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## **Controlling Asylum Migration to the Enlarged EU**

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### **Abstract**

We examine the ways in which candidate countries which are to join the EU in 2004 are responding to increasing asylum migration from the East and assess the impact of accession on their asylum and immigration laws and policies. It will be argued that recent changes in asylum and immigration laws in candidate countries have been largely affected by current EU efforts to devise a common immigration policy and a possible common asylum system. Instead of devising their own response to asylum migration, candidate countries are merely aligning their asylum policies with EU practice and expectations.

Keywords: asylum, immigration, EU enlargement

JEL classification: F22, K33

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The 2002 Copenhagen European Council confirmed that the first wave of enlargement will take place in 2004 and this undoubtedly constitutes one of the most important developments in the history of European integration. Provided that the accession process is completed, ten new Member States, namely Cyprus, the Czech Republic, Hungary, Malta, Poland, Slovakia, Slovenia and the three Baltic States (Estonia, Latvia and Lithuania) will soon join the EU. Around 2007, Bulgaria and Romania will probably also join. Previous enlargements have taken place in the past,<sup>1</sup> but the imminent accession of ten countries, mainly from Central and Eastern Europe, is unprecedented not only in terms of scale, but also for its political symbolism: for these states, EU membership confirms the success of their democratic and economic transition efforts and represents their (re-)integration to the European family after decades of political isolation.

Much has already been written about the impact of eastward enlargement on the EU's institutional framework and current EU policies.<sup>2</sup> This paper deals with the recent measures implemented in candidate countries to control asylum migration to the enlarged EU. In particular, it assesses the impact of accession on the candidate countries' asylum and immigration laws and policies. In order to do so, the paper examines the ways in which candidate countries are responding to increasing asylum migration from the East and argue that recent changes in asylum and immigration laws in candidate countries have been largely affected by current EU efforts to devise a common immigration policy and a possible common asylum system. Instead of devising their own response to asylum migration, candidate countries are merely aligning their asylum policies with EU practice and expectations.

Because of their geographical location, the new Member States will be responsible for policing the new Eastern border of the EU and receiving asylum seekers travelling from further East. Cyprus and Malta are thus excluded from the analysis which only examines the candidate countries from Central and Eastern Europe. Current EU Member States are very concerned about illegal migration from the East and are putting considerable pressure on candidate countries to set up efficient asylum systems and, more importantly to them, strict border controls. This paper does not deal with issues of free movement of persons within the enlarged EU, but with the regulation of asylum migration from outside the EU. Until recently, most of the academic literature had concentrated on the emergence of EU immigration and asylum laws under the new Title IV introduced at Amsterdam in 1998,<sup>3</sup> and very little attention had been given to the impact of these developments on candidate countries.<sup>4</sup>

Following a brief overview of the asylum situation(s) in candidate countries, the paper then demonstrates how the changes recently implemented in candidate countries may not be adapted to such asylum situation(s) because they mainly result from a policy

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<sup>1</sup> Denmark, Ireland and the UK first joined in 1973, Greece in 1981, Spain and Portugal in 1986, and Austria, Finland and Sweden in 1995.

<sup>2</sup> On issues of institutional reform in anticipation of enlargement, see for instance, Shaw (2001).

<sup>3</sup> See, for instance, Guild and Harlow (2001), Hailbronner (1998); O'Keefe (1999), and Simpson (1999).

<sup>4</sup> For recent studies of asylum and immigration laws in candidate countries, see Byrne *et al.* (2002a) and Laczko *et al.* (2002).

transfer from EU Member States which have a totally different asylum situation. The EU strategy for controlling asylum migration to the enlarged EU can be broken down into several areas: setting up new asylum systems in candidate countries, restricting entries through the imposition of visa requirements, preventing illegal entries by reinforcing border controls and facilitating returns with the signature of re-admission agreements. Frequent references will be made to Poland because of that country's strategic importance in terms of controlling the future Eastern border of the EU.<sup>5</sup> It is by far the largest candidate country both in terms of area (313,000 km<sup>2</sup>) and population (38.6 million inhabitants in 2000). Moreover, Poland has a strategic position since it shares common borders with Germany to the West, Lithuania, Belarus, and Ukraine to the East, and the Czech Republic and Slovakia to the South. It even has a common border with the Russian Federation whose enclave around Kaliningrad is sandwiched between Poland and Lithuania, both future EU Member States. Consequently, Poland shares borders with a number of countries which are refugee-producing countries (such as the Russian Federation for instance) on the doorstep of the future EU and/or for which EU membership is a very distant prospect. The EU is also extremely concerned about organized criminal networks operating in the former Soviet Republics which will use Poland as an entry point into the enlarged EU. As a result, Poland constitutes a very important country in terms of controlling the 'main European migratory channel between a disintegrating East and an integrating West' (Jerczinski 1999: 105), and thus for ensuring the EU's internal security. Finally, Poland has so far pursued dynamic Eastern policies towards its neighbours and the changes in asylum and immigration laws demanded by its new EU partners are likely to have a significant impact on these policies.

## **1 Recent and future asylum flows to Central and Eastern Europe**

During the Cold War, the countries examined here were mainly refugee-producing countries. The only country to have received some asylum-seekers in the late 1980s was Hungary which took on refugees from neighbouring Romania (Wallace 2002: 609). In the early 1990s, it also received asylum-seekers from the former Yugoslavia but most of them returned to their country of origin as soon as the security conditions had improved. Since the mid-1990s, most candidate countries have become transit countries for people wanting to seek asylum further west. The number of asylum applications has increased in most candidate countries but there are substantial differences between the countries. Indeed, the Baltic countries still receive a relatively low number of asylum applications whereas countries like the Czech Republic and Hungary have seen a dramatic increase in the number of asylum applications. Nevertheless, when compared to the numbers of asylum applications lodged in Western European countries, candidate countries clearly do not face the same pressures.

So far, most asylum-seekers in candidate countries have not actually remained in these countries and have often attempted to move to Western Europe. Since border controls are still relatively strict between current EU Member States and candidate countries, these asylum-seekers often remain 'trapped' in candidate countries which form a buffer

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<sup>5</sup> The analysis is partly based on interviews conducted in June 2002 in Poland with government officials, non-governmental organizations dealing with refugees and asylum seekers, and academics.

zone between Western Europe and poorer and more unstable regions in Asia. The combination of migration pressure from the East following the disintegration of the Soviet Union and restrictive migration policies in the EU have led Central and Eastern European countries to become countries of destination. This phenomenon has been described as the ‘closed sack’ effect (Byrne *et al.* 2002b: 28). This situation will be confirmed with EU accession: more asylum-seekers will target the new Member States as countries of destination. To anticipate this change and in order to gain EU membership, these countries are under considerable pressure to implement major changes to their asylum and immigration laws and policies.

Table 1  
Numbers claiming asylum in candidate countries (1992-2001)

	1992	1995	1998	2001
Czech Republic	817	1,413	4,082	18,087
Estonia	-	-	23	12
Hungary	458	130	7,097	9,554
Latvia	-	-	58	14
Lithuania	-	-	163	256
Poland	592	843	3,373	4,506
Slovakia	87	359	506	8,151
Slovenia	-	-	499	1,511

Source: *UNHCR Statistical Yearbook 2001, Refugees, Asylum-seekers and Other Persons of Concern-Trends in Displacement. Protection and Solutions*, October 2002, Geneva, Annex C.1.

## 2 The integration of Justice and Home Affairs issues in the enlargement process

The initial accession criteria did not explicitly refer to Justice and Home Affairs issues partly because the EU was only just getting involved in this area when enlargement was envisaged. The enlargement process finds its origins in the Association agreements, also called Europe agreements, which were signed between the EU and each country in the 1990s. The 1993 Copenhagen European Council confirmed that Central and Eastern European countries could one day join the EU, and between 1994 and 1996, all of them formally applied for EU membership. However, EU Member States have for a long time refrained from giving specific dates for accession and pressure by candidate countries was put on the EU to define a more specific pre-accession strategy.

Since 1993, the definition of the criteria for accession has been rather progressive and piecemeal. The basic condition for enlargement is contained in Article 49 TEU which provides that any European State which respects the principles of democracy, human rights and the rule of law as set out in Article 6(1) TEU, may apply to become a member of the EU. When identifying more detailed accession criteria, the challenge was

to enlarge the EU without diluting it, that is, without endangering the process of further integration. It is therefore crucial that new Member States can be integrated without undermining the progress made since 1957. In addition, they must be able to follow the current pace of integration without slowing it down.

The 1993 Copenhagen European Council identified three types of criteria. Candidate countries must fulfil political criteria relating to the stability of institutions guaranteeing democracy, the rule of law, respect for human rights and minority rights. The importance of these criteria as an essential prerequisite for opening accession negotiations was reaffirmed at the 1999 Helsinki European Council (Seiffarth 2000: 62) and may explain why negotiations have not yet been opened with Turkey. Since one of the EU's primary aims remains the establishment of the internal market, candidate countries must have a fully functioning market economy. Beyond the political and economic criteria, candidate countries must also demonstrate their general ability to take on the obligations of membership such as the adjustment of their administrative structures and a guarantee that EU legislation will be properly implemented.

In order to help candidate countries fulfil accession criteria, reinforced pre-accession strategies have been defined for each country and regularly updated since 1997 on the basis of a Commission paper entitled 'Agenda 2000'. The reinforced pre-accession strategies are also based on the Europe agreements, the accession partnerships and national programmes for the adoption of the EU *acquis*, and pre-accession assistance which is mainly allocated through the Phare programme.<sup>6</sup> Since 1998, the Commission has produced yearly reports on each candidate country which identify the areas where progress is still needed before EU membership can be possible.<sup>7</sup>

The 1997 Amsterdam European Council called for accession negotiations to start with a group of six states (Cyprus, Czech Republic, Estonia, Hungary, Poland and Slovenia) and negotiations were launched in March 1998. To this purpose, the EU *acquis* was divided into 31 chapters: on each chapter, a common negotiating position is adopted by the Council and is then put forward to each individual candidate country during bilateral inter-governmental conferences. Accession negotiations also started with another six countries (Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia) in February 2000. For ten of the twelve countries, negotiations have now been concluded on all 31 chapters. Negotiations are still taking place with Bulgaria and Romania. The first wave of accession is expected to take place before the next elections for the European Parliament in 2004. For each country, accession is only possible once negotiations have been concluded on all chapters of the EU *acquis*, the draft accession treaty is approved by the Council with the assent of the Parliament and is ratified by all current Member States and the country concerned.

When the EU's eastward enlargement was first envisaged, the main concern was over the economic gap between EU economies and those of the candidate countries. Following the Balkan crisis in the first half of the 1990s, there was increasing awareness

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<sup>6</sup> The Phare programme was initially set up in 1989 to support the transition to a market-orientated economy in Poland and Hungary and was subsequently extended to other countries. It is now complemented by two other funds created in 2000, SAPARD (Special Accession Programme for Agriculture and Rural Development) and ISPA (Pre-accession Instrument for Structural Policies).

<sup>7</sup> For the latest Progress Reports, see <http://www.europa.eu.int/comm/enlargement/report2002/>.

that non-economically related issues such as Justice and Home Affairs (JHA) issues also needed to be included in the accession negotiations in order to ensure the internal security of the enlarged EU. The Commission thus recommended that co-operation in JHA matters be more structured (Lavenex 1998a: 284). One must recall that before 1989, candidate countries did not have any immigration or asylum laws or policies for the simple reason that there was no immigration to regulate (Grabbe 2000: 529). With EU accession, these states are bound to become more attractive as countries of destination and the Langdon Report released in 1995 emphasized the need to adopt measures against illegal immigration and build efficient asylum systems in candidate countries (Lavenex 1998a: 288). The inclusion of asylum and immigration matters in the accession negotiations was also made necessary by the transfer of these matters to the EC pillar at Amsterdam in 1998. In particular, the Schengen *acquis* became part of the EU *acquis* and, as such, it also had to be adopted by candidate countries.

Co-operation between EU Member States and candidate countries had already developed in the early 1990s. When Central and Eastern European countries acceded to the Council of Europe, EU Member States took the opportunity to declare them safe third countries, despite their unsatisfactory asylum legislation. If these countries were considered to be safe third countries, asylum seekers who had travelled to the EU via these countries could be returned there without their application being examined in substance in any EU Member State.<sup>8</sup> Similarly, some Central and Eastern European countries were also considered safe countries of origin where there was a presumption of protection: no genuine asylum seeker could come from such countries (Bouteillet-Paquet 2001: 279-80).<sup>9</sup> In order to ensure returns to safe third countries and safe countries of origin in Central and Eastern Europe, a series of readmission agreements were concluded. In effect, EU Member States are using these agreements to transfer the 'asylum burden' to Central and Eastern European countries.

The nature of the earlier co-operation between EU Member States and candidate countries in the field of asylum and immigration has set the tone of the current dialogue. EU Member States consider candidate countries to be a 'buffer zone' between themselves and countries further East. They also know that in the medium to longer term, when complete freedom of movement of persons is achieved within the enlarged EU, they will have to rely entirely on the new Member States to control entries into the EU at the Eastern border. The fear of crime and illegal immigration has prompted existing Member States to demand strict border controls on the future Eastern border in order to ensure that the enlarged EU is as secure as it currently is. In practice, agreement on what constitutes the EU *acquis* in the field of JHA was reached in May 1998 and is also referred to as the TAIEX list which names all the texts to which candidate countries must accede, introduce and/or live up to.<sup>10</sup> One can observe that this list contains a

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<sup>8</sup> The 1990 Dublin Convention on the allocation of responsibility for examining an asylum application does not guarantee that an application will be examined by an EU Member State and allows transfers of asylum-seekers to safe third countries which are not parties to the Convention, see Article 3(5).

<sup>9</sup> One must note that some EU Member States do not always agree upon which Central European countries should be considered to be safe. Nevertheless, once candidate countries become EU Member States, they will be covered by the 1998 Protocol on asylum for nationals of Member States of the European Union (or 'Aznar Protocol') which states that all EU Member States constitute safe countries of origin.

<sup>10</sup> This list has been reproduced in van Krieken (2000: 104-14).

number of third-pillar instruments which are not legally binding upon existing Member States, but which appear to be presented as such to candidate countries (Lavenex 2002: 703). As will be seen below, EU expectations go far beyond the mere adoption of the EU *acquis*: candidate countries must also ‘bring [their] institutions, management systems and administrative arrangements up to Union standards with a view to implementing effectively the ‘*acquis*’, and in particular adopt and implement measures with respect to external border controls, asylum and immigration, and measures to prevent and combat organised crime, terrorism and illicit drug trafficking.’<sup>11</sup> Negotiations on Chapter 24 on JHA have been concluded and it is already clear that the commitments undertaken by candidate countries in this field will be closely monitored before and upon accession. Now is therefore a good time to review what measures candidate countries must undertake in order to gain the confidence of their new European partners and, ultimately, EU membership.

### **3 Setting up new asylum systems in candidate countries: the transfer of the EU asylum *acquis***

Before the end of the Cold War, there were no procedures for determining refugee status, and no provisions regulating the situation of asylum seekers and refugees, because there was no need for asylum systems in the former Communist States. As the first asylum seekers arrived in these countries in the early 1990s, the first generation of asylum legislation was hurriedly adopted. At the same time, all candidate countries became parties to the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol.<sup>12</sup> Nevertheless, the asylum systems initially set up in candidate countries did raise some problems in terms of refugee protection standards (Bouteillet-Paquet 2001: 333). This was to be expected since these countries had no tradition of asylum and/or lacked a human rights culture. When the EU realized this ‘lack of humanitarian tradition, norms and institutions’, (Lavenex 1998a: 277) more attention was paid to asylum matters in the accession strategy. Originally, candidate countries adopted relatively generous policies towards asylum seekers because they had not yet realized the impact of future EU accession and also thought that the influx of asylum seekers was going to be temporary (Bouteillet-Paquet 2001: 334). This attitude towards asylum seekers soon had to be modified as all candidate countries found themselves under the obligation to adopt the EU asylum *acquis* and align their practices on the current restrictive EU policies. A second generation of asylum legislation was adopted in most candidate countries in the late 1990s in order to reflect these changes.<sup>13</sup> In addition, one

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<sup>11</sup> EU initial position for the opening of negotiations with the first six countries, Document 6473/3/98 REV 3 JAI 7 ELARG 51, 25 May 1998, reproduced in Seiffarth (2000: 67-68).

<sup>12</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 1950 and *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267. See UNHCR, *State parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol as of 30 September 2002*, at <http://www.unhcr.ch>. Hungary had already been a party to the 1951 Convention since 1989 for reasons mentioned.

<sup>13</sup> See for instance Czech Republic: Act No. 325 of 11 November 1999 on Asylum, Estonia: Law on Refugees of 18 February 1997, Hungary: Act CXXXIX of 9 December 1997 on Asylum, Poland: Aliens Law of 25 June 1997 (amended by the Act of 11 April 2001), Slovenia: Law on Asylum of 30 July 1999.

project funded by the Phare Programme started in April 1998 in order to help candidate countries adapt their asylum legislation and improve its implementation.<sup>14</sup>

EU assistance to candidate countries in the field of asylum has two underlying objectives. Firstly, it is in the interest of current Member States, most notably Germany, to improve asylum systems in candidate countries. Indeed, if these countries implement refugee protection standards that are equivalent to those of Western European States, such states will have less difficulty justifying returns of asylum seekers because they will benefit from an equivalent level of protection in candidate countries. In other words, by improving protection capacities in candidate countries, Member States are preparing them to receive returned asylum seekers and hoping that they will be able to shift the 'asylum burden' eastwards (Byrne *et al.* 2002b: 17). Although the motivation of Member States can be seen as problematic, EU pressure to implement changes in the asylum systems of candidate countries has brought about some positive consequences. Asylum procedures have been adopted and/or improved, specialized administrative structures have been set up to deal with asylum seekers and refugees, support groups have been created, and so on. It must be noted, though, that significant differences remain between candidate countries, with the Czech Republic, Poland and Slovenia much ahead of the others. The second objective of EU efforts to modify asylum systems in candidate countries is to ensure that these countries do not become too attractive to asylum seekers: they must therefore also adopt deterrence measures similar to those already in place in Western Europe.

One can wonder whether restrictive EU standards currently being imposed on candidate countries are adapted to those countries' situation. A UNHCR officer has noted that 'some CEBS (Central Europe and Baltic States) have adopted notions they might not otherwise have contemplated introducing' (Petersen 2002: 367). For instance, accelerated procedures have been introduced in all candidate countries' asylum systems to deal with manifestly unfounded applications.<sup>15</sup> One may argue that in some cases, these procedures have been introduced without the necessary procedural safeguards and in any case, what candidate countries need are efficient, rather than accelerated, procedures. Indeed, the usefulness of accelerated procedures can be doubted for countries such as Estonia, for instance, which receives less than 30 asylum seekers per year.<sup>16</sup> Candidate countries have also incorporated other well-established EU concepts such as 'safe third country'<sup>17</sup> and 'safe country of origin' whose conformity with international refugee protection standards may be in doubt (ECRE 1998). As candidate countries are going through the transition from countries of transit where asylum

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<sup>14</sup> This Joint Support Program on the Application of the EU *Acquis* on Asylum and Related Standards and Practices in the Associated Countries of Central and Eastern Europe resulted from co-operation between the Commission, UNHCR and the German Federal Office for the Recognition of Refugees, with the assistance of six other Member States (Austria, Denmark, France, the Netherlands, Spain and Sweden). For more detail, see Anagnost (2000).

<sup>15</sup> On accelerated procedures, see van der Klaauw (2001: 180-183).

<sup>16</sup> See table above. On accelerated procedures, see for instance Article 9 of the Estonian Law on Refugees of 18 February 1997; Articles 43-47 of the Hungarian Act CXXXIX of 9 December 1997 on Asylum; and Article 14(2) of the Lithuanian Refugee Law of 29 June 2000, No. VII-1784, No. 56-1651.

<sup>17</sup> On the adoption of the safe third country concept by candidate countries, see Lavenex (1998b: 138).

seekers did not stop to lodge an application, to countries of destination, they must focus on establishing asylum procedures and reception conditions which are in full conformity with international human rights law and refugee law. They should not merely import EU policies which may not be adapted to their current asylum situation and/or administrative structures and practices.

One of the main problems encountered by candidate countries relates to the fact that the exact content of the EU asylum provisions, which they are to adopt, is currently being defined by Member States. There is thus uncertainty as to what norms must be implemented (the problem of the ‘moving target’) (Lavenex 2002: 702-4). European asylum law has only emerged in the last few years and is not yet very elaborate. At the moment, it is mainly composed of non-binding instruments adopted in the first half of the 1990s.<sup>18</sup> These non-binding instruments were presented to candidate countries as binding and therefore to be implemented by them: there has thus been a ‘hardening’ of soft law which is a cause for concern (Anagnost 2000: 386). These instruments were supplemented by international conventions concluded outside the EU framework such as the Dublin Convention on asylum and the Schengen Implementation Agreement which contains some provisions dealing with asylum.<sup>19</sup> It was only in 1998 that asylum became an EC competence under Article 63 EC which envisages the adoption of legally-binding instruments in a number of areas by April 2004. So far, some instruments have been adopted and are now clearly part of the EU asylum *acquis* to be adopted by candidate countries.<sup>20</sup> Nevertheless, the other proposed directives which are also more important remain under negotiation and candidate countries can only speculate as to what their final content will be.<sup>21</sup> At this point, when adopting new asylum legislation, they can try to anticipate EU developments and, if in doubt, may choose the most restrictive standards in order to demonstrate that they can stem the

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<sup>18</sup> See for instance *Resolution on manifestly unfounded applications for asylum, Resolution on a harmonised approach to questions concerning host third countries, Conclusions on countries in which there is generally no serious risk of persecution* (London, 30 November and 1 December 1992), and *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, OJ 1996 C 274/13.

<sup>19</sup> *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, 15 June 1990 (hereinafter the Dublin Convention) OJ 1997 C 254/1, and *Agreement on the Implementation of the Schengen Agreement of 14 June 1985 concerning the Gradual Abolition of Checks at their Common Borders*, 19 June 1990 (1991) 30 ILM 84. For more detail, see Hailbronner and Thiery (1997).

<sup>20</sup> *Council directive No. 2001/55 of 20 July 2001 on minimum standards for 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*, OJ 2001 L 212/12; *Council directive No. 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, OJ 2003 L 31/18; *Council regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member states responsible for examining an asylum application lodged in one of the Member States by a third-country national*, OJ 2003 L 50/1.

<sup>21</sup> *Proposal for a Council directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 Protocol, or as persons who otherwise need international protection*, 12 September 2001, COM(2001) 510 final; *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 20 September 2000, COM(2000) 578 final.

influx of asylum seekers as well as current Member States. What we are also witnessing is candidate countries amending their asylum and immigration legislation almost on a yearly basis in order to take into account recently adopted EU instruments: such frequent legislative changes create serious challenges to the stability and certainty of the law in candidate countries.

A more detailed analysis of the asylum provisions adopted by Poland in 1997 and 2001 illustrates how the EU asylum *acquis* is being transferred to the legal system of a candidate country. Although Poland became a party to the 1951 Convention and its 1967 Protocol on 27 September 1991, there were no specific asylum procedures in place in the country.<sup>22</sup> At the time, Polish authorities seemed to believe that the sudden influx of asylum seekers would soon cease and that no permanent bodies or procedures were necessary (Stainsby 1990: 637). However, as a result of readmission agreements signed with EU countries, as well as an increase in direct arrivals, the numbers of asylum seekers in Poland continued to increase.<sup>23</sup> These asylum seekers were mainly from Russia, Romania, Armenia, Bulgaria and Azerbaijan (in order of decreasing numbers) (Mikolajczyk 2002: 52). Moreover, it became increasingly clear that Poland would have to adopt the EU asylum *acquis* before accession. It was thus decided that Poland needed an asylum system in order to determine which asylum seekers should be granted refugee status.

It must be noted here that a large number of asylum seekers appear to be persons who have been returned from Germany under the readmission agreement signed on 29 March 1991 with Schengen countries and the separate readmission agreement signed with Germany on 7 May 1993.<sup>24</sup> Under the safe third country rule adopted by Germany, it is almost impossible to obtain asylum in that country if one has travelled via Poland (Grabbe 2000: 529) and the overwhelming majority of asylum seekers in Germany have entered through the German-Polish border (Lavenex 1998b: 140). In effect, Poland has thus become a *de facto* member of the Dublin Convention system as it receives asylum seekers who have travelled to the EU via Poland, but it is not allowed to transfer asylum seekers to the EU (Lavenex 1998b: 132-33). Poland was encouraged to sign the readmission agreement with Germany in exchange for funding of 120 million DM to improve its asylum systems and border controls (Bouteillet-Paquet 2001: 292).

The 1997 Aliens Act constitutes the first attempt to regulate comprehensively the situation of asylum seekers and refugees in Poland.<sup>25</sup> Chapter 5 of the Aliens Act deals with refugee status. It appears that the legislation has introduced satisfactory procedural standards which include, for instance, the right for asylum seekers to be informed in a language they understand (Article 33), the right to a personal interview (Article 40) and

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<sup>22</sup> Some amendments were made to the 1963 Aliens Act in 1991, but proved completely insufficient to deal with the situation, see Czaplinski (1994: 637).

<sup>23</sup> See table above. A very high proportion of these applications (55 per cent in 1998) are discontinued as a result of the applicants disappearing, probably trying to enter the EU.

<sup>24</sup> In 1998, there were 698 asylum applications lodged at the German-Polish border (Mikolajczyk 2002: 53). To this figure, one must add the number of applications lodged by asylum seekers re-admitted from Germany within the country.

<sup>25</sup> Aliens Act No. 114, 25 June 1997, OGRP, No. 739/1997. For more detail, see Chlebny and Trojan (2000).

the right to contact the UN High Commissioner for Refugees' Office (UNHCR) (Article 49). Initial decisions on asylum applications were taken by the Ministry of Internal Affairs and this responsibility has now been transferred to a specific body called the Office for Repatriation and Aliens which was set up in 2001. Chapter 10 of the Aliens Act creates a new institution to examine asylum appeals, the Refugee Board, which was established in 1999. Further appeals can be made to the Supreme Administrative Court but only an extremely small number of decisions are reversed on appeal (Mikolajczyk 2002: 55).

On paper, the laws and procedures adopted by Poland in 1997 appear to be in conformity with international refugee and human rights standards,<sup>26</sup> but have been restrictively and/or not properly implemented. For instance, time limits for lodging an application were initially interpreted quite strictly until the Supreme Administrative Court intervened (Chlebny and Trojan 2000: 220-21). These time limits were removed in 2001. It has also been reported that many initial interviews of asylum seekers were not conducted by qualified immigration officers (Monar 2001: 42). This raises the more general problem of lack of resources, staff and training. Consequently and despite the low number of applications compared with Western Europe, there is already a backlog of cases which were initially supposed to be decided within three months (Article 41). This period was extended to six months in 2001, but is still shorter than the average time actually needed to obtain a decision on an asylum application. The recognition rate remains just below 2 per cent, which is extremely low, even for Western European standards (Noll 2002: 322).<sup>27</sup>

Amendments to the 1997 Aliens Act were introduced in 2001, partly to meet EU requirements.<sup>28</sup> The two main changes in the field of asylum were the introduction of accelerated procedures (Article 41a) and the development of a temporary protection status (Chapter 6a). Nevertheless, although Article 53 provides that nobody can be deported if he would be exposed to a breach of the European Convention on Human Rights,<sup>29</sup> no subsidiary status currently exists in Polish law (Mikolajczyk 2002: 73-74): failed asylum seekers who can nonetheless not be deported, mainly Chechens, are merely given a temporary residence permit and are not entitled to any support.<sup>30</sup> Some form of 'tolerated status' will be created to remedy this situation. Indeed, Polish authorities are currently drafting new laws to be adopted in 2003. The 1997 Aliens Act is to be replaced by two separate pieces of legislation on asylum and the regulation of immigration (entry, residence and exit). Every effort is made to ensure that the new legislation implements recently adopted EU standards without questioning the validity and conformity of these standards with international standards.

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<sup>26</sup> Interview with Christian Mahr, UNHCR London, 29 September 2001.

<sup>27</sup> Other candidate countries such as Hungary and the Czech Republic also have very low recognition rates, which puts them amongst the most restrictive countries in Europe.

<sup>28</sup> See *2001 Regular Report on Poland's Progress towards accession*, SEC(2001) 1752, 13 November 2001, 87. I would like to thank Katarzyna Cuadrat-Grzybowska for providing me with an English translation of the amended 1997 Aliens Act.

<sup>29</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 *U.N.T.S.* 221.

<sup>30</sup> Interview with Irena Rzeplinska, Warsaw, 11 June 2002.

In drafting and amending the 1997 Aliens Act, most EU asylum standards contained in soft law instruments have largely been ‘taken into account’ by Polish authorities, that is, implemented, as they believe that these instruments will be shortly adopted as legally binding. It is significant to note that, when assessing the conformity of the 1997 Aliens Act with EU standards, references are frequently made to soft law instruments. Current negotiations on the Commission asylum proposals made under Article 63 EC are closely monitored, but it is clear that Poland cannot amend its legislation each time a new directive or regulation is adopted by the EU. As mentioned above, new legislation has been drafted in order to take into account EU legislative developments of the last few years and the Polish Government is keen to see its adoption as soon as possible, that is, before the EU adopts more texts which would require the Government to further amend its proposals.

EU influence has had some positive consequences on the treatment of asylum seekers in Poland. Unfortunately, Poland has also adopted a number of restrictive measures borrowed from EU practice. For instance in 1997, Poland adopted the concepts of safe country of origin and safe third country as defined in Article 4(10) and 4(11) of the Aliens Act. However, these concepts were not always correctly applied: Article 35(3) of the 1997 Act provided that *access* to asylum procedures would be denied to anyone arriving from a safe third country to which he can return. This was an incorrect implementation of the EU soft law standards<sup>31</sup> and the provision could not have been said to be in conformity with international refugee law standards. As a result, this provision was amended in 2001. In order to implement the ‘safe country of origin’ and ‘safe third country’ rules, the Polish Government was required to adopt lists of safe countries under former Article 95. However, it failed to agree on such lists. In practice, these concepts could thus not be applied (Mikolajczyk 2002: 70). The requirement of adopting lists of safe countries was abandoned in 2001 and it seems that the two concepts can now be applied. In any case, although current EU Member States apply these concepts to candidate countries (Lavenex 1998b), it seems unlikely that Poland would similarly be able to declare its eastern neighbours safe countries in order to be able to send asylum seekers there. Nevertheless, Bulgarian and Romanian asylum seekers have seen their applications rejected on the basis that they were coming from safe countries of origin.<sup>32</sup> Poland may be anticipating the application of the Protocol on asylum added by the Treaty of Amsterdam which stipulates that ‘Member States shall be regarded as constituting safe countries of origin.’<sup>33</sup>

Poland has also introduced accelerated procedures for manifestly unfounded applications (Article 41a) which are defined as applications not specifying any ground of persecution under the 1951 Convention or which are intentionally misleading. Manifestly unfounded applications include applications made by nationals of safe countries of origin. Article 41a constitutes a perfect example of the 1997 Act being amended to conform with a soft law instrument such as the 1992 London Resolution on

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<sup>31</sup> See *supra* note 18.

<sup>32</sup> Telephone interview with Marek Szonert, Warsaw, 26 June 2002. In 2000, 308 persons (members of the Roma community) from Bulgaria and 864 from Romania sought asylum in Poland (Mikolajczyk 2002: 52).

<sup>33</sup> *Protocol on asylum for nationals of Member States of the European Union*, annexed to the EC Treaty (1998).

manifestly unfounded applications for asylum (Mikolajczyk 2002: 70). This non-binding Resolution invites EU Member States to consider certain types of applications as manifestly unfounded and the application of accelerated procedures to examine such applications. One can note that Poland has chosen to consider as manifestly unfounded most types of applications mentioned in the Resolution.

For a country which currently ‘only’ receives less than 5,000 asylum applications per year, one can wonder how appropriate the mere transposition of EU measures to the Polish legal system is and whether Poland would have adopted a similar asylum policy regardless of EU requirements. It can be argued that Poland would have adopted the same standards anyway: due to a lack of asylum tradition, it would have looked to its Western neighbours for models of asylum systems. On the other hand, EU standards and practice would not have been copied with the same zeal and Poland could have independently developed its own asylum policy. In the current situation, Poland has little choice but to adopt the EU asylum *acquis* in its entirety before EU accession. Perhaps the alternative would have been for Polish authorities to challenge parts of the EU asylum *acquis* whose conformity with international refugee law is in doubt. This could have made Poland an active partner in the shaping of the developing EU asylum system.<sup>34</sup>

Enlargement has provided an opportunity for candidate countries to establish comprehensive asylum systems and standards with EU assistance and funding. On the other hand, the export of current EU asylum policies without reform simply entrenches restrictive practices which may not be in conformity with international refugee and human rights standards. Nevertheless, whilst it appears that some EU Member States have put pressure on candidate countries to initiate some changes in their asylum systems, there is no doubt that they have been much more interested in investing in the improvement of border controls which is perceived as an essential requirement for ensuring the internal security of the enlarged EU.

### **Restricting entries: new visa requirements**

One area which is likely to raise a number of problems is the EU’s visa policy which has become a central instrument of (asylum) migration control. Candidate countries have to adopt the EU’s strict visa policy which requires nationals of a long list of countries to apply for a visa in order to gain entry to the EU.<sup>35</sup> All refugee-producing countries are included in this list and since it is not possible to lodge an asylum application from outside the country considering the application, visa requirements hinder access to asylum procedures. Most candidate countries had visa-free regimes with their eastern and southern neighbours. EU Member States are especially concerned about restricting the entry of nationals of these new states resulting from the disintegration of the Soviet Union, all of which are included in the EU visa list with the

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<sup>34</sup> Email exchange with Michal Kowalski, 15 July 2002.

<sup>35</sup> See *Regulation No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement, amended by Regulation No. 2414/2001 of 7 December 2001* (deleting Romania from the visa list).

exception of the Baltic States. However, candidate countries are reluctant to impose visa requirements on their neighbours with whom they have often maintained close political and economic links (Jileva 2002: 686-9). Moreover, some candidate countries want to allow national minorities living in neighbouring countries easy access to their territory. For instance, up to 3 millions ethnic Hungarians are living outside Hungary as a result of the 1920 Treaty of Trianon.<sup>36</sup> Finally, it must be noted that some of the former Soviet Republics are still refugee-producing countries and the imposition of strict visa requirements would in effect contribute to denying persecuted individuals access to protection. It has been recommended that the EU should consider the long-standing relationships between the candidate countries and their neighbours, and envisage special visa arrangements such as fast-track, multiple-entry visas or single-country visas (House of Lords 2002: para. 76). Hungary had also suggested special visa arrangements for ethnic Hungarians living abroad, but these proposals were abandoned (Grabbe 2000: 531).

Poland has already terminated visa exemption agreements with a number of countries, mainly former Soviet Union Republics and other Communist States.<sup>37</sup> However, Polish authorities have been much more reluctant to do the same with regard to its immediate eastern neighbours, namely Belarus, Russia and Ukraine: the introduction of visas for citizens of these countries has posed a dilemma for domestic policy-makers who want to protect close historical, cultural and economic links with them. There is, indeed, a concern that the introduction of visas will pose a threat to economic activities in eastern areas (Anderson 2000): such activities have been partly fuelled by ‘shuttle migration’ from Ukraine for instance (Iglicka 2001: 8 and Wolczuk 2002: 245). Moreover, there are some Polish minorities living in Belarus (418,000) and Ukraine (220,000) who want to retain easy access to the Polish territory (IOM/ICPMD 1999: 112). Finally, successive Polish governments have pursued dynamic foreign policies towards their eastern neighbours, in particular Ukraine, in order to stabilize the region (Wolczuk 2001).

Measures introduced in 1998 to restrict entries from Belarus and Russia have already provoked strong protests from these countries (Grabbe 2000: 530). This may explain why Poland has been delaying the introduction of visas for as long as possible. Visas were initially to be introduced in 2001 for these two countries and in 2002 for Ukraine (Mikolajczyk 2002: 60), but these dates were considered to be premature and visas will now be introduced on 1 October 2003 for all three countries. Such new visa requirements are likely to have an impact on Chechen asylum seekers who continue to be the most numerous among those seeking asylum in Poland.<sup>38</sup>

The introduction of visas will contribute to a shift of responsibility for immigration control from border services to internal administrative services which will deal with an increased number of applications for residence permits (as migrants will use other means of entering and staying in the country) (Iglicka 2001: 13) and external embassies

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<sup>36</sup> See Zielonka (2001: 514) and Grabbe (2002: 531). See also the case of Romanian minorities in Moldova (*Le Monde* 2002).

<sup>37</sup> See 2001 Regular Report, *supra* note 28, at 85 and 2002 Regular Report, SEC (2002) 1408, 9 September 2002, 113-114.

<sup>38</sup> See 2002 Regular Report, *supra* note 37, at 115.

dealing with visa applications. The implementation of the new visa regime required by the EU will not be cost-free and embassies will have to be staffed and equipped to deal with high numbers of visa requests. It is also to be expected that some asylum seekers will have to turn to illegal channels of migration as a result of the new visa requirements. In order to limit the negative impact of visas, it is crucial to ensure that the issuing of visas remains as easy and cheap as possible (IOM/ICPMD 1999: 115). The Russian enclave of Kaliningrad raises some specific problems because it will soon be surrounded by EU Member States: Russians transiting EU territory by land between Kaliningrad and the rest of Russia will have to hold a passport and transit visa.<sup>39</sup>

#### **4 Preventing illegal entries: border controls at the EU's future Eastern borders**

During the 1990s, the EU's internal security agenda has been developing at a fast pace. One of the central elements of this agenda is external border controls which are becoming increasingly elaborate. Border controls are regulated within the Schengen framework which has been integrated into the EU *acquis* since Amsterdam. The improvement of border controls in candidate countries is seen as an essential condition for accession. When visa requirements are imposed, illegal entry may constitute the only way of getting access to asylum procedures and border controls which are reinforced to prevent illegal entries are therefore bound to have an impact on access to protection.

The Commission has been keen to stress the 'need to strengthen border management, most urgently at future EU external borders, and to prepare for the participation in the Schengen Information System.'<sup>40</sup> Each of its country reports produced yearly focuses on the need to improve border controls. This has thus become the main EU demand in JHA and a priority area for EU aid. Indeed, many Phare projects on migration and border control have been funded in the last few years. In particular, candidate countries need elaborate technological frameworks to enter the Schengen Information System (SIS) which is a computerized system storing information on persons, and stolen vehicles and objects for the use of border control. Besides, the SIS requires the setting up of effective data protection mechanisms. Border services also need to invest in expensive surveillance equipment such as thermo/infrared cameras, x-ray-units and police helicopters (House of Lords 2000: para. 14). All in all, the adoption of the Schengen standards of border controls is not so much a problem of political will, but of resources and is already proving to be extremely expensive for candidate countries.

Aside from the funding problem, a fundamental change of attitude is also required from border guards who now have to 'keep foreigners out rather than keep citizens in' (Grabbe 2000: 529). The complete overhaul of border control mechanisms in candidate countries thus requires an important amount of human and financial resources, as well as training, and will not be achieved as promptly as Member States would wish. Nevertheless, no concessions are being granted and the Schengen *acquis* must be

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<sup>39</sup> See *Communication from the Commission to the Council, The EU and Kaliningrad*, COM(2001) 26 final, 17 January 2001, 5.

<sup>40</sup> *Making a success of enlargement, strategy paper and report of the European Commission on the progress towards accession by each of the candidate countries*, 13 November 2001, 18.

complied with in full,<sup>41</sup> even though it is well-known that some current Member States still do not comply with it (House of Lords 2000: para. 25). In reality, there is doubt as to whether the candidate countries will be able to implement the Schengen *acquis* in full by the time of accession (House of Lords 2000: para. 52). If this is the case, the problem remains that candidate countries are uncertain about what standards of border control, short of the Schengen standards, they are supposed to reach in order to gain accession (House of Lords 2000: para. 54). Considering how costly upgrading border controls is, there is also uncertainty as to whether the borders with Bulgaria and Romania should also be ‘sealed’ to the same extent as the eastern borders: since these countries are also to join the EU within the next few years, it would appear counterproductive to invest in border control infrastructures which will then have to be dismantled.

Poland has always been a country of mass emigration since the mid-nineteenth century. Immigration to Poland has traditionally been negligible, hence the lack of immigration controls (Stola 2001: 176). This lack of controls, particularly on the Eastern border, has been a major source of concern for the EU because of the nature and location of this border. This ‘green border’ which runs through open country and mountains is difficult to police and has traditionally been a relatively open border with many cross-border activities (Monar 2001: 43). Poland shares more than 1,000 km of borders with Belarus, Ukraine and Russia, countries which are unlikely to join the EU in the near, or even distant, future and host criminal networks which try to smuggle goods and people into the EU.

Over the last few years, Poland has been under considerable pressure from the EU to adopt measures to establish and reinforce border controls. One must remember that before 1989, there were no Polish border guards on the eastern border, only Soviet border guards: most border controls took place on the western and southern borders (Monar 2001: 44). The challenge was thus to organize a complete overhaul of the border guard service (Latawski 1999). More crossing points were established on the eastern border, several thousand new staff were recruited and trained, equipment was purchased and so on. The EU, as well as individual Member States such as Germany and the UK (House of Lords 2000: para. 63), have invested considerable resources in the export of EU border control technology and staff training: it was estimated that Poland has received over 100 million euros of Phare funding to upgrade its eastern frontier controls (House of Lords 2000: para. 61). Nevertheless, raising border controls to Schengen standards is proving extremely expensive and EU funding is still insufficient to implement all the required changes (House of Lords 2000: para. 60). With the lack of funding, training border guards to deal with asylum-seekers is probably not a priority. EU efforts have so far focused on reinforcing controls at the Polish eastern border and extending the EU visa regime to its eastern neighbours. There is no doubt that EU accession has been ‘the main stimulus for rebuilding the system of border control’ (Mikolajczyk 2002: 58).

Even though the candidate countries are under pressure to comply fully with the Schengen *acquis*, they will not be fully part of Schengen when they become EU Member States. Indeed, free movement of persons will not be allowed in the years following accession. Transitional arrangements have been negotiated whereby free

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<sup>41</sup> See Article 8 of Schengen Protocol.

movement of workers will be guaranteed within seven years following accession.<sup>42</sup> This can be partly explained by the fear, notably in Germany and Austria, of a mass influx of migrants from the East similar to that witnessed in the final months leading to the fall of the Berlin Wall in 1989 (Zielonka 2001: 520). It follows that candidate countries have to comply with the obligations arising from Schengen *before* benefiting from the advantages in terms of abolition of internal border controls and free movement of persons.<sup>43</sup> In other words, tougher border controls must first be applied on the eastern borders of the candidate countries, and only then will concessions be made on their western borders (Grabbe 2000: 527). It has been argued that the current EU demands on border controls ‘might well be used as a pretext for postponing the free movement of labour and other persons for a long time’ (Lavenex 1998a: 293). It is ironic that while Western States used to criticize Communist States during the Cold War for imposing restrictions on the free movement of their own citizens, they now impose such restrictions on the very same persons (Bouteillet-Paquet 2001: 263), although they are obviously of a very different nature.

## 5 Facilitating returns: re-admission agreements

There is no doubt that the most important obligation arising from the 1951 Convention to which all candidate countries are party is the obligation of *non-refoulement* (Article 33): state parties shall not return a refugee to a country where he would face threats to his life or freedom. The scope of this obligation has been extended beyond the refugee context by the Convention against Torture (Article 3)<sup>44</sup> and the ECHR case law on Article 3 (Lambert 1999). Nevertheless, all candidate countries have started concluding re-admission agreements in order to facilitate the return of illegal immigrants and some asylum seekers.<sup>45</sup> When examining the text of some of these re-admission agreements, it appears that they may not contain sufficient guarantees against *non-refoulement*.

As a result of the 1991 readmission agreement which allows Schengen countries to return to Poland anyone who has entered the Schengen area illegally via Poland, as well as rejected asylum seekers, an increasing number of persons have been readmitted to Poland, particularly from Germany. With EU accession and entry into the Dublin Convention system, Poland can expect a further increase in the number of asylum seekers transferred from other Member States, but it does not want to become the final destination for these asylum seekers. Consequently, it has endeavoured to negotiate and sign bilateral readmission agreements with its own neighbours: throughout the 1990s,

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<sup>42</sup> For the first two years, EU Member States will apply national measures to regulate the employment rights of nationals from the new Member States. For the next three years, they will be free to apply the EU *acquis* and remove obstacles to free movement. This transitional period can be extended for a further two years. In total, free movement of persons can thus be delayed by a maximum of seven years. Nevertheless, access to current Member States’ labour markets cannot be restricted from the time of accession and during the whole transitional period. In addition, preference will be given to nationals of the new Member States over third country nationals.

<sup>43</sup> See Commission, *supra* note 40, at 5.

<sup>44</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 23 *I.L.M.* 1027 and 24 *I.L.M.* 535.

<sup>45</sup> See the full list of agreements concluded by candidate countries, see Lavenex (2002: 708).

Poland has managed to sign such agreements with all other candidate countries and some of its eastern neighbours.<sup>46</sup> It is also currently negotiating readmission agreements with Armenia, Belarus, Kazakhstan, Russia and even countries further afield such as Vietnam. These readmission agreements are aimed at facilitating the transfer of illegal immigrants, which includes some asylum seekers, to other countries: Poland is, in effect, adopting the same strategy as Schengen States in order to ensure that people cannot stay in Poland.

The readmission agreements concluded by Poland with its neighbours are very varied. Most of them cover not only nationals of both parties to the agreement, but also third country nationals. One would expect Poland to conclude readmission agreements only with countries which are deemed safe for anyone to be returned to, but it is debatable whether some countries, such as Bulgaria or Romania, can be regarded as safe for certain rejected asylum seekers of Roma origin.<sup>47</sup> Some agreements which cover asylum seekers do not contain any reference to the 1951 Convention, or even, in some cases, to any human rights instrument.<sup>48</sup>

One minimum prerequisite before signing a readmission agreement should be to ensure that the other party is at least a party to the 1951 Convention, which should guarantee that it is under the obligation of *non-refoulement*. However, it is worrying to note that a number of readmission agreements were signed with countries which were not parties to the 1951 Convention at the time of signature. For instance, Poland signed readmission agreements with Estonia and Latvia in 1993 although both countries only became parties to the 1951 Convention in 1997. In most cases, Poland seemed to have waited until the other State party to the impending agreement had signed the 1951 Convention.<sup>49</sup> There is also a concern that Poland has signed or is about to conclude readmission agreements with countries which are still refugee-producing countries and which figure amongst the list of the main countries of origin of asylum seekers in Poland.<sup>50</sup>

The readmission agreement concluded between Poland and Lithuania in 1998 is undoubtedly one of the most important to the extent that both countries are on one of the main migrant routes to Western Europe. It covers nationals of both countries and third country nationals, including asylum seekers (Article 3). However, the agreement contains no reference to the 1951 Convention, nor does it guarantee access to asylum

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<sup>46</sup> Poland has signed readmission agreements with Bulgaria (1993), the Czech Republic (1993), Estonia (1993), Hungary (1994), Latvia (1993), Lithuania (1998), Romania (1993), Slovakia (1993) and Slovenia (1996). It has also signed agreements with other countries such as Moldova (1994) and Ukraine (1993).

<sup>47</sup> See Klaczynski (1997). The overwhelming majority of asylum seekers from these two countries do not obtain refugee status in Poland.

<sup>48</sup> See the readmission agreements concluded between Poland and the Czech Republic, Slovakia or Ukraine (Bouteillet-Paquet 2001: 362).

<sup>49</sup> In the case of the readmission agreement signed with the Czech Republic, it was signed just the day before the Czech Republic also signed the 1951 Convention (10 and 11 May 1993 respectively).

<sup>50</sup> See list of the main countries of origin for 1999-2000 in Mikolajczyk (2002: 52).

procedures:<sup>51</sup> UNHCR has already expressed concern at ‘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.’<sup>52</sup> As a result, the combination of the Dublin Convention, the application of the safe third country rule and the conclusion of re-admission agreements between Poland and its eastern neighbours can lead to ‘chain deportations’, sometimes all the way to countries of origin (Byrne *et al.* 2002b: 25).

It appears that some of the readmission agreements signed by candidate countries with their neighbours do not contain enough guarantees that asylum seekers are not removed by these states to yet another third country which may not be safe and/or may even be the country of origin. To some extent, candidate countries are replicating the German strategy which has been to sign readmission agreements with all its eastern neighbours.<sup>53</sup> Nevertheless, Germany has also attempted to engage in bilateral cooperation with these countries to reinforce their protection capacities: candidate countries cannot offer the same level of support to their eastern neighbours as Germany has done for its neighbours.<sup>54</sup>

## 6 Conclusion

The hard border regime imposed by the EU on candidate countries is likely to have an important impact on asylum seekers. When examining the asylum laws of candidate countries, it appears that they are already, or will soon be, providing the same level of refugee protection as current EU Member States. Nevertheless, grave concerns must be expressed about the lack of strong guarantees against direct and indirect *refoulement*. Risks of *refoulement* are being increased by the introduction of strict immigration measures and these risks are not being correctly evaluated because of the current lack of connection between migration control and asylum (ECRE 1998: para. 5). Despite EU pressure, candidate countries must not forget that they have international obligations not to return people to situations where their life or security would be at risk. This shows that EU demands are inconsistent to the extent that candidate countries must demonstrate their commitment to democracy and human rights whilst, at the same time, adopting restrictive asylum and immigration policies towards foreigners. Candidate countries’ adherence to international human rights law and refugee law is thus being tested and it is important that domestic developments in the areas of immigration and asylum continue to be scrutinized.

Earlier EU developments in the field of immigration and asylum already demonstrated the prioritization of security concerns over humanitarian concerns and followed a strong logic of inclusion/exclusion as illustrated by strict border controls. Current efforts to

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<sup>51</sup> See the number of asylum applications lodged in Lithuania upon readmission from Poland, in Sesickas *et al.* (2002: 238).

<sup>52</sup> *Background information on the situation in Poland in the context of the return of asylum seekers*, UNHCR Geneva, November 1998, quoted in Mikolajczyk (2002: 62).

<sup>53</sup> See list of agreements concluded by Germany, see Lavenex (1998b: 133).

<sup>54</sup> Interview with Christian Mahr, London, 29 September 2001.

align candidate countries to EU policies follow the same logic. Recent developments, analysed above, also show the prioritization of security concerns over legitimate economic or foreign policy concerns. Not surprisingly, candidate countries are becoming increasingly nervous about accession as they have realized that ‘asylum and immigration are being instrumentalised by EU Member States in order to establish a filter or buffer zone between them and the countries of emigration’ (Lavenex 1998a: 290). With EU accession, the responsibility for ensuring border controls, tackling illegal immigration and dealing with asylum seekers will fall disproportionately on candidate countries which do not have the same financial and human resources. So far, these countries have been so keen to gain EU membership that they have agreed to adopt most measures.

The EU is still under the illusion that efficient border control mechanisms can ensure its internal security. Firstly, there is no such thing as perfect border controls and migrants who are persistent will always find a way in. In any case, border controls alone cannot stem the flow of asylum-seekers and other migrants or ensure the EU’s internal security: the EU should address the causes of migration (poverty, human rights violations, armed conflict, etc.) through its foreign and aid policies. It is also in the interest of the EU to ensure political stability in the region and maintain good relations with its immediate neighbours. It is thus important that it respects candidate countries’ special relationships with their eastern neighbours, instead of imposing its own policies on them without taking into account their foreign policy interests.

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