by police or after being transferred to the Foreigners' Registration Centre. The situation changed substantially in 2000, when 51 applications for asylum (encompassing 80 persons) were submitted at Lithuanian borders. It is unlikely that this is the influence of the revised legislation, as the new version of

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[67] Law on Amendment to the Law of the Republic of Lithuania 'On Refugee Status in the Republic of Lithuania' of 29 June 2000, No. VIII-1784, 'Zinios', No. 56-1651 (UNHCR translation into English) that came into force 1 September 2000.

[68] Breakdown of the largest groups of asylum seekers in Lithuania according to their nationalities in 2000 according to the information of the Migration Department at the Ministy of Interior: 1. Russian - 115; 2. Vietnamese - 27; 3. Afghan - 20; 4. Pakistani - 8; Stateless - 8.

[69] The Report on Lithuania's Progress in Preparation for Membership in the European Union, July 1997 - July 1998, prepared by the European Committee under the Government of the Republic of Lithuania on 31 August 1998.

[70] Article 14 of the UDHR, GA Res. 217 A (III) of 10 December 1948.

the Refugee Law was adopted only in July 2000 and enforced in September of the same year.

The 2000 Refugee Law sets out detailed regulations for the admission of asylum seekers into Lithuanian territory, in contrast to the Law on Refugee Status 1995,[71] which only stated in general terms that asylum seekers shall be granted entry to the country through border control points under an order established by the Lithuanian Government.[72] The Government, in its Resolution,[73] established that the only grounds for refusing asylum seekers entry into the country, is if there is no risk of persecution in the country of her origin or the third country. However, according to the information available, this provision has never been applied by the authorities in practice. The 2000 Refugee Law in this respect, compared with the old version, seems to be not only more explicit, but also more restrictive. The new Law states five grounds on the basis of which asylum seekers may be refused entry into the country. Article 10 of the Law provides that admission to the territory may be refused if a foreigner:

(a) has arrived from a safe third country (emphasis added);

(b) has been granted asylum in another state;

(c) possesses citizenship of several states and without serious reasons does not avail herself of the protection of a state of which she is a citizen;

(d) the application for refugee status has been earlier rejected after examination under the order of this Law, and the new application does not contain important additional information;

(e) the application is manifestly unfounded (emphasis added).

Once the initial interview of asylum seeker has been conducted at the border, the central institution in asylum procedure, the Migration Department at the Ministry of Interior (Migration Department) must decide within 48 hours on whether a foreigner shall be allowed to enter the country. If admission is refused, the foreigner is entitled to file an appeal against such a refusal to Vilnius District Administrative

[71] Effective until 31 August 2000.

[72] Article 7 of the 1995 Refugee Law.

[73] Paragraph 6 of the Order on Crossing the State Border for Foreigners, Seeking Asylum in the Republic of Lithuania, approved by Resolution No. 421 of the Government of the Republic of Lithuania of 3 April 1996.

Court within seven days from receipt of decision.[74] However, the effectiveness of such an appeal may be reasonably doubted, as it carries no suspending effect against execution of the decision. But this is only applicable to those applicants who are at the border. Those who are *de facto* in the territory and apply for legal admission are entitled to appeal with suspending effect.[75]

Some grounds set forth in Article 10 of the 2000 Refugee Law might well raise not only academic interest but also practical concern as to whether their application at the Lithuanian border may limit the protection afforded to asylum seekers. Two grounds justifying rejection at the border seem to represent the restrictive attitude of the state towards arrivals to its territory. These are the application of the notion of the safe third country[76] and manifestly unfounded claim,[77] both terms defined in the 2000 Refugee Law, while the first is also detailed in the Order on Determination of Safe Country of Origin and Safe Third Country and Return or Deportation of Foreigners to Them, approved on 27 October 2000 by the Minister of Interior and Minister of Foreign Affairs (Order on Determination of Safe Country).[78] The lack of legal remedy with suspending effect against rejection at the border, and the fact that getting access to legal aid within 48 hours in order to submit an appeal within the time limit is in reality an illusion, raises some doubts as to whether the practice of application of the border procedure would be compatible with Lithuanian international obligations under Article 13 of the ECHR, which specify that the national authority must grant effective remedy. The possibility given by the safe third country clause of deporting a foreigner immediately after a decision on rejection, as stipulated in the Order on

[74] Article 9 (3) of the 2000 Refugee Law.

[75] Article 9 of the 2000 Refugee Law.

[76] Article 2 (15) of the 2000 Refugee Law: 'safe third country - a state which, while not the foreigner's country of origin, is party to the 1951 Convention Relating to the Status of Refugees and (or) the 1967 Protocol relating to the Status of Refugees, and to the 1950 ECHR and (or) the 1966 ICCPR, and which implements the provisions of these documents and in accordance with its national laws provides for a real possibility to apply for refugee status and obtain it in accordance with the established procedure'.

[77] Article 2 (7) of the 2000 Refugee Law: 'manifestly unfounded application for refugee status - [is] an application for refugee status in the Republic of Lithuania, submitted by a foreigner, which manifestly contains no substance for risk of persecution in the country of origin or is based on deliberate deception, or is an abuse of the refugee status determination procedure, and which due to the above-mentioned reasons manifestly meets none of the substantive criteria under the 1951 Convention or 1967 Protocol Relating to the Status of Refugees.'

[78] Order on Determination of Safe Country of Origin and Safe Third Country and Return or Deportation of Foreigners to Them of 27 October 2000, approved by the Order No. 418/136 of the Minister of Interior and Minister of Foreign Affairs.

Determination of Safe Country,[79] and before the time limit for the appeal against such a decision has passed can only have a negative impact on the protection situation of a rejected asylum seeker. The application of the manifestly unfounded claims notion may raise concerns as to the practical possibilities of examining applications within the 48 hours allocated for border procedure. It is doubtful if this time frame is sufficient to conduct a full and detailed examination of an asylum application in order to fairly declare it 'manifestly unfounded'. Moreover, the fact that no substantial examination of the claim is to take place during the border procedure leaves room for erroneous decision-making, which may arise not from faulty examination, but from the lack of practical possibilities to assess the claim properly. This may entail irreversible consequences for genuine asylum seekers. Interestingly, the possibility to refuse entrance in cases of manifestly unfounded claims at the border was introduced at a late stage of the adoption of the Refugee Law, and seems as odds with the general procedural framework established in the Law by the Working Group on its preparation. This could be alleged to the fact that Article 14 of the Refugee Law also provides for the application of the manifestly unfounded claims notion, this time as a ground for accelerated refugee status determination procedure to be applied. Here, the claim is being examined in substance; therefore, it seems illogical to have a duplication of the notions in different procedures.

Although both versions of the Refugee Law equipped the migration authorities with legal tools to refuse entry for asylum seekers at the Lithuanian border, at the end of 2000 the authorities did not seem to be using these tools extensively in practice. Out of 51 applications for asylum (encompassing 80 persons)[80] the decision to refuse entry to the country was adopted only once. Rejection was then justified on the ground that the applicant had been already granted asylum in another state.[81]

At the time of writing this paper, a proposal for amendments and supplements to the 2000 Refugee Law is in preparation by the authorities despite the comparatively short period of time that the Law has been in force.[82] Some of the proposed amendments deal directly with revision of the list of grounds justifying refusal of admission to the territory of Lithuania. If the proposal is upheld by Parliament,

[79] Paragraph 16 of the Order on Determination of Safe Country.

[80] The total number of asylum applications submitted during 2000 stands at 146 (the number covers 199 persons), information of the Migration Department.

[81] Decision No. 15/6-1A-562 of the Migration Department of 19 October 2000 in the case of a Russian national granted asylum in Hungary.

[82] Adoption expected in 2001.

application of the safe third country notion should remain as the only ground to refuse entry into the country. No suspending effect of appeal for the applicants at the border is going to be introduced, at least with these proposed amendments. However, even if these legislative proposals become a reality, one could predict that application of the safe third country notion will gain more importance in the future and will be applied much more frequently. The possibility to introduce and use the lists of safe third countries is established by the Ministry of Interior and Ministry of Foreign Affairs.[83] No doubt, the existence of such lists and their application in practice may serve as a tool to protect the interests of the state against the increased numbers of asylum seekers. Furthermore, application of the safe third country notion without necessary procedural safeguards, which still do not exist, may raise legitimate concerns.

4.II.B.2 Access to the Procedures

4.II.B.2 (a) At the border

Due to the very few applications and the absence of official information on *refoulement* of asylum seekers at the border under the 1995 Refugee Law, no objective assessment of the situation could be made. Insufficient practice under the 2000 Refugee Law does not yet allow us to have a complete picture of the situation. By the end of 2000, based on available information on asylum applications at the Lithuanian border and the only refusal to grant access to the territory under the 2000 Refugee Law *supra*, it would seem that no practical protection problems have occurred so far, and that asylum seekers at the border have enjoyed full access to refugee status determination procedures in the country. However, the potential of limiting such access through refusing entry to the territory objectively exists, based on the extensive legislative possibilities embodied in Article 10 of the 2000 Refugee Law.

4.II.B.2 (b) In the territory

[83] Paragraph 8 of the Order on Determination of Safe Country stipulates, 'on the basis of reports on third countries and countries of origin, the Ministry of Interior together with the Ministry of Foreign Affairs can draw lists of safe third countries and safe countries of origin'.

If a foreigner is present in the Lithuanian territory, she may submit an asylum application to the town (district) police commissariat, Foreigners' Registration Centre or other state or municipal bodies and institutions.[84] Such an asylum seeker is subject to the same procedure as the border applicants, during which the Migration Department ascertains whether there may be grounds to refuse her stay in the country under Article 10 of the 2000 Refugee Law. If such an asylum seeker is denied legal access to the territory, then she is subject to deportation from the country, and consequently has no access to asylum procedure. By the end of 2000, the practice of denying legal access to the territory under the 2000 Refugee Law for so-called 'in-country' applicants has not been recorded. In comparison, the 1995 Refugee Law raised some concerns in this respect because the issue was not properly regulated by law. Moreover, in practice there were cases when asylum seekers were refused access to the asylum procedure because they were denied legal access to the territory. These concerned six Kurdish Turks whose denial of legal access to the territory was justified by the fact that they illegally resided and worked in Lithuania.[85]

Even though refusal of admission to the territory under the 1995 Refugee Law automatically meant refusal of admission to asylum procedure, this was not true in the opposite case. In other words, admission to the territory did not automatically lead to admission into asylum procedure. The applicant still had to undergo the so-called 'pre-screening procedure' as applied under Article 4 of the 1995 Refugee Law. While deciding on admission to asylum procedure, the Migration Department had to decide on whether any reasons existed to prevent the foreigner from enjoying asylum in Lithuania.[86] The whole concept of admission into asylum procedure was defective. Grounds for refusing a foreigner's admission to the asylum procedure were mixed with traditional exclusion clauses,[87] clauses related to public security and clauses related to credibility.[88] In practice,

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[84] Article 8 of the 2000 Refugee Law.

[85] Consequently, three of the asylum seekers were *refouled* from Lithuania, while the other three consented to voluntarily repatriate to Turkey: information of UNHCR Asylum Nord No. 2 of 14 August 1998.

[86] Article 4 of the Refuge Law 1995.

[87] Article 4 (1) (2) stated, 'A foreigner shall not enjoy the right to use the Republic of Lithuania as asylum, if: 1) there are sound reasons to assume that s/he has committed a crime against peace, humanity, or a military crime, as said crimes are defined in international instruments; 2) s/he is accused of an actual non-political crime or if the judgement for a crime or action committed by him/her which contradicts the objectives and principles of the United Nations has become effective.'

[88] Article 4 (3), (7) provided that a foreigner could be denied asylum in Lithuania

however, the Migration Department rarely refused foreigners access to the asylum procedure. Of a total of 343 decisions on admission into asylum procedure, taken during 1997–2000, only 17 decisions were negative, which meant that Article 4 had been applied. Four of these negative decisions were later changed in favour of the asylum seeker. The following table illustrates the application of Article 4 by the Migration Department.[89]

TABLE 23. MIGRATION DEPARTMENT'S APPLICATION OF ARTICLE 4 1997–2000

Year	Positive Decisions	Negative Decisions
1997	80	1
1998	117	11
1999	94	3
2000	52	2
Total	**343**	**17**

The new Refugee Law does not set any additional barriers for admission into the asylum procedure, as Article 4 of the 1995 Refugee Law did not survive the revision of legislation. Once admitted to the territory, the foreigner is guaranteed that her application for asylum will be examined in substance. However, two procedures are available for such a substantive examination: normal and accelerated, which seem to be *lex novella* compared to the 1995 Refugee Law. The procedure set forth by the new Refugee Law envisages that after admission to enter or permission to stay in the country the foreigner shall be directed to the Foreigner's Registration Centre, which has 45 days to decide which refugee status determination procedure should be applied in a particular case. Having received a decision from the Foreigner's Registration Centre, the Migration Department makes a final decision on the procedure applicable in the case.[90] Four grounds

because: 3) 'there are sound reasons to believe that s/he constitutes a threat to the security of the Republic of Lithuania, or danger to its society'; 7) 's/he has a very dangerious infectious illness or does not agree to a medical examination under the suspicion that s/he has one'.

[89] Information of the Migration Department of 11 August 1999 and information of the Foreigners' Registration Centre of 10 August 1999.

[90] Article 11 of the 2000 Refugee Law.

for application of accelerated procedure are established under the 2000 Refugee Law [for more details see *infra* 4.II.B.4(c)].

4.II.B.2 (c) On readmission from the West

None of Lithuania's readmission agreements effective with the Western countries contain specific provisions applicable to asylum seekers. The Lithuanian–Polish agreement concerning readmission and admission of persons, signed in 1998, merely says that asylum seekers could be returned under the agreement. However, it fails to provide guarantees that such persons are readmitted to asylum procedure in the country to which they are returned. This means that foreigners who applied for asylum abroad can be returned and readmitted to Lithuania, if it is established that they transited its territory or entered asylum procedure. Even though there are no comprehensive statistics on readmitted asylum seekers to Lithuania, given that the numbers usually refer only to irregular migrants, one cannot exclude the possibility that asylum seekers are indeed returned under existing readmission agreements. Furthermore, Lithuanian media have recorded cases[91] where foreigners were returned from Poland to Lithuania on the basis of the Visa Free Travel Agreement signed between the Governments of Lithuania and Poland on 7 May 1993. According to the information of the Foreigners' Registration Centre, some of the foreigners readmitted from Poland asked for asylum in Lithuania. It appeared in many cases that persons who are asylum seekers in Lithuania were previously caught in Poland after transiting Lithuania illegally. Although no legislative obstacles to submitting application for asylum after readmission exists, the fact of being readmitted sometimes undermined the credibility of an individual *vis-à-vis* Lithuanian authorities throughout the asylum procedure. Such a situation arose in the last appeal stage (which was the second appeals instance until 1 September 2000) when Vilnius District Court took this fact into consideration when denying refugee status to an Afghan asylum seeker in Lithuania.[92] The Court reasoned that 'the applicant expressed his will to receive asylum in Lithuania only after having been detained by Lithuanian officials when he failed to cross the Lithuanian–Polish border'.

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[91] The largest group of foreigners (113 people) were returned to Lithuania on 20 November 1998, Lithuanian daily 'Respublika', 15 December 1998.

[92] Vilnius District Court decision of 11 January 1999, Civil case No. 244 - 254 1999.

4.II.B.3 Refugee Definition

4.II.B.3 (a) Existing definition

The Lithuanian state has usually recognized as refugees only those individuals who fall within the scope of the Refugee Convention definition of refugee. The National legislation reflects Article 1A of the Convention, as amended by the 1967 Protocol, embodying the following definition in paragraph 1 of Article 2 of the 2000 Refugee Law: 'Refugee – a foreigner who has a well-founded fear of persecution because of his/her racial origin, religion, nationality, membership in a particular social group, or political opinion and cannot, or fears to enjoy the protection of the country of which he/she is a citizen, or if he/she has no corresponding citizenship and is outside the territory of the country where he/she used to reside permanently, and due to above reasons cannot, or fears to, return home.' Although slightly different in wording, the definition of refugee embodied in 1995 Refugee Law implied the same meaning.

Although there are no official guidelines on the interpretation of the definition of refugee on a nation-wide scale, administrative practice reveals certain aspects of the approach adopted towards its various elements. Given that they are not based on any written guidelines, the interpretations have been diverse and inconsistent. They differ depending on the decision-making body concerned, which can be migration authorities or the Court.

Some issues of interpretation seem to arise on an ad hoc basis, while others can be continually found in each decision of one or another decision-making body. Interpretation by the national decision-making bodies mainly relates to the requirement for individualized or personalized persecution, actually experienced persecution, persecution carried out by state authorities, application of the notion of the alternative of internal flight and specific emphasis on politically motivated persecution. From the case law available on implementation of the 1995 Refugee Law, persecution in the context of refugee definition seems to have been recognized as individualized or personalized for it to fulfil the requirements for recognition as refugee. In cases where the applicant failed to prove that persecution was individually related, persecution criteria, according to the definition, were not considered met and application for refugee status was therefore rejected. As could be concluded from several cases, failure to meet this requirement by the applicant was generally formulated by the first instance of the asylum procedure as follows

'the applicant was never persecuted personally.[93] The wording of decisions of the former appellate instance, the Council of Refugee Affairs,[94] although slightly different from that of migration authorities, sent the same message: 'refugee status shall be refused to the applicant as there is not sufficient evidence of threat of individual persecution'.[95]

While at the time of writing this paper there has not been sufficient practice of the administrative courts in this respect, some of the first decisions adopted under the 2000 Refugee Law confirm that requirement of individualized or personalized persecution is one that the Court has been consistently invoking in judging an appeal. In the case of a Somali national, Vilnius District Administrative Court stated that 'while living in Somalia the applicant did not experience *personal persecution*'(emphasis added) and that 'there are no grounds to grant refugee status under the Law and the Convention if there is no personal persecution'.[96] Singling out of the applicant for the purpose of persecution has been confirmed in a subsequent decision of the Court, where it stated that 'the same threat arises with regard to any other Chechen, Russian or person belonging to another nationality living in Chechnya'.[97] Similarly, when individual persecution was proved, the individual was recognized as fulfilling the criteria of refugee definition and the Court ordered migration authorities to grant refugee status to the applicant.[98] This requirement seems to have been invoked by all decision-making bodies, both under the 1995 Refugee Law, and under the one adopted in 2000. Another aspect of the interpretation of the definition of refugee, although not consistently applied by the decision-making bodies, is the requirement of persecution to be actually experienced by the applicant, found in decisions adopted under the 1995 Refugee Law. Such interpretation of persecution sometimes resulted in the rejection of applications where

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[93] Conclusions to the Migration Department decisions to deny refugee status to Afghan applicants of 31 October 1997 and 21 October 1997.

[94] The Council of Refugee Affairs was an appeal body, composed of 12 members representing different ministries, the Parliament, the President's Office and NGOs and its composition used to be approved by the Government of the Republic of Lithuania. This appellate institution was abolished by the Refugee Law 2000, whereby the function to examine appeals was transferred to administrative courts.

[95] Decision of the Council of Refugee Affairs No.2-21-1 of 18 February 1999 in a case of an Afghan applicant.

[96] Decision of Vilnius District Administrative Court of 10 January 2001 in administrative case No.III[1]-17.

[97] Decision of Vilnius District Administrative Court of 17 January 2001 in an administrative case regarding a Chechen national, No.III[5]-7-2001.

[98] Decision of Vilnius District Administrative Court of 22 January 2001 in an administrative case regarding an Afghan national, No.III[7]-9/2001.

individuals fled imminent persecution.[99] However, the limited practice adopted so far under the 2000 Refugee Law does not reveal any tendency towards such interpretation. Similarly, application of the 1995 Refugee Law showed a tendency to place restrictions on the notion of persecution by applying the concept of non-state agents of persecution,[100] and on this basis almost all Somali asylum seekers were denied refugee status, even though it was not explicitly mentioned in the decisions issued by the authorities. The vast majority of them were subsequently granted humanitarian residence in 2000 under the Law on the Legal Status of Foreigners (the Aliens Law).[101] The implicit requirement for persecution carried out by the state can be found in the Administrative Court's decision, adopted under the 2000 Refugee Law, whereby the Court stated, 'as could be seen from the applicant's explanation he did not experience *persecution by state authorities* while living in Somalia' (emphasis added).[102] But this single case is not enough to serve as a strong indication that in implementing the 2000 Refugee Law Lithuania recognizes only persecution carried out by the state authorities.

On the other hand, no doubt exists as to the fact that the application of the notion of Internal Flight Alternative[103] is one of the issues generally considered by all decision-making bodies in Lithuania, as evidenced by the rejections of the claims on this ground.[104] This notion has been widely applied not only by the first instance body, but also by the Council of Refugee Affairs under the 1995 Refugee Law either for rejection of the claim[105] or for recognition of refugee status in the cases where the notion cannot be confirmed.[106] Another appeals instance under this Law was also held the position that 'refugee status

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[99] Decision of the Council of Refugee Affairs No.2-26-1 of 21 June 1999 in a case of an Afghan applicant.

[100] The sense of the concept is that those persons who are persecuted by non-state agents in their country of origin fall outside the scope of the refugee definition under the 1951 Refugee Convention, and thus should be denied refugee status.

[101] The Law on Legal Status of Foreigners in the Republic of Lithuania of 17 December 1998, No. VIII-978 (came into effect on 1 July 1999).

[102] Decision of Vilnius District Administrative Court of 10 January 2001 in administrative case No.III[1]-17.

[103] The sense of the notion is that the applicant should not be granted refugee status if she was persecuted only in a particular area in the country of origin and could have found protection within the same country if moved to another area.

[104] E.g., Conclusion to the Migration Department decision of 31 October 1997 to reject refugee status to an Afghan applicant on the basis that 'he was not persecuted in Kunduz Province in Afghanistan.'

[105] E.g., decision in a case of a Sri Lankan national of 14 February 2000, No.2-35-3; decision in a case of a Somali national of 22 May 2000, No.2-42-4.

[106] E.g., decision in a case of a Somali national of 29 November 1999, No.2-31-1.

cannot be granted to the applicant if internal flight alternative is available in the country of origin'.[107] The Court applied the notion on the ground that 'persecution should extend to the whole territory of the state'. Thus, if the activity of the applicant was restricted to a particular territory of the state, existence of internal flight alternative has been recognized.[108] The practise of decision-making bodies under the 2000 Refugee Law has so far clearly shown that the notion is widely recognized, at least in the first instance of decision-making. The existence of internal flight alternative is not only examined by the migration authorities in the context of recognition as a refugee,[109] but also when a decision on a humanitarian residence permit is taken.[110] Judicial practice under the new Law is still insufficient to confirm or reject the tendency of applying the notion in the courts. Similarly, like the notion of persecution itself, grounds for it under the definition of refugee have been interpreted in a peculiar way. Interestingly, the term of political refugee status was most often used by the Lithuanian authorities, which consequently placed a greater emphasis on political grounds for seeking protection while marginalizing the others. Decisions on refugee status of the first instance, in denying refugee status to applicants under the 1995 Refugee Law, merely referred to their having no political opinions or participating in political parties.[111] The same formerly applied to the issues presented in the standard preliminary conclusion on the case made by the Secretariat of the Council of Refugee Affairs, which emphasized participation in political parties or organizations. This was also clearly stated as an obstacle to recognition as a refugee in the decisions of the Council of Refugee Affairs.[112] Ethnicity, religion, race, nationality or social group formerly played only a minor role in refugee status determination in Lithuania. However, in a very few cases the establishment of persecution due to membership in a particular social group rather than

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[107] Decision of Vilnius District Court of 23 May 2000, in a case regarding a Somali national, No.2[39]-323-2000.

[108] Decision of Vilnius District Court of 5 April 2000 in a case regarding a Somali national, No.2[43]-619-2000.

[109] E.g. decision of the Migration Department of 8 January 2001 in a case regarding an Indian national, No.15-6-5-C-1-261.

[110] E.g. conclusion of the Migration Department of 28 November 2000 in a case regarding a Chechen national.

[111] Conclusions to the Migration Department decisions in cases of Afghan applicants of 21 October 1997 and 31 October 1997; Conclusion to the Migration Department decision in a case regarding a Somali applicant of 5 May 1998.

[112] E.g. Decision of the Council of Refugee Affairs No.2-26-1 of 21 June 1999 in a case regarding an Afghan national.

for political motives led to a positive result for the applicants, who were granted refugee status on different grounds.[113]

4.II.B.3 (b) Exclusion clauses

Exclusion clauses under the 2000 Refugee Law could be divided into two groups, which to a certain extent reflect the peculiarity of Lithuanian asylum procedure: traditional clauses;[114] and mixed clauses.[115] Traditional exclusion clauses are those enshrined in Article 1F of the Refugee Convention. It seems that the wording of exclusion clauses in Lithuanian legislation corresponds with that in the Convention, with one exception: Lithuanian Refugee Law, in contrast to the Refugee Convention, omits the word 'serious' before the expression 'reasons for considering that'. Although seemingly a minor inconsistency, the absence of the word 'serious' could lead to a much broader application of the exclusion clauses in Lithuania, and thus to a conflict with the Refugee Convention. Bearing this in mind, it is difficult to understand the reasoning of the Lithuanian legislator for not following the exact wording of the Convention. Under the heading 'mixed clauses' the new Refugee Law combines clauses provided in Articles D and E of the Refugee Convention. There being no practice of the application of the exclusion clauses in Lithuania under the new Law, it is still difficult to predict how Lithuanian administrative and judicial bodies will interpret them in concrete cases.

Practice under the 1995 Refugee Law proved that application of the exclusion clauses was problematic, resulting in severe criticism expressed by the UNHCR and even leading to the resettlement to a third country of Afghan nationals. Provisions of the 1995 Refugee Law, parliamentary debates on refugee policies as well as the relevant practice of asylum institutions clearly demonstrated Lithuania's

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[113] Decision of the Council of Refugee Affairs No. 2-17-3 of 16 November 1998 to grant refugee status to an Afghan woman on the basis that 'she lost her right to employment and in future this right would be denied for her.'; Decision of the Council of Refugee Affairs No. 2-23-2 of 31 March 1999 to grant refugee status to an Afghan applicant on the basis that 'he worked in Afghan television, which was banned in 1996 in Afghanistan.'; Decision of the Council of Refugee Affairs No.2-40-3 of 1 May 2000 to grant refugee status to an Afghan women on the basis of her belonging to a group of educated women and additionally to a group of single women. Restriction on the right to work imposed by the Taleban was considered amounting to persecution in this case.; Decision of the Migration Department No. 15/6-4-c-242 of 3 October 2000 to grant refugee status to a Chechen applicant on the basis of his belonging to a particular social group of young Chechen males.

[114] Article 4 (3), (4) of the 2000 Refugee Law.

[115] Article 4 (1), (2) of the 2000 Refugee Law.

intention to use exclusion clauses as an instrument to protect national interests to the disadvantage of certain groups of asylum seekers.[116] The materialization of this intention, which allegedly aimed at the protection of national interests, was Article 5 (4) of the 1995 Refugee Law, added to the list of traditional exclusion clauses in July 1998. This stipulated that a foreigner shall not be granted refugee status in Lithuania if there are serious grounds for assuming that:

> '[he] or she has committed a crime against peace or humanity, or a war crime, as well as if there are serious grounds for assuming that while serving in a repressive structure of totalitarian regimes or while collaborating with the occupation regime which ruled the country, or while being involved in the activities of terrorist groups, s/he grossly violated fundamental human rights and freedoms and fled his/her own country in order to evade responsibility for such criminal acts.'

It was obvious that such a provision made room for a wider interpretation of the exclusion clause contained in Article 1 F of the Refugee Convention; this could not be considered permissible, given that the generally strict application of the exclusion clauses led to serious consequences for individuals.[117] UNHCR also expressed its concern over such legislative innovation.[118] Subsequent developments in the practice of asylum appeal institutions proved the legislator's intentions to use this clause to target Afghan asylum seekers who were former supporters of the Najibullah communist regime and had served as KHAD officers.[119] One concrete example illustrating this allegation involved an Afghan refugee who was a former KHAD officer and supporter of the Najibullah communist regime. The Vilnius District Court granted the applicant refugee status and the judgement of the Court was severely criticized by the signatory of the Lithuanian Independence Act in the mass media,[120] as well as by right wing

[116] See Minutes of the Parliamentary discussions on the adoption of Draft Supplement to Article 5 of the Refugee Law of 16 July 1998, which reveal the legislator's intention to create a legislative barrier to prevent former Afghan communists and security officers from receiving refugee status in Lithuania.

[117] The Exclusion Clauses: Guidelines on their application. UNHCR, Geneva, December 1996; see also paragraph 149 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992, p. 35.

[118] Letter of the UNCHR Regional Office for the Nordic and Baltic Countries of 11 August 1998, addressed to the Minister of Foreign Affairs of the Republic of Lithuania.

[119] E.g. Supreme Court Decision No. 2[37]-196 98 in a civil case No. 3K-73 1998, category 27, rendered on 9 November 1998 and Decision of the Council of Refugee Affairs' No.2-24-3 of 29 April 1999 denying refugee status to an Afghan asylum seeker.

[120] Article in the national newspaper 'Lietuvos Aidas', published in July 1998.

politicians during the parliamentary debates. At the time of presenting the draft of the above-mentioned supplement, it was stated that the provision was necessary to create a legislative barrier against the former Afghan communists and security officers seeking asylum in Lithuania.[121] The controversy resulted in a review of the above-mentioned Vilnius District Court decision by the Supreme Court, which revoked the refugee status granted and referred the case back to Vilnius District Court. It was mentioned in the Supreme Court decision that the applicant had served in the security service and had taken part in military actions in Afghanistan, which is why the Vilnius District Court should consider the possibility of applying the exclusion clause.[122]

4.II.B.4 Asylum Procedures

4.II.B.4 (a) Time-limit clauses for asylum applications

Neither version of the Refugee Law contains an explicit time limit for the submission of asylum applications. Consequently, an asylum seeker may submit her asylum application irrespective of the length of time spent in the country, and such asylum applications should in principle, be accepted by the migration authorities. However, both Laws provided a time limit for presenting oneself to the authorities in case of illegal entry to the territory. The 1995 Refugee Law required the person to present herself to the authorities within 48 hours, and in such cases criminal responsibility for illegal entry would not apply.[123] No exceptions to this requirement were provided. A much stricter time limit was set by the new Refugee Law, which allows only 24 hours before presenting oneself to state authorities. If an asylum seeker fails to comply with this requirement and cannot provide an exhaustive explanation for her failure, she may be held responsible for illegal entry and stay in the country.[124] Amendments to the 2000 Refugee Law, under preparation at the time of writing this paper, propose replacing the existing 24 hour time-limit with the expression

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[121] Minutes of the Parliamentary discussions on the adoption of draft supplement to Article 5 of the Refugee Law, 16 July 1998.

[122] Supreme Court Decision No. 2[37]-196 98 in a civil case No. 3K-73 1998, category 27, rendered on 9 November 1998.

[123] Article 8 of the 1995 Refugee Law.

[124] Article 6 of the 2000 Refugee Law.

'without delay' in order to fully align the provision with Article 31 of the Refugee Convention.

Although no time limit for the submission of an application has been introduced into Lithuanian legislation, the practise under the 1995 Refugee Law revealed that the time-limit for presentation to the authorities in case of illegal entry is closely linked to this issue; thus, a long delay before submission of an application has affected the adoption of decisions in some cases. Sometimes it has even amounted to suspension of the examination of an asylum application pending the final result in the criminal case,[125] while in another case it was identified as one of the grounds for rejection of refugee status by the Court.[126] The case of an Afghan asylum seeker who was a former pilot in the Najibullah army exemplifies the argument where, in testing the credibility of the claim, Vilnius District Court *inter alia* took into account the fact of delayed submission of application for asylum.[127] No sufficient practice is yet available under the 2000 Refugee Law to confirm or reject the tendency that failure to comply with the said requirement would result in an instigation of criminal charges against the asylum seeker who illegally entered or staying in the country. However, tardy submission of asylum application could undermine the credibility of an asylum seeker's claim, as in the case of an asylum seeker from Viet Nam who finally submitted his application after two months of illegal stay in the country.[128] The Migration Department decided that this fact was one of the elements that proved the claim of this asylum seeker was not genuine, and therefore examined his asylum application under accelerated procedure.

4.II.B.4. (b) Appeal rights and suspending effect

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[125] E.g. Decision on legal status, adopted by Migration Department No.15/6-3-A-335 of 17 March 1999 in a case regarding a Nigerian asylum seeker.

[126] Decision of Vilnius District Court of 11 January 1999, in a civil case No. 244-255 1999.

[127] The Court stressed that 'according to the Article 11 of the 1995 refugee Law, a foreigner shall submit an application on refugee status at the border checkpoint. However, the applicant crossed the border illegally. Besides, he did not try to submit the request for refugee status to the competent authorities. The applicant admits that his country of destination was Germany. He declared the wish to receive asylum in Lithuania after he had failed to cross the Lithuanian–Polish border.',Vilnius District Court decision of 11 January 1999, Civil case No. 244 - 254 1999.

[128] Conclusion No. VN00113-07/J-14 of the Foreigner's Registration Center of 15 November 2000.

The appeal rights of asylum seekers are included in Article 21 of the 2000 Refugee Law, which specifies that a negative decision of the Migration Department on refugee status may be appealed to the Vilnius District Administrative Court within 14 days of receipt of the decision. The new Refugee Law simplifies the asylum appeals procedure, as compared with the 1995 Refugee Law. The second instance, the Council of Refugee Affairs, has been eliminated from the asylum appeals procedure and competence over asylum appeals has been transferred to the administrative court. This simplification of the appeals procedure could be explained by the legislator's intention to shorten the asylum procedure in order to ensure efficiency.

The new Refugee Law provides that an asylum seeker shall not be deported from the country pending examination of her appeal against refusal of refugee status.[129] A similar provision, but with different wording, could be found in the 1995 Refugee Law.[130] As regards suspending effect against refusal to grant physical and legal access to the territory, the 2000 Refugee Law establishes a controversial provision which differentiates between the admission procedure at the state border (physical access to the territory) and inside the country (legal access to the territory). The Law states that 'submission of appeal suspends only the execution of the decision on refusal of stay in the Republic of Lithuania'.[131] This means that an appeal against refusal to grant access to the territory submitted by an asylum seeker staying in the country carries suspensive effect, whereas when submitted by an asylum seeker at the border it has no such force. A situation in which an asylum seeker may be deported from the Lithuanian border without being granted the possibility of waiting until a court pronounces a decision in her case, and may even face deportation before the time-limit for the submission of an appeal in safe third country cases elapses, may well raise an arguable claim under Article 13 of the ECHR.

The 2000 Refugee Law contains no regulation as to foreigners' deportation from the country. It refers to the Aliens Law, which stipulates that appeal against a decision of deportation from the country postpones its execution.[132] Although this provision would seem to be more favourable for asylum seekers, it is established that

[129] Article 21 (3) of the 2000 Refugee Law.

[130] Article 15 (3) of the 1995 refugee Law ('During the investigation of the appeal the foreigner shall use the Republic of Lithuania as a temporary asylum').

[131] Article 9 (3) of the 2000 Refugee Law.

[132] Article 36 part 2 (3) of the Aliens Law.

the Aliens Law applies only to aliens, excluding therefore those who apply for asylum in Lithuania.[133]

4.II.B.4 (c) Accelerated procedures

In contrast to the 1995 Refugee Law, the new version clearly establishes procedure for the examination of asylum applications in an accelerated manner. One could allege that the Lithuanian Government has a legitimate interest in shortening the time the so-called 'bogus' asylum seekers spend in the country, thus saving taxpayers money. On the other hand, the state's interest conflicts with an asylum seeker's right to have her asylum applications examined in a fair manner.

Article 14 (2) of the 2000 Refugee Law stipulates that accelerated procedure may be applied when: (a) a foreigner comes from a safe country of origin; (b) his/her application is manifestly unfounded; (c) a foreigner submits clearly fraudulent information about him/herself and the circumstances of arrival or stay in Lithuania; (d) there are serious reasons to consider that the foreigner poses a danger to the security or public order of Lithuania. Existing practice shows that since 1 September 2000, when the new Refugee Law came into force, until 31 December of the same year, the accelerated procedure was applied in five out of 53 cases.[134] Decisions of the Migration Department in these cases were not questioned in the administrative court, although appeals could have been filed under the administrative complaint procedure.[135] Analysis of these cases[136] reveals that all of them were examined under accelerated procedure because they were declared manifestly unfounded. The migration authorities based their decisions in this respect on the following grounds: (a) fear of persecution was not based on one of the criteria for the definition of refugee; (b) the claim failed to correspond with the requirements set forth for refugee status; (c) persecution was not real, but anticipated; (d) failure to make use of internal flight alternative was based on economic reasons; (e) asylum application was used in order to prevent deportation from Lithuania. It is quite possible that some of these grounds, specifically (c) and (d), were not properly invoked: these

[133] Article 2 (2) of the Aliens Law.

[134] Information of the Migration Department.

[135] Appeals againts decision of the Migration Department can be filed under the new version of the Law on Proceedings of Administrative Cases of 19 September 2000, No. VIII-1927 (came into effect on 1 January 2001).

[136] These cases concerned asylum seekers from: India – 2; Pakistan –2 (1 separated child); Vietnam - 1.

grounds should normally come under scrutiny while deciding on refugee status, and not when deciding which procedure of examination should be applied, because they are not specific. In practice accelerated procedure is not frequently invoked, although once invoked the justification for its application should be clear and appropriate.

4.II.B.4. (d) Detention of asylum seekers: general rule or exception?

In Lithuania asylum seekers are held in detention for two reasons: *firstly*, it is a part of the common practice of the state to detain all aliens without proper identification or travel documents or who have entered the country illegally, irrespective of whether they are asylum seekers, or not; *secondly*, detention is in practice still perceived as an inevitable stage of the asylum procedure, except for those who come or stay in the country legally. Both aspects are related, meaning that asylum seekers are being detained pending legal admission to the territory and during the procedure if they entered the country illegally, or lacked proper identification, or were without documents permitting their stay in Lithuania. Asylum seekers who entered in a legal manner are not subject to detention and usually stay in private accommodation. Permission for such a stay used to be an administrative practice, not regulated by legislation until mid-2000, which only provided for a stay in the Refugee Reception Centre. The 2000 Refugee Law introduced an opportunity of staying in private accommodation for this category of individuals.

In Lithuania there is no single issue regarding refugees that has been so controversial and so often debated as that of the detention of asylum seekers. It continues to be the main protection concern in the country, not only from the perspective of ensuring the rights of asylum seekers but also in the broader context of human rights protection, since it is still at variance with the standards provided by international human rights instruments[137] as implemented by democratic states. Detention in the Foreigners' Registration Centre has until very recently not been viewed by the migration authorities as detention', but rather as 'temporary accommodation' or a situation restricting certain rights of asylum seekers who are in the country illegally.[138] This approach has been changed at the legislative level,

[137] The most important being the 1950 ECHR.

[138] Regulations of the Foreigners' Registration Centre, approved by the Commissar General on 10 June 1999.

where provisions on the detention of asylum seekers were introduced in the Refugee Law in 2000. Before that, no legal acts had dealt with the detention of asylum seekers in the centre. The Refugee Law makes a distinction between detention and temporary accommodation of asylum seekers, as can be concluded from provisions that require a court decision for detention in the Foreigners' Registration Centre, whereas a decision by the Migration Department is sufficient for accommodation in the latter. In its Article 12, the Law enumerates the grounds that may justify the detention of asylum seekers. Starting with the basic rule that 'a foreigner cannot be detained in the Republic of Lithuania, except on the following grounds' the article paradoxically concludes that 'there may be also other grounds' to detain asylum seekers. The open-ended list seems to conflict with the introductory principle that it is more an exception to detain an asylum seeker than a general rule. Several grounds in Article 12 reflect those, listed in Article 5 of the ECHR: detention for the purpose of preventing the foreigner from unauthorized entry into the country, when actions are being taken with regard to deportation, for the purpose of preventing the spread of infectious deceases. Only one is of a slightly different nature: detention for the purpose of ascertaining the reasons why a foreigner used forged identity documents or destroyed them. Despite obligations under Article 31 of the Refugee Convention providing for exemption of refugees from penalties for illegal entry, Lithuania does not exempt asylum seekers from responsibility for forged documents, which they may use for their flight in search of protection. Pursuant to this policy, some individuals have been charged with the criminal offence of possessing forged documents, but no information is available as to whether anybody was sentenced purely on this ground. Even though the list of detention grounds in the 2000 Refugee Law is similar to those used in other states, the legislative drafting process of the revisions to the Law reveals restrictive tendencies and a willingness to use detention more as a general rule than an exception. Possibility of detention for the purpose of verifying identity, initially included in the draft Law, was later removed as possibly being in conflict with the norms of the ECHR, although accepted by UNHCR in its Executive Committee Conclusions No. 44 of 1986. It would be rather difficult to imagine what the existence of this provision would have meant in practice had it remained in the draft Law, but one may guess that it would have served to continue the earlier practice of almost automatic detention as the vast majority of asylum seekers arrive without valid documents and are thus in need of identity verification. Another ground for detention 'for the purpose of protecting state security and public order' appeared during the debate of the draft in the Parliament, but was subsequently omitted after it

had been severely criticized by the President of Lithuania[139] and international organizations. The detention provisions of the Refugee Law still cannot be regarded as fully meeting international standards, given that no time limit is provided for detaining an individual and there is no possibility to review or challenge a detention order. Nor is there any right of appeal or alternatives to detention or guaranteed rights of detained asylum seekers. The willingness to incorporate these provisions is present, as supplements to the article are being prepared. The regulation of detention by revised legislation can be considered as a positive sign for dealing with the automatic detention of all asylum seekers who have entered illegally. However, the practice does not seem to have made great progress, and the enforcement of the Refugee Law in September 2000 did not produce a significant change as one might have expected. At the end of 2000, individuals were still being kept in the Foreigners' Registration Centre in conditions amounting to detention irrespective of whether a decision of the Court on detention or that of the Migration Department on accommodation had been issued in her respect. In fact, as of the end 2000, there was no substantial difference between those two terms (detention and accommodation) in administrative practice. In view of the restrictions, accommodation in the centre could be considered as amounting to detention. The following elements characterizing 'accommodation' support this conclusion:

individuals are kept in a closed camp, where their freedom of movement is restricted to the extent that they cannot freely leave the centre, save in cases of hospitalisation or exceptional personal permission granted by the administration (in the latter case they have to be accompanied by the staff of the centre);

individuals are subject to a strict routine imposed by the administration and are supervised by the guards and video supervision system;

no outside visitors are allowed, except in single cases approved by the administration of the centre;

correspondence is limited, as individuals can only rely on the goodwill of officers who may be asked to carry the post, or permit telephone communication, provided they have the means;

[139] Article 2 (4), Decree of the President of the Republic of Lithuania of 14 June 2000 on return to the Parliament for additional consideration of the Law on Refugee Status, adopted by the Parliament, No. 908.

access to public education for children is limited, since no proper education facilities are present on the premises of the centre.

Administrative practice also reveals that those considered by the administration of the centre as genuine asylum seekers (the main criteria seems to be submission of asylum application at the border) were afforded better treatment and accommodated in better living conditions, while those perceived as 'bogus' (e.g. those returned from Poland after illegally transiting Lithuania or those apprehended by police as illegal migrants already in the territory of Lithuania) were kept in *de facto* detention conditions, despite the fact that the legal ground for their stay in the centre was the decision of the Migration Department to accommodate, and not to detain them there. This practice supports the view that the tendency to consider detention in the centre as accommodation still prevailed at the end of 2000, and the authorities' actions continued to be motivated more by protective attitudes against bogus refugees than a wish to safeguard the rights of refugees. The judiciary shared this tendency at the time when the 1995 Refugee Law was applied. In a case of an Afghan asylum seeker, the Vilnius District Court considered that 'given the applicant's illegal stay in the Republic of Lithuania, his accommodation in the Foreigners' Registration Centre can not be considered as detention or arbitrary restriction, but rather safeguarding of minimum living conditions for his benefit pending implementation of authoritative decisions in his regard'.[140] After enforcement of the 2000 Refugee Law, similar wording is unlikely to occur in court decisions for the simple reason that the Law makes a distinction between the two notions. But the perception of the centre as a place of accommodation may well lay behind the decisions of the Court.

The detention of asylum seekers in the Foreigners' Registration centre is connected to a broader area of detention in the centre of foreigners illegally entering the country. Many controversies exist around the wording of Article 45 of the Aliens Law. The Article deals with the right of police to detain a foreigner for the purpose of identification. It stipulates: *'the police may detain a foreigner for 48 hours, while further placement in the Foreigners' Registration Centre must be confirmed by the Court'.* It could be implied from such wording that a foreigner can be detained only for the period of 48 hours, and that it is the exclusive right of the police to sanction that, while the Court can only decide on accommodation in the centre. Although the necessity for the Court's

[140] Decision of Vilnius District Court of 10 September 1998 in a civil case No. 2[38]-623.

sanction for placement in the centre already implies that some kind of restrictions will be applied, this does not necessarily mean resorting to detention, as the use of different words in the Article (detention and placement) would have been meaningless if they were intended to mean the same thing. However, this article has been used to justify the factual detention of asylum seekers who arrived at the centre initially as illegal migrants on the basis of a court decision to send them there under the said Article, and later applied for asylum. Formally, the Aliens Law ceases to apply to foreigners once they apply for asylum and thus fall under the jurisdiction of the Refugee Law. Such factual detention of asylum seekers for whom decisions of the Migration Department on accommodation have been issued raises doubts regarding compliance with the norms of the Refugee Law. Even though the meaning of the Court's decision as a sanction of detention adopted under the Aliens Law is questionable, the practice shows an interesting and radically different tendency from the one described above, which while sometimes sanctioning accommodation, is interpreted as detention if it could serve against allegedly bogus asylum seekers.

One may legitimately ask why factual unsanctioned detention is still being used for asylum seekers, now that there is heightened awareness of their rights and legal grounds for detaining people when necessary have been established by legislation. The times when Lithuania lacked preparedness and lawful means to deal with an unexpected influx of foreigners from distant countries belong to the past. It could be either a guess or the absolute truth that the desire of the state to protect its own interests by maintaining a deterrent for potential undesirable newcomers still exists. Even though certain links to the effect of Western policies could be established here, it is more a matter of domestic practice than a result of external influence.

4.II.B.5 Cases Falling Outside the Existing Refugee Definition

4.II.B.5 (a) Lack of alternative status and efforts towards introducing one

As already mentioned in section 4.II.B.3(a), Lithuanian legislation follows the 1951 Refugee Convention definition of refugee. However, individuals who fall outside this definition, according to a rigid interpretation of the Convention by national authorities, or those not

qualifying as refugees but nevertheless considered in need of international protection for refugee-related reasons, do not enjoy an alternative status according to Lithuanian legislation in the sense it is understood in Western Europe. Until mid-1999 these individuals had been left in total limbo. If rejected under refugee legislation, they would simply become illegal aliens in the country, subject to detention and deportation at any time. Since the end of 1998, a possibility for solving their situation has existed, at least by law, but this did not become reality until the very end of 2000 for legislative and practical reasons. The new Aliens Law contained two provisions relevant to this category of individuals, namely Article 19 (3) and Article 36 (2) (1). Article 19 (3) established the possibility of obtaining a temporary residence permit on humanitarian grounds for one year, subject to extension. Article 36 (2) (1) of the same Law contained the possibility of suspending deportation from the country if is demonstrated that a real danger to an individual's life or health will result from this return. Even though the Aliens Law did not clarify the relationship between these two provisions, whether they complement each other or are to be considered as separate, these provisions seem to be interrelated. No definition of 'humanitarian grounds' was provided in the Aliens Law, but a Government Resolution approved in May 2000 provided an explanation of this term. A resolution approving the order of issuance, change and cancellation of residence permits to foreigners in the Republic of Lithuania incorporates an open-ended list of humanitarian reasons which refer to situations where foreigners cannot be deported to the country of origin: the application of the principle of *non-refoulement* after her application for refugee status had been rejected; the state of war or natural disaster in the country of origin of the foreigner; if the foreigner needs medical treatment in the Republic of Lithuania, or for other reasons.[141]

4.II.B.5 (b) Fate of persons excluded from the existing refugee definition

By the end of 1999, those who fell outside the existing refugee definition, but were in need of protection, were in the vast majority Afghan and Somali nationals. In 2000 the new arrivals mainly originated from Chechnya. They were refused refugee status by Lithuanian authorities because of a rigid interpretation of the Refugee Convention, lack of proper evidence to support their cases, or simply

[141] Paragraph 14 of the Government Resolution No. 486 on approval of order for Issuance, Change and Cancellation of residence permits in the Republic of Lithuania to foreigners, No. 486, 1 May 2000, 'Zinios', No. 37-1036.

because their cases did not fully meet the criteria of refugee definition. The rules applied provided that those finally rejected as refugees should be transferred to detention in the Foreigners' Registration Centre for an indefinite period of time pending deportation from the country.[142] Thanks to a UNHCR appeal[143] and widespread acknowledgement by the Lithuanian authorities of the situation in the countries of origin of asylum seekers, deportation of these individuals, although effective, has not been implemented in practice. As it was thought that the new Aliens Law, scheduled for 1 July 1999, would remedy the existing situation, a group of rejected individuals was allowed to remain in the Refugee Reception Centre pending entrance into force of the new legislation. Detention was prevented, but nevertheless the individuals faced numerous hardships: the lack of education for their children; no access to legal employment or other gainful occupations; and constraints on their freedom of movement, arising not from the rules of the centre, but from the lack of proper identity papers which could have caused problems with police. However, even after the enforcement of the Aliens Law in July 1999 the individuals could not receive humanitarian residence permits, as there was no implementing legislation on the issuance of such permits. Given that it is an exception rather than a rule that those seeking protection arrive with valid travel or identity documents, lack of such documents was another reason to delay the practical enforcement of the humanitarian provision of the Aliens Law. This obstacle could not be removed for practical reasons because Lithuania does not issue Aliens' passports. While a residence permit, which has no validity on its own, is a sticker to be attached to an identity or travel document. The first constraint was eliminated in May 2000 when the Government Resolution on issuance of such permits was approved. Much more difficult was the practical constraint, as Aliens' passports are planned to be issued only in years to come. Ignoring this, the migration authorities started to take decisions on residence for humanitarian reasons, and the question of affixing the permit for successful applicants was left to be solved sometime in the future. Without the 'humanitarian visa' document, no person receiving a positive decision on this type of residence permit could enjoy any of the rights pertaining to foreigners possessing temporary residence in Lithuania. An unexpected solution was found in the practice of Sweden, which issues a kind of certificate for those not possessing and unable to obtain any identity or travel document. With funding from the

[142] Regulations on transfer of foreigners from Refugee Reception Centre to the Foreigners' Registration Centre, approved by the Ministries of Social Security and Labour and of Interior on 15 December 1997, No. of order – 582/154.

[143] UNHCR letter to the Vice-minister of the Interior of 9 March 1999.

UNHCR, migration authorities have developed and produced certificates called Temporary Aliens' Passports, meant to substitute for an identity document, although not valid for travel outside the country. Thus, it was possible to overcome the practical constraint of regularizing those who were rejected as refugees but needed protection on other important grounds. As a result, the first temporary residence permits have been issued to those rejected as refugees as from late summer 2000. After only a half year since the start of practical enforcement of the Aliens Law provision, statistics on the issuance of humanitarian residence permits show that this tiny provision in the Law has become a solution for those who need protection on refugee-related grounds. Only two individuals have been denied issuance of this permit, while the majority of Afghans, Somalis and Chechens (listed under 'Russia') have been able to receive protection in Lithuania in this way.

TABLE 24. 2000 LITHUANIAN REFUGEE APPLICATIONS

Country of Origin	Applications	Positive Decisions	Negative Decisions	Pending Cases
Afghanistan	13	10	1	2
Armenia	1	0	0	1
Belarus	6	1	1	4
Russia	33	21	0	12
Somalia	20	19	0	1
Sri Lanka	2	2	0	1
Stateless	2	1	0	0
Ukraine	1	0	0	1
Yugoslavia	1	1	0	0
Vietnam	1	0	0	1
Total	**80**	**55**	**2**	**23**

Source: Migration Department, as of 1 January 2001

However, the regularization of status for those rejected as refugees but in need of protection has been an essential part of the solution of the fate of these individuals. Until other problems are solved, the possibility of obtaining a humanitarian residence permit cannot be considered equal to alternative protection status given the benefits this status guarantees. Those granted humanitarian residence frequently have to face many difficulties, because free medical care, employment possibilities and housing are almost inaccessible. Being uprooted and having lost everything at the moment of departure from the country of origin, and usually being without any help in the host country, they represent a different category of foreigners in Lithuania compared to those normally staying temporarily for study, work or family purposes. By the end of 2000, no specific legislation existed on state assistance with integration to foreigners in general, except that on the integration of refugees. Recognizing the vulnerability of individuals coming from refugee-related situations, the Government took a decision to apply to them the same conditions of social

integration as those applicable to refugees.[144] In fact, to make this goodwill operation work in practice, certain legislative obstacles need to be eliminated, such as: the requirements for obtaining a work permit normally issued only when a concrete job proposal is available; provision of access to the state's free medical care; and facilitation of access to housing. Moreover, the right of free movement to and from Lithuania of those possessing only a temporary aliens passport is further restricted, as this document is for only internal use only.

4.II.B.6 Restrictive Practices

It is an inevitable and widely known fact that asylum seekers frequently use the same means of flight as irregular migrants and often find themselves associated with them. Such association proves to be detrimental not only to their credibility in the asylum procedure, but also as shown above, largely determines the conditions of their stay in the Foreigners' Registration Centre because they may be viewed as bogus asylum seekers against whom certain restrictions are applied.

From previous and current Lithuanian refugee legislation as well as its practical implementation, two groups of restrictions can be identified: those related to procedural aspects of the asylum procedure; and those of material consideration. The former target any foreigner seeking asylum in Lithuania and include the deadline for approaching the authorities after illegal entry, and the accelerated admissibility and border procedures. Though they can be implemented at the early stage of the asylum procedure, like those previously found in the 1995 Refugee Law, the difference between the old and the new ones lies in the interest being protected. While the previous restrictions reflected the intention of the state to protect various fields of national interest, like public health, public order or regulation of migration, the new ones are more focused on preventing entry and dealing with allegedly unfounded claims. Relevant provisions of the 1995 Refugee Law allowing the exclusion of an asylum seeker from the procedure followed by expulsion from Lithuania, on the ground of her dangerous infectious illness or personality constituting a threat to the security of Lithuanian society could be seen as instruments used to protect the national interest. The restrictions of procedural nature contained principally in Article 4 of the 1995 Refugee Law attracted much criticism both from the European Commission and international

[144] Resolution No. 513 of the Government of the Republic of Lithuania on Social integration of foreigners who were issued permits to live temporarily in the Republic of Lithuania on grounds of humanitarian nature, 8 May 2000.

organizations, and were eliminated when the legislation was revised. However, the new legislation led to new restrictions, albeit of a slightly different nature. While the old ones consisted of ways of protecting its own interests that were specific to Lithuania, the new restrictions were mainly derived from those also adopted in Western Europe, including notions of safe third country, safe country of origin or manifestly unfounded claims.

Restrictions of a material nature, or in other words those related to the refugee definition are not found in legislation, but arise exclusively from administrative practice. One exception to this is the exclusion clause in Article 5 (4) of the 1995 Refugee Law, which targeted a particular group of asylum seekers (so called 'former Afghan communists') by creating a barrier against obtaining refugee status for asylum seekers with certain political or professional backgrounds. But this clause did not survive the revision of the legislation, since it was deemed to have broadened the limited scope of use of exclusion provisions under the Refugee Convention. Currently, application of the concepts of internal flight alternative, non-state agents of persecution, requirement of individualized and actually experienced persecution are scattered in the decisions of different bodies, and some of them play a crucial role in the refugee status determination procedure. However, their use has slightly diminished, as the focus of the new legislation is mainly placed on procedural restrictions. This marks a shift from screening individuals during a substantial examination procedure to early identification of those who may be considered in no need of proper examination of their claims, thereby preventing their entrance either to the territory of the state or to a regular refugee status determination procedure.

4.II.C Policy Strategies

4.II.C.1 Concerns for Stability

It has been estimated that there are several hundreds of thousands of irregular migrants temporarily resident in the countries of the CIS who are preparing to move westwards. For example, the Belarus Government estimates that there are some 100,000 illegal migrants on its territory. The Government believes that the country has become a major hub for migrant trafficking. There is also evidence of a tremendous build-up of South Asian transit migrants in the Russian Federation, with an estimated 200,000 illegal aliens in temporary

residence in Moscow at any one time.[145] The Russian Federal Migration Service estimates that there have been between 500,000 and one million irregular migrants in the country.[146]

A large concentration of Asian and African irregular migrants in the CIS region is indeed viewed as a potentially destabilizing factor for Lithuania. Increasing political and economic uncertainties, primarily in Russia and Belarus, could give impetus to larger or smaller scale transitory movements *via* Lithuania as well as other Eastern European countries. Potential arrivals will not necessarily be making 'positive choices' to reach economically prosperous Western European countries. It may be inevitable for groups of this heterogeneous population to move, since even a legally uncertain stay in the CIS region may become impossible. Therefore, this 'soft security' concern should not be underestimated. *Nolens volens* Lithuania will for a certain period of time remain a transit zone between the CIS and Western Europe.

4.II.C.2 Avoiding the 'Closed-Sack' Effect

While independent identification of the reasons lying behind restrictive Lithuanian policies and practices can hardly be absolutely precise and uncontroversial, some factors that have impact on their development should be understood. To wit, they represent the following:

Fairly easy access to Lithuanian territory from Eastern states through improved but still inadequate border control;

Higher standards of protection and better living conditions for asylum seekers than in the Eastern neighbours;

Lack of official possibilities to return those entering the country from the East (lack of readmission agreements);

Limited resort to forcible return mechanisms due to financial constraints;

Effective protection of the borders exercised by Poland combined with efficient implementation of the readmission clauses of the visa-free agreement with that state.

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[145] IOM, 1994.

[146] OMRI, 'Illegal Immigrants Update', 3 January 1997.

In 1999 some results were achieved in drafting state policy in the field of migration,[147] and there was already certain a capacity to deal with the phenomenon. However, control of the Eastern borders with the Russian Federation and Belarus is still inadequate,[148] despite the efforts undertaken to strengthen them. The majority of protection seekers entering the country illegally continue to come from the Byelorussian or Russian side. Protection of the Eastern borders is hampered by lack of demarcation signs and loose control mechanisms at the green border area. Demarcation with Belarus from the Lithuanian side has been completed, but there is still an area on the other side where work has to be done. Demarcation work with the Russian Federation (Kaliningrad region) has not been started, as the mutual agreement on borders, signed in 1997 and ratified by Lithuania in November 1999, awaits ratification by the Russian Duma. Lithuania's approaching membership in the EU is likely to exert further pressure on its Eastern borders, which will become the external borders of the EU.

Since mid-1997, when the asylum procedure became operational, Lithuania has joined a club of countries that not only declare an intention but also actually do ensure protection to those who ask for it and are found eligible. Reception conditions for asylum seekers are in accordance with international standards and living conditions in the detention facilities have significantly improved. This situation is somewhat more favourable than in neighbouring Eastern countries, in which large numbers of asylum seekers are concentrated and face serious hardships not only in finding permanent solutions, but even living their daily life. Better protection prospects and higher chances of obtaining access to asylum procedures in Lithuania may serve as a potential factor of attraction for movements of persons in temporary transit in Russia or Belarus, and this will be even more so as Lithuania's economy grows more stable. A slight tendency towards this trend can already be observed in the increase of Chechen arrivals, tempted by the description from far away of Lithuania as a 'good country'. Although very few applications from this particular ethnic group were recorded in 1999, they constituted more than half of all new applications submitted in 2000 (115 out of 199 total applications comprising all nationalities). However, this may very well be inspired by lack of protection in other neighbouring regions for this particular

[147] Program on the Control of Migratory Process was approved by the Government in June 1999. It aims at removing barriers obstructing the free movement of persons and preventing unlawful entry and stay in the territory of Lithuania.

[148] Regular Report from the EU Commission, 1998, p.33, Commission's Report for 1999 does not explicitly address the issue of border control efficiency.

group, as no significant increase in numbers was recorded for other nationalities.

There is still no official return mechanism from Lithuania to the countries through which asylum seekers usually transit before arrival in Lithuania. Readmission agreements have been negotiated with Belarus and the Russian Federation, although they have as yet produced no tangible results. There is also no forcible return mechanism in existence, owing to the financial constraints involved in returning individuals to their countries of origin instead of to the transit countries. This seems to work only for nearby countries, but not for distant ones. On the other hand, readmission clauses of the visa-free agreement with the country on the western border, namely Poland, are effectively implemented, with the result that individuals transiting Lithuania from the eastern territories and not apprehended within Lithuanian territory are considered coming from this state and have therefore on a number of occasions been readmitted to the Lithuanian side. Although the agreement refers, in fact, to irregular migrants, many of the persons returned under its terms later expressed a wish to apply for asylum in Lithuania. The following table illustrates the situation in this respect for the period between 1996 and 2000.[149]

TABLE 25. ASYLUM APPLICATIONS BY PERSONS READMITTED FROM POLAND

Year	Persons Readmitted from Poland	Applied for Asylum upon Readmission
1996	52	2
1997	371	120
1998	219	35
1999	36	17
2000	14	13

Given the above considerations, Lithuania has legitimate cause to be concerned about finding itself in a 'closed sack' fearing new movements from the East, which it might still feel unable to control effectively, and being unable to return them due to the lack of effective return mechanisms, while local solutions might not be financially affordable. This may be an explanation for the application of restrictive practices in asylum procedure, which aim at the self-defence of the state in order to address, at least partially, possible consequences contrary to its interests. Asylum seekers could find

[149] Information of the Foreigners' Registration Centre of 12 May 1999.

themselves in the same 'sack', as their chances of being recognised as refugees or integrated as humanitarian residents are slight, and it is difficult for them to move on from Lithuania, although many would opt for more economically attractive states.

In spite of these considerations, it is possible to try to assess the practical reality of the concerns that bother Lithuanian authorities. *Firstly,* starting from 1998 the flow of irregular migrants into Lithuania has significantly decreased, amounting to only 483 irregular migrants apprehended on the territory of the state in comparison with 1382 in 1997.[150] *Secondly,* comparison can be made between the arrival of asylum seekers and numbers of asylum applications in the first and second year of the operation of the asylum system. In 1997 some 180 applications were submitted[151] (it should be stressed in this respect that this number refers not only to spontaneous arrivals, but also to individuals who had arrived in Lithuania at an earlier date and were waiting for asylum legislation to be enforced). While in 1998, the number of applications was as follows (the total number of applications in 1998 was 119).[152]

TABLE 26. ASYLUM APPLICATIONS 1997 AND 1998

Year	Applications
1997	180
1998	119

[150] Information of the Migration Department of 18 March 1999.

[151] Information of the Migration Department.

[152] Information of the Migration Department.

FIGURE 1. 1998 MONTHLY ASYLUM APPLICATIONS

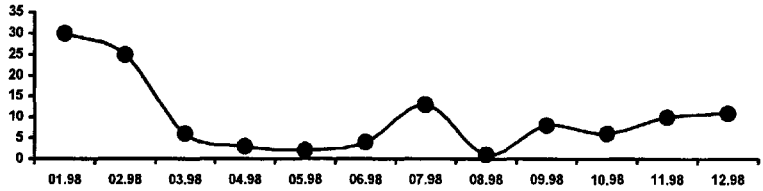
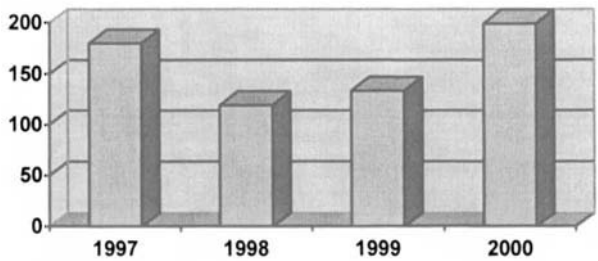


FIGURE 2. TENDENCIES IN ASYLUM APPLICATIONS DURING THE FOUR YEARS SINCE THE ASYLUM PROCEDURE BECAME OPERATIONAL IN LITHUANIA (1997-2000).



These statistics prove that there has been no major increase in arrivals since the asylum procedure became operational, which would seem to indicate that the concern that a functioning asylum system attracts new migrants is unfounded. However, theoretically the threat remains that in the long run Lithuania may become a country of destination and not of transit. It is difficult to foresee at this stage what reactions and actions on the part of the state this would entail, but current policies and restrictive practices seem to be aimed at preventing this before it happens.

4.II.C.3 Adopting Western Practices

Developments in the asylum field in western countries, and the close co-operation of Lithuanian asylum authorities with their partners in the West undoubtedly contributes to the asylum practice in this country. Being a sovereign state without experience or long-term practice in the field of asylum, Lithuania is likely to follow the practices and policies adopted by other states facing the same problems, rather than follow policy recommendations of international bodies like the UNHCR. Without underestimating the positive developments deriving from the influence of the experience of western states (e.g. humanitarian status, temporary aliens' passports), it would be worthwhile to determine the restrictive elements of Western policies and practices that have found a place in the Lithuanian asylum system. As already mentioned in section 4.2.2.6, restrictive practices as well as 'imported' policies may be divided into two main groups: *First of all*, restrictive policies that have found a place in the legislation and are mainly related to procedural issues; and *secondly*, practices and policies that are exclusively related to the application of the refugee definition.

The former group relates to the application of certain well-known notions borrowed from the West. Among these 'safe third country' and 'manifestly unfounded application' are of major concern. Even though these notions were initially based on the example of procedures for manifestly unfounded cases or accelerated procedures in the West, they were not applied in practice until 1998, as no implementing mechanism existed. Implementing legislation contained in the 2000 Refugee Law now regulates in detail the application of the safe third country notion, at least. Although by the end of 2000 there was not sufficient practice to evaluate the implementation of the provisions enforcing these notions, the legislation makes clear that they are meant to be practical tools and not mere legal declarations.

On the substantial level, certain notions applied by the Lithuanian asylum authorities in the course of refugee status determination procedures would seem to be the result of the importation of restrictive policies or practices from western states operating in furtherance of nationally adopted restrictive tendencies. One of the issues which played a major role in implementing the 1995 Refugee Law was the notion of individual persecution and non-state agents of persecution, which in the context of Lithuania has resulted so far in almost total rejection in the first instance of Somali, Afghan and Sri Lankan asylum seekers, considered to be, in general the victims of civil wars in their respective countries. Application of the internal

flight alternative, a notion widely accepted in the West, has also played a significant role in the Lithuanian refugee status determination procedure, and continues to be widely applicable. In the beginning it was mainly applied regarding Afghan and Iraqi asylum seekers, but current practice shows that it has become a part of determination procedure in almost every case. Another issue to be mentioned relates to the position on gender-based persecution of certain western European and Nordic states,[153] which was interestingly interpreted by Lithuanian asylum authorities, so that for one applicant the same position was used to support the claim, granting refugee status, while for another, on the contrary, the application was rejected as falling outside the persecution criteria provided by the Refugee Convention refugee definition and Article 2 of the Lithuanian Refugee Law.

As Lithuania has become a country with a functioning asylum system and has started to share the burden of the international community towards people in need of international protection, it has started considering the extension of burden sharing with the states to the East, whose burden it feels it is taking upon itself. Although there is as of yet little or no practice of applying the notion under the new Refugee Law, Belarus and Russia may potentially be treated by Lithuania as 'safe third countries', where asylum applicants could be returned. On the other hand, any practical implementation of the notion requires that political decisions be taken to guarantee the safety of these countries for the purpose of return.

[153] See e.g., Communication between Lithuanian Council of Refugee Affairs and Danish Immigration Service concerning gender based persecution, dated 3 March 1998.

4.III Latvia

Dace Ose

4.III.A Factors which Prompted Establishment of the Asylum System

4.III.A.1 Background and Context

When the three Baltic countries regained their independence in 1991 after the collapse of the Soviet Union, they were confronted with the challenges of migration in all its aspects, including the lack of appropriate administrative structures, an insufficient legislative base, an influx of illegal immigrants and asylum seekers, as well as complicated questions of minority rights, citizenship and the return of their own citizens.[154] Since 1992 Estonia, Latvia and Lithuania have been used as transit countries by asylum seekers and other migrants on their way to Western Europe, particularly the Nordic countries. The illegal crossing of the Baltic Sea has often been arranged by smugglers and has sometimes taken place under dangerous circumstances.

27 August 1991, the day when the European Community officially recognized referred to as the beginning of the relations between Latvia and the EU. Significant steps in the development of Latvia's relations with the EU were the signature of the Free Trade Agreement between Latvia and the EU (signed on 18 July1994, entered into force on 1 January 1995) and the Association Agreement (signed on 12 June 1995, entered into force on 1 February 1998). On 14 October 1995 all political parties represented in the Sixth Saeima (Parliament) of the Republic of Latvia signed a declaration to the effect that integration into the European Union is Latvia's foreign policy priority and the precondition for the preservation of the state's independence. On 27 October 1995 the government submitted its application for accession to the EU.

The concept paper prepared by the Government Working Group in September 1996 argued that '[the] government is unable to fight illegal immigration effectively... and simultaneously continue its successful approaches towards the EU, until the national legislation has resolved

[154] Technical Co-operation on Migration (TCM). Experiences in the Baltic Countries (1994-1999), IOM, March 1999.

the matter of the legal status of persons seeking asylum and refugees in accordance with norms of international law.[154] The drafting of asylum legislation was viewed as a matter that 'should not be delayed, not only from the viewpoint that... it will undoubtedly be one of the pre-conditions upon Latvia's joining the EU, but also because similar moves have been made by the other Baltic countries'.[155]

At the time when draft refugee legislation was being reviewed by the government ministries, Mrs. Anita Gradin, EC Commissioner for Justice and Home Affairs, visited Latvia. In an interview with the daily 'Diena', the Commissioner said, in the context of combating illegal immigration and making a distinction between those in need of protection and those who are searching for a 'better life', that it was important for Latvia to sign the Refugee Convention on refugees. 'Then you will have every right to return the illegal immigrants'.[156]

Estimated numbers of irregular migrants and illegal border crossings during the early and mid-1990s varied from a few hundred to tens of thousands. In 1995, out of an estimated 30,000 illegal border crossings, 7,511 persons were detained.[157] According to statistical data provided by the Immigration Police, 2005 and 1556 persons in 1997 and 1998 respectively were detained for violating visa and passport regimes and or illegal immigration.

Prior to the adoption of refugee legislation, all asylum seekers entering Latvia without visas were detained as a matter of routine. They were considered and treated as 'illegal immigrants' and subjected to unlimited deprivation of freedom of movement. Authorities regarded detention as a 'solution' to the problem of asylum seekers and refugees. However, at the end of 1994, when more than a hundred people were detained on a ship at sea, the institutions were forced to think about how to deal with this group of people and where to accommodate them. 'In April 1995 a temporary camp for illegal immigrants was established in Olaine... and most of those detained were moved there'.[158] More than one hundred asylum seekers, half of them children, were kept in detention for the following 21 months.

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[154] Concept For the Process of Preparing Draft Legislative Acts in the Matter of Determining The Legal Status of Persons Seeking Asylum and Refugees, prepared by the Working Group of the Cabinet of Ministers, September 19, 1996.

[155] Ibid.

[156] Diena, January 24, 1997.

[157] Migration and Asylum in Central and Eastern Europe, Working Paper, The European Parliament, LIBE-104 EN, 02-1999.

[158] Latvia Country Report, 3rd International Symposium on the Protection of Refugees in Central Europe, 23-25 April 1997, Budapest, European Series, UNHCR.

This fact without doubt framed the context of policy discussions for the next three years (see infra, III.A.3 on pressure from international organizations).

The Law on Asylum Seekers and Refugees in the Republic of Latvia (Refugee Law) was adopted on 19 June 1997. The asylum procedure became operational in early 1998 when the Refugee Affairs Centre (first instance in asylum matters) and the Refugee Appeals Council were established. In addition, all the bylaws required by the Refugee Law were adopted. There were 58 persons (35 cases) seeking asylum in Latvia in 1998 and 21 persons (17 cases) in 1999.

Most of those who arrive illegally in Latvia come through Eastern countries, and it is reported that often, professional smugglers assist them. Consequently, Latvia has strongly emphasized the need to enter into readmission agreements with her eastern neighbours, and a readmission agreement between Latvia and Belarus was initiated on 3 March 1998. From 1997 to 1999 Latvia signed readmission agreements with Austria, the Benelux countries, Croatia, Denmark, Finland, France, Germany, Greece, Estonia, Lithuania, Iceland, Italy, Liechtenstein, Norway, Slovenia, Spain, Sweden, Switzerland and the Ukraine, all of which have come into force. Further, drafts of readmission agreements have been submitted to Azerbaijan, Canada, Poland, Romania and Russia. Belarus, Bulgaria, Georgia and Portugal are expected to sign agreements in 2000.

Currently Latvia is in the process of harmonizing its legislation in the field of asylum so as to follow the EU's common standards. Since February 1999, Latvia, together with nine other associated countries, participated in the PHP for Justice and Home Affairs Joint Support Programme on the Application of the EU *Acquis* on Asylum and related Standards and Practices in the Associated Countries of Central Europe and Baltic States. The two-year project consisted of a series of workshops, two round tables and, to close, an evaluation conference in November 2000. Every workshop was organized for the working and mid-ranking management level of the partner authorities and dealt with the relevant legal instruments and content of the EU *Acquis* and related standards and practices. In the round tables all key actors involved in the decision-making process at the political level gathered to familiarize themselves with the EU *Acquis*, and to jointly assess and analyse existing needs.

In 1999 the Latvian government prepared new legislative changes in the field of asylum, compatible with the EU *Acquis* on Asylum. A governmental working group (National Task Force) was established in May 1999 and a National Action Plan (confidential document) on

necessary changes in refugee and migration legislation has been adopted.

A new Refugee Law has been drafted by members of the Latvian National Task Force, established within the framework of PHP during 1999–2000. At the time of writing, the Draft Law is in the Cabinet of Ministers for review and Parliament is expected to adopt it by the end of 2001.

4.III.A.2 Trading Rights with Nordic States: Visa-free Travel and Asylum Protection

Since 1997, when Latvia adopted the national Refugee Law and ratified the 1951 Convention relating to the Status of Refugees, it has signed visa-free travel agreements with all Nordic countries and also with most western and central European states.

When Latvia was engaged in negotiations for visa-free regimes with Finland and Norway, it was emphasized at high-level meetings[159] that Latvia should first solve the issue of refugees and sign the 1951 Refugee Convention.

The readmission agreement between Latvia and Norway was seen as a prerequisite for visa-free travel between the two countries. The preamble makes reference to the 1951 Refugee Convention and the 1967 Protocol. In the readmission agreement between Latvia and Finland, where a reference to the 1951 Refugee Convention and 1967 Protocol is mentioned as well, it is anticipated that the agreement would be applied to asylum seekers only when Latvia has a functioning asylum system in place. The readmission agreements or the readmission provisions of the visa-free travel agreements between Latvia and Norway, Sweden, Finland and Denmark have not yet been applied, because there have been no cases.[160]

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[159] E.g., during the signature of readmission agreement on December 2, 1996 by the Finnish Prime Minister Lipponen and his Latvian counterpart Skele, a statement by Lipponen was quoted by the newspaper The Baltic Times as 'urging Latvia to accept and sign the 1951 Geneva Convention on Refugees as well as to beef up its border control'. A similar statement by the Norwegian Minister of Foreign Affairs Godal that Latvia 'must first solve the issue of status of political refugees and illegal immigrant transit' was published by the official newspaper 'Latvijas Vestnesis' on January 14, 1997.

[160] Nordic countries still do not recognize Latvia as a safe third country and consider that while establishment of a functioning asylum procedure has not been completed in Latvia, it is too early to apply the readmission provisions. It could be assumed that if any third country national asks for asylum, they will not send them

Both official and public opinion judged visa-free travel as having a number of potential economic and political benefits, including the promotion of foreign investment and the facilitation of tourism. The success of the Government's foreign policy has been measured by the number of visa-free agreements signed.

4.III.A.3 Pressure from International Organizations

In 1991 the UNHCR Office in Stockholm assumed responsibility for Estonia, Latvia and Lithuania. On many occasions such as meetings, correspondence and press statements, UNHCR had expressed its concern over the absence of asylum policy and legislation in Latvia, particularly in the context of the prolonged detention of more than hundred asylum seekers. This kind of treatment was considered inhumane and risked undermining the steady progress that Latvia had made towards the establishment of the rule of law.

Upon Lithuania's adoption of the national refugee law, UNHCR expressed the fervent hope that the other Baltic countries would soon adopt similar policies, as this would benefit all the States in the Baltic Sea region, where transmigration is a continuing problem.[161] UNHCR publicly announced that it had made considerable efforts to enhance Nordic-Baltic cooperation with regard to asylum seekers and refugees and had clearly expressed its willingness to assist the Baltic countries, but obviously made it a condition that such assistance should go to humane and internationally acceptable policies.[162]

The continued detention by Latvian authorities of asylum seekers had drawn the attention of the media and several international governmental and non-governmental organizations (e.g., the Council of Baltic Sea States and AI). In its reports of 1995 and 1996, AI referred to the letters sent to the Latvian authorities stating that refugees and asylum seekers should not be seen as illegal migrants and that the right to seek asylum was laid down in the UDHR. AI urged the Latvian government to ratify the 1951 Refugee Convention and the 1967 Protocol and to establish an adequate protection system for refugees.

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back to Latvia automatically without examination of the case.

[161] Press Release, UNHCR Regional Office for the Nordic and Baltic Countries, Stockholm, July 5, 1995.

[162] Press Statement by the UNHCR Concerning the 'Refugee Train Shuttle' between Latvia, Russia and Lithuania, UNHCR Regional Office, March 31, 1995.

The most important foreign policy issue for Latvia is accession to the EU. On 15 February 2000, the EU accession negotiations with Latvia were officially opened. Accession to the EU means the complete adoption of the body of EU legislation, the *acquis communautaire*. Special emphasis was laid on Latvia's ability to fully implement EU policy in such sectors as the free movement of goods, services, capital and people, the Common Trade Policy, the Common Foreign and Security Policy, as well as in justice and home affairs, including the conditions of the Schengen Agreement. The essential condition for both opening and concluding the negotiations is complete compliance with the criteria of the EU Member States, defined by the EU Copenhagen and Madrid Summits. The fulfilment of the commitments that Latvia has assumed in the framework of the Association and other agreements will also be taken into account.

4.III.B Legislative Practice: Balancing Refugee Protection against Exclusion

4.III.B.1 Access to Territory

A foreigner can enter Latvia in accordance with the 'Law On the Entry and Residence of Foreign Citizens and Stateless Persons in the Republic of Latvia' (Immigration Law) with a visa (tourist, business, transit, etc.). Past experience indicates that only a few of the asylum seekers who arrive in Latvia have obtained a visa (either tourist or transit visa) to go further west. The majority of asylum seekers enter Latvia illegally.

It should be noted that each person crossing the state border illegally could be punished with up to three years imprisonment or a fine according to Article 284 in the Latvian Criminal Law. In practice, only four asylum seekers have been accused of violating the above-mentioned Article. In three cases criminal charges were withdrawn or the Court released the person. In one case an asylum seeker was sentenced to six months imprisonment.

There is a clear conflict between Article 31 of the 1951 Refugee Convention and Latvian Criminal Law. However, not all cases of criminal charges were taken to court. If a person applies for asylum within a 'reasonable period of time' she cannot be accused. In practice, the authorities follow international standards, but from the legal point of view there is a gap between international obligations

(Article 31 of the Refugee Convention) and national legislation (Latvian Criminal Law) that partially explains the lack of consistency in court rulings.

4.III.B.2 Access to Procedures

According to the Latvian Refugee Law, asylum applications can be submitted at the land and sea borders or in the territory of the country. Every person who submits an asylum application should immediately be considered as an asylum seeker. This provision is also stated in the Article 3 of the Latvian Refugee Law: 'A person shall be considered an asylum seeker at the moment he/she has submitted a written application to have refugee status granted, as provided by this law.' According to the Latvian asylum system there is no initial screening before a person is allowed to begin the asylum procedure.

4.III.B.2 (a) At the border

Articles 12 and 13 of the Latvian Refugee Law state that if a person arrives in the Republic of Latvia by crossing the state border at a land border control point, or at the state border control point at an airport or seaport, for the purpose of obtaining asylum and refugee status, she shall be taken immediately to the nearest state police station where application for refugee status shall be made. The asylum seeker is interviewed at the state police station by state police officers specially trained for this purpose. During the interview and the initial examination of the application, any asylum seeker shall be lodged in accommodations specifically provided for this purpose at the state police station, and separate from persons held under suspicion of having committed a crime.

In practice, the above-mentioned articles have not been applied, as all asylum applications have been submitted inside the territory. In addition, it should be mentioned that for the implementation of the above-mentioned articles, no special bylaws or internal instructions have been issued by the Latvian Government. The border guards have been instructed to contact the state police when asylum seekers arrive at the state border. UNHCR has no information on any case when an asylum seeker was not admitted into the territory.

The new Draft Refugee Law foresees a border procedure and if an application for asylum is filed at the land border, border guards are

responsible for conducting an asylum interview. This may raise a question concerning the quality of the interview and the compliance of the Law to the EU Council's Resolution on Minimum Guarantees for Asylum Procedures, Chapter III (6).

4.III.B.2 (b) In the territory

If a person would like to submit an asylum application in the territory of Latvia, Article 14 of the Refugee Law sets the procedure, which is similar to the border procedure. The person should approach the State Police station or the Refugee Affairs Centre.

After submission of the application, the same interview procedure applies to all asylum seekers: the applicant is interviewed at the state police station by officers of the state police specially trained for this purpose. During the interview and the initial examination of the application, any asylum seeker shall be lodged in accommodation specifically provided for this purpose at the state police station, and separate from persons held under suspicion of having committed a crime.

In practice both institutions, the Refugee Affairs Centre and State Police, have accepted asylum claims. After conducting an interview the police officer submits the interview protocol to the Refugee Affairs Centre where a decision on the validity of the claim is made. If the claim is considered manifestly unfounded, it will be examined under the accelerated procedure.

4.III.B.3 Refugee Definition

4.III.B.3 (a) Existing definition

The Latvian Refugee Law contains, in principle, the same definition of refugee as the 1951 Refugee Convention. Article 2 (1) of the Law reads: 'Refugee status may be claimed by asylum seekers who are not citizens of Latvia or subject to the Law on the Status of Former USSR Citizens who do not have the Citizenship of Latvia or of any Other State,[163] and who arrive or are in the territory of the Republic of

[163] All persons who are subjects of the law 'On the Status of Former USSR Citizens who do not have the Citizenship of Latvia or of any Other State' at the same time

Latvia because of well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion in the country of their nationality (citizenship) or, in the case of stateless persons in the country of their habitual residence and who, owing to this fear, are unable or are unwilling to avail themselves of the protection of that country'.

By the end of 2000 the Latvian asylum system did not provide protection other than the Convention refugee status. However, it should be noted that the Draft Refugee Law provides several types of subsidiary forms of protection, which are based on the Article 3 provisions of the ECHR and provisions included in the CAT.

4.III.B.3 (b) Exclusion clauses

Article 18 of the Refugee Law contains all the exclusions in the 1951 Refugee Convention as well as several additional exclusion clauses, e.g. a person who comes from a safe country of origin or safe country of asylum, an applicant who belongs to a terrorist or other criminal organization (the law does not define terrorist or other criminal organizations).

Article 21 of the Refugee Law institutes an additional exclusion clause: a time limit of 72 hours for the submission of an asylum application (Article 21 (1)).

In fact, Latvian Refugee Law and its application expands grounds for exclusion as provided by the Convention. According to the Law, a case can be examined under accelerated procedure if any of the exclusion clauses can be applied. This approach is in contradiction with generally accepted standards of accelerated procedure and the application of exclusion clauses. Following current legislation and practice, exclusion clauses can be applied at the beginning of the procedure, which means that examination of the claim starts with the application of exclusion clauses, and if any of them are found to be applicable the case can be considered under accelerated procedure.

The new Refugee Law, which will probably be adopted in 2001, will likely revise the above-mentioned provisions.

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are permanent residents of Latvia and protected by the Latvian state.

4.III.B.4 Asylum Procedures

4.III.B.4 (a) First instance level

When the authorities receive an asylum application the asylum seeker is interviewed at the state police station by officers especially trained for this purpose. During the interview police officers use a list of questions, prepared by the Refugee Affairs Centre. In practice, an official of the Refugee Affairs Centre also takes part in the interview and may ask additional questions.

An asylum seeker has the right to ask her lawyer to be present during the interview. If the asylum seeker is an unaccompanied minor, the Refugee Law requires the presence of her representative (Article 11 (2)). During the initial interview the asylum seeker is provided with accommodation at the state police station (Article 12 (2)) or at the air or seaport (Articles 13 (2) and 14 (2)).

The state police forward the interview protocol to the Refugee Affairs Centre, which decides whether the case is 'well-founded' or not. The Refugee Affairs Centre has three months to decide on a case under regular procedure. In particularly complicated cases the time limit may be extended to six months with the agreement of the Director of Department (Article 17). If the case is found to be manifestly unfounded, the Refugee Affairs Centre has two working days to make a decision (Article 21 (2) (see *infra*, III.B.4.(c) accelerated procedure)).

The decision of the Refugee Affairs Centre has to be in writing and communicated to the applicant in the language that she understands. Also, the applicant must sign the decisions. If the Refugee Affairs Centre finds the claim to be well-founded the asylum seeker is transferred to the Asylum Seekers Reception Centre. During a stay in the Reception Centre a person is entitled to the asylum seeker's allowance and emergency medical assistance. In compliance with the Reception Centre's internal rules, attendance of Latvian language courses is compulsory. Computer classes and a library are also available in the centre

4.III.B.4 (b) Second instance

If the Refugee Affairs Centre rejects an application, the applicant or her representative may appeal to the Refugee Appeals Council within seven days (Article 20). The Appeals Council has to examine the

application within two months, and its decision is final. A written decision has to be given to the applicant. The Refugee Law provides for suspensive effect of appeals in cases examined in the regular procedure as well as in cases where refugee status is terminated (Articles 20 and 28). Upon refusal in the appeals instance the person would be transferred from the Refugee Reception Centre to the detention camp pending expulsion.

4.III.B.4 (c) Accelerated procedures

If an asylum application is considered as manifestly unfounded, the Refugee Affairs Centre has to decide on the substance of the claim within two working days. Then the file is automatically sent to the Refugee Appeals Council, which has three working days in which to verify the decision. The Council shall either confirm the decision or return the case to the first instance for consideration under the regular procedure.

The most contended issue of the accelerated procedure is that an asylum seeker is not informed of the fact that her application is examined under the accelerated procedure, and therefore she has no possibility to rebut. In practice all asylum claims examined under the accelerated procedure have been rejected. No case has been returned to the first instance for reconsideration. It should be mentioned that this provision is expected to change with the New Refugee Law.

Article 21 of the Refugee Law sets up the procedure for examining applications under the accelerated procedure (see *supra*, 4.III.B.3(b) Exclusion Clauses).

The new Refugee Law will slightly change time frames in which a decision on the refugee status should be taken by first and second instance in the regular as well as in the accelerated procedure.

4.III.B.5 Caseload Falling Outside the Existing Definition

4.III.B.5 (a) Lack of alternative status

As was mentioned before, the refugee definition in the Latvian Refugee Law is similar to the Refugee Convention definition. Neither

the Refugee Law nor the Immigration Law provides any temporary protection or protection based on humanitarian grounds. This means that people who do not qualify for refugee status but nevertheless are in need of protection cannot obtain such protection. As mentioned earlier, alternative status is introduced in the new Refugee Law.

4.III.B.5 (b) Deportation

A person who has been refused refugee status is to be deported in accordance with the provisions of the law 'On the entry and stay of aliens and stateless persons in the Republic of Latvia' (Immigration Law Article 40). According to Article 38 of the Immigration Law, the Director of the Department for Citizenship and Migration Affairs or the Head of the District Office issues an order for expulsion. This order may be appealed against to the Director of the Department within seven days. If the Director upholds the expulsion order, the applicant may appeal to the courts.

A person has five days to leave the country voluntarily. After that the case is given to the Immigration Police, who are charged with the execution of the expulsion order.

4.III.C Capacity Building

4.III.C.1 Reception and Asylum Systems

In 1997 and 1998 UNHCR assisted the Government of Latvia to raise funds from donors for the implementation of the Latvian refugee law, and in particular for the renovation and establishment of a reception centre, as well as for training government staff dealing with refugee administration. UNHCR provided over USD1.2 million, of which USD850,000 was donated by the U.S. Department of State for the refurbishment of two accommodation buildings for the reception centre. In addition, the U.S. Department of Defence contributed bilaterally USD155,000 towards the same project, and Sweden donated equipment and furniture of an estimated value USD300,000. In January 1999 the reception centre, with a capacity to accommodate up to 250 persons, started to operate and received its first residents. UNHCR and Finland have provided funds, USD50,000 and USD20,000 respectively, for the establishment of a temporary reception facility at Riga airport.

The Nordic donor governments, especially Denmark and Sweden, have provided a large amount of training to the decision-makers in the Refugee Affairs Centre and Refugee Appeals Council. The Swedish contribution to training in the Baltic Countries (most of which is implemented in Latvia) has been estimated at USD400,000 a year. Training activities include; seminars, study visits and 'on the job training' of officials in refugee law and asylum procedure. Interviewing and country of origin information seminars are organized mainly for refugee status determination decision-makers in the first and second instance, immigration police and reception centre staff.

4.III.C.2 Strengthening Border Controls[164]

On 27 March 1997 the Latvian Cabinet of Ministers agreed that special attention should be paid to the eastern border. This was reflected in the National Plan for the Adoption of the *Acquis* (NPAA), whereby the government promised to establish technical surveillance and control of the eastern border by 2001, update radio connections and telecommunications systems by 2000, develop the border guard information system by 2002 and the guarding infrastructure system by 2003. The Border Guard is responsible for the implementation of these initiatives.

The Phare project 'Latvian Eastern Border Management and Infrastructure' contributes significantly to the Governments initiatives. In the National Initiative Programme (NIP) for 1998–2000 the Government noted that ECU27,7000,000 was required for the period 1998–2002 to develop the infrastructure of the eastern border of Latvia. The projects administrated by the Border Guards will include: development of infrastructures on the eastern border, and development of the technical security and control system for the eastern border.

In addition, the 'Action Plan for the Solving of Shortcomings Outlined in the Regular Report of the European Commission' adopted by the Cabinet of Ministers on 29 December 1998 calls for the setting up of a mobile patrol service on the eastern border. This would include infrastructure development as required by the NPAA, the provision of vehicles, plus additional equipment and weaponry for the Border Guards. Concerning maritime patrol to meet EU standards, it

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[164] Source of information for this sub-section: Technical Cooperation on Migration (TCM), Experiences in the Baltic Countries (1994-1999), IOM, March 1999.

was noted that authority should be shifted from the Navy to the Border Guards.

At the time of writing the Latvian government is preparing a new Phare National Application; 'Asylum and Migration Management System'. The main objectives of the new application are; to increase the administrative capacity of the institutions involved in the field of migration and asylum, to harmonize national legislation in the field of migration according to EU standards, and to develop a common information system on migration and asylum cases.

4. IV Estonia

Anu Potisepp

4.IV.A Factors which Prompted the Establishment of Asylum Systems

4.IV.A.1 Background and Context

In the early 1990s the newly independent Estonia, like the other two Baltic States, was faced with a new problem: refugees, illegally passing through on their way to Scandinavia or Western Europe. They were brought to the Baltics by smugglers, boarded on to ships and sent off from the shores of the Baltic Sea. Not all of the refugees succeeded in making their way to their final destination. Some were stranded in the Baltics, hiding from the authorities while trying to continue their journey; some were caught; and an unknown number of refugees may have been killed in shipwrecks.

The first time the newly independent Estonia was confronted with refugee issues was in 1992, when a group of Romanians tried to get to Scandinavia via Estonia. A greater number of irregular migrants were caught in Estonia in the early years of the 1990s, but since 1994, when an international network of human trafficking was discovered, the Estonian Board of Border Guard has had to deal with approximately one major case of human smuggling every year.[165] People who were on their way from Estonia to Scandinavia have included citizens of Iraq, Turkey and India.[166] The numbers involved, however, were relatively small. Since 1991 about 400 potential asylum seekers are known to have tried to pass through Estonia, and only a slightly larger number must have transited the country unnoticed by the authorities.[167]

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[165] *Kerli Hirv*, Illegal Entry of Migrants into Estonian Republic, in: Report. IOM Regional Seminar on Migrant Trafficking through the Baltic States and Neighbouring Countries, 17-18 Sept. 1998, Vilnius, Lithuania (IOM Helsinki 1999) 43-45 (43).

[166] *Mart Nutt*, The Refugee Policy in the Light of Estonian Legislation and its Perspectives, in: *Kari Hakola* (ed.), Migration and Refugee Policy - on the Eastern Border of the European Union (University of Jyväskylä 1998) 101-103 (101).

[167] *Peter van Krieken*, Mission Report for the Analysis of the Asylum Sector and for the

Nevertheless, problems arose with those caught by the border guards. At that time there were neither legal nor institutional possibilities to submit asylum applications in Estonia, and refugees were treated as illegal migrants, more often than not detained while the authorities looked into the possibilities of returning them either to their countries of origin or the countries through which they had come to Estonia. Those who managed to transit through Estonia and reach the Scandinavian countries were not returned, as Estonia, for obvious reasons, was not considered a safe country of asylum. This situation resulted in international pressure being put on the Estonian government. One of the conditions imposed by the Finnish Government when it accepted a large group of mainly Iraqi asylum seekers in February 1995, was that Estonia should establish a refugee policy.

It is quite clear that Estonian policy in different fields is closely related to the country's geopolitical position; hence its concern about security. It is not surprising, then, that Estonia's principal foreign policy objective is to guarantee the country's security, and to achieve this Estonia has chosen to try to be integrated into Western structures as closely and speedily as possible. According to the Estonian Foreign Minister, Estonia's foreign policy priorities are accession to the EU and NATO, as well as the strengthening of the effectiveness of our foreign economic policy to support international co-operation in business and trade. The objective of Estonia's foreign policy is to defend Estonia's security and her just position in the open world.[168]

Given the fact that guaranteeing the country's security is such a central and vital concept for Estonia, it is only natural that the country observes the situation in the neighbouring countries very closely. In this context, the situation in Russia is of special interest because it is the most unstable and unpredictable of the neighbouring countries and the one with which Estonia has a complex relationship, owing to the recent past. Therefore, it would be fair to state that the situation in Russia is of central importance to the policies and strategies Estonia adopts in various fields.

An important element of Estonia's policy of integration into Western structures was its application for EU membership, lodged on 24 November 1995. This meant that Estonia set off on a path of a clear

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Identification of Projects - In the Field of JHA to be Implemented under the Phare Programme (Tallinn 12 June 1998) 1-2.

[168] Address by T. H. Ilves, Minister of Foreign Affairs, on behalf of the Government of Estonia to the Parliament in June 1999, 'Estonia's Main Foreign Policy Priorities'.

commitment to the adoption and implementation of international standards in all possible fields, including the treatment of asylum seekers.

4.IV.A.2 Trading Rights with Nordic States: Visa-free Travel and Asylum Protection

Although in Estonia the issues of asylum seekers and refugees were (and still are) considered of marginal relevance, the above-mentioned experience with groups of refugees and migrants who ended up in Estonian territory clearly brought the need to establish a refugee policy to the attention of the authorities. In addition, in the light of the right of all persons to seek and enjoy asylum as laid out in Article 14 of the UDHR, treating refugees as illegal immigrants by detaining them and not being able to guarantee them the right to apply for asylum was clearly against the principles of international law. This gave rise to criticism and pressure from other states as well as international organizations. A newly independent Estonia, aspiring to be accepted in the community of Western countries, had no option but to begin ratifying international conventions and bring its domestic legislation into line with international standards.

Among the Western countries, the interaction of Estonia with the Nordic countries in the field of asylum issues was the most intense. This was only natural considering the fact that Nordic countries received many irregular migrants who transited through Estonia. Thus, the Nordic countries were the ones most affected by the asylum policies or the lack of policies in the Baltic States. In its desire for acceptance as a member of the Western community, Estonia has striven for visa freedom with the Western countries. It was of course particularly desirable to conclude visa-free agreements with the Nordic countries, its closest neighbours. They, on the other hand, regarded the establishment of an asylum system in Estonia as a condition to the conclusion of such agreements. Therefore, it was not a coincidence that the agreements abolishing visa requirements between Estonia on the one hand, and Finland, Sweden, Norway and Iceland, on the other, entered into force on 1 May 1997, after Estonia had adopted a refugee law and ratified the 1951 Refugee Convention and the 1967 Protocol in February of the same year. The visa-free agreement between Estonia and Denmark, however, had been in force since 1 May 1993.

All these agreements were either preceded or accompanied by readmission agreements, those between Estonia and Finland having entered into force in March 1996; while those between Estonia and

Sweden, Norway and Iceland, respectively, all entered into force in May 1997. The visa-free agreement between Estonia and Denmark contains provisions for the readmission of third country nationals. The preambles of the Estonian readmission agreements with Finland, Norway and Sweden contain references to the 1951 Refugee Convention and the 1967 Protocol. In addition, the authorities of all the Nordic countries have indicated that the readmission agreements will not be applied to asylum seekers until there is an asylum system in place in Estonia and the asylum seekers will be allowed into the procedures in the Nordic countries. To date, there is no information about the Nordic countries having applied the provisions of the readmission agreements to asylum seekers by returning them to Estonia. Thus, it is obvious that while trying to guarantee the protection of asylum seekers, the Nordic countries are gradually shifting the responsibility for the reception of asylum seekers to the Baltic States.

4.IV.A.3 Pressure from International Organisations

UNHCR, as the main international refugee organization, has followed the situation in Estonia closely; it has expressed its concern about the treatment of refugees and lobbied for the ratification of the 1951 Refugee Convention. UNHCR's Regional Office in Stockholm started covering the Baltic countries in 1992, and since 1996 UNHCR has a seat in Estonia. Prior to the adoption of the refugee law, UNHCR had repeatedly drawn the Government's attention to the unacceptability of its detention policy. In his Press Statement of 31 March 1995, the Regional Representative of the UNHCR Regional Office for the Nordic and Baltic Countries, commenting on the week-long shuttling of over 100 asylum seekers between Latvia, Russia and Lithuania, said the following: The episode concerning the train shuttle underlines the paramount need for all countries in the region to establish refugee reception policies which would finally allow the distinction between those who need protection and those who could be treated as purely 'economic migrants'. While insisting on the establishment of asylum systems in the region, UNHCR stressed that it recognised that they would be an additional burden on the newly independent Baltic States. Therefore, it was the policy of the organization to enhance Nordic-Baltic Cupertino with regard to asylum seekers and refugees. At the same time, it made it clear to the Baltic States that every kind of

assistance from UNHCR and the Nordic governments was conditional on *humane and internationally acceptable policies* in these countries.[169]

Among the other international organizations that were concerned about the plight of asylum seekers in Estonia, Amnesty International should be mentioned. According to that organization's report on the Baltic States of August 1996, one of its main concerns was the detention of asylum seekers. Caritas Sweden, together with the local Caritas representatives in the Baltics, also followed the situation of the asylum seekers closely.[170]

As a result of all the above-mentioned factors, in September 1996 the Cabinet requested the Ministries of the Interior, Foreign Affairs, Justice and Social Affairs to come up with a draft action plan for establishing an asylum system in Estonia. Nothing happened until December 1996, when a group of parliamentarians submitted a draft refugee law to Parliament. During the process of drafting the refugee law, UNHCR's Regional Office provided comments on the draft text and made the services of an independent expert available. The comments were well received and the drafters did their best to take them into account in the final version of the text. In February 1997, the Estonian Parliament adopted a refugee law and ratified the 1951 Refugee Convention and the 1967 Protocol.

An analysis of the interests of the various parties in the development of an asylum system in Estonia reveals a number of dilemmas and tensions on all sides. It is not at all surprising that one element of the formula is always the self-protection of the state, the other elements depending on the geographical position of the country. As far as the Nordic countries are concerned, while providing genuine assistance and support to the nascent democracy in Estonia, they are interested in Estonia emerging as a country with tight border controls and a functioning asylum system, so that together with the other countries in the region it can share the burden of checking illegal immigration and processing asylum applications. In other words, it is in the interests of the Nordic countries that Estonia becomes a safe third country of asylum while acting as a reliable buffer zone for illegal immigration. It has to be noted, however, that the Nordic countries were not prepared to achieve the latter objective by sacrificing the rights of asylum seekers. They have indicated that no asylum seekers

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[169] Press Statement by UNHCR Concerning the 'Refugee Train Shuttle' between Latvia, Russia and Lithuania (Stockholm: UNHCR Regional Office for the Nordic and Baltic Countries 31 March 1995).

[170] Cf. *Kaj Engelhart* (ed.), Baltic Report (Caritas Sweden: Summer 1995, January 1996, Summer 1996, February 1997).

will be returned to Estonia prematurely and they are monitoring the situation in Estonia very closely and providing various forms of assistance to the emerging asylum system in the country.

Estonia, on the other hand, highly interested in being gradually integrated into Western European structures, had no option but to do its best to meet the required criteria. This obviously includes the building up of a functioning asylum system. On the other hand, bearing in mind the country's relatively poor economic and social situation as well as the presence of a large non-Estonian community, Estonia is trying to resist becoming a refugee-receiving country too soon. In actual fact, the dilemma Estonia is facing is embedded in the two aspects of the state's self-interest: it is trying to maximise the gains from integration into the West while lowering the price it has to pay for it.

Ironically, it can be stated that, in the short term it will even serve Estonia's interests to become a safe country of asylum, because then it would no longer be used as a transit country to Scandinavia; at the same time, at least for now, it is not expected to become a target country for asylum seekers. Asylum seekers, knowing that they would be returned to Estonia from the Nordic countries and not wishing to end up there, would simply choose not to come to or travel through the country. This argument, however, is not likely to hold very long, as Estonia, being a successful candidate for EU membership, will most probably start attracting more and more asylum seekers.

4.IV.B Legislative Practices: Balancing Refugee Protection against Exclusion

The Estonian Refugees Act, which was adopted by Parliament on 18 February 1997, entered into force simultaneously with the 1951 Refugee Convention and the 1967 Protocol on 9 July 1997. The Refugees Act has been complemented with a number of bylaws regulating the implementation of the Act. On 8 February 1999, The Act Amending the Refugees Act was adopted by Parliament and entered into force on 1 September 1999. The need to amend the existing Refugees Act and better regulate certain aspects of the asylum field was based on Estonia's first practical experiences with asylum seekers. Subsequently, following Estonia's participation in the PHP,[171]

[171] Phare Horizontal Programme (PHP) on Justice and Home Affairs was a 2-year project (1999-2000) designed by several EU Member States, in co-operation with

an overview of the main incompatibilities between Estonian legislation, practice and institutional capacity and the EU *acquis* on asylum and related international standards was produced. In an effort to bridge the identified gaps, The Act Amending the Aliens Act and Refugees Act was drafted in June 2000. The amendments are not expected to enter into force before 1 January 2002. UNHCR has drafted its comments to the recent amendments and at the time of writing, these, together with the bill, await discussion in a parliamentary committee. In the analysis that follows, the existing law and the amendments are dealt with in parallel.

4.IV.B.1 Access to Territory

The first possibility to lodge an asylum application in Estonia is at the border. To date, however, the majority of applications have been submitted within the territory of the country (5 out of the total of 48 applications have been received by the Border Guards). Those who have applied for asylum within the territory of the country have come to Estonia either legally or illegally (in the latter case mostly from Russia). The fact that so few applications have been received at the border leads one to conclude that Estonia is not generally regarded as a target country by asylum seekers, and thus they do not arrive at the border with a clear intention to seek asylum there. In most cases they are transiting through Estonia on their way to Scandinavia. It appears to be the case that applications at the border are often lodged by those who are caught by the Border Guards while trying to enter or leave the country illegally.

4.IV.B.2 Access to Procedures

4.IV.B.2 (a) At the border

The asylum application of a person who gives notice of her wish to apply for asylum while at the border, before entering the territory of Estonia or during the prevention and processing of her illegal border crossing is received by a Border Guard official specially trained for this work. This official is also responsible for conducting an initial

UNHCR, to support the implementation of the evolving EU *acquis* on asylum in 10 Associated Countries of Central Europe and the Baltics.

interview with the applicant. After the initial interview the border guard official decides either: (a) to send the applicant to a reception centre where a thorough interview is conducted by an official of the Citizenship and Migration Board; or (b) to conduct an accelerated processing of the application.

The accelerated procedure is conducted in respect to applicants who arrive from a safe country of origin or safe third country, or whose application is considered manifestly unfounded.[172] As to the interpretation and application of these concepts, it is difficult to draw any conclusions, as there has been no real experience. While the amendments to the Refugees Act that entered into force on 1 September 1999 included mere references to these concepts, the recent bill, inspired by the need to approximate the Estonian legislation to the EU rules, introduces a detailed explanation of which applications can be considered manifestly unfounded. The text exactly follows the wording of the EU Council Resolution on Manifestly Unfounded Applications for Asylum. While the existing law states that when defining a safe third country Estonia follows the principles of UNHCR[173], in the proposed bill this has been replaced by references to the Conclusions on Countries in which there is Generally No Serious Risk of Persecution and the Resolution on Harmonised Approach to Questions Concerning Host Third Countries. According to the bill, these two EU documents thus form the basis for the application of the concepts of safe country of origin and safe third country.

In the course of the accelerated procedure a supplementary interview is conducted with the applicant and as a result the Border Guard official can either: (a) discontinue the accelerated procedure and channel the application to a regular procedure by sending the applicant to a reception centre where a thorough interview is conducted; or b) reject the application and send the person back from the border.

Considering the fact that so few applications have been received by the Border Guards it is hard to evaluate the fairness and efficiency of the accelerated procedure at the border. However, it is obvious that the Board of Border Guard has been given a substantial role in the asylum procedure in Estonia. Although the officials carrying out the initial interview and conducting the accelerated procedure have been specially trained, the processing of asylum applications is by no means their main field of responsibility. This is one of the reasons why it has

[172] Cf. Estonian Refugees Act § 9 subsection 1.

[173] Cf. Estonian Refugees Act § 9 subsections 1 and 7.

been noted by several foreign experts that the accelerated procedure at the border falls short of the required procedural guarantees.

Various experts have already pointed out that the procedure lacks the necessary minimum guarantees provided by the EU *acquis* on asylum.[174] This requires that a decision on an asylum application must be taken by a central and fully qualified authority, and that provision must be made for an appeal to a court or a review by another independent central authority.[175] Although the Estonian Refugees Act stipulates the right to submit an appeal to an Administrative Court against the decision to send the rejected applicant back from the border, the appeal does not have a suspensive effect.[176] Therefore, the appeal itself cannot be considered a sufficient guarantee.

The EU experts also identified the border procedure as one of the main deficiencies in the asylum system during the PHP. In an effort to bridge the gap, The Act Amending the Aliens Act and Refugees Act introduces a suspensive effect of appeals into the accelerated procedure. Furthermore, the Act introduces a requirement for the Border Guards to request the non-binding advice of the Citizenship and Migration Board, the first instance in the asylum procedure, before taking a decision to reject an application in the accelerated procedure. Although this procedure can be seen to be in line with the minimum requirements of the EU *acquis*, it remains to be seen whether in practice the applicants will have the possibility to exercise their rights, as the proposed time frame for lodging an appeal is extremely tight. The amendments stipulate that a rejected asylum seeker should immediately inform the Border Guards in writing of her wish to appeal against the decision and she then has three days to submit the actual appeal to an administrative court. This is highly unrealistic for a person at the border in a situation where the practice of guaranteeing asylum seekers access to legal assistance, non-governmental and international refugee organizations, and competent interpreters has not evolved.

At a more analytical level, it can be stated that the introduction and the continuation of the accelerated procedure at the border, which enables Estonia to return persons directly from the border, is a clear example of the country's efforts to protect its national interests in a given geopolitical situation. To be more precise, Estonia is unlikely to do away with the border procedure before a readmission agreement

[174] A Report of General JHA Expert Mission to Estonia on 1-5 June 1998.

[175] EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures.

[176] Cf. infra, section 4.IV.B.4.(b).

with Russia has been concluded. Until then, the only quick way of returning people coming from Russia is to do it immediately at the border. There is a possibility, however, that the border procedure will be further reviewed in the future, since its concept is confusing: applicants coming from a safe third country should simply be refused admission to the procedure instead of rejected in an accelerated procedure. In the long run, it would be logical and compatible with the tasks of the Border Guards if their role were limited to taking decisions on non-admission into the country.

4.IV.B.2 (b) In the territory

Those asylum seekers who submit an application within the territory of the country generally encounter no problems in accessing the asylum procedure. However, there have been cases when those who have entered the country illegally and expressed their wish to apply for asylum within the territory have been charged with illegal border crossing and sentenced to administrative detention under the Administrative Offences Act. UNHCR expressed its concern in these cases, making a reference to Article 31 of the 1951 Refugee Convention, and since then such incidents have not occurred. The persons in question were able to submit their asylum applications once they had been released from detention. Those who applied while being detained (mostly for staying in the country illegally) have, similarly, been able to submit their asylum applications only after their release.

A factor that can be seen as an obstacle to lodging an asylum application is that information about the possibilities of applying for asylum in Estonia is not easily available. Officials in government institutions, who are responsible for dealing with issues related to foreigners, are not always in possession of such information.

The procedure for applying for asylum within the territory of the country is as follows: an initial interview is carried out with the applicant within 48 hours from the moment she notifies the authorities of her request to apply for asylum. In the course of an initial interview the applicant is asked to fill in and submit a standard asylum application to the Government of Estonia.

4.IV.B.2 (c) Upon readmission from the west

Estonia has concluded readmission agreements with the other two Baltic countries, all the Nordic countries and several others.[177] To date, the readmission agreements have not been applied to asylum seekers, and thus no third country nationals have been readmitted to Estonia from the Nordic countries. It appears to be the case that the Nordic countries are currently observing the situation in Estonia closely in order to decide whether the country is ready to be declared safe for the return of asylum seekers.

4.IV.B.3 Refugee Definition

According to the Estonian Refugees Act, '[a refugee is] an alien: 1) who complies with the definition in Article 1 of the Convention together with the complementary provisions of Article 1 of the Protocol; 2) to whom the Government of the Republic has granted asylum.'[178] Thus, for the purposes of the act a refugee is a person who meets both of these conditions simultaneously.

Article 5 (1) (1) (3) of the Refugees Act stipulates that asylum may be granted to a person who has applied for asylum in Estonia and who has reason to fear persecution in her country of permanent residence or nationality as laid out in Article 1 of the Convention, provided the applicant has arrived directly from the country of her permanent residence or nationality or indirectly from another country in which the person is also threatened by the above-mentioned persecution or by expulsion to a country where such persecution is threatened. This definition excludes from the right to asylum refugees who have arrived indirectly from a country in which they may not have been threatened with persecution (within the meaning of the Refugee Convention) or with *refoulement* to a third country, but in which they cannot be granted effective and durable protection or asylum. While it is obvious that the intention of the drafters of the law was simply to import the concepts of safe country of origin and safe third country, the way in which this was done (including the concepts in the definition of refugee) gives rise to an unacceptable protection gap. Unfortunately, the pending amendments to the Refugees Act have overlooked this particular issue.

Up to date, only 26 decisions on asylum cases have been taken by the first instance (Citizenship and Migration Board), out of which four have been positive. Thus, there is not enough experience to allow one to draw more fundamental conclusions as to the interpretation of

[177] Cf. supra, section 4.IV.A.2.

[178] Cf. Section 4 of the Estonian Refugees Act.

different elements of the definition of refugee. However, looking at the texts of the decisions taken so far, certain ways of applying the definition can be detected. The failure to meet the following criteria seems to be recurrent: firstly, the indication that an applicant has been subject to personal persecution; and, secondly, the persecution must have already taken place. It should also be noted that the decision-makers are not inclined to attach a great deal of value to subjective elements such as well-founded fear of persecution and the psychological characteristics of each and every individual. Problems have also been observed with regard to questions related to standards and burden of proof, where the authorities have been reluctant to give refugees the benefit of the doubt. Most of the first-instance decisions have been appealed against to the Administrative Court, which has satisfied most of the appeals, usually referring to procedural shortcomings but also to the above-mentioned issues. The court cannot take decisions on the granting of asylum, but can simply refer the case back to the first instance for review.

Among the reasons leading to the decision on the refusal to grant asylum are those for exclusion as laid down in Article 1 (F) of the Refugee Convention and listed in the Refugees Act. Grounds for exclusion corresponding to Article 33 (2) of the Refugee Convention have been included in the Act. The pending amendments to the Refugees Act have, however, addressed the issue. As none of the exclusion clauses have been applied in practice, it is difficult to predict their impact on the scope of protection.

4.IV.B.4 Asylum Procedures

4.IV.B.4 (a) Time-limit clauses for asylum applications

Asylum seekers are not restricted by any time limits for submitting their applications for asylum. However, the time and circumstances of lodging an application are likely to be taken into consideration when assessing an applicant's credibility.

4.IV.B.4 (b) Appeal rights and suspensive effect

When the Citizenship and Migration Board makes a negative decision, it automatically issues the person concerned with an order to leave the

country. When an applicant is rejected at the border a decision is taken to send the person back from the border. The decision to deport a person from the country is taken by an administrative judge. This does not apply in the border procedure, as the person has not been allowed to enter the territory of Estonia in the first place.

As to the right to appeal against the refusal to grant asylum, section 7.7 of the Refugees Act reiterates a general principle of the Estonian legislation that *applicants and refugees have the right of recourse to the courts if their rights and freedoms are violated.* An appeal, in general, has to be submitted within 30 days from the moment the person is informed of the decision. The law does not contain an explicit statement to the effect that all applicants have the right to submit appeals against negative decisions. However, in the case of an accelerated procedure the law says that an appeal against the rejection of an application and against the precept to leave the country, or against the decision to send the applicant back from the border, is to be submitted to an administrative court within ten days from the date the person was informed of the decision.[179]

An appeal against a negative first-instance decision to an administrative court does not have an automatic suspensive effect. In the case of the appeals against negative first instance decisions taken within the territory of the country, the judges have suspended, on a case by case basis, the deadlines contained in precepts to leave the country issued by the Citizenship and Migration Board, pending final decision. The fact that the decision on the deportation of a person from the country must be taken by an administrative judge can be seen as a safeguard balancing the lack of automatic suspensive effect of the appeal. This does not, however, apply in the case of applications submitted at the border. Neither does the law mention the suspensive effect of the appeal. It is, therefore, clear that the current procedure at the border, which contains neither suspending effect of the appeal nor an independent review of the decision taken by the Board of Border Guard, falls short of international standards.

The pending amendments to the Refugees Act have reviewed the appeals procedure by shortening the time limits for submitting the appeals. The suggested time limit is ten days from the day a person is informed about a decision in the case of a regular procedure and three days in the case of accelerated procedures. According to the amendments, in the accelerated procedure an administrative judge should review the appeals without delay. The amendments state that a person is sent out of the country or returned from the border only

[179] Cf. Section 9 (5) of the Estonian Refugees Act.

after the appeals procedure, thus introducing an implicit suspensive effect of an appeal in all procedures. However, considering the difficulties in finding interpreters and translators and lawyers and, or NGO representatives who can assist the asylum seeker in drafting her appeal, it is very likely that the suggested procedure at the border will seriously hamper the asylum seeker's right to acquaint him/herself with the motivation of the decision and the possibility to appeal.[180]

Another question that arises in this context is whether the appeals body in Estonia, the Administrative Court, fulfils the requirement of an effective remedy within the sense of international requirements (Article 13 of the ECHR). Although the Administrative Court is empowered to examine a negative decision on an asylum application, both on substance and on point of law, it cannot take an independent decision to grant asylum in cases where it overrules a negative first instance decision. Instead, the Administrative Court has to return the case to the first instance body (Citizenship and Migration Board or Board of Border Guard) with an instruction to review the case in line with the argumentation provided in the motivation of the Court's decision. The Court cannot revoke the first instance decision and instruct the Citizenship and Migration Board to automatically grant the applicant refugee status. In practice, this means that a number of asylum cases end up moving back and forth between the first instance and various court instances, making the entire procedure extremely lengthy and inefficient.

4.IV.B.4 (c) Accelerated procedures

There are two sets of accelerated procedures currently in existence in Estonia: one at the border and the other within the territory of the country. An accelerated procedure with respect to in-country applications, in addition to the accelerated procedure at the border that has existed since the adoption of the Refugees Act in 1997, was introduced by the amendments to the Refugees Act that entered into force on 1 September 1999. This clearly reflects the intention of the authorities to make the whole procedure more efficient.

According to section 9 of the Refugees Act, the accelerated procedure (both at the border and within the territory) is conducted in respect of applicants who arrive from a safe country of origin, safe third country or whose application can be considered clearly unfounded. Concerning the interpretation and application of safe third country concepts, it is

[180] Cf. supra, 4.IV.B.2.(a).

difficult to draw any conclusions, as there has been no real experience. However, the amendments to the Refugees Act that entered into force on 1 September 1999 include clear references to these concepts as well as to the principles of UNHCR in defining a safe third country.[181] The pending amendments to the Refugees Act further elaborate on the application of these concepts, drawing directly on the relevant EU documents.[182]

As to the procedures themselves, an application is received and an initial interview is conducted either by a Border Guard official (at the border) or an official of the Citizenship and Migration Board (within the territory). As a result, an applicant is either channelled into a regular or an accelerated procedure. In the latter case the above-mentioned officials conduct a supplementary interview with the applicant and take a decision either to channel the applicant to a regular procedure or reject the application. If an application is rejected at the border, a decision is taken to return the person from the border; while in the case when an application is rejected inside the territory of the country, a precept is issued for the person to leave the country. As the accelerated procedure at the border has been seen to be lacking in sufficient safeguards, the proposed amendments to the Refugees Act introduce a requirement for the Border Guards to request the Citizenship and Migration Board's non-binding advice before taking a decision to reject an application in the accelerated procedure. According to the amendments, negative decisions taken in the accelerated procedure can be appealed against in the Administrative Court with a suspensive effect, but with a very short time limit.[183]

The accelerated procedure (including the initial interview) must be conducted within seven days from the moment of the notice of an applicant's request to apply for asylum. In case circumstances emerge which obstruct the procedure, the Director of the Citizenship and Migration Board or the Director General of the Board of Border Guard has the right to extend the term of the conduct of the procedure to a maximum of 30 days.[184]

While the accelerated procedure within the territory of the country can indeed be seen as serving the purpose of making the whole asylum

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[181] Cf. Estonian Refugees Act Section 9 (1) and (7).

[182] Cf. supra, 4.IV.B.2.(a). The accelerated procedure in the territory is identical to the one at the border, the only difference being that the conducting of the accelerated procedure at border results in non-admission to the territory.

[183] Cf. supra, 4.IV.B.4.(b).

[184] Cf. Regulation of the Government of the Republic No. 263, 'The Procedure for Accelerated Processing of an Asylum Application' (adopted on 31.08.1999 and entered into force on 10.09.1999).

system more efficient, the accelerated procedure at the border, which gives a Border Guard official the task of deciding on the substantial aspects of asylum cases and which is clearly lacking in necessary safeguards, is likely to emerge as a major protection gap.

4.IV.B.4 (d) Detention of asylum seekers

Although in general asylum seekers are not detained in Estonia, there have been cases when persons who have informed the authorities of their wish to apply for asylum have been detained for short periods and charged with illegal border crossing. In those cases, UNHCR informed the authorities of the unacceptability of this practice, making a reference to Article 31 of the Refugee Convention. These incidents have not been repeated.

However, Section 9.3 of the Refugees Act states that an applicant is not permitted to leave the territory of the border checkpoint during the initial interview and the accelerated procedure except when the person withdraws her asylum application, is in need of urgent medical aid, or has a legal basis to stay in the country. In addition, pursuant to the Refugees Act a primary reception centre is to be created in which asylum seekers will be obliged to stay during an initial interview and the conduct of an accelerated procedure, except in cases where an applicant has legal basis to stay in Estonia. Section 9 of the Refugees Act states that 'an applicant can leave the primary reception centre temporarily with the permission of the government agency in the following cases: 1) for carrying out an initial interview; 2) to receive urgent medical aid'.

In addition, pursuant to section 10.3, asylum seekers are not allowed to leave the centre if: they live in the regular reception centre and are suffering from an infectious disease; their identity has not been established; there are serious reasons for considering that her stay outside the reception centre could pose a threat to security or public order, or criminal proceedings have been initiated against her.

Following the logic of Article 20 of the Constitution, according to which 'No person may be held in custody for more than 48 hours without specific permission by a court', applicants should not be kept on the border checkpoint territory, the initial reception centre or the regular reception centre for more than 48 hours unless by court order. However, the authorities seem to be trying to circumvent the requirement by arguing that not all of these situations can be seen as amounting to custody or detention within the meaning of the Constitution. It can be concluded from the suggested amendments to

the Refugees Act that the restriction of movement in the initial and regular centres amounts to detention, since in these cases the requirement of a court sanction was introduced. On the other hand, no safeguards have been introduced by the bill with regard to asylum seekers kept at border crossing points. This reasoning is clearly inconsistent.

4.IV.B.5 Caseload Falling outside the Existing Definition

4.IV.B.5 (a) Lack of alternative status

According to the amendments to the Aliens Act, which entered into force on 1 October 1999, it is possible to apply for a temporary residence permit basing the application on an international agreement.[185] This is currently the only legal ground on the basis of which a person can find alternative protection in Estonia. The Aliens Act does not specify exactly which international agreements would qualify under this provision, but lawyers have tried to use it, referring to conventions such as the CAT, CRC and ECHR. To date no applicants have been granted humanitarian protection on the basis of this provision.

While the proposed Act Amending the Aliens Act and Refugees Act introduces the concept of alternative status more explicitly, the amendment still fails to be satisfactory. It includes protection for persons falling within the scope of the CAT but does not include any reference regarding the right to protection for persons falling within the scope of the ECHR, in particular its Article 3. The inclusion of the requirement that officials must also examine asylum applications in the light of the CAT provisions is a positive development, since it indicates an evolving unified procedure for all applications.

4.IV.B.5 (b) Fate of those persons outside of the definition

Those asylum seekers whose applications have not been found to be in conformity with the Convention definition have been denied asylum in Estonia and issued precepts to leave the country. However, most of

[185] Cf. Estonian Aliens Act Section 12 (1) (5).

the applications that have been denied by the first instance are currently pending in the appeal procedure. Three rejected asylum seekers have lodged applications for temporary residence permits on humanitarian grounds. One of the applications was rejected and the other two are currently pending. Asylum experience in Estonia is presently coming to the point where the first rejected asylum seekers are emerging in whose cases it is obvious that there are no reasons to continue appealing or to apply for a residence permit. While nobody has been forcefully deported from Estonia to date, there will soon be cases of former applicants who will have to return to their country of origin. As for rejected asylum seekers who cannot be returned due to technical obstacles, their status remains legally unregulated. In general, such people are kept in closed camps pending deportation.

4.IV.C Policy Strategies

4.IV.C.1 Policies of Evasion: Fear of 'Closed-Sack' Effect

Estonia has now managed to conclude border negotiations with Russia. In March 1999 the land and sea border agreements, including appendices, were initialled. Estonia is prepared to sign the border agreement, but the signature of the agreement is now dependent on the political will of the Russian side. Estonia regards this as an important issue, since the signing of a border agreement is both an attribute and guarantee of a state's sovereignty.[186] However, even if the border agreement is signed, it will probably be a long time before a readmission agreement with Russia is concluded. Estonia has been pursuing this, but its initiatives have met with little response from the Russian side.

On the other hand, Estonia has concluded visa-free agreements with all the EU countries. The same applies to readmission agreements between Estonia and the EU countries. Naturally, there is a readmission agreement between the three Baltic States (since June 1995). Therefore, Estonia could easily end up in a 'closed-sack' situation in which readmission works effectively from the West to Estonia but not from Estonia to the East. This is one of the reasons why Estonia has focused to such an extent on the development of the effectiveness of border control. If irregular migrants are caught at the

[186] *Ibid.*

Estonian border immediately after their arrival from Russia, they can be returned there. Since the day-to-day working relations between the Estonian and Russian border guards are apparently very good, there are usually no problems in returning to the Russian side those people who have obviously come from the East. Difficulties, however, would clearly emerge with the return of those who have been returned from the West.

As far as asylum seekers are concerned, of course they cannot be returned to Russia in any way, as the latter can hardly be considered a safe third country in the foreseeable future. Estonia, on the other hand, is likely to emerge as a safe country of asylum fairly soon. This means that Estonia could end up 'collecting' asylum seekers from the West who transited through Estonia, and possibly other Eastern countries. The 'closed-sack' effect has not developed so far; nevertheless, the fear that it may develop in the future may explain certain policies that aim at preventing this from happening.

4.IV.C.2 Transposing Western Practices

Considering Estonia's fear of having to deal with the 'closed-sack' effect, it is no wonder that the country has been trying to protect its self-interests as far as possible by adopting restrictive policies in the field of asylum, while at the same time attempting to guarantee the rights of asylum seekers and refugees, a condition for the country's integration into Western structures. As already indicated, this is of vital importance from the point of view of the country's national security.

Estonia has been trying to deal with the dilemma of national self-interest *versus* protecting the rights of refugees by importing the restrictive measures in the field of asylum practised in the West: If they are allowed to do this, why not Estonia? The most striking example of this is the accelerated procedure at the border, which essentially allows border guard officials to send applicants back from the border without ever letting them enter the territory of the country.[187] Considering the fact that the only way to return irregular migrants to Russia is to hand them over to the Russian border guards immediately, it is easy to see why such a procedure was set up in Estonia.

[187] Cf. supra, sections 4.IV.B.2.(a) and 4.IV.B.4.(c).

The accelerated processing of applications of persons arriving from safe third countries and those that are manifestly unfounded, even at the border[188], is a clear example of importing from the West restrictive measures that are meant to protect the self-interest of the state. Introducing measures to restrict the freedom of movement of asylum seekers[189], and exercising the policy of a restrictive application of the definition of refugee[190] in order not to attract asylum seekers to Estonia offer further proof of the imitation of Western practices.

In some cases, however, it appears that Estonia has gone too far in its attempt to adopt these practices. At least this is how the West thinks, and so it is now suggesting that Estonia change and revises some of its asylum legislation. It has all the power to do so by using the 'carrot and stick' policy, knowing that Estonia is desperate to become a member of the EU and integrate into other Western structures. It is interesting to note that the EU *acquis* on asylum, while not obliging the Member States to do much, is a 'take it or leave it' condition for membership for the aspirant countries.

[188] Cf. supra, section 4.IV.B.2.(a).

[189] Cf. supra, section 4.IV.B.4.(c).

[190] Cf. supra, section 4.IV.B.3.

4.V Concluding Observations on the Northern Link

Jens Vedsted-Hansen

The country-specific sections II, III and IV above reveal quite important differences between Estonia, Latvia, and Lithuania as regards the evolution of their asylum systems. These differences appear both in asylum procedures and jurisprudence, and in the organisation of facilities for the reception of asylum seekers. In addition to explaining the various basis of analyses presented in these sections, the differences may suggest that, despite common factors in history and political experience throughout the Baltics, the legal traditions of the three states play an important role in the evolving law on refugees and asylum. These traditions as well as other national specifications related to their different geographic and demographic situations, political priorities, etc., determine the contents of domestic law and, perhaps not least, influence their practices in this field of administration.

The most significant common feature of the three asylum systems is the fact that at the outset they were all strongly linked to the administrative structures and legal notions of immigration control.[191] This has resulted in certain tendencies towards the subordination of asylum issues to the control-based rationale of the ordinary migration system, in which international human rights and refugee protection principles do not hold any prominent position. While this obviously defines much of the work that has to be done in terms of law-making and capacity-building, perhaps sometimes frustrating parts of the specially targeted assistance programmes, it has had immediate and tangible consequences for asylum seekers arriving in the Baltic countries. They soon learned that these countries were not just a transit stop *en route* to Western Europe. Instead they found themselves detained, often under harsh conditions, and with little hope for any sort of durable solution.[192]

This need for control possibly reinforced by the unfortunate term 'illegal migrant', means that there is a long way to go until the asylum

[191] See supra, sections 4.II.A.1 (Vysockiene et. al.); 4.III (Ose and Zumente-Steele), and 4.IV (Potisepp).

[192] Cf. 4.I.D, 4.II.B.4(d), 4.III.A.1, and 4.IV.B.4(d).

systems in the Baltic countries can be considered a full and effective solution for persons in need of international protection. These problems of notions and perceptions relating to refugee protection have in fact been magnified by some of the approaches that were available in the form of Nordic and EU contributions to meet the refugee challenge in the newly independent Baltic States.[193] The credibility of these contributors' claims to uphold international standards for the protection of human rights is likely to have been somewhat reduced in that the donor states themselves were the source of encouragement, and in some instances even pressure, to contain asylum seekers within the Baltic sub-region. By imposing on the Baltic States an obligation to prevent 'illegal immigration' to the west, it obviously became more difficult to expect the same three states to treat these persons as potential refugees.

For both the Baltic and the Nordic countries, the challenge was initially defined by the perceived risk of a mass-outflow from Russia and other neighbouring states to the east. However, the implications of this risk were quite different for each group. The Nordic and other Western European countries feared onward movements via the Baltic states,[194] and it was their responses to this development that soon created the most concrete risk for the transit countries themselves. The combination of the Western containment strategies, the lack of readmission agreements with the eastern neighbours, and difficult-to-control borders with these neighbouring states gave rise to the fear of a *closed-sack* effect.[195] Whether merely a perceived risk or a reality, the *closed-sack* effect must inevitably have caused some concern for social stability in these fragile societies, thereby increasing already negative feelings towards asylum seekers within the Baltic countries.

Hence, the Western European containment and readmission policies are likely to have exacerbated some of the problems that the donor states attempted to solve by means of assistance programmes in the Baltic sub-region. One of the elements in this process was the Baltic implementation of transposed Western law and practices regarding restrictions and deterrents in the treatment of asylum seekers. It cannot be disregarded, however, that in some instances such practices were implemented in furtherance of restrictive tendencies which already existed in the Baltic countries, or which were at least in line with other policy priorities at the domestic level.

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[193] For examples of such terminology applied in this context, see 4.I.C.2 and 4.I.D.

[194] Cf. 4.I.A.1 and 3.

[195] See 4.II.C.2 (Lithuania), and 4.IV.C.1 (Estonia).

These perceived risks and the policy concerns mentioned above affect both procedural and substantive asylum practices. Thus, there have been fairly clear tendencies towards exclusion rather than protection of refugees in terms of the introduction of specific *non-admission* provisions in national legislation, as well as an expanded scope of application of such national exclusion provisions.[196] Furthermore, there are disturbing examples of a broad application of the *exclusion* clauses in Article 1 F of the Refugee Convention, beyond the limits set by international law in this area.[197]

Among the issues which call for attention so that the Baltic asylum systems can be in accordance with international and European standards is the lack of an appropriate alternative status for persons falling outside the already restrictive application of the Convention refugee definition, but nonetheless in need of international protection.[198] While such alternative status is now underway in all three Baltic states, the persisting insufficiencies in this respect may result in an unclear position of aliens who have been denied asylum, although they are not returnable to their country of origin for valid legal reasons. At the procedural level, various limitations of appeal rights, especially in connection with admissibility decisions and other accelerated procedures, give rise to concern for the genuine fulfilment of international protection obligations.[199]

The more fundamental concern, however, should be the often-uncertain legal environment in the newly independent states, which can hardly be considered capable of maintaining basic legal safeguards in connection with exceptional arrangements such as accelerated asylum procedures. Experience from the EU member states themselves shows that the asylum *acquis* cannot work in a sustainable manner, if at all, without the ideological and organizational support of a deep-rooted tradition of the rule of law and human rights principles.

It can thus be concluded that Western capacity-building efforts are bound to fail to establish credible asylum systems in the Baltic states, to the extent these efforts contradict their own values, and the underlying legal principles and mechanisms, by maintaining a primary interest in migration issues and focussing their attention on migration control methods and objectives.

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[196] See examples in 4.II.B.3(b) (Lithuania), and 4.III.B.3(b) (Latvia).

[197] For a significant example from Lithuania, see Vysockiene et. al., at 4.II.B.3(b)(2).

[198] Cf. supra section 4.II.B.5, 4.III, and 4.IV.

[199] Cf. section 4.II.B.4, 4.III, and 4.IV.

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5 Protection in a Spirit of Solidarity?

Gregor Noll

5.1 The Role of Burden-Sharing in the Enlargement Context

The changing geometry and geography of integration we are presently witnessing in Europe will necessarily impinge on the distribution of refugee protection within and outside the community of the 'Fifteen' and the accession candidates. In the field of migration and refugee protection, the process of change started after the fall of the Iron Curtain and has come a long way during the pre-accession phase. In recent years, this process has coincided with repetitious debates about 'burden sharing' or 'international solidarity' with regard to the reception of protection seekers. While there seems to be a consensus that reception responsibilities and fiscal burdens are inequitably borne at regional as well as global levels, these debates failed to bring about tangible results so far.[1] Academic, governmental and institutional actors tend to link the issue of burden-sharing to the concept of mass influx, thus adopting an unnecessarily narrow perspective. By contrast, we would like to underscore that the redistribution of responsibility among states will *always* impact, in one way or another, the remaining parts of the migration and protection systems, irrespective of whether the number of protection seekers is large or small. This is particularly visible in the context of EU enlargement.

Against this background and drawing on earlier research[2], the present chapter aims at (a) clarifying the notion of burden sharing, (b) elaborating the relationship between a more equitable sharing of the

[1] See further below as well as IGC/The Danish Immigration Service, Study on the Concept of Burden-Sharing, March 1998, A. Suhrke, "Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action" (1998) 11 *Journal of Refugee Studies* 396.

[2] This article is partly based on the author's earlier research on various theoretical approaches to burden-sharing. See G. Noll, Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection, Martinus Nijhoff Publishers, The Hague 2000, pp 263-351.

R. Byrne et al. (eds.), New Asylum Countries?, 305–324.

responsibility for protection seekers[3] and the normative framework for refugees and immigration emerging within the EU and (c) outlining the consequences of the present distribution of responsibilities for the candidate countries.

5.I.A The Objective of Burden-sharing

The logic of burden-sharing rests on the axiom that an equitable distribution of costs and responsibilities in protection will generate not only a maximum of fairness among states, but also a maximum of openness vis-à-vis protection seekers. Where a collective of states shares the task of protection, peak costs will be avoided, while existing resources will be fully exploited. There are two beneficiaries to such arrangements; host States and protection seekers. First, states engaging in burden-sharing cut their total costs. Second, the number of protection seekers finding haven is larger than it would be in the absence of burden-sharing arrangements. In analysing actual burden-sharing schemes, these two beneficiaries should be kept apart. Indeed, we are once more faced with a triangular relationship; the protection seeker is first opposed with a state of first arrival, which in its turn is opposed with other states; finally, the protection seeker is opposed with those other states.

To wit, the core desideratum of any burden-sharing arrangement is the creation of predictability. Like an insurance contract, burden-sharing arrangements allow states to calculate maximum costs in future crisis situations. The insurance parallel suggests that burden-sharing cannot be an ad hoc affair. Predictability presupposes that principles of distribution are agreed upon in a sufficiently detailed fashion *before* a crisis materializes. From that perspective, a major problem of present approaches to burden-sharing is the absence of such predetermined distributive principles.

On the other hand, it can be argued that states would take an unnecessarily cautious approach, if pushed to predetermine principles of distribution for all conceivable crises of the future.[4] By contrast, a

[3] In spite of its prejudicial timbre, the term 'burden-sharing' will be used as an overarching concept throughout the text. Better terminological alternatives (as, e.g. 'responsibility sharing' or 'solidarity') are only slowly establishing themselves in the language used by actors of international law, and cannot be regarded as universally accepted yet.

[4] 'If the states choose to institute a sharing formula, the temptation would be to peg commitments at low admission levels and restrictive rights. Ambitious sharing

mere negotiating framework, allowing for flexible and situation-adapted solutions, might yield a better, i.e. more generous, outcome. This argument disregards, however, that states had ample opportunity to practise such ad hoc burden-sharing, and that they made insufficient use of this option. The persistent discussions on burden-sharing and the tendency towards measures of deflection support this assessment.[5] Moreover, it should be underscored that predetermined principles of distribution represent a minimum common denominator of assistance. Nothing inhibits states from agreeing on more generous aid in single cases, exceeding the exigencies of an underlying burden-sharing arrangement. A fixed normative framework prevents states from remaining completely passive when others are struck by a crisis. They are free to do so, though, under a negotiating framework. In light of these arguments, the ensuing analysis is based on the assumption that regulating burden-sharing beforehand is better than negotiating it ad hoc.[6]

5.I.B The Scope of Burden-sharing

But what exactly does it mean to distribute costs and responsibilities more equitably? The malleability of the burden-sharing concept makes it simultaneously attractive and repulsive. While its underlying axiom is generally accepted, states do not necessarily agree on how to frame the burden to be shared. Borrowing from insurance terminology, we can assert that determining the scope of burden-sharing is a first, rough selection of risks as part of the underwriting process.

This selection process may be split into two steps. The first is about determining the circle of participants in a burden-sharing scheme, and

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schemes, particularly if they were institutionalized with long-term time horizons, might encourage states to define a refugee flow out of existence by declaring it to consist of "migrants".' Suhrke, note 1 above, p. 414.

[5] The analysis of the receptive unwillingness persisting in Europe is facilitated by looking back to the South Asian refugee crisis of the seventies and eighties. At the time, the reluctance by countries in the region to receive refugees could be mitigated by launching an elaborate and predictable burden-sharing scheme. It could be argued that a European burden-sharing scheme could mitigate the tendency towards ever more deflective policies proliferating among European asylum countries.

[6] The divergence between proponents of a negotiation solution and a prescription solution in burden-sharing is only one manifestation of this argumentative topos in law. The argument between proponents of framework legislation and proponents of detailed regulation depicts the same underlying opposition.

the second is about delimiting the specific risks these participants are willing to share with each other.

Regarding the first step, most actors in the North agree that regional burden-sharing is a more realistic option than a global scheme. One of the reasons is precisely that risks in a regional scheme are *a priori* more circumscribed than those in a global one, which increases predictability and facilitates consensus among would-be participants. Thus, the question of which states should participate in any given scheme is of the utmost importance for its problem-solving capacity.[7]

At any rate, we have confined this work to the regional context of the EU, which entails a fixed circle of participants and obviates the need to explore global burden-sharing. Let us therefore move on the delimitation of the specific risks that participating states could share.

For our needs, it makes sense to distinguish between:

(a) Sharing the burden of preventing and resolving refugee crises;

(b) Sharing the burden of preventing and deflecting arrivals; and

(c) Sharing the burden of reception.

The first item stretches from diplomatic efforts to the expenditures of military intervention.[8] While the linkages to refugee reception are

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[7] Again, the insurance analogy is enlightening. Each new participant admitted to a given scheme changes both the collective risk prognosis and the resource base of that scheme. The composition of the circle of participants is something of a watershed between the various models proposed in contemporary discourse. Global schemes often involve a development perspective (see e.g. A. Acharya and D. B. Dewitt, 'Fiscal Burden Sharing', in J. Hathaway (ed.), *Reconceiving International Refugee Law* (1997, Martinus Nijhoff Publishers, The Hague), while regional ones typically endorse an alliance perspective (again, the negotiations within the EU may serve as an excellent illustration, as will emanate below in this chapter). On the threat-focused characteristics of an alliance perspective, see Acharya and Dewitt, p. 127.

[8] It should be recalled that intervention raises a number of intricate legal and practical issues. For an analysis of five options of intervention (punishment, safe zones, safe havens, enforced truce and offensive war), see B. Posen, 'Can Military Intervention Limit Refugee Flows?', in R. Münz and M. Weiner (eds), *Migrants, Refugees and Foreign Policy. U.S. and German Policies towards Countries of Origin* (1997, Berghan Books, Providence). For an overview of preventive intervention, see P. Freedman, 'International intervention to combat the explosion of refugees and internally displaced persons', 9 *Georgetown Immigration Law Journal* 565 (1995). Arguing that states have a right to use force to defend themselves against a massive influx of refugees: B. K. McCalmon, 'States, Refugees, and Self-Defense', 10 *Georgetown Immigration Law Journal* 215 (1996). *See also* S. P. Subedi, 'The legal competence of the international community to create "safe havens" in "zones of

clear, the scope of such burden-sharing is extremely large and difficult to delimit. This form of preventive burden-sharing will certainly remain on the agenda, but given its complexity, it is problematic to make other forms of burden-sharing contingent on its availability.

Regarding the second item, persuasive examples of the feasibility of burden-sharing already exist. The areas of visa requirements, the control of aliens' movements within a group of states and border control at large have been made the subject of such sharing. Consider the rather inexpensive instrument of common visa lists (as devised within the Schengen co-operation and the EU). Consider also the Schengen Information System, a costly computer network jointly financed by the Schengen Parties. A further example is provided by the 1993 agreement on co-operation in migration movements between Germany and Poland,[9] under which Poland received DEM120 million to reinforce 'technical equipment for preventing uncontrolled migratory movements'.[10] Finally, consider the array of 'flanking measures' ensuring control of external borders of the EU as well as its financial and training support to Central and Eastern European neighbours' border control under the PHARE, TACIS and ODYSSEUS programmes. While the costs of these co-operations were not trivial, their sharing could be successfully negotiated. To conclude, governments seem to find little difficulty in acting 'in a spirit of solidarity' when it comes to the burden of deflection.

Precisely as for the two forms of preventive burden-sharing, co-operation on the actual reception of refugees may take many forms. It is reasonable to distinguish between three main approaches:

(a) Harmonizing refugee and asylum legislation (sharing norms);

(b) Reallocating funds (sharing money); and

(c) Distributing protection seekers (sharing people).

As this work focuses on the access of protection seekers to protecting territories, we shall limit our inquiry to the sharing of reception burdens. In the following, each of the three main approaches will be analysed in greater detail.

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turmoil" ', 12 *Journal of Refugee Studies* 1 (1999).

[9] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen [Agreement between the Federal Republic of Germany and the Republic of Poland on co-operation regarding the effects of migratory movements], 7 May 1993, BGBl. 1997 II, pp. 1734–6.

[10] Ibid., Art. 3.

The creation of predictability has many facets. They all impinge upon the fundamental choice between politics and law. Which issues should be solved by applying predetermined norms laid down as law, and which should be tackled through ad hoc negotiations of a predominantly political character? The conflict between rigidity and flexibility is fought out in two arenas, and the outcome is obviously of crucial importance for the practical value of any scheme.

The first is the question of underwriting: which risks should be included and which excluded? Where the scope of burden-sharing is set too wide, doubts can be raised about the stability of the system in extreme situations. A comprehensive scheme might cope with one refugee crisis in the vicinity of participating states, but what if two crises coincide? On the other hand, if the scope is set too narrowly, those risks excluded from the scheme may trigger insecurity with participating states. Where burden-sharing is limited to a certain subgroup of protection seekers, states are left with unpredictable costs for other subgroups. In other terms, the underwriting issue calls for a balance between the comprehensiveness and the stability of a given scheme.

The second issue is the establishment of a distributive key. The spectrum of proposals spans from mathematically determined equality to the freedom of pledging. The degree to which states choose to specify this key impacts heavily on the degree of predictability produced by the scheme. Where a distributive key is formulated in abstract or vague terms, its frictionless adoption may be more likely, but the probability of interpretive conflicts increases. Where a distributive key approaches mathematical formalism, such conflicts may be avoided, but states will have a hard time committing themselves in a binding fashion. Thus, both solutions place the conflict differently, either at the moment of negotiation, or at the moment of interpretation.

Determining contributions might be the most intricate issue, as contributive capacities vary among states. Obviously, Luxembourg and Germany are not on an equal footing with regard to their 'absorptive capacity' vis-à-vis refugees. Proposals for sharing schemes typically revert to such parameters as total population, population density and gross national product when determining the contributive capacity of states. However, the successful protection of refugees relies heavily on factors much more difficult to measure. Ethnic and religious are certainly of importance, but remain difficult to translate and incorporate into models relying on a formal equality of all participating states.

Underwriting and the establishment of a distributive key are interrelated issues. Quite obviously, it is hard to specify a rating system and a distributive key for a scheme encompassing not only physical protection, but also preventive diplomacy and intervention. Limitations in underwriting pay off in facilitating consensus on a specified distributive key. When evaluating burden-sharing schemes, it is reasonable to focus on the degree of specification attained in both arenas. Against that backdrop, we shall assess the European asylum and migration regime with regard to the sharing of norms, money and people. In this assessment, we shall also account for factors leading to greater, rather than lesser divergences in the sharing of protection burdens amongst European states.

5.I.B.1 Sharing Norms

A comparatively simple step is to *harmonize domestic refugee and asylum laws* within a group of states, thereby neutralizing inequalities in distribution due to differences in the protection offer made by single countries. In this sense, binding instruments as the 1951 Refugee Convention as well as non-binding instruments as the UNHCR EXCOM Conclusions can be understood as a rudimentary starting point for burden-sharing. In the EU context, variations between Member States' protection offer have been perceived as creating distortions in an equitable distribution of protection seekers between the Fifteen. Consequently, the Council has launched a number of non-binding instruments to promote normative harmonization.[11] Apart from protection categories and procedural aspects, variations in social rights offered to asylum seekers have also been presumed to impact on their distribution.

However, harmonization of norms can merely address those forms of unequal distribution based on differences in domestic legislation. Refugee legislation is but one determinant affecting the choice of destination made by a person seeking a haven. Other factors such as geographical proximity of a potential destination country or the availability of social networks could be of far greater importance.

[11] Among those instruments, the 1996 Joint Position Defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'Refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees. 4 March 1996, OJ 1996 L 63, and the 1995 Resolution on Minimum Guarantees for Asylum Procedures, 20 June 1995, OJ C 274, merit special mention.

5.I.B.2 *Sharing Money*

In contradistinction to the other two approaches, harmonizing the protection offer is largely a preventive approach in that it seeks to avoid the emergence of unequal distribution. The *reallocation of funds*, on the other hand, is reparative in nature, as it seeks to level out existing inequalities through various forms of financial transactions. A major difficulty in fiscal burden-sharing is the establishment of a distributive key.

Are there any examples of fiscal burden-sharing as it is? In fact, UNHCR could be described as such a reallocation mechanism, albeit in an imperfect form. Donors make means available to UNHCR, enabling the office to run various forms of assistance programmes in refugee hosting countries. Ultimately, this form of distribution is contingent upon, first, yearly decisions to be taken by the Executive Committee and the General Assembly and, secondly, the charity of donors.[12] In all, this allows for considerable fluctuations in funding, thus diminishing the predictability of such burden-sharing. Moreover, funding is inequitably distributed among regions and crises.[13] On the other hand, UNHCR operations boast an almost global coverage, which gives the mechanism a universal potential. It must be recalled, however, that UNHCR was not conceived as a burden-sharing mechanism and should not necessarily be judged as one.

Fiscal burden-sharing also takes place through other channels. States may support other states on a bilateral or multilateral basis. States or non-state actors fund NGOs that support refugees in other countries, thus exonerating public expenditure there. Even in that case, fluctuation in funding is burden-sharing is that reception costs are

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[12] For a brief overview over the financing of UNHCR, see V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (1992, Duncker & Humblot, Berlin), pp. 127–34.

[13] The main group of donors consists of industrialized countries. As of 12 March 1999, the USA, the Netherlands, Norway, Denmark, Sweden, Switzerland, Australia, Germany, Belgium and the European Commission were the top 10 non-private donors to UNHCR (ordered according to the size of their contribution). With all due respect for the commitments of industrialized countries towards programmes targeted at the South, it must be acknowledged that funding follows a clear preference for refugee issues in the North. In the UNHCR budget for 1999, the operations in Former Yugoslavia and Albania remain the most resource consuming item with some USD156 million. At a distant second place, one can find the Great Lakes Operation with some USD97 million. If regional allocation is related to the number of refugees assisted, the preferential treatment of refugees in Europe emerges even more clearly. UNHCR Funding Overview 1999, available at <http://www.unhcr.ch/fdrs/weekover.htm> (accessed on 15 March 1999). Therefore, allocating funds to UNHCR remains an imperfect form of burden-sharing, which manages to level out reception inequalities only to a limited degree.

quantifiable. Obviously, this is not entirely true. While it is comparatively easy to a considerable threat, preventing receiving countries from trusting the availability of assistance in the long term. The persistence of the burden-sharing debate indicates that reallocations through UNHCR as well as other channels are perceived as insufficient to secure openness in the reception of refugees.

5.I.B.3 Sharing People

The underlying presumption of fiscal determine the costs of food and housing in terms of Euros, Dollars or Yen, setting numbers on the costs of integration is much more difficult, if not impossible. This is why some major receiving countries militate for sharing schemes involving the redistribution of protection seekers. From a state perspective, the attraction of people-sharing lies in the redistribution of the perceived source of all conceivable costs linked to reception, be they fiscal, social or political. Clearly, redistributing protection seekers is more intrusive vis-à-vis the individual than sharing money. First, people-sharing may lead to an undesirable second uprooting. Second, the presence of family members or the existence of social networks in a specific country can play a crucial role in the protection seeker's prospects for integration. Where a sharing scheme denies the protection seeker access to this advantage, it may augment the total cost of protection in the group of receiving states.

By sending and receiving protection seekers under such schemes, states share responsibility rather than mere cost. Therefore, these forms of co-operation are properly designated as responsibility sharing. Precisely as for fiscal burden-sharing, the viability of responsibility-sharing hinges on the establishment of a distributive key.

5.II A Synopsis of Burden-Sharing in the EU Context

5.II.A Bosnia and Kosovo as Problem Indicators

On an empirical level, there is no such thing as an equitable sharing of reception burdens in Europe. [14] The cases of Bosnia and Kosovo provide vivid illustrations. The largest populations of protection seekers from Bosnia were found in those countries of Western Europe that were either geographically proximate or already hosting immigrant communities from former Yugoslavia. In descending order, per capita, Austria, Sweden, Germany and Switzerland received most of these persons. With regard protection seekers from Kosovo, the region of origin took the brunt of protection obligations, with some five percent of spontaneous arrivals being taken care of by EU Member States. The Humanitarian Evacuation Programme, designed to exonerate the region, provided only partial relief. The 89,982 beneficiaries of this programme must be contrasted to the total number of 778,300 persons who had left Kosovo for other parts of the Federal Republic of Yugoslavia or other countries. It is quite clear that evacuation programmes, only play a minor role in the management of today's refugee crises by Western states.

However, the Bosnian refugee crisis set off a process of reflection and deliberation among European states. Within the EU, a complex discussion evolved on the development of a mechanism for burden-sharing in situations of large-scale influx. Serious efforts were made ever since 1992, but the considerable reluctance of Member States to commit themselves in terms of a predictable and detailed sharing scheme delayed the process and watered down its results. Kosovo brought a renewed impulse to this process, and the new millennium saw the establishment of concrete measures with a long-term perspective. Nonetheless, Europe at large and the EU in particular is still far from a predictable burden-sharing scheme, as the following sections will show.

5.II.B Standard-Setting and Regime-Building Efforts in the EU

The EU discussion on burden-sharing has covered much ground, while its results are not necessarily in proportion to the work invested. In the following, we intend to give a brief overview of the most important developments, without analysing each initiative and each mechanism in detail.[15]

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[14] This paragraph is based on a statistical analysis in Noll, note 2 supra, pp 285-289.

[15] For a comprehensive historical account with detailed references to single proposals,

Let us start with the sharing of norms. It is quite clear that all forms of European co-operation in the area of asylum and migration can also be regarded as attempts to make protection obligation more equitable by harmonising applicable laws. Already in the pre-Maastricht period, this objective was clear. With the Maastricht Treaty, an intergovernmental competency to legislate was created, and the first version of the *acquis* was launched. It was hampered by its non-binding nature, and its efficiency as a tool for harmonization remained very limited. With the Amsterdam Treaty, a supranational competency was created in the area, and the EC institutions are now drafting binding instruments, which have a better potential to bring about a sharing of norms. However, throughout this process, Member States have also created norms which amplify the concentration of burdens, namely through the DC and so-called safe third country-mechanisms. Later, we shall take a closer look at the detrimental effects of these instruments on an equitable distribution of protection responsibilities.

How, then, did Member States approach the other, and more demanding dimensions of burden-sharing, namely the redistribution of money or people? In the last ten years, a pendulum movement can be made out, swinging from discussions on substance to a debate on procedural solutions and then back to substance. Let us track this movement.

The best starting point is perhaps the Draft Council Resolution on Burden-sharing with Regard to the Admission and Residence of Refugees,[16] tabled by Germany in 1994. The German Draft drew on the idea of people sharing, and proposed a mathematical distribution mechanism. It was quite clear that Germany would be among the winners under the instrument, and that it would entail correspondingly greater protection responsibilities for many other Member States. Following the logic of a prisoners' dilemma, the latter had good reasons to vote against this redistribution mechanism, at least in a medium-term perspective. Thus, the German Draft was never adopted, which illustrates that a general and abstract mathematical redistribution mechanism has little chance of being adopted in a unanimity procedure, as Member States perceive its costs as incalculable.

Rather than the rigid insurance model proposed by the Germans, the Council finally settled for an extremely diluted and practically non-obliging approach. The Council Resolution of 25 September 1995 on Burden-sharing with Regard to Admission and Residence of Displaced

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see Noll, supra note 2, pp. 289-316.

[16] Doc. No. 7773/94 ASIM 124 (hereinafter the German Draft).

Persons on a Temporary Basis[17] was largely devoid of any sufficiently precise distributive key. In its essence, the non-binding 1995 Resolution contained but a commitment for Member States to discuss burden-sharing should a refugee crisis occur. To this end, the 1995 Resolution was supplemented by a Decision on Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis[18], which specified the form of such discussions. To wit, nothing in the two instruments indicated who the group of beneficiaries of burden-sharing were (displaced persons, refugees under the 1951 Refugee Convention, or both) or what form of sharing should be used (money sharing or people sharing). Informally, there seems to be agreement even among Member States that the 1995 Resolution was a useless instrument. The fact that it was never resorted to during the Kosovo crisis is indicative in this regard.

If anything, the 1995 Resolution and its focus on procedures made way for the establishment of an EC competency to legislate in the area of burden-sharing. The pillar shift in the area of asylum and migration effectuated through the Amsterdam Treaty[19] entailed new powers for the EC institutions, among them, the adoption of '[measures] ... promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and other displaced persons[20]. This power is subject to unanimous decision making, with the possibility of a shift to qualified majority voting after 2004, as set out in TEC Article 67. Lamentably, the temporal framework in TEC Article 63 places burden-sharing outside the mandatory five-year deadline applying for most competencies in the area of asylum and migration. This will induce Member States to adopt unnecessary restrictive norms, as they will not know whether burden-sharing will come about at all, and, if it does, to what extent it will cut protection peaks. Rather, a cautious Member State would resort to measures of containment, deflection and deterrence, both unilaterally and within the EC Council. In that sense, the negative impact of the solution chosen by the drafters of the Amsterdam Treaty can hardly be overestimated.

Parenthetically, it should also be named that the Amsterdam Treaty brought a provision on short-term burden-sharing measures, to be adopted by qualified majority voting. This competency is regulated in

[17] OJ (1995) C 262/1 [hereinafter the 1995 Resolution]. According to the Draft List, this instrument is part of the *acquis*.

[18] OJ (1996) L 063/10.

[19] For a comprehensive account, see infra, Chapter 6.

[20] Art. 63 (2) TEC.

TEC Article 64 (2). Hence, Amsterdam brought a set-up of competencies and procedures, but it did not bring any concrete redistribution solution in the area of burden-sharing. Until July 1997, the Union lacked any tangible expression of material burden-sharing.

In the later Nineties, the discussion on burden-sharing took place in two contexts. The first was the debate on temporary protection in situations of mass influx, where burden-sharing was regarded as an intrinsic element. Secondly, the Council launched a series of experimental fiscal burden-sharing instruments drawing on Community funds, which culminated with the creation of a European Refugee Fund in 1999–2000. As we shall see, the latter step actually merged the two contexts again. Let us pursue each of the two discussions in turn.

A serious debate on a future temporary protection instrument started in 1997, when the European Commission placed a draft instrument in this area on the table of the Council. After a period of inter-institutional reflection, the Commission moved forward with an amended proposal, now featuring two instruments, of which one would deal with the sharing of norms in the area of temporary protection, while the other would tackle the sharing of money and, as a secondary measure, even of people. In the ensuing Council debate, it became evident that burden-sharing was a highly contentious issue, and that Member States were deeply split on what formula was to be preferred. Step by step, the element of people sharing was watered down in the ensuing series of Council drafts, and the solution finally accepted in the 2001 Directive on temporary protection in case of mass influx of displaced persons and solidarity between Member States[21] was in reality limited to fiscal burden-sharing through the European Refugee Fund.[22] The reach of burden-sharing is further restricted by the Directive's limited scope *ratione personae et temporis*. After all, the group of beneficiaries and the length of temporary protection is determined by the Council *ad hoc*. In other words, burden-sharing under the Temporary Protection Directive only

[21] The text of the Directive was not available at the time of writing. Information on its contents is taken from European Refugee Fund, 'Breakthrough in the Establishment of a Common European Asylum System', Press Release, available at <www.european-refugee-fund.org> (accessed on 4 June 2001).

[22] Although the Directive is said to contain solidarity measures for the reception of persons between the Member States, these are largely devoid of substance. They are based on the principle of 'double voluntariness', i.e. both the individual protection seeker and the Member State must agree on a transfer. As this mechanism relies on the ad-hoc benevolence of Member States in crisis situations, it is but one in the long row of procedural approaches to people-sharing, avoiding any sense of obligation and predictability.

addresses exceptional situations, and leaves the day-to-day inequalities in the reception of asylum-seekers and refugees in EU Member States unaltered.

The second discussion was exclusively focused on fiscal burden-sharing by means of EU funds. The Council, the Commission and the Member States gathered experience with small-scale burden-sharing by means of various pilot programmes on the reception and voluntary repatriation of specific categories of protection seekers. Typically, these programmes were endorsed for the duration of one year and operated with relatively moderate budgetary means.[23] Their importance lays not so much in the practical impact achieved with these limited resources, but rather with the testing of a new method of burden-sharing. In brief, the redistribution of means was channelled through the Community budget and subjected to a quite complex decision-making procedure, which makes the redistribution effects rather difficult to predict and reconstruct. The project management was vertical and centralized, and the European Commission played the role of the administrator. The experimental instruments, moulded in the form of Joint Actions, were targeted to improve admission in Member States and to facilitate voluntary return. In spite of their modest funding and limited duration, they must be regarded as the first tangible expression of fiscal burden-sharing in the EU. Again, the Kosovo crisis provided a warning signal, as it quickly depleted the allotted EU funds under the 1999 Joint Action, which created the so-called European Refugee Fund (ERF),[24] and showed that the role of the Union in cutting peak reception costs for its Member States would be a limited one.

In 2000, the European Refugee Fund was restructured by means of the Council Decision of 28 September 2000 establishing a European Refugee Fund.[25] The ERF will support measures for the reception, integration and voluntary return of a broadly defined group of beneficiaries (Convention refugees as well as beneficiaries of subsidiary protection and temporary protection) under a five-year period ending on 31 December 2004. The financial reference amount

[23] EMU23.75 million in 1997, EMU26.75 million in 1998 and some EMU35 million in 1999. See Financial statement attached to EFR Proposal, para. 7.1.

[24] Joint Action of 26 April 1999 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo, OJ L 114 , 01/05/1999.

[25] Council Decision of 28 September 2000 establishing a European Refugee Fund, OJ L 252 , 06/10/2000 p. 12 [hereinafter ERF Decision].

is € 216 million for the five years. The ERF Decision contains a mathematical redistribution key for its funds, which combines a minor fixed amount for each Member State with a sum based on the numbers of persons in Member States' protection systems over the past three years.[26] However, compared to the total costs of reception in Member States, the redistribution effects of the ERF are but a drop in the ocean. It must be praised as a dam-breaker construction with regard to the many dilemmas of fiscal burden-sharing, but its practical role in creating predictability and diminishing the resort to restrictive asylum and migration policies is rather negligible. Finally, it is worth mentioning that the allotted funds must be heavily boosted the day new Member States are welcomed into the club, if only to keep up the present level of fiscal burden-sharing within an enlarged Union.

5.III Burden-Concentration in Europe

It is not enough to depict those instruments and mechanisms intended to bring about a more equitable distribution of protection seekers among EU Member States. A balanced account must also take into account those instruments aggravating inequalities in the sharing of protection obligations. Most prominently, the reallocation of protection seekers by one Member State to other Member States or to a safe third country bear a strong potential for burden concentration, which shall be expounded in the following.

5.III.A The Dublin Convention

The DC[27] deviates from an ordinary readmission agreement in that is sets out a hierarchical list of criteria, steering the reallocation of an asylum seeker. In order of priority, these criteria can be subsumed as follows:

(a) Family;

(b) Residence and entry permits;

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[26] See art. 10 of the ERF Decision.

[27] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990 [hereinafter DC], Arts. 5-7. Entered into force, 1 September 1997. OJ 1997 C 254/1.

(c) Entry;

(d) State in which the application was lodged.

The bottom line of the reallocation criteria in the DC is that facilitation of entry and failure to remove entails responsibility. Moreover, the criteria disfavour countries with existing populations from countries of origin, as such networks will attract further direct arrivals. Finally, those countries hosting an external border of the Union will find themselves with a larger fraction of arrivals than countries without such borders.

Statistics indicate that an external border typically turns a Member State into a net receiver under the DC. The following countries receive more asylum seekers than they send to other Member States under the DC;[28]Austria, France, Germany, Greece, Italy, Portugal and Spain.

All of these countries host a sensitive external border, be it territorial or maritime. The remaining Member States are all sending countries under the DC. In the future, the efficiency of the DC may be augmented through the implementation of the EURODAC fingerprint exchange system. This may further aggravate inequalities in distribution. Enlargement will shift some of the crucial external borders eastwards, and create additional burdens on the new Member States hosting them. On a national level, more affected States will be inclined to cut back protection and benefits for those groups not covered by international law. The rationale for doing so is, firstly, to create a disincentive for potential asylum seekers and, secondly, to stretch resources.

Turning around the logic of these developments, a burden-sharing mechanism stretching over both Convention refugees and other categories is indeed the key for safeguarding refugee protection on the territory of the Member States; such a broad mechanism is mandated by TEC Article 63 (2) (b). If combined with a material harmonization of protection categories and reception standards, it would mitigate competition for deflection as well as for the downgrading of territorial protection. Ideally, such a mechanism should have been launched

[28] Numbers are based on Danish Refugee Council, The Dublin Convention. Study on its Implementation in the 15 Member States of the European Union, Copenhagen 2000, pp. 129-162, and, in a subsidiary fashion, on the statistical study in Noll, supra note 2 above, pp. 323-324. A comparison has been made between the per cent of requests leading to effective transfers to other Member States with the percentage of requests leading to effective transfers from other Member States. Where numbers on effective transfers have been unavailable, recourse was taken to the numbers of applications for transfers.

concurrently with the mechanisms of migration control, so as to inhibit the latter setting the preconditions for the operation of the former.[29]

5.III.B Safe Third Countries in the East

Presently, it is extremely difficult to analyse the redistribution effects of safe third country mechanisms between the EU Member States and the candidate countries. Different from what applies to the operation of the DC, detailed statistics reflecting 'country to country' readmission of persons falling under 'safe third country' mechanisms simply do not exist.[30] However, from the statistical material available,[31] a few trends emerge which are worthy of reflection in our present context.

In the associated countries at large, the numbers of filed asylum seekers has been on the rise throughout the last years, albeit from a very low base.[32] From 1996 to 1997, the aggregate number of applications in the associated countries rose with 35 per cent to some 10,000 cases, which is what Germany could receive in a month.[33] During later years, the application statistics have been topped by

[29] In this respect, it is of interest to compare the development in the EU with the bilateral developments between Germany and Poland. The EU's Member States put a readmission mechanism in place without any linkage to the question of burden-sharing. In contradistinction to this, the named bilateral arrangement seized the opportunity by linking readmission with rudimentary forms of burden-sharing. In both cases, the readmission agreements covering return of third country nationals (a) contained a burden-sharing clause for cases of massive inflows and (b) was coupled to an agreement on financial assistance. Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen, supra note 9, arts. 6 and 2.

[30] Those statistics available often refer to return measures at large, without breaking down numbers into cases with and without asylum dimensions. Regarding asylum returns, a distinction of pre-procedure and post-procedure returns is frequently lacking. It is true that single countries produce such statistics, but these are collected according to quite different methodologies and, alas, often classified.

[31] UNHCR collects data on the processing of asylum applications worldwide, while ICMPD collects data on migration movements in the countries participating in the Central European Initiative. This author is indebted to both organizations for providing relevant data.

[32] IOM/ICMPD, *Migration in Central and Eastern Europe: 1999 Review*, Geneva, 1999, p.28.

[33] By way of example, 10877 persons applied for asylum in Germany during January 1997. For the rest of the year, the monthly number varied between 7750 and 9760 applying persons. Source: Federal Ministry of the Interior (Germany).

candidate countries. In 2000, Slovenia came first with 9,240 applications, the Czech Republic second with 8,770 applications, Hungary third with 7,800 applications, and Poland fourth with 4,290 applications.[34] Compared to the size of its population, this situated Slovenia as the largest receiver among European states at large. The Czech Republic, Hungary and Poland rank much lower (rank 13, 14 and 23 respectively among all European states). As they share land borders with present EU Member States, they are of special interest in the context of safe third country-reallocations, therefore the following analysis will focus solely on these three candidate countries.

First, in 2000, the recognition rates in all three countries were markedly lower than the average of all European states. The Czech Republic only recognized 1.9 per cent of all applicants as 1951 Refugee Convention refugees, that may be compared to the corresponding German figure of 10.8 per cent. The corresponding numbers were 2 per cent for Poland and 2.2 percent for Hungary. The differential is even higher when comparing the total number of recognitions, accumulating 1951 Refugee Convention status and other protection-related statuses. Only Hungary offers an alternative status beyond the Convention, which boosts its total recognition rate to 10 per cent. Again, this may be compared to the total of positive decision in Germany with 12.4 percent or in the U.K. with 29 per cent. Poland and the Czech Republic had no alternative status in 2000, why their total recognition rate remains at alarming 2.0 per cent and 1.9 per cent respectively. From this perspective, both countries are amongst the most restrictive in Europe. This confirms the logic of evasion inherent in burden shifting. When faced with large burdens, be they real or merely anticipated, states react by retaliating against protection seekers.

Second, a marked feature of the three candidate countries is the high number of cases closed due to either formal grounds or the disappearance of the claimant. While the European average was a rate of 18.4 per cent in 1998, Hungary closed 25.8 per cent of all cases on which a decision was taken. The corresponding numbers for Poland (54.8 per cent) and the Czech Republic (76.5 per cent) stand out even more. The statistics for the year 2000 confirm that this trend still prevails.[35] Generally, there is no breakdown available as to how many cases are closed due to disappearance of the claimant, and how many are closed on other formal grounds. However, various indicators

[34] UNCHR, Asylum Applications submitted in Europe 2000, Geneva, 25 January 2001.

[35] In the Czech Republic, of a total of 6954 applications, 4287 cases were 'otherwise closed' (Hungary: 4956 of 8811 cases; Poland: 1206 of 3910 cases). UNCHR, Asylum Applications submitted in Europe 2000, Geneva, 25 January 2001.

suggest that disappearance is the dominating reason.[36] By way of comparison, the rate for cases otherwise closed was 9.9 per cent for Germany in 1998. Of the 5,760 pertinent cases, roughly 2,500 cases were closed due to withdrawal of the application, which can be formally presumed by the authorities when the applicant fails to maintain contact with them. This makes up approximately two per cent of the total number of applications.[37]

Disappearances under procedure are often interpreted as a confirmation that the applicant is 'abusing' asylum procedures in the candidate country as a mere base camp when attempting onward migration to Western Europe. This would confirm the image of bogus refugees, which are economically motivated in reality. Against the background of low recognition numbers and the limited availability of alternative statuses, a person with a genuine protection need may act wisely when attempting to migrate onwards. Therefore, the conclusion that each disappearance is an economic migrant is simply not warranted.

It is quite another matter if persons attempt to migrate westwards after they have been recognized as refugees. Various actors claim that this happens, but it is naturally hard to substantiate this claim with any official statistics. If refugees indeed embark on such onward migration, they are surely not always taking a wise decision. Due to safe third country mechanisms, protection may not be readily available for such persons. Moreover, practices can be harsher even for those protected. Germany started out with return of Bosnians comparably early, while Hungary provided protection to the same group for a longer period.

All aspects considered, the high number of disappearances in the three named candidate states do not alter the conclusion on their restrictive practices. Obviously, the differentials for recognition rates between the three countries and the European average are much higher than those for rejection rates.

By way of conclusion, safe third country mechanisms may produce effects similar to those under the DC. For the Czech Republic, Hungary and Poland, the rising number of asylum applications was hardly unanticipated. Therefore, it is of little surprise that these countries seek to limit their protection burden maintaining restrictive

[36] For 1997, the Polish administration stated that 89% of all applicants disappeared during procedures. Source: ICMPD questionnaire.

[37] In another 1,440 cases of the pertinent 5,760 cases, the applicant was found to be from a safe third country, which inhibited her from invoking the asylum provision of the German basic law.

recognition practices and emulating the deterrent policies of their Western neighbours.

5.IV Conclusions

Let us briefly recall the main conclusions that emerged in the course of this chapter.

(a) Equitable burden-sharing is inextricably linked to the maintenance of refugee protection capacities globally as well as regionally.

(b) Three main approaches to achieve a more equitable sharing of the reception burden can be distinguished; harmonizing refugee and asylum legislation (sharing norms), reallocating funds (sharing money) and distributing protection seekers (sharing people).

(c) Member States have hitherto failed to develop a sufficiently comprehensive burden-sharing mechanism. The European Refugee Fund provides a good working model for fiscal burden-sharing, but is clearly under-funded. Presently, there is no mechanism for people sharing in the EU.

(d) The DC stabilizes an inequitable distribution of protection seekers between Member States. There is a risk that the Dublin mechanism aggravates inequalities in the future.

(e) In three candidate countries, the number of protection seekers is on the rise, while recognition rates are extremely low. It appears that protection seekers generally do not trust the relatively new protection systems in these countries.

(f) As equitable burden-sharing is systemically blocked by the DC and safe third country mechanisms, the only choice left for States perceiving themselves as overburdened is; (a) to avoid protection obligations vis-à-vis persons in need of international protection not qualifying as refugees or (b) to block access for any category to their territory.

6 Title IV TEC and the Schengen Integration Protocol with Special Regard to Implications on Accession Candidates

Ulrike Brandl

6.I. Introduction

The Treaty of Amsterdam created new competences for the European Community in the areas of asylum and immigration. In Title IV of the third part of the Treaty establishing the European Community [1] Article 61 enumerates the fields to be regulated, with the aim of creating an area of freedom, security and justice. It also specifies the Council's duties to take action[2]. Thus, these matters previously, contained in the Third Pillar in Title VI[3] of the Treaty of the European Union,[4] are 'communitarized' and [5] is moved from the realm of public international law and institutional intergovernmental

[1] The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Consolidated Version of the Treaty Establishing the European Community, O. J. 1997 No. C 340, p. 173.

[2] Art. 67 TEC regulates the law making-procedure.

[3] Co-operation in the fields of Justice and Home Affairs.

[4] O. J. 1992 No. C 191, p. 1; O. J. 1994 No. C 241, p. 22; O. J. 1995 No. L 1, p. 2.

[5] See Hailbronner, K., The Treaty of Amsterdam and Migration Law, European Journal of Migration and Law, Vol. 1, 1999, p. 9-27; Hailbronner, K., Die Neuregelung der Bereiche Freier Personenverkehr, Asylrecht und Einwanderung, in: Hummer, W. (ed.), Die Europäische Union nach dem Vertrag von Amsterdam, Wien 1998, p. 179-196; Noll, G./Vedsted-Hansen, J., Non-Communitarians: Refugee and Asylum policies, in: Alston, P. (ed.), The European Union and Human Rights, Oxford 1999, p. 359-410; Bank, R., The Emergent EU Policy on Asylum and Refugees, Nordic Journal of International Law, Vol. 68, 1999, p. 1-29; Weber, A., Möglichkeiten und Grenzen europäischer Asylrechtsharmonisierung vor und nach Amsterdam, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR), 1998, p. 145-152; Hailbronner, K., European Immigration and Asylum Law under the Amsterdam Treaty, Common Market Law Review, Vol. 35, 1998, p. 1047-1067; Hailbronner, K., Immigration and Asylum Law and Policy of the European Union, The Hague 2000, 35ff.

R. Byrne et al. (eds.), New Asylum Countries?, 325–350.

cooperation within the Union structure to that of supranational Community law.

Because immigration, asylum and freedom of movement are matters that touch the very essence of state sovereignty, they were among the most controversial topics of negotiation at the Intergovernmental Conference. Their 'communitarization' could only be achieved through the creation of complex regulations[6] with five-year transition periods in the law-making process, and by granting exceptions to certain States.[7] Furthermore, the jurisdiction of the ECJ in this field deviates from its general jurisdiction.[8]

This chapter focuses in particular on the formal institutional consequences of 'communitarization' in the areas of asylum and immigration. Special attention is paid to the various forms of legal action. The complex substantive adaptations to the Accession Candidates' legal systems required to prepare implementation of the developing Acquis are dealt with in detail in the specific country chapters. Step by step, new legal acts in the field of asylum and immigration will be created and the 'Third Pillar *Acquis*' in asylum matters will be modified and incorporated into Community legislation. In this law-making process, experience gained with the implementation of the Third Pillar *Acquis* can be taken into account. The change of legislation will have an impact on the present Member States as well as EU membership candidates. For Member States, overall plans exist to implement the provisions of the TEC in an area of freedom, security and justice[9] and to prepare the transfer of the *Acquis* from the Third to the First Pillar, but so far only a few of the legal acts which have been adopted are in force.[10] The implications for

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[6] Thun-Hohenstein, C., Der Vertrag von Amsterdam, Wien 1997, p. 28.

[7] See the following Protocols (Article numbers not changed): Protocol No. 3 on the application of certain aspects of Art. 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, O. J. 1997 No. C 340, p. 97. Protocol No. 4 on the position of the United Kingdom and Ireland, O. J. 1997 No. C 340, p. 99. Protocol No. 5 on the position of Denmark, O. J. 1997 No. C 340, p. 101.

[8] Art. 68 TEC.

[9] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, O. J. 1999 No. C 19, p. 1.

[10] Council Regulation of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, O. J. 2000 No. L 316, p. 1. Council Decision of 28 September 2000 establishing a European Refugee Fund, O. J. 2000 No. L 252, p. 12. Several proposals exist, see e.g., Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2000) 578 final. Proposal for a Council Directive on minimum standards for

accession candidates are clearly indicated in the Council's Action Plan, which refers to the enlargement process. It states that the Third Pillar *Acquis* is different in nature from other parts of the Union's *Acquis*. In regard to the future, the Action Plan goes on to state 'that much still needs to be done and the *acquis* will therefore constantly develop during the pre-accession years'.[11] Implications for the accession candidates lie in the present effects of the Union's 'aliens and asylum law'[12] and its implementation by Member States.[13] Furthermore, the preparations for membership in the Union require the adaptation of accession candidates' domestic law and practice.[14] This includes the responses necessitated by the altered legislation.

To start with, it can be said that with 'communitarization' little has changed with respect to the underlying concept that the field of asylum is regulated both in connection with general questions of migration and immigration into Community territory and in connection with the fight against crime and the realization of an area of security. There has been no attempt to consider asylum as a separate concept. The legal position of aliens seeking protection continues to be seen in the context of controlling migration into the EU. The EU Action Plan of the Council and the Commission makes the connection to the context of migration and the fight against crime clear by pointing out that the 'TEC makes a direct connection between measures establishing freedom of movement of persons and specific measures aimed at combating and preventing crime (TEU Article 31 (e)), thus creating a conditional connection between the two areas'.[15] Without suggesting suitable solutions, it concludes that 'the measures to be drawn up must take due account of the fact that the areas of

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giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, COM (2000) 303 final, O. J. 2000 No. C 311 E, p. 251.

[11] See supra, note 9.

[12] See supra, Chapter 1; see also, Lavenex, S., Asylum, Immigration, and Central-Eastern Europe: Challenges to EU Enlargement, European Foreign Affairs Review, Vol. 3, 1998, p. 275-294, p. 278-283; and see, ECRE, Position on the Enlargement of the European Union in relation to Asylum, September 1998, available at http://www.ecre.org/ (23 January 2001).

[13] See supra, sections 2.I; 3.I; 4.I.

[14] Joint Action of 29 June 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *Acquis* of the European Union in the field of Justice and Home Affairs, O. J. 1998 No. L 191, p. 8; see also, Chapter 1.

[15] See supra, note 9.

asylum and immigration are separate and require distinct approaches and solutions.[16]

Plans for a so-called 'harmonization of asylum law' in Europe were already in existence in the mid to late 1980s and were closely connected with the Single European Act of February 1986[17] and the intention set down in the Single European Act to allow freedom of movement of persons within the Member States by no later than the end of 1992. However, to abolish internal border controls, it was obvious that accompanying measures to uniformly regulate the crossing of external borders by third country nationals were necessary. In this context, provisions for asylum seekers were planned, which culminated in a Commission proposal for a directive in March 1988.[18] This proposal contained provisions regarding the jurisdiction of Member States to examine asylum applications and to uniformly determine the status of asylum seekers during asylum proceedings. At that time asylum and aliens law were highly controversial[19] matters in the Community, so the path of uniformity of jurisdiction was not followed in subsequent years; instead, an intergovernmental approach was adopted.[20]

6.II.A New Areas of Jurisdiction in Title IV of the TEC; the Third Pillar *Acquis* in the Fields of Asylum and Refugee Law to be Implemented in the First Pillar

The Council's jurisdictions and duties to act are enumerated in Articles 61 to 63 of the TEC and cover both special asylum law jurisdictions and other subject matters relevant to asylum in a wider sense, especially access to Community territory and freedom of movement within Community territory for third state nationals.[21] The

[16] The Action Plan (supra note 9) also requires 'When looking at the priorities ahead, different considerations must apply to immigration policy on the one hand and asylum policy on the other'.

[17] O. J. 1987 No. L 169, p. 1, in force since 1.7. 1987, O. J. 1987 No. L 169, p. 29.

[18] See Wollenschläger, M./Becker, U., Harmonisierung des Asylrechts in der EG und Art. 16 Abs 2 S 2 GG, Europäische Grundrechte-Zeitschrift (EuGRZ), Vol. 17, 1990, 1-10.

[19] Von Arnim, R., Asylrecht in der Europäische Gemeinschaft vor und nach 1992, in: Barwig, K./Lörcher, K./Schumacher, C. (eds.), Asylrecht im Binnenmarkt, Baden-Baden 1989, p.289-300.

[20] Hummer, W./Obwexer, W., Österreich in der Europäischen Union, Vol. 3, Wien 1996, p. 7.

[21] This could especially be relevant for recognised refugees, but also for persons with

structure and wording of Article 63 demonstrate that the starting point was the adoption of existing norms in the area of asylum. These are to be further developed in new Community legal acts. Standards already exist with reference to nearly all of the cited areas. These standards are either legally binding in public international law or have the character of a recommendation, resolution or a similar non-binding form. The Action Plan demands priority for binding legislation instead of soft law: 'In legislative work, account has also had to be taken of the existing third-pillar *acquis*, making it necessary to decide which, if any, of the present provisions should be replaced by more effective ones. Those classifiable as "soft law" formed the prime candidates for this purpose'.[22] In the course of the negotiations, a consensus regarding already elaborated proposals for legal acts, which at that time existed in draft form,[23] was neither expected nor agreed upon.

The new Title IV of the TEC expressly sets down certain jurisdictions that, according to the views of numerous authors, were already covered by the jurisdiction of the old TEC Article 7 (a),[24] which regulated the realization of the internal market and the abolition of internal frontiers. The Commission itself based its proposed directive of 1988, *inter alia*, on this Article.

Under the Third Pillar, asylum policy was generally defined as a matter of common interest under Article K (1) (1). Articles 61 to 63 of the TEC enumerate individual fields in which not only jurisdictions but also duties to act are set down for the Council. Thus, there is *a priori* no Community jurisdiction to regulate all immigration and asylum issues;[25] rather, its authority is limited to the admittedly very comprehensive enumeration in Articles 61 to 63.

In the Maastricht Treaty, in the context of the Third Pillar, joint positions, joint actions and corresponding implementation measures as

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temporary residence permits, temporarily protected persons, asylum seekers a.s.o.

[22] See supra, note 9.

[23] See e.g., the Draft Convention on the Crossing of the External Frontiers of the Member States, O. J. 1994 No. C 11, p. 6. See also Legislative resolution embodying Parliament's opinion on the draft Council Act drawing up the convention concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum, and on the Convention, drawn up on the basis of Art. K.3 of the Treaty on European Union, concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum, O. J. 1998 No. C 34, p. 131. See for the regulation fn. 10 and for Eurodac below 3.

[24] Thun-Hohenstein, fn. 6, p. 28.

[25] Hailbronner, Neuregelung, fn. 5, p. 180.

well as public international law treaties and implementation treaties[26] were available to the Council. Also, so-called undesignated forms of action could be adopted.[27] At least initially, only sporadic use was made of joint actions and joint positions because, on the one hand, there was little clarity as to the legally binding character of these instruments,[28] and on the other hand, there was controversy as to which regulatory content should be included in the available, newly created forms of action.[29] The assessment of the legally binding character of these forms of action was viewed differently in academic writing.[30] Besides, as is clear from their development, these measures only represented an intermediate stage in the transition from public international law or EU law to Community law. These forms of action have no direct effect on national law. If they were adopted as binding in public international law, they would require, like all other binding public international law instruments, transformation into the domestic laws of the Member States.[31]

Essentially, the Third Pillar *Acquis* covers the following subject matters in the area of asylum:

(a) Specifying competence for the examination of asylum applications that are filed in a Member State through the Dublin Convention;[32]

(b) The (legally non-binding) interpretation of Article 1 of the 1951 Refugee Convention in a joint position;[33]

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[26] See TEU Art. K.3 (2)(a) and (b) (in force since 1 November 1993), note 4.

[27] Brandl, U., Die ZBJI: Wie tragfähig ist die dritte Säule? In: Hummer, W./Schweitzer, M. (eds.), Österreich und das Recht der Europäischen Union, Wien 1996, p. 151-165, p. 161f.

[28] Ibid., pp. 157-159.

[29] Fortescue, J.-A., First Experiences with the Implementation of the Third Pillar Provisions, in: Bieber, R./Monar, J. (eds.), Justice and Home Affairs in the European Union, Brussels 1995, p. 19-27, p. 26. Lobkowicz, W., Zusammenarbeit in den Bereichen Justiz und Inneres, in: Hummer, W. (ed.), Die Europäische Union und Österreich, Wien 1994, p. 139-150. Bank, fn. 5, p. 8.

[30] See with references Brandl, supra note 27, p. 157-160.

[31] Öhlinger, T., Die Übernahme von EU-Recht in die österreichische Rechtsordnung, in: Hummer & Schweitzer, fn. 27, p. 169-197, p. 189-191. In any case, these forms of action are not directly applicable in domestic law. With respect to non-binding forms of action, a state that basis a legal act on such a form of action may claim the assumption of legality. The state may be indirectly bound by the concept of estoppel as a basic principle of public international law. See Hummer & Obwexer, supra notes 20, 22.

[32] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, O. J. 1997 No. C 254, p. 1.

(c) Minimum requirements for the proceedings for review of an asylum application;[34]

(d) Initial regulations for the temporary protection or acceptance of refugees fleeing civil war or war and of burden sharing,[35] and;

(e) The matters contained in the Resolutions of London and Copenhagen, in particular;

(f) Proceedings for the examination of manifestly unfounded asylum applications and their definition;[36]

(g) Criteria for the determination of safe third states and the possibility to transfer asylum seekers to third states for the examination of their asylum requests before an allocation of jurisdiction to an EU Member State within the context of the Dublin Agreement;[37]

(h) Criteria for the definition of safe countries of origin.[38]

Besides the binding norms of the Dublin Agreement (whose application, however, has been regulated in different ways in the various Member States[39]), the non-binding forms of action have

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[33] Joint Position defined by the Council on the basis of Art. K.3 of the Treaty on European Union on the harmonized application of the definition of the term refugee in Art. 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, O. J. 1996 No. L 63, p. 2.

[34] Resolution on Minimum Guarantees for Asylum Procedures, formally adopted by the Council of Justice and Home Affairs on 20 June 1995, O. J. 1996 No. C 274, p. 13.

[35] See supra, Chapter 5.

[36] Resolution on manifestly unfounded applications for asylum, in: Meijers, H. (ed.), A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration, Dutch Centre for Immigration, Utrecht 1993, p. 72.

[37] Ibid., pp. 73-75 (Resolution on the harmonised approach to questions concerning host third countries).

[38] Ibid., pp. 76-77 (Conclusions on countries in which there is generally no serious risk of persecution).

[39] See Brandl, U., Drittlandsicherheitskonzepte im Spannungsfeld zwischen verfahrensrechtlicher Effizienz und menschenrechtlichen Verpflichtungen, in: Hailbronner, K./Klein E., (eds.), Flüchtlinge - Menschenrechte - Staatsangehörigkeit als Herausforderung des 21. Jahrhunderts, Heidelberg 2001; see also, Noll, G., Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection, The Hague 2000, p.185-199; see also, Nicol, A. & Harrison, S., The Law and Practice in the Application of the Dublin Convention in the United Kingdom, European Journal of Migration and Law, Vol. 1, 1999, p. 465-481; see also, Noll, G., Formalism vs. Empiricism. Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law, Nordic Journal of International Law, Vol. 70, 2001/1; see also,

particularly influenced the asylum law-making process in the Member States.[40] This is especially evident in the implementation of the safe third country concept in nearly every Member State.[41] Its actual content, however, was only partly harmonized by the relevant resolution.

The joint position, the only one of its kind under the Third Pillar in relationship to asylum law, is only of non-binding character according to its formulation. Its application by the Member States diverges, much like Article 1 A of the 1951 Refugee Convention, which has been interpreted differently in national decisions.[42]

The norms that regulate access by non-EU citizens to the territory of the Member States must also be seen in this context. Like the *Acquis* regarding questions of asylum, these provisions have a significant influence on European asylum policy. They even determine the factual circumstances and the chances of individual asylum seekers being

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ECRE/ENAR/MPG, Guarding Standards – Shaping the Agenda, Brussels 1999, p. 9; see also, Hailbronner, K. & Thiery, C., Schengen II und Dublin – Der zuständige Asylstaat in Europa, ZAR, 1997, p. 55-66; see also, Hailbronner, Immigration and Asylum Law, supra note 5, p. 382-398; see also; Liebaut, F., The Dublin Convention: Study on its Implementation in the 15 Member States of the European Union, January 2001 (Study conducted for the Danish refugee Council).

[40] See supra, note 13; see also, Steenbergen, J., All the King's [Horses], European Journal of Migration and Law, Vol. 1, 1999, p. 29-60, p. 33.

[41] Achermann, A. & Gattiker, M., Safe Third Countries: European Developments, International Journal of Refugee Law (IJRL), Vol. 7, 1995, p. 19-38; Kjaergaard, E., The Concept of "Safe third Country" in Contemporary European Refugee Law, IJRL, Vol. 6, 1994, p. 649-655; Hailbronner, K., The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective, in: IJRL, Vol. 5, 1993, p. 31-65. Soft Law as a source of international and European refugee law, in: Carlier, J.-Y./Vanheule, D. (eds.), Who is a refugee? The Hague 1997, p. 203-226, p. 219f.

[42] It remains problematic in this context that the attribution of activities to the persecuting state is restricted to acts by state organs and does not cover non-state agents of persecution and cases of so-called 'failed state'. The Joint Position states that 'persecution by third parties will be considered to fall within the scope of the Geneva Convention where it ... is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.' See UNHCR Position Paper with regard to persecution by non-State agents, 30 January 1996. Vermeulen, B. & Spijkerboer, T. & Zwaan, K. & Fernhout, R., Persecution by Third Parties, Nijmegen 1998, with state practice and jurisprudence from the EU Member States Germany, France, Italy, the Netherlands, Sweden and the United Kingdom. ELENA, Research Paper on Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, September 2000, available at http://www.ecre.org/ (accessed on 23 January 2001).

accepted more than the norms in the field of asylum *per se*. Asylum seekers' access is regulated through uniform controls of the external EU borders, particularly of the Schengen Area;[43] they are also extensively restricted by carrier sanctions,[44] visa policy and existing visa requirements[45] for nationals of states that are main countries of origin, and who allegedly regularly abuse asylum for immigration purposes.[46] Unfortunately, the measures intended to stop illegal immigration and prevent crime have proved to be more successful in sorting out those in real need of protection and consigning them to criminal organizations which traffic in persons to Union territory than in realizing their original aim.[47] Provisions that aim at preventing illegal immigration and illegal residence as well as at the return of such persons (already partially contained in the Schengen *Acquis*) constitute

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[43] This area is mainly regulated in the Schengen Convention. The Draft External Frontiers Convention (supra note 23) was never signed.

[44] See Abeyratne, R.I.R., Air Carrier Liability and State Responsibility for the Carriage of Inadmissable Persons and Refugees, IJRL, Vol 10, 1998, p. 675-687.

[45] Council regulation No. 1683/95 of 29 May 1995 laying down a uniform format for visas, O. J. 1995 No. L 164, p. 1. Council Regulation No. 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O. J. 1995 No. L 234, p. 1. This Regulation was annulled by the Court of Justice on 10 June 1997 and replaced by Council Regulation No. 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O. J. 1999 No. L 72, p. 2. Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 27 final, O. J. 2000 No. C 177 E, p. 66. See for the Schengen States Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), O. J. 2000 No. L 239, p. 317.

[46] See e.g. Joint Action of 4 March 1996 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union on airport transit arrangements, O. J. 1996 No. L 63, p. 8: 'Whereas the air route, particularly when it involves applications for entry or de facto entry, in the course of airport transit, represents a *significant way* in with a view in particular to *illegally taking up residence* within the territory of the Member States'. See also, the Judgment of the Court of 12 May 1998. Case C-170/96, European Court Reports 1998, p. I-2763. Joint Position of 25 October 1996 defined by the Council on the basis of Art. K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments, O. J. 1996 No. L 281, p. 1. 'Whereas checks carried out on embarkation onto flights to Member States of the European Union are *a useful contribution to the aim of combating unauthorized immigration* by nationals of third [countries].' (emphasis added).

[47] See supra, Steenbergen, note 40, p. 57, 'All these efforts make one really wonder how asylum seekers still manage to reach EU Member States. But the fact that persons still manage to find their way here also proves that it is not possible to lay a *cordon sanitaire* around Europe.' Compare also the list of states whose nationals need a visa with that of the main countries of origin.

one of the areas of aliens law where refugee law and aliens law overlap, and that deserves special attention for just that reason.[48]

The areas covered by TEC Title IV will gradually become regulated by Community legislation. The Council is required to issue measures guaranteeing the free movement of persons according to TEC Article 14 and accompanying measures directly related to it within a period of five years.[49] In particular, these are measures relating to the crossing of the external frontiers, including norms and procedures that the Member States must adhere to in applying border controls (largely already contained in the Schengen *Acquis*[50]); provisions on the issue of visas (uniform format for visas, proceedings and conditions for the issue of visas, lists of states whose nationals require a visa to be admitted to the EU territory[51]); and measures and proceedings that regulate the freedom of movement for third state nationals within the Union for a period up to three months.

Furthermore, competence for the examination of an asylum application is to be regulated (at present this subject matter is regulated by the DC). In the area of asylum, this is supplemented by minimum standards for the admission of asylum seekers in the Member States, minimum standards for the nationals of third states as refugees and minimum standards for the proceedings in the Member States relating to the recognition or denial of refugee status. As all these areas are already regulated in Third Pillar instruments, a political consensus on the content or a further agreement seemed to be likely. Accordingly, the Council's Action Plan reduced the time frame for these subjects to two years.[52] Meanwhile a number of proposals exist.[53]

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[48] See supra, Meijers, note 36, pp. 83-88 (Draft recommendation regarding practices followed by Member States on expulsion).

[49] TEC Art. 61 (a).

[50] See infra, Chapter 6 (especially notes 102 and 103).

[51] These provisions ended the unsuitable competence relating to visa policy in Community jurisdictions according to Art. 100c (old) and European Union jurisdictions according to Art. K.1 (2) and (3).

[52] See supra, note 9, 'The following measures should be taken within two years after the entry into force of the Treaty: (a) measures in the fields of asylum and immigration, assessment of countries of origin in order to formulate a country-specific integrated approach; (b) measures in the field of asylum: (i) effectiveness of the Dublin Convention: continued examination of the criteria and conditions for improving the implementation of the Convention and of the possible transformation of the legal basis to the system of Amsterdam (Art. 63(1)(a) of the TEC). A study should be undertaken to see to what extent the mechanism should be supplemented, inter alia by provisions enabling the responsibility for dealing with the members of the same family to be conferred on one Member State where the application of the responsibility criteria would involve a number of States, and by provisions whereby the question of protection when a refugee changes his/her

Minimum standards are to be set down for the temporary protection of displaced persons from third states that cannot return to their state of origin, and of persons who for other reasons are in need of international protection. Also, a balanced distribution of the burdens arising from the admission of refugees and displaced persons and the consequences of this admission in the Member States are to be set down. Obviously, aware that controversy surrounds the political will to achieve these standards and that, at best, they would have only led to the division of financial burdens, a five-year period was not foreseen here either.[54]

For other areas in which a consensus at the moment also seems unlikely, the Member States dispensed with the setting of a five-year period:[55] These areas are immigration policy measures that contain conditions for entry and residence as well as norms for the proceedings for the issue of long-term visas, and the granting of other authorizations for residents, including those for family unification. This also applies to measures relating to conditions under which nationals of third states who are lawfully in a Member State may also stay in other Member States, and their rights.

The powers under TEC Article 63, sections (3) and (4), are also relevant for asylum seekers, refugees and displaced persons. They

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country of residence can be resolved satisfactorily; (ii) the implementation of Eurodac; (iii) adoption of minimum standards on procedures in Member States for granting or withdrawing refugee status (Art. 63(1)(d) of the TEC) with a view, inter alia, to reducing the duration of asylum procedures. In this context, special attention shall be paid to the situation of children; (iv) limit 'secondary movements' by asylum seekers between Member States; (v) defining minimum standards on the reception of asylum seekers with a particular attention to the situation of children (Art. 63(1)(b) of the TEC); (vi) undertake a study with a view to establishing the merits of a single European asylum procedure; (c) Measures in the field of immigration: ... (ii) establish a coherent EU policy on readmission and return; (iii) combat illegal immigration (Art. 63(3)(b) of the TEC) through, inter alia, information campaigns in transit countries and in the countries of origin.' (Emphasis added).

[53] Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status and Proposal for a Council Directive on minimum standards for giving temporary protection, (supra note 10); see also Communication from the Commission to the Council and the European Parliament on a Community immigration policy, COM (2000) 757 final. Communication from the Commission to the Council and the European Parliament towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM (2000) 755 final.

[54] See supra, Noll, note 35; see also Council Decision of 28 September 2000 establishing a European Refugee Fund, (supra, note 10) Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx.

[55] TEC Art. 61 (b)-(e).

stipulate that entry and conditions for stay (long term) and the standards and proceedings for the issue of visas for such stays may be regulated (no five-year period is envisaged in this context). Provisions relating to the unification of families are also to be linked to this.

After the experiences regarding the timetables for realizing the internal market and the abolition of internal border controls, it appears unlikely that this timetable will be kept for all the areas to be regulated.[56] In such cases, each Member State or any Community organ could raise proceedings before the ECJ according to TEC Article 232.[57]

The wording also suggests that little will change in substance. The Article's object is the setting down of minimum standards, in other words, the implementation in the present and future by Member States may not fall below these minimum standards. It does not involve the setting of truly uniform positive standards. A disengagement of refugee and asylum issues from the general context of immigration and the debate on security, and their establishment in a separate chapter in the human rights context, as demanded by UNHCR and NGOs[58] in numerous publications, has not occurred.

6.II.B Forms of Legal Action; Possibilities of Incorporating the Acquis to Date into Community Law

Designated forms of action under the Third Pillar are no longer available for 'communitarized' fields since the coming into force of the Amsterdam Treaty. According to TEC Article 67, regulations and directives as well as decisions are available as forms of action.[59] Also, legally non-binding forms of action such as opinions and

[56] See e.g., the demand by the European Parliament in a Legislative resolution embodying Parliament's opinion on the draft Joint Action adopted by the Council on the basis of Art. K.3 of the Treaty on European Union on airport transit arrangements (Consultation procedure), O. J. 1998 No. C 379, p. 387 (Amendment 16): 'Whereas this Joint Action must be replaced by a Regulation within six months of the entry into force of the Treaty of Amsterdam.'

[57] See supra, note 5, Hailbronner, p. 182.

[58] See supra, note 39, p. 21.

[59] See also Resolution on the progress made in 1998 in the implementation of cooperation in the fields of justice and home affairs pursuant to Title VI of the Treaty on European Union, O. J. 1999 No. C 104, p. 135. The Parliament called on the Council 'to convert legal acts adopted or still being negotiated under Art. K.3 of the TEU into the legal form prescribed therein and, in so doing, to involve the European Parliament in an appropriate manner'.

recommendations and similar instruments may be used. Regulations, in particular, will guarantee the greatest possible uniformity in the application of the norms in the Member States. Regulations dispense completely with the need for implementing domestic legal acts in the are binding on national organs with respect to their contents and aims; however, implementation remains necessary, a situation that does not essentially differ from the implementation of Third Pillar acts to date.

The 'communitarization' of the existing legal acts under the Third Pillar raises a number of questions. These include *inter alia*; the relationship between existing Union law to subsequent regulations and directives, the amendment or termination of public international law treaties and the incorporation of their content into Community legislation, and the necessary adaptations of national acts generally, or of those adopted because of implementation obligations arising from legal acts from the Third Pillar.[60]

It is clear that the existing legal acts under the Third Pillar will remain in force until their contents are regulated by a Community legal act and their subsequent formal repeal.[61] A tacit repeal of earlier Union law through subsequent Community law cannot be assumed. Thus, a shift in the legal basis only occurs gradually in the course of the Council exercising its powers according to TEC Articles 61 through 63 in the envisaged proceedings. For the relationship between existing Union law and regulations and directives, it can be said that binding Union law demands a formal termination when the corresponding Community acts are adopted. Non-binding forms of action can remain in their present form or be amended or newly created through the procedures under Article 67 and Article 249 of the TEC.

Its own Article 16[62] already envisages a revision or amendment of the DC. If its content were regulated by binding Community acts as planned for 2001,[63] then a formal termination of the Agreement would

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[60] Schmahl, S., Europäische Konzepte der Flüchtlingspolitik, in: Hailbronner & Klein, supra note 39.

[61] See supra, note 5, Hailbronner, Neuregelung, p. 184.

[62] Art. 16 (2) reads: 'If it proves necessary to revise or amend this Convention pursuant to the achievement of the objectives set out in Art. 8a of the Treaty establishing the European Economic Community, such achievement being linked in particular to the establishment of a harmonized asylum and a common visa policy, the Member State holding the Presidency of the Council of the European Communities shall organize a meeting of the Committee referred to in Art. 18.'

[63] European Commission, Commission staff working paper Revisiting the Dublin Convention, SEC (2000) 522. European Commission, Working Document, Towards common standards on asylum procedures, SEC (1999) 271 final, p. 8. Communication Towards a common asylum procedure, supra note 53, 'The Commission is currently engaged in evaluating the implementation of the Dublin

be called for. As Norway and Iceland will be included in the Dublin system, this termination raises questions on how to regulate their further participation. The same goes for Denmark, U.K. and Ireland when existing Third Pillar instruments will be replaced by Community legislation.[64]

Some proposals and drafts for forms of action under the Third Pillar, which were based on Article K (1), either did not enter into force under the Maastricht Third Pillar regime or were 'frozen' by common consent until the Treaty of Amsterdam came into force. The first category included, in particular, a proposal on a convention regulating uniform external border controls[65] and a proposal for the abolition of internal border controls between all Member States.[66] An agreement relating to the computer supported storage and exchange of data relating to asylum seekers, notably their fingerprints, the so-called Eurodac Convention[67] should have been concluded. Further negotiations on this draft convention were postponed until the entry into force of the Amsterdam Treaty. The first Commission proposal for a regulation under the new Title IV was then based on the planned contents of this treaty.[68] The Regulation entered into force in December 2000.[69] The Member States are obliged to store, in a central unit, the fingerprints of those asylum seekers and persons of 14 years of age and over who had illegally crossed the external border of a Member State. This unit will be established by the Commission according to its Article 27. The Regulation will apply and EURODAC will start operations from the date (to be published in the O.J.) when each Member State has notified the Commission that it has made the

Convention and in spring 2001 will be proposing a first-stage Community instrument to replace it.'

[64] See supra, note 60, Schmahl.

[65] See supra, note 23, Guide for effective practices for controls of persons at external frontiers, Doc. 8271/97.

[66] Commission Communication to the Council and to the Parliament - Abolition of border controls, SEC/92/877 final; see also, Resolution on the abolition of controls at internal borders and free movement of persons within the European Community, O. J. 1992 No. C 337, p. 211.

[67] See supra, note 23, Proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens, O. J. 2000 No. C 337 E, p. 37, para. 1.2: 'The text of a draft Convention under Title VI of the Treaty on European Union was prepared and consensus was reached within the Council ... in December 1998 to "freeze" the text pending the entry into force of the Treaty of Amsterdam.'

[68] Ibid. (Amended proposal for a Council Regulation concerning the establishment of 'Eurodac'; for the comparison of the fingerprints of applicants for asylum and certain other third-country nationals to facilitate the implementation of the DC, COM (2000) 100 final.

[69] See supra, note 10.

necessary technical arrangements to transmit data to the Central Unit and the Commission has made the necessary technical arrangements for the Central Unit to begin operations.

According to TEC Article 63 (penultimate paragraph), the Member States may retain or introduce national provisions that are compatible with the TEC and with international agreements if the Council adopts measures relating to immigration policy in the following areas:

> (a) Conditions for entry and stay as well as norms for the issue of a visa relating to a long- term stay;
>
> (b) Measures for determining the rights and conditions on the basis of which nationals of third states who are lawfully present in one Member State may also stay in other Member States;
>
> (c) Illegal immigration and illegal stay, including the return of such persons who stay illegally in a Member State.[70]

The last point also covers the network of bilateral and multilateral readmission agreements.[71] These readmission agreements also serve to enable the return, deportation, repatriation or similar measures (the domestic law terminology varies significantly) of persons who illegally stay in a Member State, or whose stay is considered to be illegal on the grounds that: they have not been admitted to the asylum procedure because they transited through a safe third country; they do not have a provisional right of residence during the asylum procedure for other reasons; or the asylum procedure ended with a negative decision. This also includes persons whose asylum applications have been rejected, even if their applications were only examined in proceedings for manifestly unfounded asylum applications.

As long as a subject in Title IV is not exhaustively regulated by Community legal acts, there is no exclusive Community jurisdiction and national legal acts thus remain permissible.[72] Also, the legal acts undertaken in the Member States to implement the forms of action under the Third Pillar remain in force; in particular, the provisions implementing the DC. These only become inapplicable when corresponding Community regulations have been adopted in a field

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[70] See supra, note 5, Hailbronner, European Immigration and Asylum Law, p. 1051; see also, Initiative of the French Republic with a view to adopting a Council Directive on mutual recognition of decisions on the expulsion of third country nationals, O. J. 2000 No. C 243, p. 1; see also, supra note 48.

[71] See also, infra Chapters 2 – 4, 8.

[72] See supra, note 5, Hailbronner, Neuregelung, p. 180; see also, supra note 6, Thun-Hohenstein, p. 35.

and the national measures are not compatible with the Community regulations. Since the Community jurisdiction is not exclusive, the Member States can also conclude further bilateral or multilateral treaties that deal with this subject.[73] In particular, a Protocol on the External Relations of Member States especially allows Member States to conclude agreements with third states concerning the control of their external borders in accordance with Community law.[74]

In any case, the Member States retain jurisdiction according to TEC Article 64 to maintain public order and the protection of internal security (*ordre public* reservation). However, this jurisdiction of the Member States can be restricted according to Article 64 (2) if a State is suddenly confronted with an influx of third state nationals. This could cover situations such as the recent conflicts in the Balkans where, however, a Community law regulation of burden sharing would seem more appropriate than 'emergency clamp down measures'.

TEC Article 67 envisages deviations from the usual law-making procedures. This came about because of the difficult political negotiations that occurred in an atmosphere of tension between efforts to achieve binding uniform norms, on the one hand, and, on the other, the States' desire to retain traditional sovereign authority. Thus, during a transitional period of five years after the entry into force of the Treaty of Amsterdam, the Council will only act unanimously on the proposal of the Commission or on the initiative of a Member State and after consulting with the European Parliament.

Only after the expiry of this five-year period will the Council be able to decide unanimously (after consultation with the European Parliament) whether all or certain areas shall become subject to the decision making process according to TEC Article 251, and whether to adapt the jurisdiction of the ECJ.[75] Only then will the European Parliament be able to have decisive influence on the law-making process.[76]

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[73] See e.g., Streinz, R., Europarecht, 4th ed., Heidelberg 1999, p. 218.

[74] Protocol on external relations of the Member States with regard to the crossing of external borders, O. J. 1997 No. C 340, p. 108; see also, supra note 6, Thun-Hohenstein, p. 32.

[75] See supra, note 4.

[76] See Twomey, P., Title VI of the Union Treaty: "Matters of Common Interest" as a Question of Human Rights, in: Monar, J./Morgan, R. (eds.), The Third Pillar of the European Union, Brussels 1994, p. 49-67, p. 49-54.

6.II.C Jurisdictions of the ECJ

Under the Third Pillar of the Maastricht Treaty, the ECJ in principle had no jurisdiction in this field apart from that which was expressly set down in an agreement concluded under the Third Pillar.[77]

The jurisdiction of the ECJ reveals two peculiarities in Title IV. The possibility of referring a matter to the ECJ for a preliminary decision is only available to courts of last instance. Lower courts cannot request such a decision. This means that even if they deem a question of Community law to require interpretation, lower instance courts have no possibility of referring the matter to the ECJ. Five years after the entry into force of the Amsterdam Treaty these provisions may be adapted by a unanimous decision of the Council after consulting the European Parliament.[78]

Furthermore, according to Article TEC 68 (3), the Council, the Commission or a Member State have the possibility of referring to the ECJ a question relating to the interpretation of Title IV or a legal act under this Title issued by one of the organs of the Community. In particular, this judicial power, diverging from the ECJ's usual jurisdiction, can promote uniform interpretation of Title IV or of legal acts based on this title. As has been the case until the entry into force of the Treaty of Amsterdam, the ECJ has no jurisdiction for the interpretation of existing legal acts under the Third Pillar in the area of asylum law.

6.II.D Implications for Accession Candidates

At present, these implications are mainly the demands for strict border control by the accession candidates of their borders with non-EU States and the overall consequences of safe third country practices of EU Member States.[79] The latter include rejections of asylum seekers at

[77] In the context of the compatibility of a measure under the Third Pillar with Community law, the ECJ decided in proceedings relating to a joint action of the Council on transit at airports that it had jurisdiction to review the contents of the legal act according to Art. 100c (old) of the ECT in order to determine whether the legal act infringed upon the powers of the Community in this provision. The Court ruled that the airport transit visa does not authorize its holder to cross the external borders of Member States in the sense contemplated by Art. 100c of the EC Treaty and that this act does not fall within the ambit of that provision.

[78] Art. 67 (2).

[79] See supra, Chapter 1.

EU borders because they transited through a safe country, returns or deportations from EU States and capacity-building measures.[80]

Furthermore, the accession candidates must prepare their national legislation for membership. They are confronted with demands by EU States to adopt asylum and aliens legislation and build up administrative practices based on minimum standards agreed in the present EU *Acquis*.[81]

With its accession to the EU, each new Member State is bound to completely adopt the entire *Acquis Communautaire*.[82] Of course, the *Acquis* generally is not a static element, but rather continues to develop during the course of negotiations. Accession candidates must, in principle, make a binding agreement to accept the entire *Acquis* at the time of their future accession, which they may not yet know. In the field of asylum and immigration, this is particularly true, for in this field the *Acquis* itself is in the process of being implemented into Community legislation. For accession candidates, this means that they will have to adopt the existing norms in the field of asylum law as well as those issued before the date of their accession. This means that regulations and directives are automatically binding for new Member States. The latter have to be implemented into the domestic law of the new members. The remaining Third Pillar *Acquis* also needs implementation in national laws. Third Pillar conventions still in force at the time of accession must be signed and ratified in the course of the accession proceedings.

A joint action has regulated the establishment of a mechanism for the assessment of the adoption, application and efficient implementation of the *Acquis* of the EU in the fields of justice and home affairs by the states seeking accession to the EU.[83] According to this measure, a group of experts has the task of maintaining up to date assessments of the situation in the states seeking accession with respect to the adoption, application and efficient implementation of the Union's *Acquis* in these fields.[84]

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[80] See supra, Chapters 1-4.

[81] See supra, note 12, Lavenex, p. 291.

[82] Vogelmann, H., Acquis screening - der erste Abschnitt der EU-Beitrittsverhandlungen, ecolex 1998, p. 892-896.

[83] Supra note 14.

[84] According to the joint action (supra) 'The evaluations ... shall as a first step draw in particular on: - information provided individually and collectively by Member States based on their direct experience of working with the candidate countries, including information available within Schengen; - reports, as appropriate, from Member States' Embassies and Commission delegations in the candidate countries, on the basis, where necessary, of a questionnaire to be prepared by the group of

Generally, the first step in the negotiation process with candidates for accession is the so-called *Acquis* Screening, during which, together with the accession candidates, an analytical examination of Community law is conducted. The screening procedure is not limited to the purely formal adoption of legal acts into national law. Rather, the degree of practical implementation as well as the administrative capacity to implement and monitor the new provisions is examined.[85] This includes asylum proceedings as well as effective border controls. To technically support the screening procedure and to constantly update the knowledge relating to the implementation of the *Acquis*, the Commission, in cooperation with the accession candidates, established so-called screening lists.[86]

In order to effectively implement the *Acquis* a special programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-Programme) was established.[87] The Programme's general aim is to extend and strengthen existing cooperation in the fields of asylum, immigration and crossing of external borders in the Member States as well as cooperation with the candidates for accession in these fields by means of annual programming. In the field of asylum, the Council's action programme envisages for the Odysseus Programme, *inter alia*, the coordinated application of the DC. Furthermore, other legal

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experts; – information available to the Commission through its role in the overall process of accession, including reports from missions conducted in the framework of the PHARE programme; ... 2. The Commission is invited to take account of the collective evaluations in its proposals for significant adjustment of the priorities and objectives of the accession partnerships, which shall be submitted to the Council for decision in accordance with Art. 2 of Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships. These evaluations shall also be taken into consideration within the established structures of the European Union in the context of future discussions on enlargement.'

[85] See supra, note 82, Vogelmann, p. 894.

[86] Compare also, Jorna, M., The Accession Negotiations with Austria, Sweden, Finland and Norway: A guided tour, European Law Review, Vol. 20, 1995, p. 131-158; Luif, P., On the Road to Brussels: the political dimension of Austria's, Finland's and Sweden's accession to the European Union, Wien 1995, p. 303ff.

[87] Joint Action of 19 March 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus Programme), O. J. 1998 No. L 099, p. 2. The Joint Action calls for programmes to be set up to prepare the applicant countries for accession. Special regard should be paid to transformation into their national law and application by civil servants working in this field. Odysseus Programme 1998, O. J. 1998 No. C 169, p. 15. Odysseus Programme: 1999, O. J. 1999 No. C 17, p. 16.

instruments relating to asylum policy are to be effectively implemented in the states seeking accession:

> (a) Review proceedings for asylum applications in first instance (normal or accelerated proceedings) and appeal proceedings;
>
> (b) Documentation as to the countries of origin;
>
> (c) Admission conditions for asylum seekers including their rights and duties and alternatives to the recognition of refugee status (including temporary protection).

In this context, special emphasis is placed on the implementation of Community provisions in domestic law and their application by the civil servants on the spot.[88] All these implementation acts must take into account the changes of the legal basis of the *Acquis*.

The establishment of an area without border controls proved to be more complicated than initially planned, and the abolition of internal border controls could not be finalized on schedule. Also, the "Dublin mechanism" for determining the Member State competent for dealing with an asylum claim did not work adequately.[89] These difficulties could not be completely solved, and they lead to the presumption that the enlargement of the Union will be a further challenge in this field. From these experiences, it can be concluded that the accession candidates' implementation of the *Acquis* will lead to similar problems.[90] In order to include non-Member States of the Union into

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[88] Odysseus Programme: 1999, supra note 87: '3. to take steps to open the programme up to non-member countries in general and the applicant countries in particular, priority being given to cooperation projects to familiarise the latter with the accumulated body of Union law relating to asylum, immigration and the crossing of external borders. The programme sets out to meet these objectives by supporting measures initiated by public institutions or private bodies aimed at developing cooperation in the fields of asylum, immigration and the crossing of external borders.'

[89] See supra, note 39; see also e.g., the Decisions set up by Art. 18 of the Dublin Convention of 15 June 1990: Decision No. 1/97 of 9 September 1997 concerning provisions of the implementation of the Convention, O. J. 1997 No. L 281, p. 1, Corrigendum to Decision No. 1/97, O. J. 1998 No. L, p. 6. Decision No 1/98 of 30 June 1998 concerning provisions for the implementation of the Convention, O. J. 1998 No. L 196, p. 49. Decision No 1/2000 of 31 October 2000 concerning the transfer of responsibility for family members in accordance with Art. 3(4) and Art. 9 of that Convention, O. J. 2000 No. L 281, p. 1; see also Eurodac Regulation, supra note 10.

[90] See e.g., Resolution on the progress made in 1998 in the implementation of cooperation in the fields of justice and home affairs pursuant to Title VI of the Treaty on European Union, O. J. 1999 No. C 104, p. 135. In the Resolution on the implications of enlargement of the European Union for cooperation in the field of justice and home affairs, O. J. 1998 No. C 138, p. 214, the Parliament even

the Dublin system, as early as 1997 the Council saw the necessity for a study of the possibility of concluding conventions parallel to the DC.[91]

At present it seems likely that a considerable part, at least, of the present Third Pillar Acquis will have been regulated by Community legal acts when the accession treaties enter into force. Regulations in this field have the same direct effect in the new Member States as all other regulations, whereas directives have to be implemented. This Community legislation does not differ from other Community legal acts. If there are 'old' Third Pillar Acts still to be implemented, the new Member States will have to adhere to them. Such 'old' Third Pillar Acts also require implementation into national law. Remaining Third Pillar conventions require formal signature and ratification by new members.

6.II.E The Schengen Protocol; Incorporating the Schengen Acquis into Community or Union Law

The Schengen Protocol[92] stipulates that from the point in time when the Treaty of Amsterdam entered into force the Schengen *Acquis*[93]

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demands the establishment of a European border control force and explicitly uses the term European asylum and immigration law: 'The European Union and the European Community must put into effect an ambitious programme for creating a European asylum and immigration law together with police and judicial cooperation in criminal matters which considerably changes the acquis communautaire in the course of the accession procedure and presents the applicant countries with major new challenges.' Furthermore, the Parliament called on the Council and Commission 'to establish in enlargement negotiations that applicant countries adapt their visa policy towards third countries to Union policy before accession'. With special regard to new Member States, the Parliament proposed that 'a European border control force should be introduced to control future external borders which draws on the national experience of border control forces for implementation at Community level as, in the long-term, the responsibility for controlling the EU's external borders cannot simply be left to the most northerly, easterly, southerly or westerly Member State but must be borne, both technically and financially, on a Community basis.'

[91] Council Resolution of 18 December 1997 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 January 1998 to the date of entry into force of the Treaty of Amsterdam, O. J. 1998 No. C 011, p. 1. To include Iceland and Norway into the Dublin system, an Agreement between the EC and these two states will be concluded. Proposal for a Council decision concerning the signing of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, COM (2000) 883 final.

[92] Protocol integrating the Schengen acquis into the framework of the European

became immediately applicable for the participating Member States.[94] From this time on, the Council replaced the Executive Committee.[95] According to Article 2 of the Protocol, the Council had to determine by unanimous decision the legal basis for every provision and every decision that forms a part of the Schengen *Acquis*. This Council decision was taken on 20 May 1999.[96] For the provisions of the Schengen *Acquis* that relate to new Community jurisdiction, a First

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Union, O. J. 1997 No. C 340, p. 96 (Annex: Schengen *Acquis* listed).

[93] According to the Annex (supra note 92) the Schengen *Acquis* comprises: Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Controls at the Common Frontiers, International Legal Materials, Vol. XXX, 73-83. Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at their Common Borders, International Legal Materials, Vol. XXX, 73-83. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996). Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.

[94] The Member States of the Union except the United Kingdom and Ireland. The Protocol includes special provisions for these states, for Denmark and also for Norway and Iceland. According to Council Decision of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway (O. J. 2000 No. L 309, p. 24) the Schengen acquis is applicable for these states in their relations between each other and with all other Member States except the United Kingdom and Ireland from 25 March 2001.

[95] See also, Council Decision of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council, O. J. 1999 No. L 119, p. 49. For the Joint Supervisory Authority see Council Decision of 20 May 1999 concerning the Joint Supervisory Authority set up under Art. 115 of the Convention applying the Schengen Agreement of 14 June 1985, on the gradual abolition of checks at common borders, signed on 19 June 1990, O. J. 1999 No. L 176, p. 34.

[96] Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, O. J. 1999 No. L 176 , p. 1. Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, O. J. 1999 No. L 176, p. 17; see for, the accession of Iceland and Norway Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, O. J. 1999 No. L 176, p. 36.

Pillar legal basis was decided, while those relating to police cooperation and judicial cooperation in internal matters were 'transferred' into the Third Pillar. It is not the scope of this essay to deal with the incorporation of the Schengen Acquis, but in some areas it seems to be questionable whether the legal basis referred to in the decision comprises the competence for the fields regulated in the Schengen legal act.[97]

The Schengen *Acquis* comprises numerous provisions with relevance for asylum and refugee issues. According to the Council decision, these provisions include norms concerning border controls, visas, readmission between Schengen states and with third states, and prevention of illegal immigration.[98]

The requirement for transparency has been completely ignored in the Schengen process, in particular with respect to the activity of the Executive Committee. Until 2000 the decisions and declarations of the Schengen Executive Committee were known to 'insiders' only. The *Acquis* was not substantively referred to in academic publications, in media, or in comments or publications by NGOs. European citizens' lack of access to Schengen documents also met with criticism from the European Parliament.[99] Through the incorporation of the Schengen *Acquis* into Community or Union law, a noticeable improvement in transparency can be hoped for. As a first step, parts of the Schengen *Acquis* were published in the *Official Journal*.[100]

For the accession candidates, the provisions of this *Acquis* are of crucial importance. Only if they fulfil the demand for a uniform and strict border control and if they prove to be able to prevent illegal immigration will full membership become possible. Schengen states

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[97] See e.g. the cooperation in returning aliens by air, based on Art. 62 (3) and Art. 63 (3) TEC.

[98] See supra, note 40, Steenbergen, p. 37.

[99] See, the European Parliament recommendation to the Council on the programme of activities to be conducted under the Schengen cooperation arrangements up to June 1999, O. J. 1999 No. C 104, p. 143. The Parliament demanded that the texts already adopted should be translated into all the official languages and published in the Official Journal. Comprehensive, relevant information on the impact of the agreement's implementation should be given to citizens. The Parliament suggested compiling a compendium of national and European case law on Schengen and a compendium of 'best practice.' See also, the written question No. 3772/97 to the Commission concerning free access to Schengen manuals, O. J. 1998 No. C 196, p. 16.

[100] O. J. 2000 No L 239. See also Council Decision of 30 November 2000 on declassifying certain parts of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985, O. J. 2000 No. L 303, p. 29.

have informed the accession candidates about their instruments of border control.[101] In order to prepare for accession, the Common Manual was forwarded to applicant states in 1999.[102] According to Article 8 of the Protocol, the Schengen *Acquis* shall be regarded as an '*acquis* which must *be accepted in full* by all States candidates for admission'.[103] (emphasis added)

6.II.F Issues of Transparency

One aim of the Amsterdam Treaty is the improvement[104] of transparency. According to Article 1 (2) all decisions should be taken in the way that is most open and accessible to the citizens.[105] The Treaty of Amsterdam also improves the transparency of the law-making procedure. Following a Council decision dating from 1996,[106]

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[101] SCH/Com-ex (97) Decl. 7, of 24 June 1997. Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration (SCH/Com-ex (98) 37 def. 2), O. J. 2000 No. L 239, p. 203.

[102] SCH/Com-ex (98) 35 Rev 2, of 16 September 1998. See Noll, fn. 13, p. (fn. 1).

[103] Supra note 92 (emphasis added).

[104] The European Parliament regarded the failure to regularly inform the Parliament (with particular regard to the preparations for and outcome of Council meetings and informal Council meetings) as a breach of the TEU. In its Resolution on the progress made in 1998 in the implementation of cooperation in the fields of justice and home affairs pursuant to Title VI of the Treaty on European Union (O. J. 1999 No. C 104, p. 135) the entry into force of the Amsterdam Treaty was seen 'to compel the institutions, in particular the Council, to alter the working methods substantially and introduce greater transparency throughout the decision-making process, be it with regard to new strategies or to specific legislative measures'.

[105] Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998, Svenska Journalistförbundet v. Council of the European Union, Case T-174/95, European Court Reports 1998, p. II-2289. The Court annulled the Council's decision of 6 July 1995, refusing the applicant access to certain documents relating to the European Police Office with the following reasoning: 'The objective of Decision 93/731 on public access to Council documents is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. It does not require that members of the public must put forward reasons for seeking access to requested documents. ... The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. Thus, the concept covers both the internal security of a Member State and its external security.' Judgment of the Court of First Instance (Fourth Chamber) of 6 April 2000, Aldo Kuijer v. Council of the European Union, Case T-188/98.

[106] Council Decision of 23 November 1995 on publication in the Official Journal of the European Communities of acts and other texts adopted by the Council in the field of asylum and immigration, O. J. 1996 No. C 274, p. 1.

those legal acts based on the Third Pillar and named in that decision were published in the *Official Journal*. The TEC Article 255 envisages a primary law entitlement for all citizens of the Union to have access to the documents of the European Parliament, of the Council and of the Commission. According to TEC Article 207, the Council must set down in its rules of proceedings the conditions under which the public may have access to the Council's documents. Where the Council becomes active as a lawmaker, the results of ballots as well as the statements made when ballots are cast and the statements reported in the minutes are to be published. These provisions let one hope for a greater level of transparency in the law-making process. Limitations result from the authority of the organs themselves to decide or to determine in their rules of procedure that documents are to be published. Furthermore, there are extensive possibilities to impose limitations in those areas where public security, police cooperation, etc. are regulated.

6.II.G The Asylum Protocol

The Protocol[107] sets down that the Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State will only be taken into consideration or declared admissible in exceptional cases referred to in the Protocol. UNHCR views this Protocol as inconsistent with the 1951 Refugee Convention and as a threat to core principles of international refugee law.[108] Although any European State, when applying to become a Member of the Union, must respect the principles set out in TEU Article 6 (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law), it remains especially problematic that the new Member States, which were the main countries of origin until 1990, are regarded *a priori* as safe.

6.III *Résumé*

The new Title IV will be a further step in the development of a European aliens and asylum law. It does not cover new areas, but establishes that the already existing Third Pillar *Acquis* is to be regulated and further developed by Community legal acts.

On the one hand, accession candidates are confronted with the impact of existing EU aliens law, which regulates and restricts entry to EU territory and which, *inter alia*, due to the safe third country provision, only affords asylum seekers limited possibilities to obtain asylum in the Member States. On the other hand, the accession candidates must first adapt their legal systems and practice to the Community legal order in preparation for accession taking into account the ongoing evolution of the *Acquis*, which is currently in a phase of restructuring, particularly in the field of asylum and immigration law, thanks to the Treaty of Amsterdam.

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[107] Protocol on Asylum for Nationals of Member States of the European Union, O. J. 1997 No. C 340, p. 103.

[108] See supra, note 39, ECRE et. al., p. 18.

7 Recent Developments in Central Europe and the Baltic States in the Asylum Field: a View from UNHCR and the Strategies of the High Commissioner for Enhancing the Asylum Systems of the Region

Michael Petersen

7.1 Introduction

The following contribution to this publication provides the perspective of UNHCR on the developments in the asylum area in the central European and Baltic states (CEBS), and describes and assesses how UNHCR has proceeded in the CEBS.

Whereas Part II contains an overview of those developments and their assessment by UNHCR, Part III describes UNHCR's objectives, strategies and activities in the region.

As all of the CEBS are candidate countries for EU membership, UNHCR has joined forces with the EU countries and institutions involved in institution and capacity building in the region, and has been building on the momentum created by the future EU membership of those countries, including in particular their wish to adopt standards conforming with the EU *acquis* on asylum. Whereas Part IV describes the EU involvement in institution and capacity building in the CEBS, Part V contains some considerations relating to the asylum *acquis* and the EU harmonization process out of which that *acquis* is gradually growing.

Finally, in Part VI, the results of UNHCR's strategy and activities are being assessed and in Part VII an attempt is made to predict future developments in the asylum area in the CEBS.

R. Byrne et al. (eds.), New Asylum Countries?, 351–372.

7.II Recent Developments in the Central European and Baltic States

7.II.A Important Achievements in Building Asylum Systems

Before their transition to democracy, none of the CEBS was party to the international refugee instruments, nor had developed a fully-fledged asylum system. Since then, the countries of the region have made considerable progress in this domain. Indeed, all of them are now parties to the 1951 Refugee Convention and its 1967 Protocol, without geographical limitation, and have adopted the laws and by-laws required for the implementation of those instruments. Some countries have already revised their asylum legislation and others are in the process of doing so. Moreover, the institutions responsible for the implementation of the legal norms are gradually being built and their capacities developed to meet current needs. The progress achieved in the area of asylum in the CEBS in recent years is all the more impressive given that those states have concurrently been faced with complex economic, political and social problems stemming from change of political systems and introduction of market economies.

7.II.B The Forces Driving Progress

There are several key factors that have motivated the CEBS to adopt human rights and asylum legislation and practices in conformity with international standards. One is undoubtedly the democratization of the societies in the region. The CEBS' desire for European integration with subsequent membership in the Council of Europe and the EU, and for adopting the standards required to this effect, is another main reason for these developments. The increasing freedom of movement of persons in the wider Europe, involving abolition of or relaxed border control, constitutes yet another reason why the CEBS have felt the need to harmonize their asylum and immigration policies with those of western European states. Clearly, the concern of western European governments as regards irregular movements of economic migrants and asylum seekers is another strong factor which has led the CEBS to gradually adopt asylum and immigration policies in line with those of Western Europe.

7.II.C Some Problems Still to be Overcome

Concerns in the CEBS of becoming 'buffers' or 'sanitary zones' for asylum seekers, refugees and stranded would-be immigrants in search of 'greener pastures' in the richer industrialized societies of Western Europe have, perhaps understandably, resulted in some of the CEBS only half-heartedly agreeing to enhance their responses to the problem of asylum-seekers and refugees. Such concerns would appear to underpin the CEBS' attempts to limit their responsibilities as regards asylum-seekers and refugees. For example, in turn they have begun to use the safe third country and country of first asylum concepts, applied by western European countries to return asylum seekers and refugees to the CEBS, in order to return such persons to their eastern neighbours. To this effect, they have concluded and continue to negotiate so-called Readmission Agreements, traditionally used by western European countries for the return of asylum seekers to intermediate countries.

The use of these agreements for return of asylum-seekers to countries through which they have transited gives rise to concern, insofar as they were originally conceived to be applied to illegal migrants. Thus, for UNHCR, they do not normally offer proper guarantees that returned asylum seekers will gain access to the asylum procedure in receiving countries.[1]

The use of the safe third country notion by central European countries vis-à-vis their eastern neighbours is problematic, because most of the latter have not as yet established fully functioning asylum systems that offer effective protection to asylum seekers and refugees. In addition, some central and eastern European countries impose restrictive time limits for applying for asylum. If the consequence of non-respect of such time limits is that the applicant is refused access to the asylum procedure, the result may be denial of Refugee Convention rights to refugees, including the right to *non-refoulement*. Of particular concern is the extensive use of accelerated and admissibility procedures, often as a result of too broad an application of the notion of manifestly unfounded claims.

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[1] UNHCR has recommended that, unless they contain clauses having regard to the specific situation of asylum seekers, these agreements should not be used as a basis for the automatic return of asylum seekers to intermediate countries. Rather, the Office has suggested that such returns should be undertaken on the basis of agreements that determine responsibility for examining asylum applications, such as the DC linking EU Member States.

Another regrettable practice in the CEBS relates to restrictive use of the exclusion and cessation clauses of the 1951 Refugee Convention. Whereas the restrictive interpretation of the Convention inclusion clause prevails mainly in Western Europe, the broad application of the Convention exclusion and cessation clauses is a well-known phenomenon in Central and Eastern Europe. Thus, the legislations of a number of the CEBS allow for applying the exclusion and cessation clauses in a broader manner than foreseen in the Refugee Convention. For example, in some of those countries exclusion clauses are applied to persons who have committed crimes that are not sufficiently serious to exclude them according to the Convention.

A further restrictive measure applied in Central and Eastern Europe as well as in Western Europe, which undoubtedly has a deterrent effect on the arrival of asylum seekers and refugees, is the detention of asylum seekers. In some countries, detention may be applied during the whole duration of the asylum procedure, or for extended periods of time. In a number of instances, detention conditions have been judged by national or international bodies to be unsatisfactory.

7.II.D Prevention of Illegal Migration and Refugee Protection

In recent years, western European countries have been strengthening immigration control at their borders with the CEBS and have stepped up the combat against illegal migration, smuggling and trafficking of humans. The CEBS have been strongly encouraged to do the same. Visa requirements and carrier sanctions, enhanced surveillance of borders, the introduction of or increase of existing penalties for smuggling, trafficking and illegal entry and stay, are among the measures adopted to this effect. For a number of years, the main focus of the Budapest Process, a forum where European countries meet to co-ordinate their efforts to prevent illegal migration, has been on the harmonization of the policies and practices of central and eastern European countries in this area with those of western European states.

The implication of immigration control measures and efforts to combat illegal migration may in some instances be to prevent people in need of international protection from obtaining such protection. This is, of course, particularly serious if it leads to the consequence that people attempting to flee their country of origin due to serious human rights violations are prevented from doing so. Clearly, the

combination of visa requirements and carrier sanctions could have such an effect. The effect is reinforced by the out-posting, in countries where serious human rights violations occur, of immigration officers or of representatives of immigration authorities of target countries for asylum seekers. One of their tasks is to ensure that persons who do not possess valid visas and or appropriate travel documents do not board aircraft destined for those countries.[2]

Consequently, the question is being raised as to how immigration control measures could be mitigated so as to reduce the possible negative impact on refugee protection. Key in this regard is the inclusion in immigration control measures of safeguards to ensure that people in need of international protection are able to access such protection.

As regards carrier sanctions, UNHCR has taken the view that, if they cannot be avoided, which the Office would prefer, they should not be implemented in a manner inconsistent with international human rights and refugee protection principles, notably Article 14 of the Universal Declaration on Human Rights, according to which each person has the right to seek asylum.[3] Another way of mitigating the negative effects for asylum seekers and refugees of measures aimed at combating illegal migration, such as carrier sanctions and visa requirements, is that countries of final destination process claims submitted to their consular authorities in transit countries. A further possibility is that countries that may grant visas in countries of origin to persons who have been, or who risk being exposed to human rights violations,

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[2] The question arises as to whether such measures may in themselves constitute violations of international human rights law, or whether they could be considered as indirect violations of the principle of *non-refoulement* as contained in the international human rights and refugee instruments. In any event, in recent years, a consensus has emerged among a number of human rights and refugee lawyers, government officials and politicians that not only restrictive asylum policies, but also a number of measures aimed at combat of illegal migration adopted by European states that do not contain the necessary safeguards or lack compensatory provisions for people in quest of protection, are at variance at least with the spirit of the 1951 Refugee Convention. It is believed that these States have in this manner retracted from their moral commitment to protect of refugees that they undertook when signing this Convention.

[3] UNHCR has taken the view that states should not sanction carriers that have knowingly brought into the state a person who does not possess a valid entry document, but who has a plausible claim for refugee status or for international protection for other reasons. Thus, states should not apply sanctions unless the carrier has shown negligence in checking documents; if the asylum claim is subsequently not considered as manifestly unfounded; or the asylum seeker is recognized as a refugee or granted stay on other humanitarian grounds.

make increased use of this option, and those countries that do not have this option consider introducing it.[4]

7.III UNHCR's Objectives and Strategies in Central Europe and the Baltic States

7.III.A How to Proceed in the New Asylum Countries?

Until the collapse of the communist regimes, UNHCR had had little experience working in the CEBS). This inexperience led to uncertainty as to how to proceed once the communist regimes had collapsed. This uncertainty was exacerbated by dire predictions that the collapse of the Soviet Union would result in massive population movements. These movements did, however, not occur. Instead, there were movements of people from outside the region, consisting of a mixture of people in need of international protection and economic migrants, many of who were attempting to reach Western Europe. Due in part to the combined effect of visa requirements and carrier sanctions, fewer persons were able to come to Western Europe by air and many, therefore, had to resort to the only land route available, i.e. through the CEBS. As a result of similar measures being adopted by the CEBS, there has recently been a diversion of movements from the latter towards Southeast Europe, including through the Balkan countries, such as Bosnia-Herzegovina, Albania and Croatia.

7.III.B The Prime Objectives of UNHCR in the CEBS

Clearly, the CEBS did not have the capacity to deal with the problems stemming from this new type of movements. For this reason, UNHCR's main input related to building the institutions and capacities necessary for coping with this phenomenon, i.e. creating the

[4] Many countries have already included such possibilities in their legislation. The question arises as to whether they should be expanded or whether they could be more frequently used. On the contrary, on a number of occasions, faced with an increase of violence and human rights violations in refugee-producing countries, some asylum countries have reduced, rather than increased, the number of visas issued to the victims of such circumstances.

structures and operational systems required for refugees and asylum seekers to benefit from protection and material assistance, and developing the skills of the staff of those structures so as to allow them to deal effectively with these issues. To this effect, UNHCR has now opened offices in all the CEBS, the only exception being Estonia and Lithuania, which are covered from the UNHCR Office in Riga.

The ultimate objective of these activities is to enable the states to fulfil their international obligations and ensure that refugees receive protection and that durable solutions are achieved for them, notably the highest degree of self-sufficiency. Hereby, UNHCR is fulfilling its own mandate, i.e. to ensure that international protection is extended to people in need of it and durable solutions found for their problems.

UNHCR's first objective was for the CEBS to accede to the international refugee instruments. Another key objective was the adoption of national legislation and by-laws relating to asylum and the establishment of administrative structures to deal with refugee related issues.

An ongoing objective for UNHCR is to develop the capacities of the CEBS to ensure that they apply asylum laws and by-laws in full conformity with international and regional standards. Where legislation and by-laws still do not fully conform to international and regional standards, the objective is to bring about revisions of the norms to meet those standards. In recent years, UNHCR is in its capacity-building activities, further to first instance decision making bodies, targeting the judiciary, which often constitutes the second instance in the refugee status determination process. As all the CEBS are candidate states for EU membership and, as such, are expected to comply with the EU *acquis* on asylum before accession, an important part of UNHCR's strategy has been to build on the momentum of EU accession. Hence, reaching at least the standards of the EU *acquis* on asylum has been a prime objective that the Office has encouraged the CEBS to meet.

Any successful institution and capacity building in the area of asylum and refugees will necessarily have to involve the active inclusion of civil society, notably NGOs. For this reason, another of UNHCR's objectives in the region has been to strengthen NGOs dealing with refugee and broader human rights issues, mainly as regards their capacity to provide legal and social counselling, and to increase the understanding and support of the public at large for the need to

receive refugees and to provide them with protection and real opportunities to integrate.[5]

7.III.C UNHCR's Main Activities in the Region

In terms of activities, the pursuance of the above-mentioned objectives has first of all entailed lobbying for accession to the international refugee instruments and advising on international standards to be included in refugee legislation. UNHCR currently provides such advice in connection with the many ongoing legislative revisions. UNHCR also provides support for the adaptation of states' administrative structures, including the introduction of co-ordination mechanisms between key administrative departments. Support for the smooth functioning of administrative structures has involved the provision of some equipment, such as registration systems for asylum seekers and refugees and access to country of origin information, including the facilitation of access to electronic databases.

UNHCR also trains civil servants. It arranges training courses and develops training programmes to be carried out by the countries of the region. Increasingly, UNHCR facilitates training activities carried out by experts from outside the region, including in particular EU countries.

In the field of integration of refugees, UNHCR supports or promotes, for example, the establishment of subsidised social housing development projects, vocational training programs and small business loan schemes. UNHCR also continues to support NGOs through training activities, conducted by the Office itself or by other NGOs, and to provide financial support. Such training includes fund raising and project submission skills.

[5] Where viable partners did not exist, new organizations have been created. As representatives of refugee-assisting NGOs often feel excluded from substantive dialogue with the authorities, UNHCR has also seen it as its task to enhance that dialogue. Increasingly, UNHCR offices in the region have sought to develop professional networks for each of the many groups of governmental and non-governmental actors working with refugees, who exchange experience and best practice with experts from other countries and commit to common standards.

7.IV EU Involvement in Institution and Capacity Building in the Central European and Baltic States

A highly particular feature of institution and capacity building in the asylum field in the CEBS has been the support and involvement of states and organizations outside the region, including, primarily, EU states and institutions. An especially welcome development in this connection has been the decision of the Essen European Council to attribute funds through the EU's PHARE Program to institution and capacity building in the areas of justice and home affairs in the CEBS. Following that decision, the EU Commission entrusted a senior UK official, Mr. Anthony Langdon, with the preparation of a report on the assistance needs of the CEBS in those areas.[6]

Gradually, elements relating to asylum are now finding their way into a number of the CEBS' PHARE National Programs. Most helpful in this regard has been the change in the PHARE guidelines, which has made the granting of assistance contingent on compliance with accession rather than on demand. In other words, the PHARE programs are now increasingly geared towards assisting candidate states for EU membership in adopting the EU *acquis* on asylum.

Especially important has been the PHARE Horizontal Programme on Asylum (PHPA). The PHPA involved seven EU countries and UNHCR. It aimed at identifying 'gaps' in the asylum systems of ten central European states candidates for membership of the EU, as well as ways of filling in those 'gaps'. Over a period of two years, the PHPA involved some 100 events, including workshops, round tables and study visits to EU countries by officials from candidate countries.[7] Thanks to the PHPA's objectives and its role in establishing and

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[6] The report is entitled 'Justice and Home Affairs Co-operation with Associated Countries' (Phare Programme, Services contract 95-0683.01).

[7] As part of the PHP exercise a Factual Working Document (FWD) describing the 'gaps' in the asylum systems of those countries as compared to the EU *acquis* on asylum was prepared. On the basis of the FWD, a National Action Plan (NAP) setting out the commitments of the respective governments to fill the 'gaps' identified by the FWD was established. For the purpose of implementing the NAP, a National Task Force, comprising the national and international actors involved in capacity building in the asylum field in a given country, was created in the majority of the candidate states participating in the PHP. Apart from its training component, consisting in explaining the content of the EU *acquis* on asylum, the PHP did not aim at filling the 'gaps' it identified. That was the purpose of other programs, including, in particular, the PHARE National Programs. Rather, the PHP had a co-ordinating role in pointing out which 'gap' can most appropriately be filled by which programs.

ensuring the application of the National Action Plans, the PHPA has become one of the most important tools for institution and capacity building in the candidate states. Particularly noteworthy is that, although informally, the PHPA provides a linkage to the so-called screening process, conducted by the EU Commission with a view to assessing the readiness of CEBS to become EU members in terms of their compliance with the justice and home affairs *acquis*.

UNHCR clearly has had some hesitations as regards its involvement in the PHPA. These hesitations stemmed from the fact that the Office had in the past expressed certain concerns as regards the process that produced the EU *acquis* on asylum, as well as reservations concerning some parts of the texts, which form part of the *acquis*.[8]

In recent years, other EU programs have also contributed to the development of asylum systems in Central Europe and the Baltic states. Those programs include the PHARE Democracy Program (or as it is currently called, the European Initiative for Democracy and Human Rights), benefiting NGOs, and the Odysseus Program.

Finally, two main vehicles for determining the strategies for PHARE programming should be mentioned: the Accession Partnership, comprising short and mid-term priorities, and the Pre-accession Strategy, developed for each of the candidate countries. The upcoming negotiations with the candidate countries on the justice and home affairs chapter are also expected to carry considerable weight as regards the development of their asylum systems.

7.V EU Harmonization and the EU *Acquis* on Asylum: UNHCR's Perspective on the Implications for the Central European and Baltic States

7.V.A UNHCR's View of the EU Harmonization Process

[8] In his book, 'Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection', Gregor Noll states (p. 156, footnote 445): ' It is quite noteworthy that UNHCR is involved in this transfer (of the EU asylum *acquis* to the candidate states) within the framework of the PHARE Horizontal Programme, given that it has criticized pivotal elements of the *acquis*. The Office must have considered that the opportunity to influence information transfer outweighs the risks inherent in its implicit endorsement of the *acquis*.'

In principle, UNHCR values the EU harmonization on asylum, or approximation, as some would prefer to call it. There are a number of reasons why UNHCR endorses this position. Firstly, because the Office believes it to be in the interest of all concerned, and in line with the universality of international refugee law instruments, that refugee protection standards are applied in a uniform manner in as many countries as possible, in particular if those countries are faced with similar categories of refugees. Secondly, because the harmonization is meant to raise standards in certain countries, bringing them into conformity with the agreed harmonized standards. Thirdly, the EU harmonized texts actually contain higher standards concerning some issues than certain universal refugee law instruments, including the Conclusions adopted by the UNHCR Executive Committee. The opposite is also true, however: on a few points the EU *acquis* texts as they now stand would appear to be below universal refugee law standards.

UNHCR's support for the EU harmonization process, as for any other harmonization of asylum laws and practices is, however, conditioned upon that process adhering to two requirements. The first requirement is that the harmonization respects international refugee norms and principles. The second requirement is that the harmonization does not lead to a general lowering of existing refugee protection standards, even if those lower standards are in conformity with the international minimum standards. This would be the case, for example, if the harmonization results in countries with higher standards lowering them to the level of the lowest common denominator, even if that lowest common denominator is not at variance with international refugee norms and principles.

UNHCR also has some concerns about an approach to harmonization whereby exemptions to fundamental principles are tailored to accommodate lower standards found in the legislation and in the practice of some individual states. Indeed, this method of harmonization risks to lead to the undesirable result of *de facto* harmonization at the level of the lowest common denominator, as States maintaining higher standards may feel obliged to revise them downwards with a view to becoming less attractive asylum countries. UNHCR has, therefore, expressed the hope, and is working towards the goal, that the instruments that will be adopted in the future in the framework of the Amsterdam Treaty will avoid this approach.

7.V.B The EU *Acquis* as an Asset for Refugee Protection in the CEBS

UNHCR also values the fact that the EU has established an *acquis* in the asylum area which the new Member States in Central Europe and the Baltic states), and other future Member States, will have to comply with. Indeed, the new Member States represent new countries of asylum with fledgling asylum systems. Bringing their asylum systems into conformity with the EU *acquis* on asylum means ensuring compliance with the international refugee law standards on which the *acquis* is based. Of course, the two caveats mentioned above apply. It would, in particular, be undesirable if, as a result of their efforts to conform to the *acquis*, new EU Member States lowered their standards to lower existing *acquis* standards. This is a possibility in the CEBS, which have in some areas adopted higher standards than those foreseen by the EU *acquis* on asylum.

UNHCR, in particular, values the fact that compliance with the EU *acquis* on asylum does not only entail acceptance and, where appropriate, ratification of the legal instruments it includes, but also comprises the implementation of those instruments. The Office, moreover, appreciates that with a view to implementing effectively the *acquis* on asylum, further to adhering to and implementing these legal instruments, current and future EU Member States are required to bring their institutions, management systems and administrative arrangements up to EU standards.

Of course, the EU *acquis* would have been an even more useful tool for institution and capacity building in the CEBS had it covered all the elements that a comprehensive asylum system needs to comprise. So far, however, the *acquis* does not include a number of key elements of such a system, including, for example, the rights of asylum seekers and complementary forms of protection.

7.V.C The EU *Acquis* on Asylum and International Refugee Law Standards

As was mentioned above, UNHCR would be concerned if the EU *acquis* on asylum contained elements not in conformity with international refugee law. When assessing whether the texts of the EU *acquis* on asylum could be at variance with international refugee law standards, it is important to stress that the *acquis* consists of a number

of quite distinct elements. Two of those elements in particular should be highlighted: on the one hand, the 'hard law' instruments adopted by EU Member States long before the harmonization process and that of establishing an *acquis* on asylum began (for example, the Refugee Convention and the ECHR); on the other hand, the harmonized texts (Resolutions, Joint Positions, etc.) adopted by EU countries in recent years, first as a result of inter-governmental co-operation on justice and home affairs among EU countries and then of the harmonization undertaken within the framework of the Maastricht Treaty.

Whereas it is difficult to see how a conflict between the first category of instruments and international refugee law and principles could arise, there could possibly be incompatibility between the second category and the 1951 Refugee Convention or other international refugee law instruments, such as the Conclusions on Refugee Protection Issues adopted by the UNHCR Executive Committee. Despite the possibility for conflicts and contradictions, however, such incompatibilities are bound to be rare because:

> (a) Firstly, as the harmonised EU 'soft law' texts are part of an *acquis* which includes also hard law texts adopted prior to the harmonized texts, an apparent conflict between the two sets of norms could be avoided through an interpretation of the 'soft law' texts in conformity with the 'hard law' texts.
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> (b) Secondly, even if a conflict between the 'soft law' harmonized texts and 'hard law' texts cannot be eliminated through interpretation, the hard law text will eventually have to prevail over the 'soft law' texts.

Incompatibility could, however, arise between a harmonized EU 'soft law' text and another 'soft law' text, such as an Executive Committee Conclusion.[9] The following constitutes a good example: The EU Resolution on Minimum Guarantees in Asylum Procedures asserts the general principle that until a decision on appeal has been taken the asylum seeker may remain in the territory of the concerned State. In other words, the appeal has suspensive effect. The Resolution, however, foresees that States 'may' provide exceptions to this principle in a number of instances, provided they comply with certain additional procedural safeguards. Based on a number of international soft law instruments, such as for example EXCOM Conclusions, and also on the ECHR as interpreted by the Commission and the Court on

[9] In this connection, however, the question arises as to whether a conflict between a universal and a regional 'soft law' text would not necessarily have to be resolved by giving precedence to the universal text.

Human Rights, UNHCR believes that appeals against negative decisions on asylum should have suspensive effect.

This does not mean, as some have alleged, that when recommending to States that do not in all instances provide for an appeal with suspensive effect to introduce such an appeal, UNHCR encourages them to go against the *acquis*. Indeed, the harmonized texts of the *acquis* are structured in a manner so as to provide for a main rule, which Member States 'shall' adopt, to which a number of exceptions that States 'may' adopt are allowed. Accordingly, what UNHCR is doing when it recommends not to apply those exceptions is just to say: the *acquis* says that you may make certain exceptions; UNHCR would recommend, based on universal or other regional refugee law instruments, not to make use of this possibility of making exceptions. As the *acquis* makes the use of those exceptions optional, it is fully in conformity with the *acquis* not to apply the exceptions.

Moreover, the exceptions allowed for by the harmonized EU texts should be seen in the context in which they were adopted. At the moment when those texts were adopted, a number of EU States were faced with considerable pressures by arrivals of asylum seekers, many of whom were attempting to circumvent the limited legal migration for work possibilities by applying for asylum. These EU States had adopted a number of measures in order to stem manifestly unfounded or abusive applications, which had to be accommodated in the harmonized texts. The same pressures may not be felt in the CEBS at the present time. Accordingly, it may not be necessary to introduce the exceptions in question in the current situation in those states.

Another area in which the EU *acquis* could possibly to be at variance with the interpretation of international refugee law, as UNHCR understands it, relates to the Convention refugee definition and, more specifically, to the application of the definition to persons fearing persecution, not by the state, but by non-state agents. The EU Joint Position on the application of the refugee definition foresees that persecution by non-state agents will be considered to fall within the scope of the Convention where it is encouraged or permitted by the authorities. Where the authorities fail to act, however, the Joint Position leaves it up to individual Member States to determine whether to grant refugee status, 'in the light in particular of whether or not the failure to act was deliberate'. The position of UNHCR is that denial of refugee status to persons fleeing persecution by non-government agents who have no link with the state and whose

activities the state is unable to control has no foundation in the 1951 Refugee Convention.[10]

At first sight, there would appear to be a conflict between the point of view defended by UNHCR and the EU *acquis* on asylum. However, before coming to that conclusion, one would have to consider whether support for UNHCR's position could be found in other parts of the *acquis*. In the jurisprudence of the European Commission and Court on Human Rights, it has been established that ill treatment by non-state actors is also covered by Article 3 of the ECHR. As a result, at least those refugees who are also covered by that provision would benefit from protection against *refoulement*, whether or not persecution emanates from state or non-state actors.

Hence, as mentioned when considering the compatibility with the EU *acquis* of UNHCR's position that appeals against negative decisions on asylum should have suspensive effect, whereas there may be a conflict with one part of the *acquis*, by having recourse to another part of the *acquis*, the conclusion can be drawn that the position is compatible with the *acquis*, or at least that it is more compatible with one part of the *acquis* than with another.[11]

UNHCR had argued that an element of the *acquis* should be practices common to a majority of EU Member States. The EU Council did not, however, follow this view when it adopted the *acquis*. Had it been followed, it could have been argued that, as the practice of an overwhelming number of EU Member States does recognize persecution by non-state actors as qualifying for refugee status, irrespective of whether the state was unwilling or unable to prevent that persecution, although there would have been incompatibility between different parts of the *acquis*, there would bee no conflict

[10] UNHCR has taken the view that there is nothing in the wording of Article 1 A of the 1951 Refugee Convention to indicate that only persons subject to persecution by the state, or which is instigated or tolerated by the state, may benefit from refugee status. That provision stipulates that any person who is outside of their country of origin owing to well-founded fear of being persecuted for Convention reasons falls within the scope of the Convention's inclusion clauses. These conditions are met when a person is outside of their country of origin because the person's life, liberty or security is threatened there by non-state agents, as a result of race, religion, nationality, membership of a particular social group or political opinion, and that the state authorities are unable to provide the person with an effective level of protection.

[11] It is of interest to note, in this connection, that a number of international conventions of relevance to the asylum field form part of the EU justice and home affairs *acquis*, such as, for example, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of all Forms of Racial Discrimination and the European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

between the *acquis* and international refugee law as interpreted by UNHCR.

7.VI Assessing the Results of UNHCR's Strategy

Has UNHCR's strategy been successful? Has it been effective in achieving the objectives the Office has set for the region?

As regards the initial objective of the countries of the region acceding to the international refugee instruments and adopting implementing legislation and by-laws, the strategy has been effective. Indeed, as mentioned above, all the CEBS are by now parties to those instruments and have adopted the implementing norms required.

Clearly, one important reason for the success has been the momentum created by EU accession. Hence the strategy of building on that momentum has borne fruit. Indeed, a powerful driving force has been the wish of the CEBS to conform to the EU *acquis* on asylum. There is, therefore, no doubt that the programs aimed at assisting states in adopting standards in conformity with the *acquis*, such as the PHPA, have achieved results that could not have been expected, or would at least not have been achieved so quickly, had those programs not existed. Another important incentive has been the financial assistance provided by the EU to support the candidate states in preparing for EU membership. The ongoing PHARE twinning programs, involving the placement of advisers from EU states' asylum administrations within the corresponding offices of the CEBS, have been very helpful, in particular in sharing practical experience acquired in EU states with the CEBS.

The strategy aimed at using the momentum created by future EU membership has its limits, however. As stated in the 'Strategic Directions 2000–2005', prepared by UNHCR's Bureau for Europe, 'UNHCR must manage the momentum from the accession carefully and balance it with other arguments in addressing the issues with governments'.

This statement is particularly valid insofar as the standards derived from the EU *acquis* are at variance with international refugee law, or when current practices of the CEBS are better than those of the *acquis*. In such instances, the wish of states to adopt *acquis* standards may even be at odds with UNHCR's strategies, aimed at bringing refugee

protection in the region into conformity with international refugee law.

A particular problem has been that, in the context of EU accession, some CEBS have adopted notions they might not otherwise have contemplated introducing, for example, the safe third country and country of first asylum notion, the safe country of origin notion, or the notion of manifestly unfounded claims. Some CEBS adopted these notions in the belief that they were required to do so in order to conform to the EU *acquis*. In some instances, the EU Commission experts would appear to have insisted that the EU *acquis* did indeed require the adoption of those notions. Clearly, this belief is not supported by the *acquis* texts: they do not require states to adopt all the concepts they contain; what they do require, however, is that, if states do adopt those concepts, they respect the minimum standards contained in the *acquis* texts.

Also the increasing familiarity of the CEBS with western European practices, which the accession preparations have brought about, have in some instances resulted in the 'export' of some undesirable practices to the CEBS. One such example is the adoption by some CEBS of the practice according to which persecution by non-state agents does not in all instances qualify for refugee status.

Another problem has been the limited application in practice in some of the CEBS of the international refugee instruments and implementing norms. The full and inclusive application of those texts is premised on the political commitment of governments, which in turn, depends on attitudes. Whereas it may be possible to ensure that adequate legal norms are adopted, bringing a change in attitudes and creating commitment could be more difficult. Therefore, UNHCR's strategy has also involved influencing attitudes, including those of civil society. Developing NGO's to become partners in advocacy is part of that strategy. Yet, substantial effects of that work can only be expected in the long term.

Another difficulty in reaching the objectives set by UNHCR for the region has been that the CEBS, struggling with the economic and social problems being faced by economies in transition, have found the financial consequences of establishing liberal asylum policies difficult to bear. Of course, western donor countries and international agencies have supported them in their efforts to build institutions and capacities in the asylum area. There is some disappointment, however, in the CEBS with the fact that donor support has so far overwhelmingly been of a technical nature, involving mainly training and advice by foreign experts. It is felt that besides this 'software',

more 'hardware', for example in the form of financial support for building reception centres, procuring office equipment, establishing business loan schemes for the benefit of recognized refugees, paying incentives for voluntary return, contributing to covering cost of forcible return of rejected asylum seekers, etc., is required in order to establish functioning asylum procedures and reception facilities and support the integration refugees and the return of rejected asylum seekers. As its own funds available for the European region have shrunk and are likely to further shrink in the future, UNHCR will not be in a position to remedy this situation substantially.

So far, efforts to integrate recognized refugees in the CEBS and to find solutions to the problem of return of rejected cases have yielded limited results. Clearly, as long as the economies of these states continue to be much weaker than even those of the poorest EU Member States the prospects of integration of refugees, if not properly supported, will remain distant. If integration fails, and as a result people recognized as refugees attempt to leave for countries with better integration prospects, serious doubt is cast on the credibility of the refugee status determination process. If at the same time, adequate solutions to the problem of rejected asylum seekers are not found, the process becomes even more questionable.

7.VII An Attempt to Predict the Future

7.VII.A The Continued Momentum Created by EU Accession

It is, of course, very difficult, if not impossible, to predict future developments in the region. It is likely that EU accession will remain the driving force for development of the asylum systems of the CEBS. Therefore, further alignment of these systems, especially as regards legislation, with the standards contained in the EU *acquis* on asylum can be expected in the coming years. Although such an alignment will in some instances result in decreasing standards, it is likely generally to lead to an improvement of protection standards in the region. One unknown factor is, of course, how the *acquis* will develop as the Amsterdam Treaty begins to be implemented through adoption of new *acquis* texts.

The considerable technical assistance currently being provided to the CEBS will further enhance their capacities to cope with the issues

related to the arrival of asylum seekers and refugees. Training of officials and improved country of origin information will improve decision-making.

It should be noted that since the 2001 PHARE National Programs will probably be implemented in 2002 and 2003 only, after which the most advanced among the candidate countries are expected to have acceded to the EU, it is not likely that there will be another PHARE National Program for those countries, at least not a program of the same size and nature. However, it is to be expected that while the protraction of EU accession will decrease its driving force, it is also likely that once countries do become members of the EU, the momentum created by EU accession will be reduced and financial assistance for institution and capacity building may shrink as compared to the accession phase.

Whether the commitment of the CEBS to actually implement international and national refugee instruments will increase is, of course, difficult to foresee. That will depend on the success of efforts to change attitudes towards the need to offer protection to refugees and commitment to take the measures required to this effect.

Among other factors, attitudes and commitment will depend on numbers of asylum applications. As the CEBS are increasingly being considered as safe third countries and countries of first asylum, increasing numbers of asylum seekers that transited through those countries are being returned there, on safe third country and country of first asylum grounds. Such returns, coupled with tighter control of illegal exits, has led to an overall increase in numbers of asylum seekers in the CEBS, adding to the pressure on their fragile asylum systems. However, as immigration control measures in the CEBS, including preventive measures prior to entry, become more effective, asylum seekers may try to avoid travelling through these states, thus reducing pressures on their asylum systems.

The adoption of an increased number of immigration control instruments, which we will undoubtedly witness in the coming years, calls for renewed reflection on the development of new and innovative approaches that will guarantee that the prevention and suppression of illegal migration is reconciled with refugee protection principles.

A particular phenomenon in the CEBS is that asylum seekers and economic migrants consider them as transit countries, rather than as countries of final destination. Gradually, as the economic conditions in some of those countries improve, they are also becoming target countries for refugees and would-be migrants. Clearly, it will take a considerable equalisation of economic conditions with those of their

western neighbours before the CEBS will as such become attractive to large numbers of refugees and economic migrants.

7.VII.B Some Problems that may Persist

Some problematic practices are likely to continue to exist in the CEBS and, perhaps, even increase. One such practice is the use of Readmission Agreements for the return of asylum seekers from the CEBS to intermediate countries further east. This practice is problematic, as the asylum systems of eastern European countries are most often inchoate or fragmented and therefore they cannot be considered as safe third countries or countries of first asylum. Some of those countries are not even parties to the 1951 Refugee Convention.

Another problem which is likely to persist and grow in importance is the use of admissibility procedures and accelerated procedures for manifestly unfounded claims, without the existence of the required safeguards for those procedures, nor necessarily of the additional 'safety nets' found in western European countries, such as well functioning judiciary, the Ombudsman institution, NGO monitoring of the asylum process, etc. Particularly worrying is the channelling of asylum applications into admissibility procedures on formal grounds (for example, lack of documentation, or non-respect for time limits for filing asylum applications), hence barring access to an examination of the substance of the claim.

Detention of asylum seekers as a matter of course and for long periods of time is also likely to continue and increase in importance in the CEBS. This tendency is partly due to pressures by western European target countries concerning movements of asylum seekers and economic migrants for transit countries to the East to exercise more stringent controls of their eastern as well as western borders. This development is particularly problematic when detention facilities are inadequate.

If in the face of increasing numbers of asylum seekers the resources attributed to the institutions responsible for reception, determination of status and integration of recognized refugees have not been increased proportionally; those structures are likely to continue to be and become even more stretched. The consequence could be a counter-reaction by border authorities that may become reluctant to grant entry into the country and access to the asylum procedure.

It is clear that technical and financial assistance provided to the CEBS for the purpose of immigration control by far exceeds assistance with institution and capacity building in the asylum field. The aim of such assistance is that those countries adopt standards for immigration control, including issuance of visas, imposition of carrier sanctions, control of borders etc., similar to those of western European states. Gradually, such measures, if indiscriminately applied both to people seeking protection against human rights violations and to people who are not, will keep people in need of international protection from accessing such protection in the CEBS. This is particularly worrisome if as a result these people are obliged to seek protection in states that are unable to offer them effective protection. Another unfortunate consequence of these measures may be that people in need of protection feel compelled to 'go underground' and to have increased recourse to smugglers.

7.VII.C Future UNHCR Activities in the Region

During the next few years UNHCR's activities in the CEBS will remain similar to the current activities of the Office as described above. Hence, UNHCR will continue to contribute to building the institutions and capacities of those countries to receive asylum seekers, process their claims, integrate recognized refugees and find solutions to the problem of rejected cases. A particular focus of the Office will be on the integration of recognized refugees. UNHCR has yet to develop its policy on integration in the region. To this effect, a study on the legal situation and practices with regard to integration of seven CEBS has been carried out.[12] It will examine possibilities of involvement and or partnership with IOM in supporting the return of unsuccessful asylum seekers.

These activities will be carried out in close co-operation with EU states and the European institutions, including in particular the EU Commission, which will remain the main providers of technical and financial assistance to the CEBS. UNHCR will, in particular, be suggesting and helping to design and implement appropriate follow-up to the PHPA. Interventions in individual cases, directly or through NGO's and individual lawyers, will for some time to come still have to be undertaken by UNHCR in the CEBS.

[12] The study, entitled 'Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries', is published in European Series, Volume 5, No 1, July 2000.

Gradually, as the necessary institutions are being created and are beginning to function autonomously, UNHCR is, as it does in Western Europe, focusing on advocacy, public awareness, training and network building in the CEBS. Accordingly, the Office has already and will continue to scale down the amount of financial assistance it provides to the countries of the region, in particular in the form of material assistance to asylum seekers and refugees.

8 Future Perspectives: Accession and Asylum in an Expanded European Union

Rosemary Byrne

8.1 Introduction

The Amsterdam Treaty reopened the closing doors in the area of asylum and migration policy in Western Europe. While this opening of doors remains confined to the corridors of policy makers, rather than the gates of frontiers, the reformulation and refinement of past intergovernmental efforts to create a harmonized European asylum regime will determine the standard of protection for refugees not only in the current fifteen Member States, but in the over 27 states that eventually may become part of an expanded EU. Although aspirations of membership for many of these states will not be met without radical reforms unforeseeable within the next few years, the impact of the measures undertaken in the area of western European asylum policy is not similarly delayed. Current discussions on EU asylum policy and the candidate countries have two central focal points. The first is on the consequences for these states of the restrictive EU refugee policies as they are already implemented in Western Europe. This debate centres on the extent to which the west is shifting the burden of hosting asylum seekers eastward, primarily through non-admission and 'safe third country' practices of Member States. The second focal point is the process and impact of transposing the entire EU asylum *acquis* into the law and policy of the candidate states, as this is an explicit criterion to gain admission into the European Union.[1]

[1] See, S. Anagnost, 'Challenges Facing Asylum System and Asylum Policy Development in Europe: Preliminary Lessons Learned from the Central European and Baltic States (CEBS), International Journal of Refugee Law, vol. 12, no. 3, pp. 380-400, (2000); S. Lavenex, "Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe." J. Ref. Studies vol. 11, no. 2, (1998); S. Lavenex, Asylum, Immigration, and Central-Eastern Europe: Challenges to Enlargement, European

R. Byrne et al. (eds.), New Asylum Countries?, 373–422.

Although this chapter will examine some of the core components of the asylum *acquis* that jeopardize protection standards for refugees in the current and future Members of the EU, it is clear that the transfer of elements of the EU asylum *acquis communautaire*[2] to applicant states has been instrumental in equal measure in advancing protection in the region. Since the advent of the accession process, many of the newly created refugee determination systems in the candidate states embraced an array of fundamental procedural safeguards that are also integral to the *acquis*. While the accession process is far from the sole variable leading to these positive legislative developments, it certainly is a central contributing factor.[3]

The fact that the *acquis* has to varying degrees advanced protection in the east, and less visibly in the west, highlights the inherent paradox within this regional body of soft and hard law for asylum. Many aspects of the *acquis* are an assembly of the basic building blocks for a regional asylum system that could guarantee protection in line with

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Foreign Affairs Review, vol. 3, pp. 275-294, (1998); IOM & ICMPD, Migration in Central and Eastern Europe 1999 Review, (Geneva: IOM 1999). ECRE, Position on the Enlargement of the European Union in Relation to Asylum, (London: ECRE 1998); UNHCR, 3rd International Symposium on the Protection of Refugees in Central Europe, 23-25 April 1997, *European Series* vol. 3, no. 2 (Geneva: UNHCR 1997).

[2] The *'acquis'* encompasses all European Union law, both legislation and treaties. It is also interpreted to include non-binding instruments and general guiding norms and rules associated with the achievement and objectives of the EU. For a list of the central instruments of the EU asylum *acquis* which inform discussions between the European Union, officials from applicant states and the UNHCR under the Phare Horizontal Programme on the necessary reforms in asylum laws and practice in preparation for EU membership *see* Draft list of the *acquis* of the Union and of its Member States in the field of Justice and Home Affairs, 20 March 1998. Council of the European Union, Doc. No. 6438/98 REV 3.

[3] As the sub-regional chapters of this book highlight, it would be inaccurate to see the domestic asylum law and policy in the Baltics and Central Eastern Europe as an exclusive outcome of the accession process. The EU admission requirements in the area of asylum, however, position the asylum *acquis* as the driving force in asylum policy in the candidate states. Anagnost points to the case of Lithuania, where as a consequence of lobbying against the asylum bill before parliament by the EU Member States and UNHCR in the Round Table discussions under the PHARE programme, the legislative process was halted and a revised bill reintroduced. Although the process of drafting asylum legislation in the Czech Republic and Slovenia had already commenced before the EU began its PHARE programme, he concludes that the process of review under the PHARE enhanced the respective draft laws. See Anagnost, supra note 1, p. 390.

international standards. These are, as critics in Europe have long observed, undermined by the some of the core practices of the *acquis*. It is no longer simply non-governmental organizations, however, that see the current cracks in the foundation of the regional system as it is now laid out. Through the EU's own process of harmonizing and reforming asylum standards and practices within the current Membership, it is recognized by the European Commission, European Council of Ministers, the UNHCR, commentators and advocates, that there are identifiable fault lines in the regional protection system that Europe has constructed over the past fifteen years.[4] Although a Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status[5] has been put forward by the European Commission, it has had no impact on the accession process to date, and is likely to undergo significant revisions before being adopted in its final form. In its early stage, its importance for the discussion of the accession process and the *acquis* lies, not so much in the intricacies of its provisions, but the extent to which it reflects the determination by policy makers within a conservative European Commission that central elements of the asylum *acquis* required higher protection standards and more developed safeguards.

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[4] Although there is a considerable range of views about the nature of the short-comings of the current *acquis* and their significance with respect to protection, official statements and publications from all of these parties reflect agreement on the need for the current weaknesses in harmonized asylum system of the EU to be remedied through the process of reform mandated under the Amsterdam Treaty. See generally European Commission, 'Towards common standards for asylum procedures,' Working Document, (SEC 1999) 271 Final; Conclusions of the Presidency (Tampere Summit Conclusions) 15 and 16 October 1999; UNHCR, 'Towards Common Standards for Asylum Procedures': Reflections by UNHCR (Geneva, 4 May 1999); UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, European Series Vol. 1, No. 3 (Geneva 1995); Reinhard Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', *International Journal of Refugee Law*, Vol. 7 (1995) pp. 383-405; Rosemary Byrne and Andrew Shacknove, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, Vol. 9 (1996) pp. 185-228; Gregor Noll, 'Non-admission and Return of Protection Seekers in Germany', *International Journal of Refugee Law*, Vol. 9 (1997) pp. 415-52; Jens Vedsted-Hansen, 'Non-admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?', in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities* (Cambridge 1999) pp. 269-88.

[5] Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2000) 578, 20 September 2000.

It is against this backdrop that transposing the west's protection landscape onto the future territories of the EU should be viewed. For under the admission criteria, the adoption of the asylum *acquis* is wholesale, failing to discriminate between the strongholds and fault lines in the terrain laid by the asylum system it exports through the accession process. The integrity of the regional asylum system that is now under the process of reform in Europe rests heavily on one, central, yet barely addressed, question. What happens to the fault lines, which leave significant gaps in the guarantees of protection in the advanced legal systems of the west, when they are exposed to the strains that accompany the transitional legal and administrative infrastructures in the newly democratized states in the east? Indeed it is remarkable how little attention is paid to the impact that the strains of expansion may have on these gaps, which are now publicly admitted to by policy makers in official documents.[6] Absent deeper analysis of this outcome, the long term protection package for an expanded EU will allow for the possibility that in certain circumstances refugees may be directly, or indirectly, subject to *refoulement*.

This study unveils a scenario that is more ominous and undoubtedly, already coming into existence. For as revealed by the sub-regional chapters of this book, the replication in the east of western asylum practices, particularly non-admission and safe third country policies, is not necessarily an affirmative implementation of the *acquis* but, as likely, a defensive mechanism against the exclusionary asylum practices carried out by the immigration authorities in the target territories. It is these practices that create the most pronounced fault-lines in the western European asylum system. The logical expectation is that as these practices continue to proliferate throughout Central Europe, their eastern neighbours, candidate and non-candidate countries alike, will respond in kind. While European policy makers barely have addressed how the fault lines of the *acquis* will fare under the strains of the transitional applicant states, none, at least publicly, have ventured to consider the degrees to which these strains are magnified in the less stable states that will soon border the expanded EU, and most importantly, what impact this will have on refugees seeking protection.

As for the effects of the accession process on western asylum systems, they have largely been considered in respect to the changing nature of migration patterns of people transiting through the candidate

[6] Ibid.

countries. The investment in, and monitoring of, refugee protection standards in the east reflects a concern for strengthening human rights protection in future Member States. Once advanced standards are in place, and as the practices of several western European states prove, even before such a time, it allows for the transfer of asylum seekers back to the respective candidate countries through which they have transited. While the outcome of this cross-regional survey on east–west migration and asylum offers important confirmation of these prevailing trends in refugee protection, it demonstrates that the substantive effects of the accession process on refugee protection are not solely experienced in the east.

The evolution of asylum policy in each of the three examined sub-regions, reveals the extent to which the transfer of the asylum *acquis* to future Member States tests the underlying assumptions and accepted practices of the existing European asylum regime and its capacity to ensure adequate standards of protection in an expanded EU. At first blush, this may indeed offer little insight for those who have argued for over a decade that select practices adopted under the European asylum framework fail to provide adequate guarantees against *refoulement* within the current Member States of the EU. While some practices have been successfully challenged in national courts, however well supported, the arguments have failed to persuade regional policy makers, state authorities and legislators that until reforms sufficiently raise the regional minimal standards across Europe, in spite of their advanced national legal traditions, current practices will continue to put individuals at risk of *refoulement*.

The period of asylum reform now underway in the Post-Amsterdam era has the benefit of witnessing the fate of the *acquis* in the east. The protection problems that emerge in the candidate countries through replication of western practices, or more directly through the implementation of the *acquis,* are different in degree, not in kind, to those that have plagued western protection systems. A difference of a few degrees, however, may offer more glaring illumination of the flaws in the foundation of the adopted European protection system that western states have chosen to overlook in their desire to push forward the process of asylum harmonization. In an optimal policy world, the potential of the accession process to affect asylum standards should ultimately be greater in the west than the east, for if analysed closely, there is the potential that the experiences of the candidate countries will do more than simply foreshadow the future of asylum in an enlarged EU. For the impact of the accession process can be measured

as much by the advances and flaws in the emerging protection regimes to the east, as by its capacity to test and inform the assumptions and practices of the current asylum policy in the west that is now undergoing reassessment by the European Commission, Parliament and Council.

In this chapter, perspectives on the future of asylum in an enlarged EU are drawn from analyses of the range of factors effecting the formation of asylum policy. Firstly, I will briefly describe the dynamics of east–west migration in the aftermath of the fall of the Berlin Wall, followed by an analysis of the general context in which asylum policy developed throughout candidate states, both before and after their formal application to the EU. This will consider the impact of bi-lateral and multi-lateral relationships outside of the formal ambit of the EU, as well as the paramount role of domestic politics. The independence of many of these factors from the immediate accession process renders them highly relevant as indicators of refugee policy developments in the eastern neighbours to the candidate countries. Against this backdrop of factors directing the course of eastern asylum policy, the ascendant and now central role of the asylum *acquis* will be examined. This will focus on the central features of the *acquis* that will have the foremost impact on protection in the East. Lastly, conclusions based on the fate of the *acquis* in the east will be discussed in light of the assumptions that underlie some of its most controversial features and the practices to which they give rise. It is the experience of protection in the east, now directly driven by the admission criteria for the EU and its array of attendant programs that should inspire and inform the reformulation of refugee policy that is underway in the EU.

8.II Migration and Asylum Policy in the West in the 1990s

Migration policy in Europe during the last two decades increasingly has been shaped in light of the prevailing goal of intensified border control. The population movements westward from former communist states long preceded the historical transformations that have altered permanently the political and ideological map of Europe. The arrival of relatively few individuals who were able to cross the fortified frontier between east and west was welcome. Western European states

readily offered themselves as a haven for those fleeing from the communist systems of the east. The costs of receiving communist dissidents in western states were low, while the symbolic political benefits were high. The means and the ends of the stringent exit controls of the Eastern Bloc symbolized by the Berlin Wall became perhaps the most powerful reminder of the deprivation of fundamental human rights under oppressive communist regimes. Indeed, the very first political trials of East German authorities after unification in 1990 were of border guards and their political superiors, culminating in the conviction in 1999 of the last communist leader of East Germany, Egon Krenz.[7] Yet while these trials raised vital issues in Germany about justice, fundamental rights and freedom of movement across borders, apprehension about potential migration patterns in the new world order transformed western perspectives on entry and exit controls in the east. European governments rapidly embraced the ends of the border policies of the old communist regimes, abandoning only the lethal means by which they had been pursued. Germany, along with all frontier states of the EU, encouraged the rapid resurrection of impermeable controls in these transitional eastern states. For with the turn of history and the crumbling of the Berlin Wall, the 'Iron Curtain' was reconstructed in response to heightened fears that independence and instability in the east would lead to exponential increases in the number of individuals illegally crossing borders into western European states. Predictably, the equation of costs and benefits shifted. As the numbers of asylum seekers entering Western Europe from the east climbed, the symbolic political rewards seemingly vanished. Refugee policy, in the minds of the authorities and in the opinion of the public, rapidly became a costly endeavour.

The context for asylum policy was not limited to the numbers of asylum seekers which arrived from the east, nor indeed solely to the weakening grounds they were able to present in their claims as a result of the newly democratized regimes in their country of origin. In the early 1990s mounting backlogs in the asylum determination systems in the west still included claims from the soon to be candidate countries,

[7] These trials were in response to the killing of over 600 people while they sought to flee across the East German border to the west. The border guards and officials were prosecuted for homicide. For an overview of these cases see M. Gabriel, *Coming to Terms with the East German Border Guards Cases*, 38 Colum. J. Transnat'l L. 375 (1999).

with progressively weaker grounds for claiming asylum.[8] However, with the exception of Poland, the number of claims submitted by the citizens of the candidate countries by the late 1990s created a negligible strain on asylum systems in Western Europe.[9] Increasingly, those crossing the borders into Western Europe were third country nationals transiting through candidate states.[10] For economic migrants and refugees alike, from the Baltics, Central and Eastern Europe or beyond, the journey through, rather than to, the eastern states became an obvious route for those seeking a better life. The economic opportunities and social welfare protections in the affluent western European states promised a better future than that which was on offer from the economic turbulence of the eastern states navigating their transition from centralized to capitalist economies.

It was not the promise of integrating into the societies and economies of the west, however, that was on offer from European states. Such prospects diminished even before the fall of the Berlin Wall, with the gradual tightening and eventual closure of all channels for immigration. While domestic offers of immigration could be abandoned in the climate of recession, international obligations towards refugees could not be renounced. The absence of binding international guidelines on implementing these obligations, however, allowed States instead to restrict the scope of protection provided to refugees through reforms in asylum policies that deterred, restricted and often denied access to western European states or inhibited the

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[8] For example, in Germany in the early 1990s there were large numbers of claims submitted by Polish asylum seekers based upon their membership in Solidarity, notwithstanding the fact that Solidarity had assumed power in 1989. These claims contributed to the mounting backlog in the German asylum system which took years to process applications. K. Hailbronner, *The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western Perspective*, 5 Int'l J. Refugee L. 31 (1993).

[9] See Table II.9, 1996-1998 Asylum Applications from Citizens of CEECs Submitted in Selected Western European Countries, in IOM & ICMPD, Migration in Central and Eastern Europe, supra note 1. As J. Vedsted-Hansen observes in his discussion of Nordic Policy, after 1995 asylum seekers originating from the Baltic States were so small in number as to not be a significant policy consideration, see Chapter 4.I.

[10] The number of asylum applicants who have disappeared from the jurisdiction during the processing of their claims in Baltic and CEEC states and presumed to have travelled into western Europe is one strong indicator of this trend. See Table II.12, Cases of Disappearance or Leaving the National Territory During the Asylum Procedure in Selected CEECs, IOM & ICMPD, Migration in Central and Eastern Europe, Ibid.

careful assessment of claims once in the system and the guarantees of independent and informed review of denied claims.

8.III Factoring the Influences on Asylum Policy: the Accession Process in Context

The overriding national policy objective of each of the candidate states is membership in the EU. As with the extensive range of areas that require reform for states to qualify for admission, the criteria established by the *acquis* for the emerging asylum and border control systems undoubtedly set the benchmarks that these governments are striving to meet. Yet an analysis of the explicit criteria for membership set forward by the EU in the instruments that make up the asylum *acquis* should not overshadow the instrumental factors external to the formal accession process that also determine the nature and substance of national asylum policies.

The sub-regional case studies in this project illustrate that the development of asylum policy in every jurisdiction is a complex and multifaceted process. Reflecting the earlier experiences in individual Member States, a dynamic array of forces that do not emanate from the EU or the formal process of accession have converged over time to shape the contours of refugee practices in applicant states. Prior to submitting applications to the EU, the current candidate states were merely eastern neighbours with a significant potential to usher unwanted migration flows westward. At the same time they maintained limited capacities to guarantee protection for asylum seekers in line with international standards. At that time, the situation of the candidate countries with respect to asylum policy provides a useful parallel for the circumstances that in turn will increasingly affect their eastern neighbours. The current trend in candidate states to replicate the deflection policies of western Member States, in turn places Russia, Belarus, the Ukraine and other neighbours to the east, in an analogous situation to that which the applicant states were in during the early part of the 1990s. The caveat, however, is that these new frontier states possess an even more diminished capacity to provide guarantees of protection for asylum seekers arriving into, transiting, or returned through, their territory. For that reason, the influences, pressures and side effects of western policy in the 1990s on the candidate countries external to the accession process are important

indicators of the broader ramifications of European practices beyond the current and future EU.

Applicant states technically agreed to approximate the asylum *acquis* into their legislation in the early 1990s, as this was inherent in the broader obligation to transpose the entire *acquis* of the EU. The candidate countries assumed this duty with the conclusion of the bi-lateral European Agreements with the European Communities as part of the pre-accession process.[11] The formal accession process began in 1994 with the submission of applications by Hungary and Poland for EU Membership, followed by each of the states of the Baltic Sea Region, Estonia, Latvia and Lithuania, in 1995[12] and the Czech Republic in 1996.[13]

The actual influence of the accession process, however, commenced well before the treaties and preceding communications; it began in the early days of the transitional post-communist regimes with the collective expression of aspirations from within each state to future membership in the EU.[14] There were two primary ways the dominant asylum agenda in the west influenced aspiring applicant states. The first was their own desire to pursue policies that would generally be perceived favourably in light of their anticipated submission of an application for membership to the EU.[15] The second was the implementation of migration policies that could cope with the demographic effects of western deflection policies. These migration policies were defensive mechanisms, to avert the dreaded destiny of

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[11] Helen Hartnell, 'Subregional Coalescence in European Regional Integration', Wis.Int'l L.J. vol. 16, 1997, pp. 115-225 (115-151).

[12] BULL. EUR. UNION, Nov. 1995, point 1.4.60; BULL. EUR.UNION, Oct. 1995, point 1.4.42; BULL. EUR. UNION, Dec. 1995, point 1.4.60.

[13] BULL. EUR.COMMUNITIES, Apr. 1994, point 1.3.18; point 1.3.19; BULL.EUR. UNION, June 1995, point 1.4.58; BULL.EUR.UNION, Jan.-Feb. 1996, point 1.4.75.

[14] Aspirations for EU Membership were expressed in the very early days of the new regimes in Central Eastern Europe. See generally, T. Garton Ash, The Uses of Adversity: Essays on the Fate of Central Europe, (New York: Vintage Books) (1989).

[15] As pointed out by B. Nagy, although the EU had little direct impact on Hungarian refugee policy until the latter part of the 1990s, '...the shadow of the Union and its *acquis* loomed large after prospects for accession became realistic.' Chapter 3.II.D.1; The Latvian Government Working Group identified in 1996 the need for introducing asylum legislation in accordance with international law as 'it will undoubtedly be one of the pre-conditions upon Latvia's joining the E.U.' Chapter 4.III.A.1.

their territory transforming into a 'closed sack' for non-deportable migrants. The term 'closed sack' refers to the fate where a transit country unwillingly becomes the final destination for asylum seekers and illegal migrants when they fail to be admitted into their target states in the west. As western governments well know, in addition to the long-term obligations these receiving states have to refugees, those without valid claims are likely to remain in the jurisdiction. Notwithstanding the powers of deportation granted to the immigration authorities for denied asylum claims, they remain difficult to implement and many asylum seekers successfully go underground and remain in the jurisdiction. The individuals captured in the metaphor of the 'closed sack' are those who will remain in the territory within, and outside, the law. The fear that attaches to the financial, social and political costs for this phenomenon is a potent fear that has affected refugee policy in each of applicant countries in this study.

8.III.A Chain Reactions: Readmission Agreements, 'Safe Third Country' Policies and the 'Closed Sack' Fear

Preceding the explicit requirements involved in implementing the asylum *acquis*, pressure was exerted initially by individual Member States, and then by the EU, to encourage its eastern neighbours to fortify border controls and conclude readmission agreements with an expanded range of states, both in the east and west. This would curtail the amount of illegal inward migration to the EU and facilitate the return of illegal migrants to applicant states and their eastern neighbours. Attempts to remedy this exclusively westward flow of benefits resulting from readmission agreements were made by the west's lifting of visa restrictions for nationals of the signatory state. Individual Member States and the EU delivered financial resources and technical expertise to the candidate countries to establish more stringent border controls for what will soon be the borders the expanded EU.[16] The 1990 Schengen–Poland Readmission Agreement

[16] For instance, both the German-Polish and German-Czech readmission agreement were from 1993 and 1994 respectively were accompanied by bi-lateral co-operation treaties which provided for the transfer of DEM 120 million to Poland and DEM 60 million to the Czech Republic to support enhanced border controls. See supra, section 2.II.A.3.

is the earliest regional example of these agreements.[17] It exemplifies the conditional bartering that accompanied the process, and it typifies the failure of the treaties to address the protection needs of asylum seekers who would be returned from the west without having had their claims examined substantively. Although the return of individuals under these agreements would include both illegal migrants and asylum seekers, there are no provisions which require that the sending state notify the receiving government that an asylum seeker has not had their claim substantively examined, nor does it require the sending state to receive guarantees from the receiving state that such an examination on the merits of an asylum claim will occur. In the mid-nineties, there were some 30 bi-lateral readmission agreements between and among western and Baltic and CEEC states. The failure to include adequate recognition of the particular safeguards required for asylum seekers gave rise to incidents where the readmitting authorities were not allowing asylum seekers who were returned on safe third country grounds access to refugee determination procedures. Hence, these asylum seekers, among them refugees and those in need of humanitarian protection, would never have the opportunity to have their claims assessed on the merits in either the sending or readmitting state. The straightforward modification of these agreements by introducing notification and guarantee provisions would avert the heightened probability of instances of *refoulement*. Instead, the then EC Ministers of Justice and Home Affairs chose to overlook the protection concerns resulting from readmission treaties whose provisions failed to distinguish between illegal migrants and asylum seekers. Rather than opting to remedy this characteristic flaw in the emerging readmission regime, the Council of Ministers engraved it in the template for regional practice. The text of the 'Standard Bilateral Readmission Agreement' adopted in November 1994, failed to include any procedural safeguards for asylum seekers that would give effective meaning to the protection obligations under the 1951 Refugee Convention.[18]

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[17] Schengen-Polish Accord Relating to the Readmission of Persons in Irregular Situation, 21 March 1991.

[18] The only provision for asylum seekers is contained in Art. 11 of the specimen agreement, which generally states that such agreements shall not affect the contracting parties obligations under the 1951 Convention, the European Convention on Human Rights, the Dublin Convention, and other international readmission agreements. Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ

The ensuing decade after the Schengen–Poland Readmission Agreement witnessed a wave of readmission agreements between individual western and future Member States, protection concerns notwithstanding. The subsequent pressure on candidate states to conclude similar readmission agreements with the states along their eastern borders was formalized by explicit admission criteria for the EU under the Associated Partnership Agreements in 1998. Again, the protection considerations were widely eliminated from these agreements. The formalization of this criteria reflects the extent to which the 'protection elsewhere' concept is assumed to prematurely enlarge the pool of states to receive asylum applicants, without the attendant guarantees for admission to procedures and genuine protection ensured.

One could argue that these treaties generated a powerful force for restrictive policies in the east. For the prospects of readmissions on a large scale, predictably, intensified national anxieties of the 'closed sack' fate. In this study, the experience of Germany and Austria as current EU frontier states shows that the phenomenon of the 'closed sack' fear is not exclusive to the east. It simply spread to the region as a result of readmission agreements and safe third country policies. Carried along with these readmission agreements is the contagion of the 'closed sack' fear travelling from west to east. As agreements are entered into with transit states farther east and more proximate on the travel routes from main countries of origin, the eastward ripple is likely to generate a wave of defensive asylum policy mechanisms.

Without the formal pressure from the EU, coupled with the 'closed sack' phenomenon that comes with the prospect of large scale transfers of aliens from the west under readmission agreements, it is not clear that defensive exclusionary policies attached to the *acquis* would necessarily be the preferred policy response of select applicant states. Strengthened Polish border controls have adversely affected cross border trade as well as given rise to concerns over adverse affects on Polish minorities in Belarus and the Ukraine.[19]

The EU is requiring that candidate states enter into readmission agreements with those states along their eastern frontiers that are both closer in proximity to main countries of origin, as well as widely recognized as lacking the capacity to ensure adequate protection at

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No.274, 19.09.1996, p.20.

[19] See supra, section 2.II, p. 11, note 34; see also, section 3.I.

this time. By advancing this objective, the EU is replicating the practices of Member States in the early 1990s. The safe third country notion was increasingly relied upon to justify removals when possible, in the absence of effective review of the quality of protection in the third state as well as the state's willingness to consider asylum claims substantively.[20] Current domestic refugee legislation in all Member States allows for returns to other western states without any right to a substantive appeal, under the terms of the DC. Practice was and remains less uniform for returns beyond the current Membership. While the Nordic governments refrained from returning asylum seekers to the Baltic States on safe third country grounds in the mid 1990s,[21] not all western governments based their removal policies on a sufficient examination of protection standards in the third country. In practice, several European governments returned individuals to states that had neither signed nor ratified the 1951 Refugee Convention.[22]

The European Commission's Proposal for a Council Directive on Minimum Standards on Procedures in Members States for Granting and Withdrawing Refugee Status contains significant advances for refugee protection that one would hope will remain intact after review by the European Parliament and Council of Ministers. The safe third country provisions in this proposal eliminate some of the most severe compromises contained in the London Resolutions.[23] Even in this improved proposed instrument, albeit not unconditionally, it specifies that '[a] country that has not ratified the Geneva Convention may still be considered a safe third country.'[24] There is a range of safeguards under this provision, yet it inevitably allows for considerable latitude in how states will interpret and apply these conditions.

The advanced traditions of constitutional and administrative law in western Europe is considered to be a sufficient safeguard for current European asylum practices against the possibility of *refoulement*. This assumption could not be transferred yet to the transitional applicant

[20] See N. Lassen and J. Hughes, eds., *"Safe Third Country" Policies in European Countries*, (Danish Refugee Council: Copenhagen) (1997).

[21] See supra, section 4.I.

[22] See R. Byrne & A. Shacknove, supra note 4, pp.200-203; European Consultation on Refugees and Exiles, Safe Third Countries: Myths and Realities (ECRE: London) (1995); Amnesty International (British Section), Passing the Buck: Deficient Home Office Practice in 'Safe Third Country' Asylum Cases (July 1993).

[23] Proposal for a Council Directive on Minimum Standards, supra note 6, arts.18-22, Annex I.

[24] Ibid., Annex I.

states, as training, strengthening and reforming the judiciary remain target objectives for membership in each of the candidate states. However, even in Western Europe the courts did not uniformly act as an effective safeguard for safe third country removals in the early 1990s. Although the Austrian Federal Constitutional Court did abolish some of the most serious abridgements of rights under the Asylum Act 1991 and Aliens Act 1992 as violations of the rule of law [25] it adopted a more deferential approach with respect to safe third country practices. Safe third country decisions were upheld based on protection standards at the time of an asylum seeker's transit. This excludes consideration of the obvious determinant as to whether protection can be guaranteed in a third country: the *current* practices and standards in the jurisdiction to which an asylum seeker is about to be returned. Even the scrutiny of standards at the time of transit was watered down, whereby mere evidence of the official ratification of international instruments and the local presence of a UNHCR office, served as sufficient justification to uphold a safe third country removal.[26] In a landmark decision in 1996, the German Federal Constitutional Court upheld the concept of 'normative ascertainment' for designating safety of the third countries. The practical effect for asylum seekers is a broad deference allowed to the views of German legislators in designating safe third countries. It permits lawmakers to presume that states that are formally bound by the 1951 Refugee Convention and the ECHR, in practice do comply with their obligations. Consequently, safe third country designations can forgo a careful and necessary assessment of actual practices and standards in the third country. The protection-based approach adopted by the British courts has resulted in closer scrutiny of both procedural practices and substantive protections in the 'safe third country' prior to removals, yet this is the exception rather than the European norm.[27] Perhaps, most reflective of the role of the Courts in monitoring this widespread practice is the absence of significant body of European jurisprudence addressing the safe third country notion.[28]

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[25] See section 3.I.D. The legislative provisions found to violate the Austrian Constitution concerned restrictions on the right of appeal for only notorious and flagrant violations, as well as the denial of suspensive effect for appeals challenging expulsion.

[26] Ibid.

[27] See A. Nicol and S. Harrison, "The Law and Practice in the Application of the Dublin Convention in the United Kingdom" (1999) 1 European Journal of Migration and Law 465.

[28] See N. Lassen and J. Hughes, supra note 20.

For the transitional legal regimes of the former communist bloc, the role of UNHCR in the process may be a substituting safeguard. Yet UNHCR's evolving position on readmission and safe third country removals may diminish faith in the capacity of the institution to sufficiently compensate for practices that heighten the risk of *refoulement*. While this will be discussed in more detail below, it is worth noting that the position of UNHCR in the early 1990s, which sought to have explicit provisions providing for guarantees for admittance and substantive examination of asylum seekers incorporated into readmission agreements, was rejected by Member States and excluded from the terms of the readmission agreements entered into with the candidate countries.[29] While the non-binding Resolution on Minimum Guarantees for Asylum Procedures fails to include a provision for the prior consent of a receiving third country, it at least contains a notification provision, which specifies that '[the] third country authorities must, where necessary, be informed that the asylum application was not examined in substance.'[30]

It is ironic, that outside of the scope of readmission agreements, UNHCR did not promote a parallel position on safe third country removals that would offer a comparable level of protection as their recommendations for readmission agreements. According to UNHCR's position stated in 1995, with respect to removals which were not carried out under the Dublin and Schengen Conventions, both treaties which allocate responsibility for examining asylum requests, the sending state need only have 'at least implicit consent' from the receiving third country that a claim will be admitted into, and considered substantively under, their national refugee determination procedures.[31] This departs from an earlier legal opinion of the London UNHCR branch office, which in 1993 acknowledges that

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[29] '[T]he provisions of such agreements should, furthermore, explicitly relate to the responsibility of that country to examine asylum requests and of the sending State to advise the authorities of that country of the basis of the removal decisions. The latter responsibility is intended to avoid the possibility that the receiving State believes the application to have been rejected on its merits.' UNHCR Position on Readmission Agreements, 'Protection Elsewhere' and Asylum Policy, August 1994. Printed in UNHCR, 3rd on the Protection of Refugees in Central Europe, supra note 1, pp.467-468.

[30] Resolution on Minimum Guarantees for Asylum Procedures, supra note 5, at para. 22.

[31] UNHCR, An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken By UNHCR, European Series, vol. 1 No. 3 (UNHCR: Geneva) (1995), pp. 19-20.

while there are circumstances where implicit consent may be sufficient, *the general principle requires that explicit consent of the receiving country be obtained as a pre-requisite for implementing 'safe third country' removals in line with international obligations.*[32] By 1999, when UNHCR responded to the European Commission's working document 'Towards common standards for asylum procedures', with respect to safe third country removals, it asserts its standard position on the need for 'sufficient guarantees' for each asylum claim that is denied on 'safe third country' grounds. It fails, however, to even address the issue of consent specifically.[33]

Given the proliferation of readmission agreements during the 1990s as a principle conveyer of asylum seekers between jurisdictions, and UNHCR's stated concerns about the absence of provisions adequately ensuring that asylum seekers will have their claims assessed in the readmitting territory, their silence on the issue of consent in remarkable. As UNHCR has often observed in its commentaries of trends in European asylum practices, when offered a lesser standard as a minimum threshold, states commonly do not feel compelled to introduce procedures that rise above it. Incorporating the lesser standard of 'implicit consent' into their earlier policy documents,

[32] 'Arguably, the agreement of the country of destination needs not be established on a case- by-case basis. Such an agreement might perhaps be presumed in cases where it is a well-established fact that, provided that certain conditions are met, the third country in question consistently accepts responsibility for asylum seekers who have applied in another country. Normally, however, the removing country will not fulfil its international obligations vis-à-vis the asylum seeker if it does not seek and obtain from that country of intended destination, explicit assurances to the effect that the person will be admitted to its territory and that his claim will be considered.' UNHCR, 'The "Safe Third Country" Policy in the Light of the International Obligations of Countries Vis-à-Vis Refugees and Asylum Seekers', (UNHCR: London) (July 1993) unpublished, para. 4.2.26.

[33] A seemingly strengthened position with respect to consent was contained in UNHCR's 'preliminary draft' of this document. The preliminary draft provides that States who return asylum seekers to another State for examination 'should at minimum *obtain the consent* of the receiving state to readmit the applicant, to consider the asylum claim in substance and to provide effective protection to the claimant.' [Emphasis added]. This provision, however, was eliminated from the final text. UNHCR, "Towards Common Standards for Asylum Procedures". Preliminary reflections by UNCHR on some of the issues raised in the Working Document prepared by the European Commission. Unpublished document, Geneva, 1999; UNHCR, "Towards Common Standards for Asylum Procedures" Reflections by UNCHR on some of the issues raised in the Working Document prepared by the European Commission. Unpublished document, Geneva, May 4, 1999.

allows states to operate readmission agreements with the real possibility that refugees may be returned to their country of origin without any assessment of their claim. This was the case particularly during the time when there were nascent or non-existent asylum systems in several candidate countries.

UNHCR's adopted standards were directly in line with European practices, whereby nearly all European states allowed for removal without obtaining explicit consent that the applicant will be admitted and have their claim substantively examined in the third country. Ironically, in the very same position statement which asserts the adequacy of 'implicit consent' prior to the removal of an asylum seeker, UNHCR then proceeds to critically depict the scope of the 'implicit consent' standard in the British legislation at the time. Yet, on its face, the British authorities could easily argue that the legislation complied with the official standard set by UNHCR in the same document.

The issue of consent, and loosely framed obligations for sending states to seek guarantees from readmitting states that asylum seekers will have access to determination procedures, illustrates one of UNHCR's central concerns about European harmonization. UNHCR criticizes the extent to which regional instruments in asylum are tailored to accommodate the lower standards of some individual states.[34] Absent clearly and strongly worded commitments to the required practices which uphold higher protection standards, as was the fate of the issue of consent for readmission, UNHCR is unwittingly promoting the same phenomenon they object to on a regional scale.

The issue of consent is a fundamental in the context of providing adequate protection for readmitted asylum seekers. It is all the more important with respect to returns to the applicant states, and even more so with respect to their frontier states. One reason for this lies with the difficulty in monitoring the fate of returned individuals to the candidate countries, and beyond. As reports from non-governmental organizations in the Czech Republic, Lithuania and Latvia, among

[34] UNHCR, "Towards Common Standards for Asylum Procedures": Reflections by UNHCR, supra note 4 at para.4. In its Proposal for a Council Directive, the European Commission avoids the issue of implicit versus explicit consent entirely, requiring that 'there are grounds for considering that this particular applicant will be re-admitted to the territory; and there are no grounds for considering that the country is not a safe third country in his particular circumstances.' Proposal for Council Directive, supra note 5, Art. 22.

others, indicate, as in many jurisdictions in western Europe, border practices are the most difficult to monitor, as they frequently are carried out without legal assistance or representation. Anagnost observes that in Bulgaria and Estonia, legislative provisions controversially allow border guards to perform decision-making functions at both border posts and the airport. He also identifies chronic problems throughout the Baltics, and Central and Eastern Europe with respect to the quality of decision making generally, in both the first and second instances, and does not foresee that additional training will remedy the endemic problem.[35] Given that this has posed a serious protection challenge in Western Europe, where asylum seekers would have the benefit of non-governmental refugee organizations with substantial expertise in monitoring and reporting on such practices, similar organizations are far less established and experienced as they emerge from the gradual construction of civil society in post-communist countries. The absence of sufficient provisions for asylum seekers under readmission agreements and guarantees for claimants removed on 'safe third country' grounds, are but one aspect of the experience in the candidate countries in the early 1990s that will have more serious protection consequences with readmissions and returns to the CIS states and other eastern and southern border jurisdictions.

8.III.B Transferring the *Acquis* and the Democratic Process

Formal requests by the EU for the conclusion of readmission agreements with eastern neighbours is not the only mechanism for transferring responsibility for assessing asylum claims eastward, but merely a component of the broader effects of the deflection policies adopted in the west.[36] In spite of the differences in the administrative and legal infrastructure between the current and aspiring members of the EU, the dynamics of policy formation in both spheres of Europe, still share similar features. Legislators in applicant states are as inclined to transport the restrictive innovations in the principles and procedures in the member states, as the member states were to mimic such policies among one another. Perspectives on the fate of asylum

[35] See supra, note 1 at pp. 397-398.

[36] See section 1.II.A.

in an enlarged EU have to look beyond the territories of the future Member States. For as was the case with western asylum policy prior to the formal criteria set by the EC Ministers in the area of asylum, eastern states were already replicating polices and transferring concepts.

In part, this would assist these nascent asylum systems to transfer the responsibility for assessing claims eastward and protect them from the dreaded 'closed sack' effect. As the figures on European asylum flows in the west indicate, there is a very real cost to embracing more progressive policies when one's neighbours are creating procedural and substantive barriers to protecting refugees. The transfer of even these positive elements under the *acquis* is hindered by the failure of the harmonization process to provide, what Anagnost identifies as 'concrete guidance' in the general areas *inter alia* of common border controls and defined roles for border officials in the asylum procedure, common asylum procedures, and common standards for appeal instance bodies. Without more developed guidelines, he concludes that it is unrealistic for the applicant states, UNHCR or the EU and its Member States to continue to commit resources and encourage further improvements in these fields when regional developments 'might change dramatically.'[37] Anagnost's assessment of the PHARE process does not consider the ramifications of the protection flaws in the *acquis*. While he concludes that the *acquis* has not progressed far enough to adequately direct future policy developments needed to improve the asylum regimes in the applicant states, we emphasize that with the outstanding protection gaps in the harmonized system, it risks misdirecting policy and practice. Our conclusions, however, converge on one point. The transfer of the *acquis* in its present state, either incomplete according to Anagnost, or significantly imperfect, according to this study, is premature.

Among the neighbouring applicant states, there also is a domino effect whereby legislative and policy models for implementing aspects of the asylum *acquis* are borrowed. As is evident, for example, in how the adoption of a 'safe third country' policy in Latvia has given rise to proposals in Lithuania for a similar policy, or how the upholding of the safe third country concept by the German Federal Constitutional Court in 1996 inspired the amendment to the Hungarian Constitution in 1997 in order to deny protection to those asylum seekers from safe third countries or safe countries of origin. In part, this is a reflection

[37] Anagnost, supra note 1, p.394

of the rippling of restrictive practices, whereby states which attempt to legitimately provide access to determination systems and ensure an adequate provision of procedural safeguards consequently are exposed to increased migration and asylum flows which have been deterred and diverted from more restrictive jurisdictions. Enhanced border controls, which may bar genuine asylum seekers and illegal migrants alike, have an equivalent effect. It is no coincidence that in 1998, with the tightening of controls on the Polish borders, the Czech and Slovak Republics became the preferred transit route to Western Europe. Furthermore, those measures adopted by members of the 'first group' states that stand at the head of the queue for admission to the EU, will be noted and potentially imitated by those states currently in the 'second group' of associated states whose membership will be considered at a later stage.[38]

With the objective of EU membership as the overriding priority in the policy agendas of each of these states, there is the political will to transfer the positive and costly aspects of the European protection regime that will uphold international standards in respective areas. The challenge is for politicians and government officials to translate international human rights norms into appropriate administrative procedures that requires safeguards to inhibit discretion and the potential for miscarriages of justice at borders, in detention centres and through refugee determination processes. The capacity to ensure these guarantees requires a commitment that transcends the vagaries of economic peaks and lulls. General societal attitudes towards refugees, reflected and inspired by politicians, the media, press and long standing cultural affinities and antagonisms towards foreigners or specific national, ethnic and cultural groups are far more subjective and readily inflamed rather than a commitment to provide costly protection to non-nationals. This is reflected, for instance, in the welcome reception of the Romanians into Hungary from 1989 to 1991 who were predominantly of Hungarian ethnic origin,[39] in contrast to the reluctant reception in Lithuania of Afghani asylum seekers. In response to the prevailing political agenda of Lithuanian politicians during this transitional period, Afghanis classified as 'former communists' are excluded by law from receiving protection.[40]

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[38] Poland, Czech Republic, Hungary, Estonia, Slovenia and Cyprus are in the first group of candidate states. Latvia, Lithuania, Bulgaria, Romania, Slovakia and Malta are in the second group.

[39] See section 3.II.B.2.

[40] See section 4.II.B.3(b).

It is this prevailing potential of domestic actors to uphold or compromise the guaranteed right of a refugee to be protected from *refoulement* that forces a careful analysis of the effects of the asylum *acquis* in applicant states. For the accession process insulates protection standards from the risk of compromise that is inherent in the democratic process when the fundamental rights in jeopardy belong to non-nationals. In the event that the EU is able to reformulate asylum practices that will eliminate the serious existing gaps in protection, so the transfer of the *acquis* may advance protection standards. When justice and home affairs officials of the candidate states review their progress on implementing the *acquis* with their European counterparts, they will need to demonstrate the existence of such safeguards for in land applicants as a full individual interview, an independent and impartial appeals process, the presence of a qualified interpreter, access to legal assistance and special provisions for women asylum seekers and unaccompanied minors.

However, not all of the standards endorsed in the *acquis* are so robust, with asylum seekers appearing at the border enjoying far more precarious protection guarantees. It is these most problematic aspects of the *acquis* that eastern legislators can implement under the full cover of compliance with the EU admission criteria. It is noteworthy that when the Hungarian government submitted its amendment to the Constitution to Parliament that brought in the safe country rules, they neither provided a justification for introducing these concepts, nor did any of the lead speakers of the political parties even raise the issue.[41] The legitimacy attached to European practices provides a convenient veil for political accountability.

This is particularly troubling with select aspects of the transposed *acquis*, discussed further below, which simply transfer some of the worst legislative human rights compromises made by the western parliaments. One central compromise applies to claimants who as a result of submitting applications at the borders and ports of entry, receive dangerously abbreviated safeguards. This sliding scale of protection standards is premised solely on the travel route of the asylum seeker. There are no substantive grounds that pertain to the merits of an asylum seekers case that would justify the differentiation of treatment between those individuals applying for asylum in land and those who submit their claims at the border. However, with the adoption of the *acquis*, governments will not feel compelled to enhance

[41] See section 3.II.D.2.

the low protection standards that exist at border points which are characterized by excessive discretion afforded to border guards in all of the countries examined in this study. For instance, in Lithuania, pre-screening practices at the border provide for no appeal. In Estonia, appeals of negative decisions taken at the borders do not carry suspensive effect. The flawed protection rationale that underlies the Resolution on Minimum Guarantees and allows for the absence of adequate safeguards for those submitting claims at the border reduces the accountability of national authorities for human rights compromises made in the interests of immigration control. For these and other reduced standards, are now incorporated into the series of resolutions that comprise the core of the EU *acquis.*

The serious problems of this bifurcated protection framework that allows for the virtual elimination of safeguards for determinations made at border points has been recognized by the European Commission in its Proposal Directive. In its alternative regime for border applications, it addresses the risk posed by the absence of appeals carrying suspensive effect by introducing the right to apply for leave to remain pending an appeal.[42] Arguably this is a less than airtight remedy to the risks entailed in accelerated border procedures, and may not even survive the current process of review by the Parliament and Council of Ministers. It does however offer recognition by the European Commission that the regional guidelines for border procedures were inadequate. Yet it is these standards for border procedures, unamended and unreformed, that are already exported to the candidate states.

The main factors that shaped European asylum policy highlight the extent to which policies were directed by the informal pressures and inducements for states to receive returned asylum seekers and consequently to improve their asylum systems. The effects of westward migration combined with western deflection policies heighten the fears of 'transit' states that their territory will become a 'closed sack.' For those states bordering the future frontier of the expanded EU, the most restrictive aspects of the *acquis* are likely to be replicated. The informal significance of the asylum *acquis* will be two-fold. Firstly, its elements that respond overtly to immigration control, deterrence and deflection will be appealing models for developing

[42] Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, supra note 5, art. 39 (2).

eastern systems. Secondly, because there is a range of questionable procedures permitted under the letter of the *acquis* as it now stands, even if in contradistinction to the spirit of the 1951 Refugee Convention, they receive a *de facto* legitimization. In the west, national courts, UNHCR and non-governmental organizations, have failed, for different reasons, to transform the restrictive template for asylum systems that the EC Ministers laid down in the London Resolutions in 1992. It is hard to predict that these institutions may have more reforming will or clout in the candidate states to transform the abridged protection standards into practices that will guarantee uniform and consistent compliance with international human rights obligations towards non-nationals. Furthermore, a by-product of these trends is that the more states adopt deflection policies, the more widespread state practices of deflection will be. A far reaching consequence of the proliferation of safe third country policies is that it will become a constant and uniform practice within the region, buttressing arguments that abridged protection standards are emerging as new norms under customary international law.

8.IV The Process of Accession

The prominence of asylum in the accession process was a late development. One of the cornerstones of the accession process lies in the capacity of Member States to protect human rights and the upholding of democratic freedoms. These are enshrined in the underlying principles for the assessment criteria establishing applicants' preparedness for membership into the EU that was set forth by the European Council at the Copenhagen Summit in 1993. Under the Copenhagen criteria, membership in the EU requires:

(a) that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities;

(b) the existence of a functioning market economy, as well as the capacity to cope with the competitive pressure and market forces within the Union;

(c) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.[43]

Fulfilling the 'obligations of membership' entails the implementation of the entire EU *acquis* as it evolves. This is particularly relevant in the area of asylum policy, as to date, only a limited number of instruments have emerged in the area and, with the main exceptions of the Dublin and Schengen Conventions, they are non-binding.[44] In the absence of a full-fledged *acquis* in the area of asylum, narrowly, and justice and home affairs, more generally, applicant states are committed in principle to implementing a yet to be constructed comprehensive framework for refugee protection.

The list of instruments under the asylum *acquis*, is a minor part of the broader process of integration that requires applicant states to carefully examine close to 1,000 European legal acts. Although the body of the asylum *acquis* was small, refugee policy emerged as an increasingly significant area for co-operation given its links to broader issues of external border control and security issues. Regional recognition of the need to have a coherent strategy with respect to asylum and the accession process was expressed by the 1994 European Council in Essen.[45] This call was met by limited exchanges between EU Ministers of Justice and Home Affairs with their counterparts in applicant states which dealt with a range of issues such as visa policies, cross border crime, human trafficking, as well as asylum.[46]

Explicit criteria for applicant states in asylum and refugee matters were set forth by the European Commission in its 1997 communication, Agenda 2000: For a Stronger and Wider Europe. These are:

(a) adoption in new Member States of the Geneva Convention and its necessary implementing machinery;

(b) adoption of the Dublin Convention;

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[43] Conclusions of the Presidency (Copenhagen Summit Conclusions) reprinted in BULL.EUR. COMMUNITIES, June 1993, points 1.1-4.1.

[44] Supra note 3.

[45] Conclusions of the Presidency (Essen Summit Conclusions) reprinted in BULL.EUR. COMMUNITIES, Dec. 1994, point I.13.

[46] For an overview of the activities of the EU in relationship to accession states and the issues pertaining to asylum, see S. Lavenex, "Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe." J. Ref. Studies vol. 11, no. 2, (1998) pp.134-137.

(c) adoption of related measures in the EU *acquis* to approximate asylum measures.[47]

In line with the policy agendas of individual Member States during the pre-accession period, the Commission acknowledges that the Member States themselves will be among the beneficiaries of improved asylum systems in the east. For the effect will be, an enlarged 'pool of states who meet common criteria to act as potential recipients for asylum applicants.' The Commission further emphasised the inter-related obligation with respect to immigration policy and border management that will place the burden of controlling the frontiers of an enlarged EU at the time of their admission upon the new Member States.

A more focussed concentration on the fulfilment of the asylum and refugee criteria emerged in the Accession Partnerships agreed by the European Commission in March 1998. In Agenda 2000, the Commission proposed that a single framework be created for pre-accession support through the creation of country specific Accession Partnerships. The Accession Partnerships are designed to prepare applicant countries to fully meet the Copenhagen criteria. Priorities and intermediate objectives are designated in preparation for a candidate's accession, along with financial assistance targeted to facilitate the realization of the stated objectives. The Accession Partnerships are accompanied for each country by an annex of recommendations that covers the full range of the *acquis*. The recommendations are tailored to the particular stage of progress attained by the respective applicant countries and their political and economic contexts. Asylum, migration or border control issues are highlighted as priority areas for applicant states in the annex attached to the Accession Partnerships for each of the Central, East European and Baltic States.

The protection of human rights is at the foundation of the political criteria for the accession process as set forth by the Copenhagen Summit. In a similar vein, the preambles of the instruments of the *acquis* that are the building blocks of a pan-European refugee protection regime rest upon principles of refugee and human rights protection enshrined in the 1951 Refugee Convention and the ECHR. With the ascendancy of asylum and refugee matters in the enlargement process, the corresponding accession criteria established by the

[47] European Commission, Agenda 2000: For a stronger and wider Union, BULL.OF EUROPEAN UNION, Supplement 5/97, p.131.

Commission and their impact will shape the nature of the refugee protection regime in an enlarged EU.

This process, which has evolved in the form of structured dialogues since 1995, has brought pressure to bear on applicant states to sign, ratify and implement the 1951 Refugee Convention through the introduction of asylum legislation to provide a formal framework for the examination of refugee claims and enhance the protection standards afforded towards refugees with safeguards. By the late 1990s each Baltic and Central and East European States had enacted refugee legislation, an impressive track record not yet achieved by every Member State already within the EU.[48]

The Amsterdam Treaty has shifted the mantle from inter-governmental *fora* under the Third Pillar to the supranational under the First. It is now the European Commission that is entrusted with rebuilding a new framework for refugee protection from the patchwork of soft instruments under international law that constitutes the main body of the asylum *acquis*. A paradox has arisen during this ongoing process of reform. While the accession process is driving the replication of the asylum *acquis*, the Commission driven reform underway is acknowledging some of the endemic problems in the asylum practices that the EU has already exported eastward.

8.V The Tampere Summit and the Future of the Asylum *Acquis*

The interdependency between the objectives of 'freedom, security and justice' within the EU and management of migration flows was a central theme of 'The Tampere Milestones' set forth in the Conclusions of the Presidency of the 1999 Tampere European Council. For the first time at a European Council Summit Meeting, asylum was a central issue on the agenda. Along with a reaffirmation of a regional commitment to the obligations of the 1951 Refugee Convention, was the expressed need for a strengthening of the current

[48] Ireland failed to fully implement the 1996 Refugee Act until 1999. In response to the rising number of asylum seekers arriving in the country, the Refugee Act was brought in with several amendments, which removed the fundamental safeguards adopted previously by the Irish parliament. Immigration Act 1999 (1999 No. 22).

asylum protection regime that would result in a forthcoming Common European Asylum System.

In Tampere, the European Council acknowledges that its policy proclamations in the areas of asylum, migration and crime prevention will be extended beyond their current frontiers to encompass an enlarged union. In its first and paramount point, the European Council accompanies its reassertion of the three unified principles which underlie the process of European integration, the shared commitment to freedom based on human rights, democratic institutions and the rule law, with the reminder that this foundation of the current EU is transposed eastward, as it states that it '[will] also serve as a cornerstone of the enlarging Union.'

More specifically, the extent to which the Tampere Milestones consider the situations and particular needs of the associated states, as well as their pre-accession and post-accession co-operation, varies revealingly according to the policy area. The conclusions concerning border control and crime prevention acknowledge the important role of associated states in implementing these objectives. With respect to asylum policy, however, no reference is made to the distinctive situations in applicant states.[49] This omission fails to recognize the extent to which the protection standards in these neighbouring states will impact the ultimate legitimacy of the pan-European protection regime that the European Council is ardently calling for in the Tampere Summit. The viability of the future Common European Asylum System will be tested by its ability to sufficiently transcend variations in domestic administrative systems to uphold international protection standards across the current and future EU.

The Tampere Milestones appear after two decades in Western Europe where the formation of asylum policy has been characterized by the intense struggle between protection based and migration control principles. The affirmation of select principles to govern the future Common European Asylum System reflects a triumph (even if only symbolic) for those advocating a protection-based approach to asylum, a triumph that optimally will encourage applicant states to conceive of

[49] Conclusions of the Presidency (Tampere Summit Conclusions), supra note 4. (See paras. 5-9 pertaining to asylum policy). The need for the 'rapid inclusion of applicant states' in the co-operation and mutual technical assistance in the area of border control is highlighted in paras. 18-19. Support for regional co-operation against organized crime between Member States and third countries bordering the Union is asserted in para. 62.

asylum policy in a more progressive sense than achieved by many of the original Member States. The most noteworthy advancements set forth in the Tampere Conclusions address the 'absolute right to seek asylum' as well as the recognition of the 'separate but closely related issues of asylum and migration.' [50] Placing theoretical optimism aside, the impact of the Tampere Milestones will depend upon their interpretation and implementation in policy. They embody the most explicit acknowledgement of the right to seek asylum, as an absolute right, expanding the concept of protection to embrace the positive right of access to asylum procedures beyond the existing negative right of *non-refoulement* incorporated into the 1951 Refugee Convention. This commitment taken alongside the reminder that asylum and immigration, although inter-related are distinctively separate, would argue for a reversal current immigration policies, such as visa systems and carrier liabilities acts, which directly deny access to asylum systems throughout most of the EU.[51] As these are now firmly entrenched under the Schengen Convention, it is unlikely that the intent of the Tampere Milestones is to unravel the Schengen regime or to alter the criteria set forth for applicant states under the Associated Partnership Agreements.[52] By 1999, each of the Baltic States had introduced visa policies that were almost in complete compliance with the Schengen negative list.[53]

Another challenge arising from the Tampere Milestones yet to be met in many jurisdictions in the western Europe is posed by the assertion that the 'area of freedom, security and justice should be based on the principles of transparency and democratic control.' This approach requires that the Council must develop an open dialogue with civil society in order to strengthen citizens' acceptance and support.[54] That

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[50] Conclusions of the Presidency (Tampere Summit Conclusions), supra note 4, paras 10 and 13.

[51] For a progressive interpretation and critique of the Tampere Milestones, see ECRE, "Observations By the European Council of Refugees and Exiles on The Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999" (London: ECRE) October 1999.

[52] For instance, under the Lituanian Associated Partnership Agreement, one of the medium term objectives in the area of Justice and home affairs is, 'the implementation of migration policy and asylum procedures, and to align visa policy with that of the EU and to complete alignment to international conventions, notably in view of the Schengen acquis.'

[53] A. Nygård, "Towards a Joint European Visa Regime", in IOM & ICMPD, Migration in Central and Eastern Europe, supra note 2, at p.112.

[54] Conclusions of the Presidency (Tampere Summit Conclusions), supra note 4, para. 7.

a common European asylum system should be developed in light of dialogue with civil society reflects a welcome deviation from the established practices of the inter-governmental *fora* entrusted with designing a regional asylum framework, largely with liberty and comfort of operating behind closed doors. This collective approach towards devising policy that illustrated poignantly the democratic deficit in a policy area with such fundamental human rights protections mirrored the attitude of the authorities responsible for formulating refugee policy and practice in many Member States. The polarization between those affected by asylum policy, primarily non-governmental organizations involved in representing claimants in the procedures or engaged in broader advocacy efforts, and those developing and implementing the policy is common throughout the EU. Few states, Denmark the striking exception, have sought to incorporate the experience and expertise of the non-governmental sector into a constructive approach to formulating a policy that balances protection and immigration control objectives.[55] The account taken by the European Council of the link between open dialogue with civil society and the aims and principles of the policy area of freedom, security and justice is significant.

Overall, the spirit of the Tampere Milestones has the potential to inspire, if not enhance, the standards of protection for asylum seekers, as well as the overall effectiveness and ultimate legitimacy of the system. If genuinely followed, the effects on accession states of the proclaimed intent to formulate asylum and other related policies into a more transparent process could be two-fold. Not only would the input from non-governmental organizations be likely to improve the common asylum system that would be directly transferred to applicant states under the future *acquis*, but it would also offer a model for post-communist systems of engaging relevant sectors of civil society in dialogue over the principles and mechanisms for implementing international human rights standards.

8.VI Transposing the *Acquis*

When the applicant states incorporate the asylum *acquis* into their own legal systems, they are accepting practices built upon prevailing

[55] R. Byrne and A. Shacknove, supra note 4, at pp.225-226.

assumptions in Western Europe about asylum seekers. It is these assumptions that direct policy strategies in adopting the necessary measures to provide protection for those in need, while deterring abusive applications. These underlying assumptions have not been closely scrutinized by legislators throughout Western Europe and are rarely challenged outside of the non-governmental sector. Because the direct transfer of the European asylum practices under the *acquis* is mandated by the accession criteria, there is even less likelihood that the democratic process in candidate states will challenge the assumptions which are at the foundation of the *acquis*. This places greater import on the review and reform of regional asylum policy underway in the aftermath of the Amsterdam Treaty and Tampere Summit. A reformulated asylum policy that can guarantee refugee protection across an enlarged EU will need to be based upon a foundation that can withstand the strains of being applied across legal and political divides not only between the current Member and candidate states, but also between current and future candidates.

The assumptions underlying the *acquis* that are most relevant in the context of expansion include generalized conclusions on: the motives of most asylum seekers and the adoption of select criteria for 'manifestly unfounded' claims that justifies speedier and less costly procedures with abridged safeguards; the adequacy of adopting minimum standards with provision for individual states to exceed these guidelines; the acceptance of a bifurcated process of harmonization whereby procedure is prioritized over substance; and lastly, the capacity of Member States and participants in the Dublin and Schengen regimes to render equivalent levels of protection for asylum seekers.

8.VI.A Manifestly Unfounded Claims

With asylum as virtually the sole means of seeking entry into Western Europe, policy makers pointed out that those availing of the asylum process on account of humanitarian need increasingly were joined by those exclusively driven by economic motives. As this oversimplified distinction between genuine and bogus asylum seekers became a central theme in political debates on asylum policy throughout Europe, commonly it was accompanied by assertions that the latter group of economic migrants disguised as asylum seekers on balance

constituted the overwhelming majority of asylum claims. The effect of this perspective translated into reforms in legislation and practice. Hence the distinction between a refugee rights based policy independent from a state control based immigration policy further collapsed. The silence of the 1951 Refugee Convention on methods of implementation and procedural protections resulted in the situation where those with genuine claims for asylum were increasingly having their claims for refugee status evaluated in systems with a range of procedural innovations intended to respond to, and deter, the illegal economic migrants.

One response to the perception that the asylum systems of western European states were being clogged by 'bogus' claims was to introduce procedures for manifestly unfounded claims. While the Executive Committee of the UNHCR accepted the practice as in line with international obligations, it did so only with respect to very tightly defined criteria. For manifestly unfounded claims to be processed with abridged rights of review, they should be either 'clearly fraudulent' or 'not related to the criteria for the granting of refugee status.'[56] UNHCR has further clarified this position, emphasizing that 'the determination of the credibility of the asylum seeker's claim or evidence' should not be determined in accelerated procedures, as 'issues of credibility are so complex that they may more appropriately be dealt with under the normal asylum procedure.' Along with these claims, UNHCR specifies that cases dealing with exclusion clauses under Article 1F of the 1951 Refugee Convention and those dealing with 'internal flight alternatives, should be dealt with only in normal procedures.'[57]

The London Resolution on Manifestly Unfounded Applications for Asylum, which constitutes a core component of the *acquis*, allows for abridged safeguards under accelerated procedures, but expands the concept of manifestly unfounded claims far beyond the two categories identified by the UNHCR EXCOM. Among other criteria, a claim can be deemed manifestly unfounded if it is 'totally lacking in substance' whereby 'the applicant gives no indications that he or she would be exposed to a fear of persecution or his or her story contains no

[56] UNHCR Executive Committee Conclusion No. 30 of 1988. See also, Position on Manifestly Unfounded Applications for Asylum, published in UNHCR, 3rd International Symposium on the Protection of Refugees in Central Europe, supra note 1, at pp. 397-399.

[57] UNHCR, "Towards Common Standards for Asylum Procedures" Reflections by UNHCR, supra note 4, para.25.

circumstantial evidence or details', or if it is 'manifestly lacking credibility–where by the story is inconsistent, contradictory or fundamentally impossible', or where there is 'an effective internal flight alternative, or where an applicant comes from a 'safe country of origin'.[58] In 1999, 14 of the 15 member states had adopted a policy for manifestly unfounded claims in their domestic practice, with virtually every state moving far beyond the narrow category of claims identified by the UNHCR EXCOM.[59] The European Commission, in its Proposal for a Council Directive, has narrowed the criteria for manifestly unfounded procedures considerably. Yet even these, which include criteria that would designate claims not submitted before final stages of deportation as 'manifestly unfounded,' arguably exceed the narrow scope established by the UNHCR EXCOM.[60]

The attractiveness of manifestly unfounded procedures has spread from western to Eastern Europe. With the exception of Hungary, which boasts a significantly high number of asylum applications in contrast to most of the other Baltic and CEEC states in this study, and Lithuania, all now have some form of manifestly unfounded procedures in their domestic legislation. The impact of the *acquis* can be witnessed by the incorporation of the 'manifestly unfounded' concept even in jurisdictions where there is a negligible number of asylum claims. For instance, Estonia has adopted manifestly unfounded procedures and yet by mid–1998 only 151 asylum applications were registered for the year. Likewise, Latvia also has accelerated procedures for unfounded claims, and yet in 1997 only 83 were submitted.[61] One of the main justifications for introducing the procedures in the west was the desire to reduce the burden on full determination procedures; the greater the backlog on these systems,

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[58] London Resolution on Manifestly Unfounded Applications for Asylum, supra note 2, paras. 6, 7, 8.

[59] Eight States, including Austria, Denmark, and Germany have accelerated procedures for processing manifestly unfounded claims, while the remaining six processed claims deemed to be manifestly unfounded in the course of an admissibility procedure applied to all applicants for refugee status. S. Egan and K. Costello, Refugee Law Comparative Study, (Dublin: Government Publications) (1999) p. 108-109.

[60] Proposal for Council Directive, supra note 5, Art. 28

[61] However, larger numbers of aliens were designated as 'illegal immigrants' and held in detention centres prior to the enactment of refugee legislation in both Latvia and Estonia during the summer of 1997, in the absence of asylum procedures. IOM & ICMPD, supra note 1, Table II.11. 1995-1997 Stocks of Asylum Seekers and Refugees in the Baltic States.

the greater the delay in rendering decisions, the greater the cost to the social welfare system, and the greater the likelihood of failure to effect deportation orders at the end of the process. A compelling case can be made for allowing speedier procedures under a limited range of circumstances. However, if a refugee determination system is well resourced, it should be able to render judgments speedily without abridging safeguards. This ultimately saves costs, time and the integrity of the system.

Under the accelerated procedures adopted in the candidate states, as in western asylum laws, the grounds for qualifying as manifestly unfounded are broadly defined in most jurisdictions. For instance, under the 1997 legislation introduced in Latvia, a claim may be considered manifestly unfounded in the applicant has stayed in the jurisdiction for more than 72 hours illegally prior to making their intent to apply for asylum known to the authorities.[62] In the Czech Republic, the 1993 amendment which introduced manifestly unfounded procedures expands the criteria even further, which would render a claim manifestly unfounded in light of 'generally known facts' or if based only on the desire to 'avoid a situation of war.' Once a claim is determined to be manifestly unfounded, the asylum seeker loses the right to an appeal with suspensive effect in the event that the request for an appeal is submitted more than three days after the initial decision.[63]

There are several troubling aspects to the criteria adopted by the candidate states. Firstly, the criteria specified above, depart from the narrow grounds established by UNHCR, for indeed claims which fall under the broad categories above may require close examination afforded under regular procedures to determine whether the stringent criteria of the 1951 Refugee Convention are indeed met. A delay of three days before submitting a claim, or fleeing from a county in a 'situation of war' is not an indicator of clearly fraudulent claims. Secondly, while liberally expanding the 'manifestly unfounded' criteria, they apply the western European formula without the corresponding fundamental safeguards. In Lithuania in 1999, for instance, while there were no procedures for manifestly unfounded claims, pre-screening admissibility procedures that resemble highly restrictive 'manifestly

[62] Fabrice Liebaut, Legal and Social Conditions for Asylum Seekers and Refugees in Central and Eastern European Countries, (Danish Refugee Council, 1999) p.107.

[63] Ibid., p.53

unfounded' procedures were introduced. Under the Lithuanian exclusion provisions, individuals would not even have the right to an appeal if they were determined to have provided incorrect information to the border authorities with respect to their travel route, or if they suffer from an infectious disease.[64] Thirdly, in light of the expansive and loosely framed criteria of the London Resolutions, the interpretation of most of the 'manifestly unfounded' criteria adopted by the Baltic and CEEC states would not directly run afoul of the regional guidelines, nor of current practices in other European states. Even if more rigid criteria are successfully introduced into the new directive, the export of the *acquis* has been long underway and these policies have had concrete ramifications for refugees seeking protection in the candidate states.

The underlying assumption of the London Resolution on Manifestly Unfounded Procedures is that a series of loosely defined guidelines will be sufficient justification in light of international standards for abridging the process of examination and review. When the narrow international criteria are applied by independent and impartial authorities, as was the case with the short lived 'credible basis procedures' in Canada, the assumption of wide scale 'bogus' asylum submissions finds little empirical support. Indeed, the Canadian authorities conceded in 92 per cent of asylum applications that there was a 'credible basis' to the claim.[65] Alternatively, in the case of Denmark, where appeal rights were abridged only upon the guarantee of a second interview carried out by the Danish Refugee Council, statistics emerging from this process reveal that first instance decision making with loosely framed criteria is not immune from flawed assessments. Between 1991–1995, roughly 14 per cent of the claims for which the Danish Refugee Council contested the government's first finding of manifestly unfounded were ultimately held to be eligible for refugee or *de facto* status by the appeals authorities.[66] Given that most accelerated procedures in western and eastern Europe have expanded the UNHCR EXCOM criteria, yet failed to incorporate additional safeguards, statistics from the Danish experience reveal the scope of the protection gaps in the *acquis* which carry the very real risk of *refoulement*.

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[64] Liebaut, supra note 61, p.116.

[65] R. Byrne and A. Shacknove, supra note 4, at p.199, fn. 53.

[66] Ibid.

The conditional approval of 'manifestly unfounded' procedures by the UNHCR EXCOM was premised on the tightly and carefully defined criteria that would identify those claims that could be dealt with in an accelerated procedure. If the criteria are broadened, as in the Danish model, safeguards, in turn, should be incorporated into the accelerated procedures. The 'manifestly unfounded' label is not the problem with these procedures, it is the failure to design the procedures based upon the axiomatic relationship between tight criteria and abridged safeguards. Unfortunately, this protection based approach to dealing with the burdens created by 'manifestly unfounded' claims, which is still cost effective, is not promoted under the current *acquis*.

8.VI.B Minimum Guarantees for Asylum Procedures

The progression of domestic and regional asylum law in Western Europe has not entirely succumbed to the zero migration agenda. In discrete areas of asylum law and practice a number of individual Member States and regional European resolutions acknowledged minimum guarantees required for determination procedures, as well as providing specific guidelines for ensuring appropriate conditions for receiving and assessing asylum claims from vulnerable populations.[67] Attention paid to aspects of the western European asylum determination systems that transgress international standards should not overshadow the importance of the central safeguards adopted in the Resolution on Minimum Guarantees for Asylum Procedures which is reflective of highly developed traditions of administrative law in western Europe.[68] The process of dialogue underway between; applicant states, representatives of the EU and UNHCR reviews legislation and the capacity of authorities to effectively implement refugee policy in applicant states in line with a range of enhanced legal standards adopted in the *acquis*.[69]

To date, most of the systems established in applicant states are progressing to meet a significant proportion of the criteria in the

[67] Resolution on Minimum Guarantees for Asylum Procedures, at paras. 26-28, Resolution on Unaccompanied Third Country Minors (1997), supra note 2.

[68] Resolution on Minimum Guarantees for Asylum Procedures, supra note 2.

[69] See further, Chapter 7.

Resolution. States such as Hungary and the Czech Republic, which only offer an administrative appeal in the second instance, under the same jurisdiction as the first instance decision was made, would require amendments to meet the criteria of the Resolution on Minimum Guarantees. Both Lithuania and Latvia included the right to appeal before an independent body in their respective legislation, while measures to bring procedures in Poland in line with the *acquis* resulted in the creation of the Council for Refugees, an independent appeals authority in January 1999. All three countries have a legislative guarantee to the right of suspensive effect pending appeal.

It can be anticipated that the process of review and discussion with the Commission and individual Member States will lead to the strengthening of current asylum practices in candidate states. One could expect, for instance, that Poland may move to eliminate the provision of its Code of Criminal Procedure that requires that the embassy of the country of origin of an alien be contacted if the non-national is involved in a minor crime. This runs counter to the data protection provisions under the Resolution on Minimum Guarantees, particularly in light of the fact that temporary arrests for crimes of illegal border crossings fall under the ambit of the Code. The Resolution's provisions that require appropriate treatment of women and unaccompanied minors may also be incorporated into national refugee procedures. Currently, the guidelines pertaining to these two vulnerable populations are not fully complied with in any of the candidate states. Should these provisions be given effect in the applicant states, they would exceed standards applied by the current Member States. Many jurisdictions have procedures that only partially comply with the relevant guidelines in the *acquis*, while Belgium and Luxembourg have yet to introduce any measures that would give effect to the Resolution for Unaccompanied Minors.[70]

A central feature of the Resolution on Minimum Guarantees is the provision which asserts that Member States have the right to enact national provisions on guarantees provided by procedures applicable to asylum seekers which are more favourable than those contained in the common minimum guarantees.[71] Determination systems in the west have not uniformly borne witness to this ideal in several crucial areas of asylum law. For in-land procedures, this does not give rise to serious protection concerns. However, the Resolution on Minimum

[70] See supra note 59 at pp.42-45.

[71] Resolution on Minimum Guarantees, supra note 3, at para. 32

Guarantees adopts a two-stranded protection regime with glaringly divergent standards applied to asylum seekers who submit their claims in-land as opposed to those who submit their claims at border posts. With respect to claims submitted at the borders, adequate protection can only be guaranteed if individual states opt to exceed the minimum guarantees adopted by the Resolution. The fault line in the protection framework lies in the prerogative available under the Resolution to deny border applicants with claims determined to be manifestly unfounded the right to an appeal with suspensive effect.[72] While UNHCR has asserted the crucial importance of suspensive effect in order for the right of an appeal to be effective regardless of where the claim has been submitted, this is not uniformly adhered to in Western Europe.[73] If European states have not been inclined to offer more effective appeal rights than those provided for in the Resolution on Minimum Guarantees, it is difficult to identify the incentives for candidate states to incur the costs of so doing. As discussed above, whether the additional safeguards in the Proposal for a Council Directive are sufficiently framed to allow asylum seekers a genuine opportunity to remain in the jurisdiction pending appeal, and if so, whether they are included in the final Directive will have important ramifications for future protection standards. For the present, however, it is the old *acquis* that prevails and refugees arriving at the borders of several frontier states cannot be guaranteed adequate protection.

The absence of an effective appeal at the borders under the European *acquis* gives rise to the greatest potential for instances of *refoulement* in current and future applicant states. A common trait among each country examined in this study is the excessive discretion granted to border authorities, along with the absence of skilled interpreters and interviewers at border posts. While reviews of claims considered to be manifestly unfounded must be referred to central authorities, as is provided for in each of the countries studied, that review is commonly only a paper review of the decision carried out at the frontier. The absence of legal assistance at ports of entry is common in most of the new asylum states. As a result, there is minimal monitoring of border practices. The pre-screening procedures in Lithuania, which do not allow for an appeal following a negative decision, would also generally be considered adequate under the Resolution on Minimum

[72] Ibid, at paras. 23-25.

[73] See supra, note 59, at pp. 74-76.

Guarantees. With the added challenge posed by the lack of experience with asylum seekers by the local police commissariats and border guards, who are conducting interviews and carrying out the first instance decision, the potential for erroneous decisions is significant.[74] Furthermore, communicating the desire to apply for asylum in a language understood by a border official in any of the candidate states is more problematic, as there is not yet a sufficient pool of trained interpreters, nor is English, as a default language for initial communication, widely spoken in the former communist bloc.[75]

At present, the option to enhance the minimum guarantees in border procedures is not being exercised in several candidate states. The training of border officials is a welcome and necessary undertaking of the PHARE program, but it will not substitute for meaningful rights of review that have proven to be fundamental even in jurisdictions long experienced with refugee determinations. The current weaknesses in border procedures in the candidate states; excessive discretion afforded to border guards, ineffective provision of legal and interpretation services, and lack of a meaningful safeguard in the form of an appeal with suspensive effect, are all permissible under the general criteria set forth in the Resolution on Minimum Guarantees and arguably in line with European practices. A legitimate framework for refugee protection in an expanded Europe will provide equivalent safeguards for border applicants as for those applying for asylum inland. As the future frontier of the expanded EU will be guarded by the candidate states, the border practices that they adopt will be the measure of protection for the region. Without a harmonized upgrading in standards for border procedures, it is a tall order for transition states to demonstrate greater political and fiscal will than their western European counterparts to exceed the European minimum guarantees. This is all the more so when the harmonization process fails to further elaborate the concrete measures required to give effect to those guarantees.[76] Clearly, any pan-regional refugee system built upon the assumption that they will rests on an unstable foundation.

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[74] See supra, note 61, at pp. 116-117.

[75] Based on his experience with the PHARE programme, Anagnost identifies language training 'the most difficult and expensive problem to overcome.' He points out that even in the event of successful training, there are no assurances that the newly skilled individual will remain in the asylum field. Anagnost, supra note at p.392, fn42.

[76] See supra, note 2.

8.VI.C Bifurcated Harmonization: Procedure Before Substance

The European Commission identifies one of the main purposes of the package of measures on asylum envisaged by the Treaty of Amsterdam to ensure that an applicant for asylum would receive the same decision irrespective of which Member State considered his or her application. It acknowledges that the attainment of this objective is outside of the scope of an instrument solely focussed on asylum procedures. Yet the Resolutions adopted by the EC Ministers on procedural harmonization in the early 1990s gave rise to the illusion that uniform and sufficient guarantees were on offer throughout the then European Community. Substantive harmonization was not even attempted until the 1996 Joint Position on the harmonized application of the term refugee in Article 1 of the Geneva Convention.[77] The assumption that refugees have equivalent opportunities to receive protection throughout Member States lies at the core of one of the only binding instruments of the *acquis*, the 1990 DC. The treaty, which entered into force in 1997, allocates responsibility for determining asylum applications amongst signatory states without any necessary examination into the 'safety' of the responsible state for individual asylum seekers prior to their removal. Recognition rates of similarly profiled asylum seekers across Europe in the early 1990s demonstrated that this assumption was pre-mature at the time. Dramatic discrepancies in the offers of protection were evident across Europe in statistics available to governments and UNHCR.[78]

It might have been hoped that the 1996 Joint Position which created non-binding interpretive guidelines on the criteria for refugee status would have given greater credence to the assumption that harmonization would result in consistent guarantees for all asylum

[77] Joint Position Defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'Refugee' in Article One of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ (1996) L 63/2.

[78] Among Iranian asylum seekers in 1991, 97% were offered asylum or leave to remain in the United Kingdom, compared with 13% in Denmark, 55% in France and 19% in the Netherlands. For Sri Lankans, 97% were similarly recognized in the United Kingdom, 35% in Denmark, 70% in France and 9% in the Netherlands. See Eurostat, Asylum-Seekers and Refugees-A Statistical Report, Vol. 1: EC Member States (1994), Tables 9.3.12.5, 9.3.2.4, 9.3.6.4, 9.3.10.5.

seekers in all Member States. Yet the Joint Position afforded ultimate deference to the interpretations of national courts, dooming its potential to bring about substantive uniformity in offers of protection for refugees and asylum seekers.[79] By the end of the 1990s, variations in rates of protection are as pronounced as at the beginning of the decade.[80] However, the Dublin regime is now in effect and pursuant to the Agenda 2000, it is identified by the Commission as one of the three central tenets of the asylum *acquis* that must be adopted by aspiring Member States. UNHCR is even advancing the proposal for a parallel DC for non-Member States, contingent upon conditions of protection.

Critiques of the DC have largely centred on the manner of its implementation and not on its failure to adequately provide safeguards.[81] As this regime is premised on the notion of equal protection across jurisdictions, the right to appeal is viewed by the participant states as superfluous and hence not included in the treaty. Official concession to the regime of transferring applications absent any right of substantive appeal, requires an acceptance of the proposition that all signatory states offer adequate and uniform standards of protection for all groups of asylum seekers. While national authorities readily dismiss the idea that protection concerns could be raised with respect to removals to their EU partners, this assumption has been challenged by the careful assessment of refugee determination procedures in Member States by independent and impartial adjudicators in the United Kingdom. In the United Kingdom, adjudicators assessing 'safe third country' appeals related to Member States considered there to be sufficient grounds to question standards of protection with respect to 44 per cent of the appeals concerning the removal of asylum seekers to France, 25 per cent of appeals concerning removals to Germany, 43.8 per cent of the appeals

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[79] See the Preamble of the Joint Position, supra note 77, 3rd indent.

[80] A comparison of European total recognition rates (the rate of combined Convention and humanitarian recognition) of asylum applicants from the Federal Republic of Yugoslavia in 1998 reflects the disparity of protection standards. In Germany, the Netherlands and Switzerland, the total recognition rate for FRY applicants was less than 10%, whereas in Bulgaria, Denmark, Greece, Iceland and Liechtenstein, Romania and the United Kingdom, it was over 50%. UNHCR, Asylum-Seekers and Refugees In Europe in 1998-A Statistical Assessment with a Special Emphasis on Kosovo Albanians, (Geneva: UNHCR) (1999).

[81] A. Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment," *International Journal of Refugee Law*, Vol. 11 No. 4 (1999) pp.646-677.

concerning removals to the Netherlands and 11.3 per cent of appeals challenging removals to Belgium.[82] These statistics offer the only objective overview of 'safe third country' appeals at the time, as virtually no other state provided the right to substantive appeals before an independent adjudicatory body prior to an asylum seeker's removal to another DC signatory state.

With respect to the DC, UNHCR has taken a surprising departure from its more protection-oriented position on safe third country removals. Generally, UNHCR requires that asylum seekers have the opportunity to rebut the presumption of safety in a third country and be afforded the right to an appeal with suspensive effect prior to their removal. Overlooking the disparities in UNHCR's published recognition rates for similarly profiled groups of asylum seekers across Europe, the effects of abridged safeguards in select jurisdictions, as well as the empirical evidence offered by the outcomes of safe third country appeals in the United Kingdom, UNHCR has affirmed the right for states to remove asylum seekers to another DC signatory state without an appeal carrying suspensive effect.[83] As UNHCR adheres to the view that an appeal can only be effective against the risk of *refoulement* if it has suspensive effect, the institution's current position on the DC deprives asylum seekers of a meaningful right to rebut the presumption of safety prior to their removal.

This position on the DC highlights the incoherence of UNHCR's policy on refugee protection in the current and expanded EU. In its response to the European Commission's Working Document on common asylum standards, UNHCR avails of the historic opportunity to influence the process of regional reform by highlighting the gaps in the current European *acquis*. It does this by identifying the requisite standards and practices that should, but have yet to be, reformed in the *acquis* in order to comply with international obligations. As many of the international guidelines that UNHCR sets forth are breached by provisions of the current *acquis*, one can only conclude that the institution is echoing serious objections to aspects of the *acquis* and European practices. Undermining the strength of its persuasive views

[82] Refugee Legal Centre, "European Union states as 'safe third countries': some observations by the Refugee Legal Centre', Jan. 24, 1996, (unpublished), p.6.

[83] See UNHCR, "Towards Common Standards on Asylum Procedures": Reflections by UNHCR on some of the issues raised in the Working Document prepared by the European Commission, supra note 4, para. 27.

is its concurrent endorsement of a DC policy. For the Dublin regime does not consider protection issues in the allocation of responsibility for asylum claims within the EU. To support a system which considers challenges to the protection offered asylum seekers in each EU state as irrelevant to its process is an unwitting grant by UNHCR of a *de facto* seal of approval for the asylum practices across the EU as applied to asylum seekers of similar profiles and nationalities; official statements challenging some of these practices notwithstanding. There is an inherent contradiction between the assumption that underlies the range of concerns raised by UNHCR in these instances and the practical effect of its DC policy.

UNHCR's European policy is even more dissonant in light of the prospect of enlargement. In its working document on asylum reform, the Commission discusses common asylum standards exclusively in light of the established regimes in current Member States. With the prospect of expansion at the doorstep, a pan-European refugee protection framework must anticipate the strains of transferring minimum standards and loosely designed criteria to developing asylum systems. This recognition requires an innovative approach to cost efficient yet effective safeguards. Surprisingly, the protection challenges arising from the emerging refugee systems in the east are wholly ignored in the UNHCR's response to the Commission's working document. However, UNHCR's DC policy may have the gravest effects under the expanded Dublin regime that is called for by the accession process. UNHCR acknowledges that the current asylum systems in candidate states have yet to evolve to meet sufficient protection standards. Aside from basic protection issues such as access to procedures, these concerns are supported by overall refugee recognition rates, as in Poland, which at 1.9 per cent falls well below the western European average.[84] Yet in an expanded EU, when applicant states have fully incorporated the *acquis*, it is not clear from its current policy what standards UNHCR will consider adequate for the successor treaty to the DC. For with its DC policy, UNHCR is indirectly endorsing the adequacy of the European standards and individual state practices within the region notwithstanding the range

[84] See supra, section 2.II.1. As Barbara Mikolajczyk points out, this figure is based on all claims in the procedure, including the 55% that discontinue their applications. Nonetheless, even eliminating these claims, the overall recognition still falls at only 4%. With the absence of an alternative status or provision for leave to remain on humanitarian grounds, the risk of *refoulement* is heightened in the context of such a low recognition rate.

of protection issues the institution identifies as being in direct violation of international refugee law. As a result, endorsement of the *acquis* is not being conveyed solely to the accession states by the EU and its current Members; UNHCR has placed itself in a legal and strategic conundrum. The logical conclusion to be derived from the official denial of the need for an effective review of safety conditions within the EU prior to removals is, that in spite of all of the flaws of the *acquis* and its erratic implementation in Member States, it provides a sufficient guarantee that refugees will not be at risk of *refoulement*.

8.VI.D Judicial Challenges to the Presumption of Equal Justice

The main challenge to UNHCR's DC policy comes no longer exclusively from non-governmental organizations, but from the Courts. It is the issue of whether the 1951 Refugee Convention protects those persecuted by non-state agents that has backed UNHCR into a corner of contradiction with respect to their failure to argue for substantive appeals under the DC. Reflecting the changing nature of strife, upheaval and the demise of traditional state structures, contemporary refugees and asylum seekers are presenting claims based on persecution by non-state agents, as would be the case for *inter alia* Algerians and Somalis. The 1996 Joint Position fails to comprehensively interpret the scope of Article 1 with respect to these claims. This is due to its non-binding nature as well as the compromise formula it has adopted which includes two of the prevailing interpretations applied by European states, yet is silent as to which should prevail as regional practice.

The first interpretative approach rests on the accountability theory, adopted by Germany and France, which will only recognize persecution upon evidence of tacit state support of the persecution. Alternatively, as adopted in the majority of Western European States and UNHCR, the second interpretative approach is based upon the protection theory, which merely requires that a state fail to prevent the persecution on account of one of the grounds enumerated in the 1951 Refugee Convention from occurring.[85] Because the DC does not require, and states do not commonly provide, the opportunity for applicants to appeal the decision to remove them to a signatory state, many asylum

[85] See supra, note 77, Joint Position, para. 5.2.

seekers who have claims based on non-state persecution may be transferred to Germany or France, in spite of the fact that the law in these states will deny protection to these claimants.

In jurisdictions where rights of review allow for scrutiny of other European practices, the divergent fates of those in need of protection in the region is illuminated. For instance, in court proceedings in the United Kingdom, a 1998 report from the International Helsinki Committee is cited which states that UNHCR was of the view that 'Norway did not appear to be fulfilling its obligations under the 1951 Refugee Convention.'[86] The Court was reviewing the removal of a Serbo–Croatian asylum seeker back to Norway in which, of 980 decided cases concerning similar Serbo–Croatian claims based on non-state persecution, none had been granted refugee status. In contrast, in the United Kingdom, 25 of 145 like applications had been given refugee status.

The issue of non-state persecution was raised before the UK Court of Appeal and House of Lords in the seminal judgements of *Adan* and *Aitseguer*. Basing its analysis on the interpretative scope of the 1951 Refugee Convention in light of the Vienna Convention on the Law of Treaties and the UNHCR Handbook, both courts upheld the appeal against a decision to remove the Somali and Algerian asylum seekers to Germany and France on the grounds that these jurisdictions applied only the accountability theory in extending the scope of protection for refugees, hence failing to provide protection against third party persecution absent state complicity.[87]

The carefully reasoned judgments of both the Court of Appeal and the House of Lords in *Adan* and *Aitseguer* affirm that the DC can not be used by the state to override its international protection obligations under the 1951 Refugee Convention. For an asylum seeker whose claim is based upon non-state persecution, return to a jurisdiction that does not recognize such persecution as deserving of protection under

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[86] The judgement includes the subsequent clarification was made by UNHCR's regional office in Stockholm that indicates that the reported statement referred to the situation in Norway prior to January 1998. U.K. Court of Appeal, R v. Secretary of State for the Home Department, ex parte Strajinic, 21 April, 1999.

[87] U.K. Court of Appeal, Adan and Aitseguer, [1998] INLR 472. U.K. House of Lords, Regina v. Secretary of State for the Home department, Ex Parte Adan. Regina v. Secretary of State for The Home Department, Ex Parte Aitseguer, Judgements of 19 December 2000, available at <http:///www.parliament.the-stationary-office.co.uk>.

its domestic law, could result in *refoulement*, and hence would be a violation of international law.[88] While the English courts do not see themselves as a supranational adjudicatory body, compliance with international legal obligations could only be determined after a careful examination of national asylum law, policy and practice in the area; a process the DC foregoes. UNHCR's long-term silence over the absence of review on protection grounds under the DC disappointingly made the organization an accomplice in the regional process of compromising the protection of a marginal group of asylum seekers. For the bedrock of the treaty is the premature and unsustainable presumption that consistent safeguards, substantive and procedural, are in place across Europe. In adopting this policy, it allowed itself to follow European trends rather than boldly set standards to be attained. The irony underlying UNHCR's European policy is that the organization has issued strong public critiques of European asylum practices, yet by watering down its position on the safeguards for safe third country removals with respect to the signatory states of the DC, the organization dissolved the coherence in its regional protection policy.

UNHCR's compromised position on DC became even more exposed in light of the invitation by the ECtHR for UNCHR to submit a written intervention in the case of *T.I. v. United Kingdom*.[89] Like *Adan* and *Aitseguer*, this case concerns the transfer of an asylum seeker with a non-state persecution claim to another Member State. Although the case was determined to be inadmissible, the decision of the ECtHR is significant in that it compelled UNHCR to acknowledge publicly that the DC in its current form, can give rise to instances of *refoulement*.

In its submission UNHCR reaffirms its position that recognition of refugee status is also required where persecution is perpetrated by non-state actors 'on account of one of the grounds enumerated in the 1951 Convention, under circumstances that indicated protection against the threatened persecution by such actors was not available.'[90] It unequivocally goes on to assert:

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[88] See G. Noll, "Formalism vs. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law," 70 Nordic Journal of International Law 1-2, pp. 161-182.

[89] EctHR (Third Chamber), Decision as to the Admissibility of Application No.43844/98 by T.I. against the United Kingdom, 7 March 2000 (unpublished).

[90] Ibid, at para. 17.

> 'Clearly the spirit and purpose of the 1951 Convention would be defeated and the system of the international protection of refugees seriously weakened if it were to be held that a person in need of protection from persecution or other harm should be denied that protection unless a State could be held accountable for the violation of his or her fundamental human rights.[91]

The central statement made by UNHCR in its submission is its assertion that the effective application of the DC is 'seriously hampered by States' diverging interpretations of the refugee definition of the 1951 Convention' and that the 'strict assignment of responsibilities to deal with an application for protection can lead to a rejection of the application by one State, whereas if processed in another State, the same application might have been accepted.'[92] Yet UNHCR confines this legal conclusion to claims transferred under Article 10 of the DC, whereby they are being returned to a signatory state that has already considered and denied their application. In these circumstances, as UNHCR points out, the claimant can no longer hope to be recognised as a refugee or to obtain alternative forms of protection in the receiving State. The likelihood also exists that the respective state will already have issued a deportation order, against which an effective legal remedy, including an appeal with a suspensive effect, will not be available to the claimant.

This following statement by UNHCR posits its DC policy in a logically and legally unsustainable position:

> 'An applicant whose valid claim had been earlier rejected by a Dublin State on the basis of that State's determination criteria which are clearly at variance with standards applied by the majority of Dublin States may succeed in demonstrating to the authorities of another Dublin State a continued risk in terms of the 1951 Convention or Article 3 of the European Convention on Human Rights.'[93]

As a matter of regional policy, UNHCR disavows the right of asylum seekers to an appeal with suspensive effect for returns carried out under the DC. Yet when confronted with an actual case which would give effect to this policy, in the instance of *T.I. v. the United Kingdom*, UNHCR observes that the 'strict application' of the DC could result

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[91] Ibid, at para. 18.

[92] Ibid, at paras. 23-24.

[93] Ibid, at para. 27.

in instances of *refoulement*. This risk arises, according to UNHCR, as a result of divergent interpretations of the 1951 Refugee Convention across Europe, and particularly with respect to non-state persecution. As its regional policy agenda conflicts and compromises the legal opinion submitted in this pending case, UNHCR attempts to argue for a narrow protective scope that only applies to cases related to Article 10, further stretching the institution's credibility. For the risk of *refoulement* acknowledged in this opinion is circumscribed to those claimants who have already had their asylum applications denied in another jurisdiction. Their expressed concern does not extend to those whose claims have yet to be determined, regardless of how explicit and established practice may be in the receiving state.[94] The only effective distinction that could be made between the protection needs of those whose claims based on non-state persecution have already been rejected by the receiving DC state, and those whose similar claims have yet to assessed, but will inevitably be denied on like grounds, is not the certainty of their deportation to their country of origin, but merely the amount of time before it will be carried out.

The central point to make about the DC and the imminent expansion of the EU rests with capacity of the emerging system to allow for a close assessment of the protection guarantees for asylum seekers prior to their removal to the new Member States with younger and weaker refugee determination systems. This applies under the readmission agreements, as they now operate, and the future framework for transferring asylum claims under the successor Dublin regime. There is another equally vital issue to be considered in the accession process. With the DC, unlike most other parts of the *acquis*, UNHCR has been left straddling over one of the fault-lines of the protection system in the west. Politically casting a blind eye to the protection ramifications, while the organization's branch offices work diligently and quietly to prevent removals that may compromise the protection of asylum seekers. One could argue both about the capacity of small branch offices effectively to provide such a safeguard, particularly in large jurisdictions, but also about its inappropriateness as an approach to a regional policy. With the prospect of up to 27 states someday entering into this regime, UNHCR will no longer be able to straddle the expanding fault lines in the system for transferring asylum applicants unless it is reformed.

[94] The extent to which protection standards are adhered to by states that adopt an accountability theory with respect to non-state persecution is at issue in each of the candidate states in this study.

8.VII Lessons Learned

The accession process highlights the need for asylum harmonization to be tailored to withstand the strains of the new Member States. This study has illustrated how the fate of the *acquis* in the east underscores the need to narrow the protection gaps in consideration of the challenges confronting the newly democratized candidate states. UNHCR has played an active role in identifying the substantive and procedural gaps that require review and reform. Yet it is the DC that precariously lets the organization stand astride a protection gap that will only expand along with the membership of the EU. In anticipation of accession, the Council of Ministers must recognize that they can no longer tolerate the inadequacies of the current *acquis*. They must comprehensively redesign and improve the European asylum regime. Likewise, UNHCR in turn must recognize that they can no longer politically straddle the widening fault lines of Dublin or its successor regime. UNHCR must approach its critique of European policy coherently and comprehensively: at stake is the fate of refugees and UNHCR's institutional credibility.

The historic transformations in the political landscape of Europe have offered a renewed opportunity for the reconstruction of the regional asylum regime that promises genuine guarantees against *refoulement*. The lessons from the pre-accession period, however, reveal that in spite of consensus from all sectors that the current framework for common asylum standards requires significant reform, the influence of western European practices on the policy of eastern neighbours is well underway. The spread of the 'closed sack' fear has generated a chain reaction across the continent with greater momentum building toward the state that finds itself the nearest link to countries of origin. The time for careful scrutiny of the European policies of non-admission, deflection and deterrence is now because experience in the candidate states has shown that it is unlikely to be exercised there. The process of accession and the obligatory transfer of the asylum *acquis*, for better or worse, circumvent the democratic process. Challenges to the assumptions underlying the *acquis* must come from the Commission, Member States and the guardian of the 1951 Refugee Convention, UNHCR.

A coherent protection-based approach is required to redesign a pan-European framework that can truly apply across jurisdictions, legal traditions and geographic realities in an expanded European Union. At this crucial time, UNHCR's positions should provide a guiding model for the process underway; one that sustains its high legal standards resting upon the basis of legal coherence rather than political

pragmatism. The narrow window for asylum reform may not be opened again for a long time. For the Council of Ministers, the European Commission, Member States, current and future, now is the time to assess the impact of current practices, challenge their underlying assumptions and learn from the successes and shortcomings of the inherited *acquis*. If we seek a uniform and principled protection regime for refugees in Europe and beyond, we must approach the task with a coherent and sustainable policy on protection.

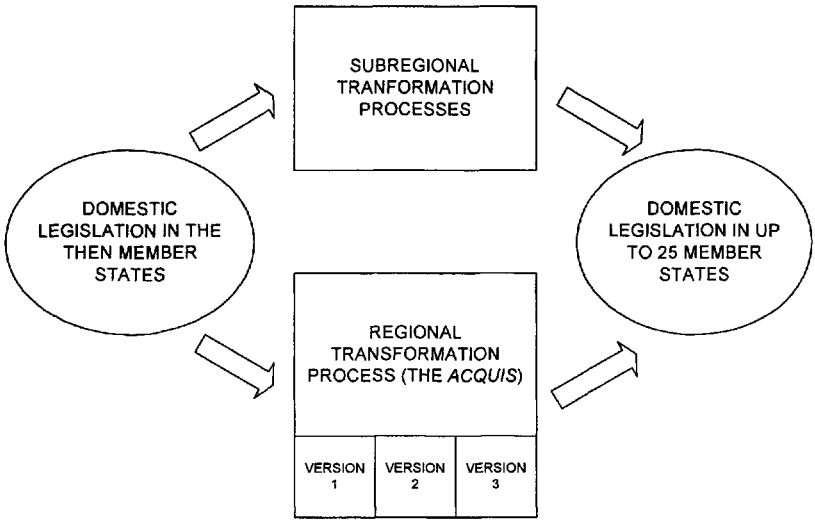
9 Transformation of Asylum in Europe

Rosemary Byrne, Gregor Noll, Jens Vedsted-Hansen

In this book, we have looked at the *transformation of asylum* in Europe in the context of the enlargement of the EU. This reformulation of refugee protection is occurring within states, on the domestic level, and between states, on the sub-regional and regional levels. In the area of migration, these three levels of law and policy, while distinct, are highly interdependent. On the domestic level, the focus of reform rests upon the electorate and legislator of a specific state. Its effects, however, extend beyond national jurisdictions, influencing the direction of sub-regional policy. On the sub-regional level, the evolution of asylum policy centres upon the interplay of national asylum practices between neighbouring countries, as, for instance, Austria and Hungary or Germany and Poland. Finally on the regional level, the central role in the transformation of asylum is played by the EU. The two processes that will shape the future of asylum in Europe are the creation of a Common European Asylum System and the accession of present candidate countries to the Union, which entails the duty to implement the *acquis communautaire*. We have attempted to illustrate the interplay between domestic, sub-regional and regional levels in Figure 1 below. The following presents some of our conclusions on how the transformation of asylum has unfolded.

R. Byrne et al. (eds.), New Asylum Countries?, 423–431.

FIGURE 3. SUBREGIONAL TRANSFORMATION PROCESSES



9.I A Comparative Assessment of Migration Control and Refugee Protection in the Three Sub-regions

From a comparative perspective, the most immediate similarity is the complex interrelationship between the factors impacting reforms in asylum law and policy in the Central European and Baltic states examined in Chapters 2–4. All of these states in the Southern, the Central and the Northern sub-regions have adopted and amended their laws and policies affecting asylum seekers and refugees throughout the 1990s as a result of ideological priorities, pressures and trade-offs which were created at the *domestic* and *bilateral* levels, and, through the EU accession process, at the *multilateral* level. It is political ideologies and interests specific to the individual countries that were ultimately decisive as to the timing and contents of legislation adopted, as well as the manner in which it was implemented and its effect on asylum seekers. The exercise of such sovereignty by the countries undergoing

transition, however, was significantly constrained by their dependency on Western neighbours.

This is most clearly expressed in the EU accession process, which requires that applicant states adopt and implement the asylum *acquis*. This formal dependency was channelled into specific organizational and legal structures. In addition to these, there were bilateral mechanisms that are likely to have been at least as effective in motivating Baltic and Central European states to establish migration control systems and arrangements for dealing with asylum seekers and refugees. As illustrated by the Northern and the Central link, this kind of dependency may have been less transparent, primarily because it was often based on a mixture of conditions from donor states that were providing assistance to the new democracies for capacity building in a variety of areas. At the same time, the recipient states were anxious to secure the goodwill of Western neighbours in crucial matters such as visa-free travel and more general support for their integration into Western European political structures. Nonetheless, as emphasized in the concluding observations of the sub-regional Chapters 2–4, the importance of *domestic policy choices* in the applicant states should not be underestimated, whereas political choices in migration are rarely divorced from the realities of geography, history and economic conditions in the Central European and Baltic countries under examination.

A type of bilateral mechanism that has proven to be of particular importance in the context of asylum and migration control is the dialectical process of restrictive measures and counter-measures. Especially for the Central and the Southern sub-regions, it appears that the Eastern states, including at an earlier stage of history Austria, were significantly affected by restrictive policy changes in neighbouring destination countries to the West, not least, by those introduced in Germany. In turn such restrictions almost inevitably inspired policy changes in the Eastern transit countries, due to their fear of a *closed-sack* effect. This fear was caused by the increasing difficulty for asylum seekers to move on westwards, combined with the inability for these states to return third country nationals eastwards upon readmission from Western neighbours.

Yet again, policy changes in Central Europe occurred as a result of complex interplay of factors generated by international pressures and domestic political choices. This was further complicated by parallel mechanisms of *counter-strategies* adopted by individual asylum seekers. When western states, that were their primary destination, erected new barriers, asylum seekers responded by adapting their own migration patterns and practices in order to evade these new obstacles to entry.

As Chapter 2's concluding observations point out for the Central Link, the strategies of host states, as well as the responding counter-strategies adopted by asylum seekers, proliferated eastward.

The scenario was quite different for the Northern Link, by virtue of both geography and legal principle. In this sub-region it is difficult and risky for asylum seekers to cross the Baltic Sea borders illegally. Consequently, the Nordic countries were able to implement successfully alternative deflection measures in order to prevent asylum seekers from moving westwards from the three Baltic States. Geographical constraints were abetted by the lack of protection structures in these states in the early 1990s, as this alternative became the more attractive because it was legally impossible to return asylum seekers to a Baltic transit country should they arrive irregularly at the borders of Nordic countries. Hence, the strategy of deflection from the West in this sub-region gave priority to *non-arrival* policies, rather than the pre-procedure returns on safe third country grounds that were practised along the Central and Southern Links. This strategy led to various *containment* mechanisms in the Baltic states, implemented through assistance programmes and other kinds of dependency at the bilateral level, yet coordinated multilaterally within the group of Nordic states.

All of the deflective measures that have been implemented by Western European states have had repercussions on the application of the Refugee Convention in the affected Central European countries, once they ratified or acceded to the Convention. The counter-strategies operated by asylum seekers against pre-procedure returns, have often been inappropriately utilized by authorities in the new asylum states to discredit the credibility of their claims for protection against return to the country of origin. In a less direct way, *non-arrival* policies implemented in the Northern Link may also have contributed to reducing the effective operation of the Convention. For these policies adopted by the Nordic states affirm the perception held by officials in the Baltic States that asylum seekers are essentially illegal migrants.

9.II The Phases of the Transformation of Asylum

Let us now consider another dimension to the transformation of asylum in Europe. It can be more easily understood if one breaks it down into three distinct historical phases between the mid-1980's and the present day. This helps us to avoid the cliché of a 'Brussels

dictate' and depicts important nuances in the interplay of the domestic, sub-regional and regional levels. During the formative phase central norms, notions and principles were conceived on a domestic level. This was followed by the transformative phase, where these domestic norms were then regionalized within Europe. Currently, the central components of these regionalized legal instruments are being reconsidered during what is now the reformative phase.

The foundation stones of current regional asylum system in Western Europe were set in place by domestic legislatures in the formative phase. National lawmakers developed a number of restrictive approaches to refugee law in order to grapple with what was considered primarily to be a domestic problem; the perceived overburdening of national asylum systems. Invariably, these innovations aimed at preventing asylum seekers from entering or remaining in the territory, set a spiral movement of like policies in the region, inspiring domestic legislatures in neighbouring states to incorporate restrictive practices into their own asylum laws. The formative phase started in 1986 (which saw the inception of the safe third country notion in the form of the so-called *Danish Clause*) and peaked in 1993 with the comprehensive limitation of the right to asylum in the German Constitution, the repercussions of which rippled through a number of neighbouring states in the following years. Since 1993, there have been no radically new norms or practices conceived by domestic lawmakers: a testament, perhaps, to the fact that the development of new restrictive concepts had reached a point of saturation. Now, states amend their asylum practices by experimenting with various formulations of existing concepts, or by simply importing those already implemented by their neighbours.

This brings us to the transformative phase, during which the domestic asylum policies of the formative phase proliferated all over Europe. For current Members of the EU, two processes of transformation can be distinguished. One took place among neighbouring states, that is, on the sub-regional level. The other took place within the framework of the EU and the Schengen Group on the regional level. There is a marked difference between the two processes. While sub-regional transformation is characterized by a rather precise and specific transfer of normative content between two countries, regional transformation takes place on a much more abstract and general level, where to date states primarily have been encouraged, but not formally bound, to implement norms and standards. Parallel to the transformation process, the candidate countries were anticipating, and then formally applying for membership to the EU in the aftermath of the fall of the Berlin Wall. During this time, there was a rippling of

safe third country mechanisms from West to East. While it is tempting to credit this phenomenon to the abstract and non-binding 1992 London Resolution on Host Third Countries, the actual driving force was domestic legislation in conjunction with the conclusion of bilateral readmission agreements. Because the London Resolution is a handy point of reference, many observers mistake it as the cause of transformation, rather than one of its symptoms.

Let us pin down both processes of transformation in time. Sub-regional transformation was most marked since 1993 onwards, while regional transformation started to gain momentum in the mid-1990s with the successive entry into force of the Schengen and DC in 1995 and 1997 respectively. At the domestic level, the adaptation of legislation was often motivated with a reference to the *acquis*, and thus to the regional process, but the dire necessity to adapt domestic law then and there was rather a result of concrete bilateral or sub-regional pressures. It is for this reason that the implications of the protection standards and asylum practices in future EU Member States are not confined to policies adopted within an expanded EU. For the sub-regional forces between Member States and Candidate Countries were strong determinants in shaping the emerging regimes in these newly democratized states, independent of the formal criteria laid down by the accession process.

Then again, looking at the *acquis* in isolation, one must distinguish different stages. The intergovernmental stage from 1990 (when the Dublin and Schengen Conventions were signed) to1999 (when the Treaty of Amsterdam entered into force) yielded a rather low output of binding norms. Moreover, both binding and non-binding norms were fraught with idiosyncrasies and thus applied in a different manner and to a varying degree by Member States. Although for current Members States most of these instruments represent soft law, for future Member States, as formal criteria for accession, they represent hard obligations. Although the endemic shortcomings of existing soft law made it particularly unsuitable for export to candidate countries, both the Commission and the Member States exercised considerable efforts for its wholesale transfer to the candidate states. This situation gives rise to the current paradox, where one Directorate of the European Commission is addressing the weaknesses of the asylum *acquis* in the process of reconstructing Europe's refugee protection framework, while another Directorate is mandating the comprehensive adoption of the very same *acquis* to eastern candidate states in the process of accession.

We are presently in the reformative phase, a period of asylum reform in the post Amsterdam era, as well as a period of enlargement. It is

remarkable, however that in the process of reform, there has been scant recognition from the individual governments, the European Commission and even the United Nations High Commissioner for Refugees of the protection consequences of including the new asylum states in the emerging pan-European refugee system that is under construction.

This pan-European refugee system will be created by the second *acquis* that is now under negotiation. As it is likely to be the crucial instrument in the future of asylum in Europe, it is all the more imperative that the fault lines in the emerging legal protection framework be sealed with more robust regional norms. Parallel to the ongoing sale of the first and already outdated version of the *acquis* to the candidate countries, the Commission is engaged in the preparation of the second version of the *acquis*. It can now do so by virtue of the Amsterdam Treaty, which has equipped it with the right to initiative. Most certainly, the proposals tabled by the Commission generally reflect a more protection-minded approach. Nonetheless, it remains to be seen whether these characteristics are preserved throughout the negotiations in the Council. Both the Commission and the Council are short of time, as the core instruments have to be adopted by 2004 at the latest, if the unambiguous letter of the Amsterdam Treaty shall be respected. Given these concerns, it is all the more serious that the second version of the *acquis* will mainly consist of binding instruments.

9.III Asylum and Enlargement

Where does this leave the candidate countries after enlargement? Different from the older Member States, they will have implemented the first version of the *acquis* in the course of the accession process. This will invariably make them unwilling to remodel their domestic legislation again. This process will take place when enlargement has begun, and the complexity of decision-making will grow exponentially, unless qualified majority voting has been introduced. Thus, after enlargement, any attempts to develop the *acquis* in a more liberal direction will need to overcome the new Member States' affinity to the first version of the *acquis*. To be sure, the present Member States will lose much of their bargaining power vis-à-vis the candidate states, once these have been admitted to the club.

The emerging European system requires confidence that it is capable of imposing uniform standards of protection across the varied legal systems of Western Europe. This is a pre-requisite for implementing the migration policies of the collective and individual Member States. The ECtHR and the British House of Lords have recently cast doubt on the sustainability of that assumption which is the bedrock of the DC. This does not even consider the diversity of standards that is a feature of the asylum systems in the new asylum states, the very states that are compelled to become part of the Dublin regime as a condition of membership of the EU.

It remains possible that second *acquis* could guarantee minimum standards dramatically higher than the current adopted threshold. These standards would be incorporated in the current and future Member States. In this improved world, sub-regional policies and assistance programmes could invest the resources and transfer a rights based ethos to the emerging refugee systems in the east (an ethos that remains yet to be dominant in western determination systems) to ensure that asylum seekers in the Baltic and CEEC states are sufficiently protected against *refoulement*. While one could debate whether this is a feasible vision for the future EU, there would, however, be greater consensus that it remains to be realized. It is acknowledged by most working in the field, that both the transfer of the current *acquis* and the scope of sub-regional policies have yet to bring about a viable refugee protection framework that guarantees adequate protection to refugees in the new asylum states. And as this study has evidenced, the protection gaps which exist in the current *acquis*, as for instance, with respect to safe third country practices or accelerated procedures, when transferred, pose an even greater threat of *refoulement* when implemented in the applicant states.

Yet the one arm of the Commission, along with UNHCR, is not waiting for the other arm of the Commission, or individual Member States, to correct the practices in the current *acquis* that threaten protection before they transport it eastwards. The Commission identifies one of the primary objectives in requiring the implementation of the first *acquis* for candidate states seeking membership as the enlargement of the pool of potential third countries to which asylum seekers can be returned to have their claims considered. If the Members of the EU are to benefit from this expanded pool of host third countries that are the new asylum states, and avoid responsibility for breaches of the 1951 Refugee Convention, one would have to accept that the first *acquis* and sub-regional policies have already succeeded in constructing a regional refugee system that can guarantee protection in the west and east. The fact that the first

acquis fails to deliver this subverts the process underway and undermines the system as it now operates.

The period of asylum reform in the Post-Amsterdam era has the benefit of witnessing the fate of the *acquis* in the east. The protection problems that arise through the shortcomings of the *acquis* are different in degree, not in kind, to those that have plagued western protection systems. A difference of a few degrees, however, may offer more glaring illumination of the flaws in the foundation of the adopted European protection system that western states have chosen to overlook in their desire to push forward the process of asylum harmonization.

The potential of the accession process to affect asylum standards may ultimately be greater in the west than the east, for if analyzed closely, there is the possibility that the experiences of the Baltic and CEEC states will do more than simply foreshadow the future of asylum in an enlarged EU. For the impact of the accession process can be measured not only by the advances and flaws in the emerging protection regimes to the east, but certainly also by its capacity to test and inform the assumptions and practices of the current asylum policy in the west that is now undergoing reassessment by the European Commission, Parliament and Council.

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