The EU's external asylum policy in Ukraine

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An increasing number of scholars of political science and international law investigate the extraterritorialisation of migration control by destination countries and how it affects the access to asylum.[1] In the years 2000, in the time before several central European states entered the European Union, a lot of scholarly attention was directed at the EU attempts of shifting the burden of asylum to the future EU member states in central Europe through which part of the asylum seekers entered the EU. The literature critically examined these EU measures of externalising asylum to non-member states and pointed out two instruments: the conclusion of readmission agreements with the future member states and the declaration of these countries as safe third countries.[2] The major criticism concerned the threat to asylum seekers who were sent back to countries with lower levels of protection. Since the inclusion of the new central European member states into the Schengen area as well as the Dublin regulations the instruments of readmission agreements and notion of safe third country have become redundant for these countries. However, the EU border having moved eastwards it may be asked whether the same policies of externalisation have been applied to the new Eastern neighbours, for example to Ukraine which borders four EU member states. Despite

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[1] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, 1 edition (Cambridge u.a.: Cambridge University Press, 2011); Bernhard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (BRILL, 2010) <https://books.google.de/books?id=GjqRfqetCtkC&printsec=frontcover&hl=fr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>.

[2] Elena Jileva, 'Larger than the European Union: The Emerging EU Migration Regime and Enlargement', in *Migration and the Externalities of European Integration*, ed. by Sandra Lavenex and Emek M. Uçarer (Lanham, Maryland, USA: Lexington Books, 2003), pp. 75–89; Sandra Lavenex and Emek M. Uçarer, 'Introduction: The Emergent EU Migration Regime and Its External Impact', in *Migration and the Externalities of European Integration* (Lanham, Maryland, USA: Lexington Books, 2003), pp. 1–13.

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the fact that Ukraine is seen by the EU and many researchers as a transit country to the EU[3], the question of externalisation of asylum to Ukraine remains under-researched. The few scholars who examined this topic refer to Ukraine as a "buffer zone".[4] **This paper addresses the question whether the EU externalises asylum to its Eastern neighbour Ukraine, if yes by which means and with which implications for asylum seekers.** Externalisation of asylum is defined here as the process of the destination countries shifting the responsibility of dealing with the migration flows and protection procedures to a third, often transit, country.

The asylum system in Ukraine has been modified many times, especially since 2001, and its legislation is now close to international asylum standards. However, practices of state authorities remain strongly shaped by arbitrary decisions, corruption and lack of resources. Most asylum seekers therefore do not find the protection in Ukraine which they would need and legitimately aspire to. UNHCR and Human Rights Watch have repeatedly pointed out that Ukraine is not a safe country for asylum seekers and refugees.[5] If the EU was outsourcing asylum to Ukraine this would represent a clear threat to the rights of asylum seekers.

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[3] On the EU vision of Ukraine as a major transit country see for example European Commission, *Implementation of the European Neighbourhood Policy in 2007 - Progress Report Ukraine* (Brussels, 3 April 2008), p. 13; European Commission, *National Indicative Programme 2011-2013 - Ukraine*, 2010, pp. 2011–2013 <http://ec.europa.eu/world/enp/pdf/country/2011_enpi_nip_ukraine_en.pdf> [accessed 21 February 2014]; For an example of a research paper see Kerstin Zimmer, 'Migrants and Refugees in the Buffer Zone: Asylum Policy in Ukraine', *Migrationonline.cz*, 2008, 1–9 <http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/KZimmer_Ukraineasylumandmigrationpolicy.pdf> [accessed 13 April 2015].

[4] Lyubov Zhyznomirska, 'Externalities of the EU Immigration and Asylum Policy: The Case of Ukraine', *Review of European and Russian Affairs*, 2 (2006); Raphi Rechitsky, 'Gefangen in Der Pufferzone: Migration, Flüchtlinge Und Die Auswirkungen Der EU-Außenpolitik', *Ukraine-Analysen*, 2011, 13–17 <http://r.duckduckgo.com/l/?kh=-1&uddg=http%3A%2F%2Fwww.laender-analysen.de%2Fukraine%2Fpdf%2FUkraineAnalysen92.pdf>.

[5] UNHCR, *Background Information on the Situation in Ukraine in the Context of the 'Safe Third Country' Concept*, 1 October 1996 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b31bc7&skip=0&query=The%20safe%20third%20country%20concept> [accessed 8 September 2015]; UNHCR, 'Ukraine as a Country of Asylum. Observations on the Situation of Asylum-Seekers and Refugees in Ukraine', *Refworld*, 2013 <http://www.refworld.org/docid/51ee97344.html> [accessed 16 December 2013]; UNHCR, 'International Protection Considerations Related to Developments in Ukraine', *Refworld*, 2014 <http://www.refworld.org/docid/5316f7884.html> [accessed 6 March 2014]; UNHCR, 'International Protection

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This paper firstly assesses whether the EU and its member states use the two major instruments mentioned in the literature to legally return asylum seekers to Ukraine: the readmission agreement and the notion of safe third country. Secondly, approaches are examined which consist of keeping asylum seekers in Ukraine before they can reach the EU.

This contribution is based on the analysis of EU policy documents, international agreements, national legislation and on semi-directive interviews which were conducted between 2013 and 2015 in Brussels and Ukraine. The overall fieldwork encompasses more than 130 interviews with representatives of different EU bodies, international organisations, NGOs, Ukrainian state authorities and migrants in Ukraine.

The potential use of legal ways to return asylum seekers from the EU to Ukraine

Authors such as Emmanuel Blanchard, Raphi Rechitsky and Lyubov Zhyznomirska wrote between 2006 and 2011 that the EU is shifting the burden of asylum cases to Ukraine and thereby putting the asylum seekers' safety at risk.[6] However, none of these authors is precise on how exactly the EU is externalising asylum to Ukraine. Rechitsky mentioned the EU return policy and claimed that the EU is considering its Eastern neighbours as safe third countries for refugees.

This corresponds to the literature on externalisation to CEECs which has pointed out two major instruments put in place by the EU and its member states in order to outsource asylum matters to transit states outside of the EU. These two instruments are readmission agreements and the notion of safe third country.[7] It will be examined here whether and if yes how the EU used and uses now these two instruments to shift the burden of asylum to Ukraine.

Considerations Related to the Developments in Ukraine – Update II', *Refworld*, 2015 <http://www.refworld.org/topic,50ffbce40,50ffbce46f,54c639474,0,UNHCR,COUNTRYPOS,UKR.html>

[accessed 8 September 2015]; Human Rights Watch, *Buffeted in the Borderland: The Treatment of Migrants and Asylum Seekers in Ukraine* (New York, USA, 2010) <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>.

[6] Emmanuel Blanchard, 'Externaliser Pour Contourner Le Droit', *Projet*, 308 (2009), 62–66 (p. 62) <http://dx.doi.org/10.3917/pro.308.0062>; Rechitsky; Zhyznomirska.

[7] Jileva.

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Readmission agreements

The EU and individual member states have signed readmission agreements with EU neighbours to readmit migrants without a regular status (or with a rejected asylum claim) from an EU country to another state such as Ukraine. This may concern migrants from the respective country (e.g. Ukrainian citizens) or migrants who had transited through the respective country (third country nationals, non-Ukrainian nationals).

Ukraine has signed and implemented an increasing number of readmission agreements since 1993, starting with its neighbours Hungary, Poland and Slovakia. Until 2003 readmission agreements with Ukraine were limited to former communist countries.[8] From 2003 onwards Ukraine began signing readmission agreements also with other (mostly European) states.[9] In 2007, Ukraine agreed on the readmission agreement with the EU which entered into force for Ukrainian nationals in 2008 and for third country nationals in 2010.[10] The agreement details the procedural requirements concerning the identification, return and readmission of people who entered or stayed on the territory of Ukraine or EU countries to their countries of origin.[11]

Readmission agreements such as the one between Ukraine and the EU often contain the possibility of an accelerated procedure in case a migrant was caught in the border region, crossing the border illegally.[12] This means that a person can be readmitted within two working days. Some readmission agreements (e.g. Italy – Albania) explicitly state that this accelerated

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[8] With the dates of the signature: Hungary 1993, Poland 1993, Slovakia 1993, Lithuania 1996, Moldova 1997, Latvia 1997, Uzbekistan 2000, Bulgaria 2001, Turkmenistan 2001, Georgia 2003.

[9] Switzerland 2003, Turkey 2005, Russia 2006, Denmark 2007, Vietnam 2007, EU 2007, Norway 2008. *Website of the State Migration Service of Ukraine (Державна міграційна служба України) - Readmission* <http://dmsu.gov.ua/normatyvna-baza/mizhnarodni-dokumenty/readmisiia> [accessed 31 October 2014].

[10] European Union and Ukraine, *Agreement between the European Community and Ukraine on the Readmission of Persons* (Luxembourg, 18 June 2007) <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=11681> [accessed 21 February 2014]. The agreement was ratified by the Verkhovna Rada on 15 January 2008. 226 MPs voted in favour of the ratification with 226 required for endorsement.

[11] European Union and Ukraine, *Agreement between the European Community and Ukraine on the Readmission of Persons*.

[12] European Union and Ukraine, *Agreement between the European Community and Ukraine on the Readmission of Persons*. Section 2, art.5(3)

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procedure cannot be applied to people claiming to be refugees.[13] In the readmission agreement between the EU and Ukraine there is no such clause. It is only mentioned that the agreement shall not violate the 1951 Convention on the Status of Refugees and the protocol from 1967 thus prohibiting the return in case of risk of the third country national in Ukraine. Moreover, according to the Dublin regulations, EU member states are obliged to accept asylum applications at their border.[14] Mariagiulia Giuffré and Nils Coleman conclude that technically, refugee rights and readmission agreements are not contradictory.[15]

In practice however, "informal practices of border return" may lead to the "employment of cursory identification and return procedures in dissonance with human rights and refugee law"[16] The risk that an asylum seeker from a third country might be sent back to the transit country from the EU via the readmission agreement is particularly high when applying the accelerated procedure. Migrants who irregularly crossed the border to move from Ukraine to Slovakia and were caught at the border were often deported back to Ukraine via the accelerated procedure even if they claimed their wish to apply for asylum.[17] According to ECRE, between January and September 2010, 28 persons, including ten unaccompanied minors, reported that their wish to apply for asylum in the EU was not respected and they were readmitted to Ukraine. Some were not allowed to apply for asylum; some claimed they were not given an interpreter; others were misled and told to sign a document which would

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[13] Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal', *Refugee Survey Quarterly*, 2013, 1–33 (p. 9).

[14] European Parliament and Council, *Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast)*, 26 June 2013 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN>. Art.3(1).

[15] Giuffré, p. 9; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Leiden: BRILL, 2009).

[16] Giuffré, p. 3.

[17] Asylum NGO in Zakarpattya, Uzhgorod, lawyer, Interview, 2014; Franck Düvell, *On The Fringes of Europe: Refugees in Ukraine* (Oxford: COMPAS, 2008), pp. 1–9 (pp. 1–2) <http://www.compas.ox.ac.uk/fileadmin/files/Publications/Research_projects/Flows_dynamics/Transit_migration_Ukraine/Ukraine_Refugees_2of3.pdf> [accessed 29 October 2014]; Border Monitoring Project Ukraine and Stiftung PRO ASYL, *Access to Protection Denied: Refoulement of Refugees and Minors on the Eastern Borders of the EU – the Case of Hungary, Slovakia and Ukraine* (Munich, Allemagne, 2010).

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supposedly allow them to be brought to refugee facilities.[18] UNHCR recorded that in 2011, through the readmission of foreigners from Hungary, Slovakia and Poland to Ukraine 44 people claimed that they were returned to Ukraine even though they had asked for asylum but were refused access to the asylum procedure in these countries (38 people from Slovakia, three from Romania and three from Poland).[19]

A lawyer of an asylum NGO in Zakarpattya, the Ukrainian region which borders Poland, Slovakia, Hungary, and Romania, described the refoulement at the Slovak border:

"They [Slovak border guards] do not want to let Somalis through. Maybe because of the colour of skin – they don't want African people on the territory of Slovakia. So we have many Somalis whom they returned. Even though they told them: 'I am not 18. I would like to stay here.' So there are a lot of violations of law in this situation because the lawyer is not present during the conversation with the border guard so no one can explain to the person. Some of them just told that 'we saw the flyer that you have the rights to seek asylum. No one told us. So we started to shout that we would like this. And they answered: 'no no, not here. In the other place.' ' So they are not frank, the Slovak border guards. The same with interpretation. They told that especially the Afghani interpreter is not fair. He didn't interpret what they told to the border guards. He mis... he didn't explain them everything. This is quite big problem. These refoulements of Slovakia. And the problem is that no one can do anything. We can just monitor. And that's all. For example when organisations such as Human Rights Watch will write a report, where they will show these facts then they [Slovak authorities] will shout that this couldn't be or something like that. Nothing changed."[20]

The head of this asylum NGO in Zakarpattya stated:

"When we started [in 2000] there were many refoulements by officials from Hungary and Slovakia. They said that people didn't ask for asylum but they said they did. We interviewed many people. We worked a lot to stop that. Today there is not so much. It's difficult to get statistics so we started with press articles to make our own statistics: on Border Guard

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[18]   ECRE, *Readmission to Ukraine*, October 2010 <http://r.duckduckgo.com/l/?kh=-1&uddg=http%3A%2F%2Fwww.ecre.org%2Fcomponent%2Fdownloads%2Fdownloads%2F583.html>.

[19]   UNHCR, *Zakarpattya Region Factsheet*, May 2012 <http://unhcr.org.ua/attachments/article/317/Zakarpattya%20factsheet.pdf> [accessed 21 October 2014].

[20] Asylum NGO in Zakarpattya, Uzhgorod, lawyer.

articles or newspaper articles. [...] They now follow the readmission agreement. Even when people say that they want to apply for asylum they are being sent back to Ukraine. But it's difficult to have proofs. We have partner organisations in Slovakia but they cannot always be at all the points of the border and they also don't know everything."[21]

A representative of UNHCR explained:

"In about 2011/2013, we did have cases of Somalis and Afghans who were returned from Slovakia to Ukraine under the readmission agreement. Some had previously applied for asylum in Ukraine, others not. Some said that they had tried to apply for asylum in Slovakia by orally stating that they wished to apply for asylum. They said they did not have access to interpretation or to information about the asylum procedure.

However, it was difficult to prove that they actually did try to apply for asylum. When we were able to access the written records in Slovakia, the written records showed that people did not apply for asylum. Indeed, if people did apply for asylum in Slovakia, then under Dublin, they would have to be fingerprinted and go through the asylum procedure there. So some asylum seekers undoubtedly chose to come back to Ukraine and wait to try again, hoping they would not get caught and would be able to proceed directly to Germany. [...]

In 2013, we started to have cases arising from joint border patrols. That is, the Slovak and Ukrainian border guards would jointly patrol the border area, people would be detained on the Slovak side, and then handed over to the Ukrainians without readmission procedures. In the paperwork it appears that the Ukrainians detained the individuals in Ukraine, but there was a pattern of people saying that actually they were detained by guards wearing one set of uniforms and then handed over to the Ukrainian side. The Border Guards explained to us that this was a standard procedure in joint patrols, but obviously this creates a lot of wiggle-room for the authorities."[22]

From these quotes it becomes clear that incidents exist when Slovak authorities use readmission agreements in illegal ways to send third country nationals back to Ukraine even when they formulate their wish to apply for asylum. Cases were recorded of border guards avoiding to record the persons' wish to apply for asylum refusing to accept the application,

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[21] Asylum NGO in Zakarpattya, Uzhgorod, head of the NGO, Interview, 2014.

[22] High employee of UNHCR Ukraine, E-mail communication, 2015.

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lying to them or making them sign a document they did not understand. The absence of interpreters and lawyers at the border guards' facilities allows for impunity of the border guards whose practices cannot be observed and controlled. There is often a lack of information on asylum at the border too.[23]

Part of the reason why border guards from the Eastern EU member states might not initiate an asylum application is their lack of experience and training concerning asylum matters. As pointed out by a report from the European Union Agency for Human Rights concerning the situation at land border crossing points (not when a migrant is apprehended when trying to cross the border illegally outside a crossing point) about one third of the border guards interviewed at the Hungarian, Polish and Slovak borders stated that they would not take steps to have an asylum procedure initiated if the person made them understand that his / her life or freedom would be at risk if returned. Between 10 and 20% of the interviewed border guards stated they would not initiate an asylum procedure if the person clearly stated that he or she is seeking asylum or is a refugee.[24] The number of border guards ready to initiate an asylum procedure in the case of a migrant apprehended outside of border crossing points is likely to be even lower.

As argued by Giuffré, readmission agreements do not represent the cause for refoulement at the border between the EU and its neighbours. However, in a context of irregular practices of border guards in contact with migrants, quick deportation thanks to readmission agreements increases the risk of refoulement.[25] The practice of joint border patrols between Slovak and Ukrainian border guards facilitates the unlawful return of asylum seekers even further as it is even less formalised and even quicker than through the readmission agreement. The impact of this practice on refoulements at the EU border has not been studied in the literature on externalisation yet. Joint border patrols between Ukrainian and EU member state border guards are part of EU projects of integrated border management. Several meetings have taken

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[23] European Union Agency for Human Rights, *Fundamental Rights at Land Borders: Fidings from Selected European Union Border Crossing Points* (Vienna, 2014), p. 42 <fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-land-border-checks_en.pdf>.

[24] European Union Agency for Human Rights, p. 43.

[25] Giuffré, p. 13.

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place in 2015 in order to reinforce the cooperation between the border guards of Slovakia and Ukraine.[26]

The notion of safe third country

The notion of safe third country means that third country nationals who transited through another country which is considered safe can be refused access to an asylum procedure in the destination country.[27] According to this notion, asylum seekers should apply for asylum in the first safe country they reach rather than continuing their way to another state. This notion is part of the national legislation – unlike readmission agreements which are international agreements. However, international transfer of asylum seekers does not have a basis in common international legislation apart from the situation within the EU regulated under the Dublin agreements. This is why EU countries can use readmission agreements in order to send asylum seekers back to such a safe third country – before the substantial examination of their asylum claim.[28] Readmission agreements simplify the execution of an expulsion decision even though this should theoretically not infringe upon the right to asylum.[29]

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[26] 'In Uzhgorod, Chief Border Commissioners of Ukraine and Slovakia Discussed Cooperation', *Uzhgorod.in* (Uzhgorod, 10 June 2015) <http://uzhgorod.in/en/news/2015/iyun/in_uzhgorod_chief_border_commissioners_of_ukraine_and_slovakia_discussed_cooperation> [accessed 11 September 2015]; 'Ukraine and Slovakia Signed a Protocol on Amendments to the Agreement Checkpoints Common Border', *Migration - Міграція*, 9 February 2015 <http://en.migraciya.com.ua/News/the-state-border-service-of-ukraine/en-ukraine-and-slovakia-signed-a-protocol-on-amendments-to-the-agreement-checkpoints-common-border/> [accessed 11 September 2015].

[27] According to UNHCR, a state to be declared a safe third country needs to fulfil the following criteria: "(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

[28] Council of the European Union, *Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Procedures Directive)*, 1 December 2005 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>. Article 25(2)(c) indicates that member states can declare an asylum application inadmissible if the person transited through a safe third country.

[29] European Parliament and Council, *Council Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Return Directive)*, 16 December 2008 <http://eur-

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Most EU member states have included the notion of safe third country in their national legislation. Criticism of this notion concerns in particular the inexistent or speedy and superficial examination of the safety in the case of the individual asylum seeker. As Coleman pointed out, a "full and individualised examination of the safety of a third country for a protection seeker can be just as time- and resource-consuming as the substantive examination of a protection claim."[30] This is why some states may examine only the general safety situation in the third country. While some states foresee the opportunity for the applicant to challenge the safety of the third country in his or her individual case (e.g. Croatia[31]) other states do not offer this opportunity (e.g. Ireland[32]). Criticism is also raised given that the notion of safe third country strengthens the predominance of a redistributive logic over humanitarian norms.[33]

While the notion seems preoccupying, when examining more closely the practices in the EU member states, it appears that the return of asylum seekers to third states under the notion of safe third country is very rare.[34] Since the enlargement, Dublin II applies to all EU member states. Iceland, Norway and Switzerland have been included as well. Some EU countries have more or less public lists of countries which they consider to be safe i.e. in which the asylum procedure is estimated functional and fair and where asylum seekers could find protection. Out of the 19 EU member states on which information is available from 2014, Bulgaria is the only state whose list includes Ukraine as a safe third country. However, Bulgaria's list of safe

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>; Council of the European Union, *Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Procedures Directive)*.

[30] Coleman, pp. 227–228.

[31] Asylum Information Database and HPC Croatia, 'The Safe Country Concepts - Croatia - Asylum Information Database' <http://www.asylumineurope.org/reports/country/croatia/safe-country-concepts-0> [accessed 9 September 2015].

[32] Asylum Information Database and Irish Refugee Council, 'The Safe Country Concepts - Republic of Ireland - Asylum Information Database' <http://www.asylumineurope.org/reports/country/republic-ireland/safe-country-concepts> [accessed 9 September 2015].

[33] Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Central European University Press, 1999), p. 168.

[34] It needs to be stressed though that it is very difficult to access the information on if and how EU member states apply the notion of safe third country. Information for this paper is derived primarily from NGO reports on national asylum practices, namely through the AIDA database.

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third countries dates back to 2005 and is not being applied at the moment. Bulgaria is currently working on its update.[35]

No information was found which would have confirmed that EU member states use or used the notion of safe third country to send asylum seekers back to Ukraine. In the cases where Slovakia (and to a much lesser extent Hungary) used the readmission agreement to send asylum seekers back to Ukraine, these EU states never referred to the notion of safe third country to legitimise their action. Rather, these practices occurred informally and illegally and were denied by these states.[36] In contrast, the use of the notion of safe third country would allow EU member states to openly and legally return asylum seekers to Ukraine. This has not been the case so far.

The absence of the use of the notion of safe third country might be explained at least partly by the normative power of UNHCR which repeatedly published reports warning states not to send asylum seekers back to Ukraine as UNHCR does not consider Ukraine to be a safe third

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[35] Bulgarian State Agency for Refugees, *Ad-Hoc Query on Safe Countries of Origin and Safe Third Countries*, 22 December 2014 <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_%28wider_diss%29.pdf>. Germany has a list of safe third countries but it includes only EU member states as well as Norway and Switzerland. The UK has a list which includes the EU member states as well as Norway, Switzerland, Canada and the United States of America. Slovakia claims that it has a list of safe third countries but that it is empty. Slovenia has a list which includes Croatia. Hungary has published its list in July 2015 and has included Canada, Australia, New Zealand, the USA as well as Albania, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia but not Ukraine. Asylum Information Database, 'Hungary Adopts List of Safe Countries of Origin and Safe Third Countries', 2015 <http://www.asylumineurope.org/news/23-07-2015/hungary-adopts-list-safe-countries-origin-and-safe-third-countries> [accessed 10 September 2015]. *The Asylum (Designated Safe Third Countries) Order 2000*, 2000 <http://www.legislation.gov.uk/uksi/2000/2245/contents/made?text=%22safe%20third%20country%22#match-1> [accessed 11 September 2015].

[36] High employee of UNHCR Ukraine.

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country for asylum seekers.[37] UNHCR has published these warnings regularly since 1996 until 2015.[38]

It was shown that EU member states do not officially use the two major instruments to legally return asylum seekers to Ukraine. Instead of sending asylum seekers back after they reached EU territory an alternative is to keep asylum seekers in the transit country.

The use of alternative approaches to keep asylum seekers in Ukraine

Several EU documents declare the objective of "partnership with countries and regions of transit" at the southern and eastern borders of the EU in order "to enable these countries better to manage migration and to provide adequate protection for refugees." as announced by the *Hague Programme: Strengthening freedom, security and justice in the European Union* produced by the Council.[39] Does this "support" refer to restrictive and preventive approaches to migration and asylum by the EU?[40] The following section presents analytical elements which can hint to certain hypotheses rather than a fully fledged proof.

A clearly restrictive approach to immigration through Ukraine – which also concerns asylum seekers

The restrictive approach concerning Ukraine includes Ukrainian border guards patrolling in the border region in Ukraine close to the EU. Ukrainian border guards therefore regularly control, apprehend and detain third country nationals who are approaching the EU border. For example reported cases of August 2015 include that Ukrainian border guards apprehended and detained four Somalis, a Sudanese, a Syrian and two Georgians who were undocumented

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[37] UNHCR, 'Ukraine as a Country of Asylum. Observations on the Situation of Asylum-Seekers and Refugees in Ukraine', p. 3.

[38] UNHCR, *Background Information on the Situation in Ukraine in the Context of the 'Safe Third Country' Concept*; UNHCR, 'International Protection Considerations Related to Developments in Ukraine'; UNHCR, 'International Protection Considerations Related to the Developments in Ukraine – Update II.'

[39] Council of the European Union, *Presidency Conclusions – Brussels, 4/5 November 2004, Annex 1: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (Brussels, 8 December 2004), para. 1.6.3. <ec.europa.eu/home-affairs/doc_centre/docs/hague_programme_en.pdf>.

[40] Christina Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy', *International Affairs (Royal Institute of International Affairs 1944-)*, 79 (2003), 619–38.

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and approaching the EU border.[41] There is no information available concerning their potential wish to apply for asylum. By apprehending migrants moving in the direction of the border to the EU, Ukrainian border guards reduce the number of immigrants entering the EU. This group of apprehended migrants is likely to contain a share of future asylum seekers who would have applied for asylum in the EU.

Migrants apprehended when trying to cross the border to the EU are now detained for twelve months. All interviewed members of NGOs stated that a detainee would not be released before the end of the maximum detention period even if he or she applied for asylum during detention − which in itself is very difficult. The detention period was extended from six to twelve months in early 2012.[42] A high official of UNHCR in Ukraine stated in an interview that Ukrainian officials went on study trips to Poland where they saw that the detention period there was of twelve months. Polish officials advised them to extend the detention period in order to establish a deterrent for illegal border crossing. The UNHCR representative commented that Ukrainian officials adopted everything they saw that was restrictive.[43] No information confirming or contradicting this explanation of the extension of the detention period in Ukraine could be found. However, members of NGOs working on asylum in the border region in Ukraine claim that the increased detention period acts as a deterrent. Migrants, including asylum seekers, who tried to cross the EU border once and were detained would now rather refrain from a second attempt and search for other routes.[44] The increase of the maximum detention period for migrants apprehended while trying to illegally cross the border to the EU is a clearly restrictive measure which limits the numbers of third country nationals transiting to the EU through Ukraine. In practice, this restrictive measure limits the access of future asylum seekers to the asylum procedure in the EU.

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[41] E.g. State Border Guard Service of Ukraine, 'Border Guards Detained 4 Citizens of Somalia in Bukovyna', *Dpsu.gov.ua*, 2015 <http://dpsu.gov.ua/en/about/news/news_8278.htm> [accessed 15 September 2015]; State Border Guard Service of Ukraine, 'Border Guards Caught Four Violators in Zakarpattia', *Dpsu.gov.ua*, 2015 <http://dpsu.gov.ua/en/about/news/news_8320.htm> [accessed 15 September 2015].

[42] Verkhovna Rada of Ukraine, *Law on the Legal Status of Foreigners and Stateless Persons*, 2011, para. 30.4 <http://unhcr.org.ua/img/uploads/docs/new_law_legal_status_Foreigners_stateless_people_ENG2.pdf> [accessed 12 November 2014].

[43] Former high official of UNHCR Ukraine, Interview, 2015.

[44] Asylum NGO in Zakarpattya, Uzhgorod, lawyer.

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Border management is in the focus of the cooperation between EU and Ukraine on Justice and Home Affairs.[45] The EU strongly supports the Ukrainian state border guard service through the Integrated Border Management Project under the Eastern Partnership. Integrated border management is also part of the Visa Liberalisation Action Plan. A restrictive influence of the EU on Ukrainian border controls is therefore very likely.

Despite the existence of strong actors in the EU pushing for restrictive measures towards immigration and asylum, especially the EU member states, other forces should not be forgotten. For instance, in opposition to the push for stronger border security, the DG on Development and Cooperation in the European Commission tries to integrate a stronger focus on human rights and asylum into border management projects[46] thus counteracting practices such as the ones of Slovak border guards presented above. According to the interview partners in the DG, they are asked by the general director to make sure that "integrated border management" is in harmony with human rights. The interview partner said that there is far more funding for integrated border management in Eastern Europe than for migration projects and that they are trying to include human rights aspects into the work on integrated border management e.g. into trainings for border guards.

Supporting the asylum system in Ukraine – a restrictive or a preventive approach?

EU funding for border management in Ukraine is far higher than the EU support to the Ukrainian asylum system. Nonetheless the EU attention to asylum in Ukraine is considerable. This interest for asylum in Ukraine began in the early 2000s. The EU intervenes in the asylum system in Ukraine at two levels: at the political level (at the level of negotiations between the EU and the Ukrainian state) and through projects funded by the EU.

At the political level, asylum is integrated in EU assessment reports, plans and agreements with Ukraine. Starting with the *EU-Ukraine Action Plan on Justice and Home Affairs* presented by the European Commission in 2001, the following EU plans have always included a section on asylum in Ukraine, requesting the harmonisation of Ukrainian asylum legislation and practices to EU norms and standards and to the Geneva Refugee Convention and its Protocol. Asylum, the implementation of the Geneva Refugee Convention and the

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[45] James W. Scott, *EU Enlargement, Region Building and Shifting Borders of Inclusion and Exclusion* (Hampshire, UK: Ashgate Publishing, Ltd., 2006), pp. 100–101.

[46] European Commission, DG DEVCO, Interview, 2014.

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Protocol of 1967 as well as the principle of non refoulement are also included in the *Association Agreement* signed in 2014.[47] EU reports on Ukraine have included an analysis of asylum since 2004 and reflect a major attention to asylum since 2007. Since 2011, the EU has published every year a progress report on the *Implementation by Ukraine of the Action Plan on Visa Liberalisation* – with a significant part on asylum. In order to achieve visa liberalisation, Ukraine has to fulfil EU demands including in the area of asylum.

The EU has also funded projects on asylum in Ukraine, especially through TACIS/ENPI/ENI and AENEAS. Several international and non-governmental organisations are or were active on asylum in Ukraine: especially UNHCR but also the Danish Refugee Council, the Hebrew Immigrant Aid Society (HIAS) and a series of Ukrainian NGOs. The work and projects carried out by these organisations are to the largest part funded directly or indirectly by the EU.

The EU thus also funded the Regional Protection Programme in Ukraine, Belarus und Moldova implemented by UNHCR. Regional Protection Programmes were established with the goal of enhancing "the capacity of areas close to regions of origin to protect refugees."[48] Leonhard den Hertog argued that Regional Protection Programmes aim at keeping asylum seekers as close as possible to their country of origin and thus limiting the migration flows to the European Union.[49] The support to asylum reception capacities in transit countries can be interpreted as a restrictive or a preventive approach. Christina Boswell herself categorises the support to asylum reception capacities sometimes as restrictive and sometimes as preventive within the same article.[50]

On the one hand, support to the Ukrainian asylum system can be interpreted as long term development aid which enables or encourages asylum seekers to stay in Ukraine rather than to

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[47] European Union and Ukraine, *Association Agreement* (Brussels, 21 March 2014), Title III Justice, Freedom and Security, Art.16 <eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf>.

[48] Commission of the European Communities, *On Regional Protection Programmes - Communication from the Commission to the Council and the European Parliament* (Brussels, 1 September 2005), p. 3 <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2005&nu_doc=388> [accessed 5 March 2014].

[49] Leonhard den Hertog, *The Rule of Law in the External Dimension of EU Migration and Asylum Policy: Organisational Dynamics between Legitimation and Constraint*, Wolf Legal Publishers (Nijmegen: Wolf Legal Publishers, 2014), p. 26.

[50] Boswell.

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move on to the EU. Indeed, interviews with asylum seekers and recognised refugees in Ukraine show that especially Russian speakers from the former Soviet Union did not originally intend on leaving Ukraine but would prefer to settle down there. However, the problems of the Ukrainian asylum system push many of them to move on (e.g. due to the risk of refoulement to the country of origin, due to the impossibility of obtaining a refugee status in Ukraine despite well founded fear of return etc).

On the other hand, support to the Ukrainian asylum system may be based on the long term strategy of in the future being able to declare Ukraine a safe third country to officially send back asylum seekers who had transited through Ukraine. Such ideas have been popular among European politicians already for some time.[51] Halbe Zijlstra from the Dutch VVD party, for instance, suggested on 10 September 2015: *"The core of this plan is that we care for refugees in their own regions. With that we offer genuine refugees safety and we damn the increasing flow of refugees into Europe. [...] I think I'm clear: if there is a safe have[n] in the region, then the right of asylum lapses. Then they do not get in here. If they come anyway, then we will ensure that they return to a safe have[n] in the region."*[52]

This section presented analytical elements hinting towards EU approaches aiming at keeping asylum seekers from leaving Ukraine instead of returning them once they already reached EU territory. First and tentative evidence suggests that the EU is strongly supporting the Ukrainian border guards. These in turn control the EU border from the Ukrainian side and apprehend third country nationals, including asylum seekers, who are approaching the EU border. The extension of the maximum detention periods for apprehended migrants in Ukraine acts as a deterrent for these migrants wishing to move on to the EU. In parallel to this clearly restrictive measure which concerns all types of migrants trying to reach the EU through Ukraine including asylum seekers, the EU undertakes also a long term approach. This long term approach consists of pushing Ukrainian officials at the political level to improve the national asylum system and at the same time supporting change through funding for asylum

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[51] See for instance: Prime Minister Tony Blair suggested to "establish protected zones in third countries, to which those arriving in EU Member States and claiming asylum could be transferred and have their claims processed." Tony Blair to Costas Simitis, 'New International Approches to Asylum Processing and Protection', 10 March 2003 <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> [accessed 16 March 2015].

[52] Janene Van Jaarsveldt, 'Conservatives Defend Criticized Refugee Plan; Labour Leader Lightens Stance', *NL Times*, 2015 <http://www.nltimes.nl/2015/09/10/conservatives-defend-criticized-refugee-plan-labour-leader-lightens-stance/> [accessed 10 September 2015].

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projects in Ukraine. This method of supporting the establishment of a functional asylum system in Ukraine can be interpreted both as a long term restrictive or a long term preventive approach.

Conclusion

Research conducted in the years 2000 before the central and eastern European enlargements has shown that the EU used readmission agreements and the notion of safe third country to shift the burden of asylum cases to its Eastern neighbours. Several authors now claim that the EU is repeating this practice in the new neighbouring states such as Ukraine. This cannot be completely confirmed by the present contribution. The EU has indeed concluded a readmission agreement with Ukraine which allows the EU to lawfully extradite irregular migrants to Ukraine. Legally, this agreement cannot be applied for asylum seekers in violation of the Geneva Refugee Convention. However, the readmission agreement facilitates unlawful practices of Slovak border guards who refuse to register asylum seekers and send them back to Ukraine through the accelerated procedure. There are hints, that such unlawful practices are even more facilitated by joint patrols of Slovak and Ukrainian border guards. Joint patrols of border guards at EU borders are strongly supported by the EU and are likely to be expanded in the future. The consequences of joint patrols at EU borders for the right to seek asylum in the EU need to be further investigated.

The second instrument which had been used by EU member states for the externalisation of asylum cases to CEECs is the notion of safe third country. This notion is not used to send asylum seekers back to Ukraine though. Indeed, Slovak border guards do not refer to this notion to legitimise the extradition of asylum seekers as they deny that they send asylum seekers back and do not record the wish to apply for asylum. It is possible that EU member states are not officially using the notion of safe third country for Ukraine given the normative power of UNHCR which regularly warns that Ukraine should not be considered a safe third country.

However, the EU might apply other means in order to keep asylum seekers in Ukraine and prevent them from reaching the EU so that the above mentioned instruments for legal return are not necessary. This corresponds to what is shown for instance by Thomas Gammeltoft-Hansen: asylum destination states try to extraterritorialise asylum and migration control

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hoping to avoid constraints of international asylum and human rights law.[53] A clearly restrictive approach consists of pushing, encouraging or supporting Ukrainian border guards to prevent third country nationals from approaching and crossing the EU border. This method is combined with detention of apprehended migrants in Ukraine. These groups of apprehended and detained migrants contain a share of potential asylum seekers who do not gain access to an asylum procedure in the EU. Moreover, their chances of obtaining asylum in Ukraine are even lower than for other asylum seekers because Ukrainian authorities consider them as economic migrants.[54]

Furthermore, it needs to be noted that the EU has invested considerable attention and funding into the establishment of a functional asylum system in Ukraine. This could be interpreted as either a restrictive or a preventive long term strategy to decrease asylum applications in the EU. Potential underlying rationales could be: (a) The EU is trying to declare Ukraine a safe third country in the long run to be able to send back asylum seekers who had transited through Ukraine or (b) The EU is trying to improve the situation of asylum seekers and refugees in Ukraine so that staying there seems more attractive to them than moving on to the EU. The support to asylum systems outside of the EU is special in the sense that it accommodates both human rights and security oriented interests and norms in the EU.

More than the mere return of asylum seekers from the territory of the EU, the externalisation of asylum policies by the EU refers a range of different activities of more or less restrictive nature, some of which only serve externalisation purposes in the long term. Externalisation of asylum policies to Ukraine needs to be examined as a multi-level approach which involves a variety of actors with different norms and interests. UNHCR, for instance, tries to attract the attention of the EU to asylum issues in Ukraine in order to maintain or increase its role and budget there.[55] A series of asylum NGOs in Ukraine depend indirectly on EU funding and

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[53] Gammeltoft-Hansen, p. 8.

[54] This was reflected in interviews with various employees of the asylum departments of local migration services in Ukraine. It was confirmed in interviews with representatives of Ukrainian NGOs and UNHCR in Kiev.

[55] Interview with a representative of the Brussels office of UNHCR, 2014. Johannes van der Klaauw, 'European Asylum Policy and the Global Protection Regime: Challenges for UNHCR', in *Migration and the Externalities of European Integration*, ed. by Sandra Lavenex and Emek M. Uçarer (Lanham, Maryland, USA: Lexington Books, 2003), pp. 33–53 (p. 39). Van der Klaauw, Senior European Affairs Officer of the UNHCR office in Brussels, describes how the European Commission was originally reluctant to include asylum in Justice and Home Affairs national programmes for accession countries and was convinced by UNHCR to do so.

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have often only been created due to the availability of this funding. Ukrainian state border guards see their role and budget increase thanks to EU interest in their control. While these actors' norms on asylum differ strongly, they are all involved in the externalisation of asylum policies to Ukraine.

The implications of these activities for asylum seekers and refugees at and outside of the EU's borders differ. On the one hand, the EU support for asylum in Ukraine has at least partially improved the situation of asylum seekers and refugees in Ukraine. On the other hand, only a minority of those stuck in Ukraine due to the restrictive measures of EU member states at the border can access protection, a regular status and decent living conditions in Ukraine.

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