will be largely responsible for the internal security of the Union.[27] However, the involvement of candidate countries in European policies on immigration control dates back to the beginning of the 1990s. The two main instruments through which present member states have unloaded part of their responsibility towards hosting migrants and asylum seekers are the "safe country principle" and "readmission agreements."

The "safe country principle" was introduced in the German Federal Constitution in 1993 with the aim of regulating the arrival of protection seekers from Poland and the Czech Republic. Asylum seekers entering Germany from a "safe country" would now be subject to denied entry or, if stopped and identified on German territory, to removal. Shortly afterwards, the "safe country principle" was adopted by the other European member states, and all countries bordering the Union were designated as "safe". This policy had the effect of transforming countries bordering the EU into "buffer zones" for asylum seekers and transit migration. Moreover, in order to maintain their good relationship with the EU, neighbouring countries were responsible for preventing transit migration from moving further west. The tightening of European migration and asylum policies has spread with a "domino effect" to Central and Eastern European Countries who, in turn, have modified their domestic legislation to declare neighbouring countries to be "safe" and have signed readmission agreements with migrants' countries of origin and transit states. Over the past decade some Central and Eastern European countries have amended their legislative framework on more than one occasion, and each time in an increasingly restrictive way. For example, according to art. 14 of the *Act on granting protection to aliens within the territory of the republic of Poland* of 13th June 2003, an alien arriving from "a safe country of origin or a safe third country" is refused refugee status as this is now regarded "[a] reason of manifestly unfounded nature of the application." In the previous *Polish Aliens Law* of 1997 the arrival from a safe country and the lodging of a "manifestly unfounded" application had to be both taken into consideration in order to refuse the refugee status.

Readmission agreements are the instruments which enable the actual removal of aliens from a state's territory and are therefore essential to the functioning of the "safe countries" policy as well as guaranteeing the return of illegal migrants. Once again, Germany acted as pioneer signing with Poland in 1993 the *Governmental Agreement on Co-Operation in matters Referring to Migration Movements*.[28] This agreement was a bilateral modification of a general document signed in 1991 between Poland and the Schengen States which had done little to limit migration, especially towards Germany. Since then most other European member states have concluded similar agreements with migrants' countries of origin and transit, and as

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[27] Doc. 1009/02 FRONT 58 COMIX 398, 14th June 2002.

[28] Gregor Noll, "The Central Link: Germany Poland and the Czech Republic", in Byrne *et al. op. cit.* n. 14. p. 43.

Central and Eastern European states constitute the unavoidable overland route to Europe (as well as being the origin of migration movements) all candidate countries are presently bound by these readmission agreements. In turn, prospective member states have had to sign analogous agreements with countries of origin of migrants in order to return illegal migrants or refused asylum seekers, but also as a condition of complying with the Schengen *aquis*. Poland has concluded readmission agreements not only with Germany and the other Schengen states, but also with Bulgaria, the Czech Republic, Romania, Slovakia, the Ukraine, Croatia, Moldova, Hungary, Latvia, Lithuania, Estonia, Slovenia and Switzerland, while the transfer of people to Russia and Belarus is regulated under a Polish-CIS agreement. In the case of Romania, an example of a country that will participate in the second stage of EU enlargement, readmission agreements have been concluded outside the Schengen area with Hungary, India, the Czech Republic, Slovakia, Slovenia and Switzerland, while negotiations are underway with Estonia, Ukraine, Belarus, China, Bulgaria, Lithuania, Turkey, Latvia, Serbia and Montenegro, Lebanon and Iran.[29] Through readmission agreements the expulsion of aliens can be conceived of as a transnational system of concentric circles. Candidate countries function as stop-off points outside the core of actual member states, but the reciprocally binding effects of this system reach territories much further away.[30]

From a legal point of view, the readmission agreements have developed from rather general texts into detailed documents which also regulate the readmission of nationals of third countries who have entered or stayed illegally in the territory of one of the contracting parties before moving to the other. Whereas these initially took the form of bilateral agreements between individual states, the European Commission has recently started to insist that these readmission agreements be signed at the communitarian level, thus binding all actual (and future) member states, and that readmission clauses be introduced in other kinds of agreements. In addition, while previous agreements required proof of an alien's nationality (which was one of the main obstacles for the return of migrants), there has been a growing tendency to include clauses that widen the range of cases which constitute presumption of a person's nationality or evidence that they have stayed in a state's territory.[31] For example, in a note written by the General Secretary of the EU Council circulated to

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[29] For the latest developments in negotiations over readmission agreements with third countries see the annual Commission's *Regular Reports on Progress Towards Accession*, available for each candidate states.

[30] According to Frank P. Weber, the historical precedents of readmission agreements were those signed by Germany in 1920–1921 with Poland, Russia, Latvia, Lithuania, and Estonia in order to facilitate mass deportation; Frank P. Weber, "Expulsion: genèse et pratique d'un contrôle en Allemagne", in Didier Bigo (ed.), *Circuler, Enfamer, Eloigner. Zones d'Attente et Centres de Rétention des Démocraties Occidentales* (Paris: L'Harmattan 1996), pp. 107–154.

[31] Steve Peers, "Readmission agreements and EC External Migration Law", Statewatch analysis 2003; a full version of the paper is published in Steve Peers and Nicola Rogers (eds.), *EU*

council members regarding the introduction of readmission clauses in cooperation agreements with China, it was advised that "*no proof of identity shall be required in respect of persons to be admitted*."[32] By tracing out these readmission agreements one effectively produces a map of the "flows of expulsion." Thus, an Asian migrant expelled from Germany might pass through Poland and Romania before being "sent home" without necessarily his or her national identity ever being proven.

These examples illustrate the assertion that European borders do not coincide with the perimeter of the European Union territory nor with the territory of those states that will become EU members in the forthcoming "waves" of enlargement. Readmission agreements are dispositives of control over population movements which de-territorialize states' sovereignty and trace borders that cannot be represented as continuous dividing lines. Instead, they constitute administrative borders whose function is not simply to keep out those who are perceived as "trespassers" but, first and foremost, to govern populations both inside and outside a state's territory. This function of borders is highlighted by another principle of European migration policy; namely the principle of "conditionality" according to which quotas of legal entry are reserved for nationals of those countries which collaborate in combating illegal migration.[33] Readmission agreements also play an important role in implementing this principle, since collaborating in the combating of illegal migration primarily means accepting and facilitating the return of unwanted migrants from European member states. During the European Council held in Seville in June 2002, the principle of conditionality was defined as either "positive" or "negative". The former connotes positive sanction—such as the provision of higher quotas of entry—for countries whose commitment against illegal migrants is judged to be efficient. The latter implies negative sanctions for countries that do not collaborate which may consist of the suspension of economic aid. The "negative conditionality" was criticized by part of the Council and in the conclusive document it was decided that "negative" sanction could only be applied unanimously by the Council and not by singular member states.[34] Although presented as innovative in Seville, a form of *de facto* "conditionality"—both in its positive and negative designations—has long been common in migration policies. In fact, the signature and the implementation of readmission agreements have often been encouraged through the promise of economic aid, while their breach has been discouraged with the threat of suspending aid.[35]

Immigration and Asylum Law: Text and Commentary (The Hague: Kluwer Law International 2003).

32 Doc. 13206/01, 25th October 2001, italics in original.

33 On "conditionality" in migration policies, see the *Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union's relations with third countries*, COM(2002) 703 final, 3rd December 2002.

34 *Presidency Conclusion Seville European Council*, Doc. 02/13, 24th June 2002.

35 Weber, above n. 30.

Readmission agreements are not the only example of the deterritoralization of borders. Migrants seeking to legally enter the EU encounter the border when they first visit the embassy or consulate in their country of origin in order to apply for an entry visa. Didier Bigo and Elspeth Guild have recently used the term "*police à distance*"[36] to describe the Schengen system of visa regulation. According to these authors, the term designates the mechanisms of control which are exercised by "professionals" of security strategies which do not refer to national police forces but to diplomatic authorities and administrative bureaucracies. Therefore, the impact of the shifting of European borders is not limited to legislative changes. It also involves the constitution of new authoritative figures and forms of expertise involved in the implementation of new social practices. Besides candidate states, neighbouring countries are also affected. Legislation on aliens approved in Central and Eastern European countries in order to comply with Schengen visa regulation, for example, provide for the establishment of new consular offices in neighbouring countries.

The incorporation of candidate countries in the area of "freedom, security and justice" also implies the transfer of the notions of "national security" and "public order" that have been developed in the present member states. According to art. 5 of the Convention which applies the Schengen Agreements, in order to be admitted into the territory, an alien must not be considered dangerous to the "national security", the "public policy" and the "international relations" of *any one* of the member states. Usually the classification of a foreigner as an unwelcome migrant depends on her/his lack of fulfilment of national legislation requirements during a previous stay in a Schengen country. The criteria of data on "undesirable aliens" registered in the pan-European information system (SIS) are therefore defined at the national level and range from criminal offences to simple breaches of administrative rules. Due to the overlapping of the different conditions of entry into Schengen territory, the concepts of "security" and public "order" (or "policy") applicable in the area of "freedom, security and justice" are thus not the result of an autonomous elaboration but the sum of restrictions established in each country.

After the completion of the accession, therefore, any interpretation of migration laws approved in candidate countries will also need to take into consideration notions of "national security" and "public order" as defined by each member state. For instance, in the case of Poland, entry is barred to those foreigners whose data "has been recorded in the index of aliens whose residence on the territory… is undesirable" (*Polish Act on Aliens* art. 21(1)) and to any foreigner whose entry or residence "may constitute a threat to the state security and defence as well as to the

[36] Didier Bigo and Elspeth Guild, "La mise à l'écart des étrangers: la logique du visa Schengen", *Cultures and Conflits*, 49–50 (2003).

public security and policy or it would be in breach of the interests of the Republic" (*Polish Act on Aliens* art. 21(6)). In the case of Romania, entry is refused to aliens who represent a "threat for national defence and security, public order, health and moral probity" (*Emergency Ordinance on the regime of aliens in Romania* art. 6(1,f)[37]) or, in the case of Bulgaria, to those "included in the informational massif of the unwelcome foreigners in the country" (*Law on Foreigners* art. 10(14)). Although these norms refer directly to domestic criteria, their combination with art. 5 of the *Schengen Convention* extends the normative definition of "national security" and "public order" or "policy" in a manner proportional to the extension of the area of "freedom, security and justice."

The notion of "*police à distance*", as exercised by consular authorities, regards migrants who attempt to legally enter European member or candidate states. In the same way, a migrant who tries to enter the enlarged Europe, partially or totally avoiding the legal requirements, encounters its borders long before its territorial delimitation. They are encountered, for example, when the migrant uses transport companies to reach the European Union or applicant states. "Carriers", in fact, are required to make stringent checks for undocumented aliens to avoid running the risk of sanctions. "Carrier liability" clauses are contained in all aliens laws of European member states, and now they are also introduced in applicant countries' legislation so as to meet the Schengen *acquis*. Such clauses were first introduced in Poland with the *Aliens Law* of 1997. In the new *Polish Act on Aliens*, art. 138 states that "if the carrier [brings] into the territory of the Republic of Poland an alien who does not posses . . . the travel document and the visa required to cross the border, . . . an administrative fine in the amount of PLN equal to the sum not less than EUR 3000 or EUR 5000 for each person carried shall be imposed on the carrier." Comparable norms are also present in Romanian (art. 7 of the *Emergency Ordinance on the regime of aliens*) and Bulgarian legislation (art. 20 of the *Law on Foreigners* amended in 2001). In addition to administrative fines, Polish and Romanian acts oblige carriers to return aliens to the countries from which they were transported or to refund expenses sustained for their forced repatriation. As a result of such provisions, not only the state's typical function of border control but also the implementation of operational tasks concerning repatriation are delegated to private agents.[38]

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[37] The *Emergency Ordinance on the regime of aliens in Romania* also provides for a particular administrative measure of authority based on a declaration of undesirability which can be ordered "against an alien who performed, performs or there are strong evidence that he intend to perform such activities as to endanger the national security and public order" (art. 83(1)). An alien can be declared undesirable for a period from 5 to 15 years with the possibility of extending the term.

[38] This state of affairs particularly jeopardizes the rights of protection seekers who normally do not posses entry visas or travel documents.

4. Legal Borders

European borders maintain many elements of "fortification" which characterized traditional national borders. Poland, for example, will preserve and even reinforce defensive tools of the old "iron curtain" that, through the PHARE programmes,[39] will be relocated along the eastern frontier:

> Unlike the German-Czech border, the demarcating barbed wire from the time before the collapse of the Warsaw Pact wall will not be removed. The fortified border watchtower, invented by the conquering and territorial sates, celebrates its resurrection here. Such towers are planned to being built every 15 to 20 kilometres, each equipped with the most advanced and expensive electronic and optical paraphernalia. Spying from above and hunting down units on the ground—with the border surveillance at Poland's eastern border, military and police units converge in new ways.[40]

Differing from conventional geopolitical borders, the new European external frontiers are not fortified against the threat of military invasions. As Helmut Dietrich points out: "The future border regime represents a socio-technological attack on the informal cross-border economy and on transit migration."[41]

Official documents and public discourse justify the fortification of European borders in view of combating illegal migration and the abuses of asylum requests. Nevertheless, the tightening of asylum and migration polices can also be seen to lead to a massive "illegalization" of movements.[42] In the case of asylum seekers, it has been underlined elsewhere that "persons who formerly sought protection would now regard illegal stay as the better option, avoiding any form of contact with authorities."[43] In the case of cross-border trade and transit migration, new visa requirements mean that movements of population which were formerly considered lawful have become illegal. In fact, until recently Central and Eastern European countries possessed relatively laissez-faire migration regimes. Even before the 1990s there was some form of mobility at least within national boundaries. In some of the countries of the former Soviet Union labour mobility, synonymous with social mobility, reached 15% of the active population.[44]

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39 PHARE stands for *Pologne-Hongrie: Assistance à la reconstruction économique*. The project specification of the PHARE programmes for 2001 and 2002 also provides an insight into the modernization and extension of Polish eastern border.

40 Dietrich, above n. 17, p. 4.

41 *Id*.

42 Noll, above n. 28, p. 31.

43 *Id*.

44 Frank Laczko, Irene Stacher and Amanda Klekowski von Koppenfels (eds.), *New Challenges for Migration Policy in Central and Eastern Europe* (The Hague: T M C Asser Press 2002).

The process of "illegalization" of migration movements can be reconstructed by examining the changes that have occurred in domestic legislation of Central and Eastern European countries. Of particular significance are the conditions of detention and expulsion of aliens as these are the sanctions that legal systems typically reserve to illegal migrants. Under the *Polish Aliens Law* of 1997, for example, illegal entry *per se* was not formally sanctioned with expulsion. However art. 52 of this Act did put forward a general requirement stating that an alien who did not possess the requisites to entry and residence in Poland was liable to expulsion. The amendments introduced in the *Polish Aliens Law* in 2001 specified the procedures under which an alien might be obliged to leave (art. 51) or might be deported from the territory of the Republic of Poland (art. 52). Listing preconditions of the deportation orders, Art. 52 of the amended act also refers to the requirements of entry established in art. 13 which, in the new version, exclude the authorization of entrance to aliens who "crossed the border in defiance of the regulation" (art. 13(1) point 6). The *Act on Aliens* of 13th June 2003 substantially reiterates the same conditions of expulsion while introducing new cases of expulsion in view of Poland's future membership in the Schengen space and information system (art. 88(1) point 4 and point 5). However, the "Penal provisions" chapter of the new act states that whoever "resides on the territory of the Republic of Poland without the required authorization . . . shall be liable to a fine" (art. 148). The progressive "illegalization" of the movement of migrants is thus completed: an alien who resides in a territory without permit is not only subject to expulsion but also liable to a penal provision.

The progressive "illegalization" of previously lawful behaviours is made explicit in the Romanian legislation. Art. 79 of the *Emergency Ordinance on the regime of aliens in Romania* states that: "The competent authorities . . . may take the measure of removal from the Romanian territory against the alien *whose stay in Romania has become illegal* or whose right to stay was revoked under the condition of this emergency ordinance, as well as against the alien *who has been decided to have entered illegally* the Romanian territory and, as the case may be, they can decide the interdiction of re-entering Romania for an established period of time" (emphasis added). In contrast with the cases of Poland and Romania, the *Law on Foreigners* amended in 2002 by the Bulgarian Parliament did not explicitly introduce major changes that would legally qualify in different terms the conduct of border "trespassers." The Bulgarian criminal code already included penal sanctions for illegal entry and stay. But, of course, the tightening of conditions for legal entry and stay widens the range of preconditions that qualify individual conduct as unlawful.

Both Romanian and Bulgarian legislation penalise the illegal crossing of borders with sanctions that include incarceration. In 2001, the Romanian government approved an *Emergency Ordinance on Romania's state border* according to which: "The entrance or exit of the country by illegal crossing of the state border is a criminal act and is punished with imprisonment from 3 months to 2 years" (art. 70(1) of the ordinance). Art. 279 of the Bulgarian criminal code provides for up to 5 years

of imprisonment for persons who cross the borders without the required documentation. Paragraph 5 of the same article excludes punishment for those who enter the country to apply for asylum, although memoranda of nongovernmental human rights organizations have reported cases of asylum seekers being detained on the basis of the criminal code.[45] While this limitation of the rights of asylum seekers rightly raises humanitarian concerns, so the deprivation of migrants' personal liberty on the basis of simply crossing borders should be a cause for alarm. Such crimes are legislatively constructed. They do not offend pre-existing public or private goods, but changeable and, to a certain extent, imported concepts of "public order" and "security" which are the outcome of the "communitarization" of borders. As a result, there is little perception of such offences as anti-social by the "perpetrators" themselves.

Even when the formal sanction for migrants who enter or reside unlawfully in a national territory is a penal sanction, expulsion remains the ultimate punishment which characterizes their legal status. This form of punishment reserved to non-citizens may lead to consequences which are more severe than those established by penal provisions. As stated in Chapter 9 of the *Polish Act on Aliens*, expulsion may also be preceded by the "placement of an alien in the guarded centre or in arrest for the purpose of expulsion." According to the *Polish Aliens Law* of 25th June 1997 and its successive amendments, an alien could be detained for 48 hours prior to expulsion. The period could be extended to a maximum of 90 days under a court decision. The new *Act on Aliens*, besides reiterating such provisions, introduces a clause which states that: "the period of stay in the guarded centre or in the arrest for the purpose of expulsion may be prolonged for a specified period necessary to execute the decision of an expulsion, if that decision was not executed due to the aliens fault. The period of stay in the guarded centre or in arrest for the purpose of expulsion may not exceed one year" (art. 106(2)). This example illustrates how the same act of illegally entering or staying in Polish national territory leads, on the one hand, to a penal sanction of a fine (qualified as such under the "Penal provision" chapter), and on the other, to an administrative procedure that can end with the actual punishment of one year of detention. In other words, a serious limitation of individual freedom is based on an administrative, rather than criminal, procedure. Moreover, the phrase "due to the aliens fault" can be better understood by referring to other legislation which contains similar provisions. For example, according to the German law the detention period can be extended if the expulsion is not executed because the alien does not collaborate in providing the information or the documents necessary to her/his identification. Therefore, even if not formally defined as penal, such norms have a correctional function typical of the modern theory of punishment which also aims to direct individual behaviour.

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[45] International Helsinki Federation for Human Rights, *Annual Report*, 1999.

In the case of foreigners who do not fulfil the legal requirements for entry or stay in Romanian territory, the *Emergency Ordinance on the regime of aliens* distinguishes between the administrative measures taken for the "return of aliens" (art. 88–90) and for the "expulsion of aliens" (art. 91–92). Both measures may imply the physical deportation from the territory also against the alien's will. The difference between the two does not depend on the outcome, but on the fact that expulsion is reserved to the alien "who committed a crime on the Romanian territory" (art. 91(1)). The combined disposition of art. 92(2) and art. 15(1) excludes expulsion for aliens "charged or accused in a penal case [when] the prosecutor decides the implementation of the interdiction measure of leaving the town or the country" (art. 15(1a)) and for aliens "sentenced by a final court decision [when] they have to carry out a prison sentence" (art. 15(1b)). Although illegal entry is qualified as a criminal offence under Romanian law, the combination of the above norms does not result in "border trespassers" facing an ordinary criminal procedure unless they have already been sentenced or there is a prosecutor's order of interdiction to leave the territory. The ultimate punishment for illegal migrants remains expulsion rather than penal sanction, nevertheless the qualification of border crossing as a criminal act plays a powerful symbolic role in the criminalization of migrants.

Under the rubrics "Public Custody" and "Accommodation Centres" the Romanian legislation also provides for the administrative detention of foreigners. The measure regards aliens issued with either a return or an expulsion order. However, while the measure expires within 30 days in the case of aliens being returned (and can be extended for a maximum period of 6 months (art. 93(2)(6))), for aliens awaiting expulsion the law does not establish any temporal limitation. Besides leading to severe consequences for personal liberty, the qualification of the detention of aliens as an administrative measure of "public custody" allows *de facto* for the breach of general principles of criminal law which require the peremptory determination of penalties.

The Bulgarian *Law on Foreigners* provides for a wide range of compulsory administrative measures for aliens who do not fulfil the legal requirements of entry and stay: the "revoking the right of stay" (art. 39(1)); the "compulsory taking to the border" (art. 39(2)); the "expulsion" (art. 39(3)); the "prohibition to enter" (art. 39(4)) and the "prohibition to leave" (art. 39(5)) the country. While expulsion is imposed when the presence of the foreigner in the country "creates a serious threat for the national security or the public order" (art. 42(1)) and is always followed by a prohibition of entry for 10 years, in the case of an alien being compulsorily taken to the border there is no automatic prohibition of re-entering the country. As distinct from Polish and Romanian legislation, Bulgarian law does not include norms which provide for the administrative detention of aliens. Nevertheless, the preconditions listed for the application of the compulsory administrative measures overlap with conducts penalised by the criminal code. Aliens may thus be detained for illegal

entry on penal grounds.[46] As a consequence the fate of "border trespassers" under Bulgarian law is ambiguous since in reality the outcome of their prosecution, as well as the entire penal procedure, may be overridden by the application of compulsory administrative measures.

These examples of the legal institution of expulsion and detention of foreigners bring into light the increasing intermingling between penal institutions and administrative procedures. This is a process which has characterized the evolution of migration laws of the member states and which is now influencing the changes to legislation of candidate countries. The fact that the Bulgarian law does not include the administrative detention of aliens is not the sign of a different political choice, but rather an indication of a lesser degree of "Europeanization" in domestic legislation. This is clearly apparent in the Commission's report on progress towards accession, which recommends Bulgaria construct adequate detention centres for illegal aliens in order to meet criteria necessary to enter the area of "security, freedom and justice."[47] Instead, the rising number of detained foreigners under the Polish law is judged by the Commission as a sign of its efficient implementation of Schengen standards,[48] while the PHARE programme for Romania provide considerable funds for the further construction of detention centres for migrants.[49]

In comparison with Romanian and Bulgarian legislation on immigration, Polish law is undoubtedly the one where the process of "Europeanization" has been the most far reaching. Administrative remedies prevail, while penal instruments mostly

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[46] According to the International Helsinki Federation for Human Rights, it is standard practice in Bulgaria to detain asylum seekers and so called "bogus" asylum seekers in the transit zone of Sophia airport and in a centre in nearby Drujba. This practice often exceeds the maximum limit of 24 hours prescribed by the Ministry of Interior (International Helsinki Federation for Human Rights, *Annual Report 1999*).

[47] European Commission, *Regular Report on Bulgaria's progress towards accession*, 2003.

[48] European Commission, *Comprehensive monitoring report on Poland's preparation for membership*, 2003.

[49] PHARE 2001, *Strengthening the management of the migration phenomenon in Romania*, RO-0107.17. A recent plan presented by the British government considers the relocation of centres for the detention of aliens outside the territory of member states a strategy for the better management of protection seekers in order to avoid the risk of abuses of the legal framework of asylum. The project includes financial aid for the construction of Transit Processing Centres in the countries of origin of migrants and asylum seekers as well as in countries of transit. The intended function of such centres is to deter "those who enter EU illegally and make unfounded asylum applications". Furthermore, "it is for consideration whether the centre would also receive illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so" (New international approaches to asylum processing and protection, attachment to a letter from Tony Blair to Costas Simitis, 10th March 2003). Although the UK proposal has not been adopted by the European Union and has been contested by governments of other member states, it seems to be consistent with the tendency of pushing Europe's borders further east.

serve a symbolic role. In contrast, the Bulgarian legislation still maintains a strong penal character which is the legacy of the normative framework preceding the country's transition from communism. In all three countries, however, there is a clear tendency towards a progressive administrative treatment of the legal position of foreigners. This is to the detriment of the judicial control over the procedures carried out against them; a danger which is exacerbated by the limited jurisdiction of the Court of Justice at European level.

5. Citizens Across European Borders

Borders not only have a physical dimension but also a temporal dimension which strongly affects the legal status of migrants. Their lives are marked by: the waiting period of obtaining the documents required to enter or reside in the host countries; the amount of time necessary to acquire a different legal status such as permanent residence; and the period of residence that national legislations impose to obtain naturalization.[50] More generally, migrants enjoy *pro tempore* rights conditioned by the persistence of their status as legal residents. The Algerian sociologist Abdelmaleck Sayad noticed that the legal systems of host countries always consider migrants in a transitory position which is intended to persist *indefinitely*.[51] This *indefinite* temporariness, which characterizes the structure of aliens' legal subjectivity, allows for the continual redefinition of the relation between citizens and foreigners. The physical and temporal boundaries of membership expand to include new categories of previous foreigners, while excluding others not only from the original polity, but also from the new extended boundaries which in the past they were allowed to cross.

The succeeding waves through which the enlargement process will take place highlight the diachronic dimension of the boundaries of European membership. Although exempt from visa requirements to enter the European Union, citizens of the candidate countries are currently subject to national legislations on immigration when hosted in present member states. Their right to reside and circulate in the area of "freedom, security and justice" is affected by measures analogous to those implemented by prospective member states to limit and regulate the accession of third country nationals, such as expulsion, administrative detention and work permits. The Commission's report on Romania's progress toward accession emphasises the

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[50] On the temporal dimension of borders see also Charles Westin, "Temporal and Spatial Dimension of Multiculturality. Reflections on the meaning of Time and Space in Relation to the Blurred Boundaries of Multicultural Societies", in Rainer Bauböck and John Rundell (eds.), *Blurred Boundaries: Migration, Ethnicity, Citizenship* (Aldershot: Ashgate 1998), pp. 53–84.

[51] Abdelmaleck Sayad, *L'immigration ou les paradoxes de l'altérité* (Bruxelles: De Boeck Université 1992), p. 51. On the issue see also Federico Rahola, *Zone Definitivamente temporanee. I luoghi dell'umanità in eccesso* (Verona: Ombrecorte 2003).