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Ukraine's policy to control illegal migration

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Foreword

This White Paper proposes an alternative, independent vision of state policy for controlling illegal migration in Ukraine. This is the final report from the “Improving the Implementation of Migration Policy by Disseminating EU Experience with Readmission Treaties” Project implemented by the International Centre for Policy Studies (Kyiv, Ukraine) and the Institute for Public Affairs (Warsaw, Poland), with support from the Embassy of the UK in Ukraine.

This document also contains recommendations for institutional reform, legislative changes, and drawing on technical assistance, as well as proposals for specific policies and programs in migration control and border management. The report also proposes responses to challenges associated with signing a Readmission Treaty with the EU: recommendations on creating conditions for the detention of illegal migrants, ensuring them legal protection, and carrying out identification and expulsion procedures. Moreover, this paper also lays out reforms that are needed to improve the effectiveness of Ukraine’s migration policy: reforms in the Ministry of Internal Affairs (MIA) and the judiciary.

This White Paper takes into account the results of expert debates during a wrap-up conference called “Applying Best Practice in

The Readmission of Illegal Migrants: Building national capacity through international cooperation” on 23 June 2006. Participants in these debates represented such stakeholders as the Ministry of Internal Affairs, the State Border Service, the State Nationalities and Migration Committee, the Ministry of Foreign Affairs, the State Department for the Adaptation of Legislation, the Verkhovna Rada Committee for Human Rights, National Minorities and Interethnic Relations, the Representative Office of the International Organization for Migration, the Representative Office of the United Nations High Commissioner for Refugees, the National Institute for Strategic Studies, the National Institute of International Security Issues, non-government think-tanks, and human rights organizations.

An electronic version of this White Paper, called “Ukraine’s Policy to Control Illegal Migration,” and the Green Paper that preceded it can be found online on the website of the International Centre for Policy Studies at <http://www.icps.com.ua/eng/project.html?pid=93>, along with other analytical reports from this project. The authors of these Green and White Papers would like to thank all those who participated in the debates, as well as those who provided feedback on these Green and White Papers in writing.

Overview

Ukraine and the European Union have agreed to sign a Readmission Treaty as part of the Action Plan for 2005–2007. This Treaty provides for Ukraine and EU member countries to accept the return of citizens who have illegally entered or illegally remained on the territory of any of the other countries, as well as to accept illegal migrants who are citizens of third countries or stateless individuals who have come to the territory of one of the countries through the territory of the other country.

The Treaty essentially obligates Ukraine to share responsibility for the security of the EU with the European Union, which Ukraine would like to join, in exchange for the free movement of people, which is the long-term goal of Ukraine and the EU. In the short term, the signing of a Readmission Treaty with the EU is a necessary condition for a simplified visa regime for citizens of Ukraine traveling to the EU.

However, analysis of the way that Ukraine's policy regarding the control of illegal migration is actually carried out reveals that the country is far from ready to carry out the terms of the Readmission Treaty as it pertains to third-country citizens. For the terms of the Treaty as regards illegal migrants who have entered the EU through Ukrainian territory mean that Ukraine must take responsibility for accepting and detaining them, issuing those travel documents necessary to identify them, and returning them to their countries of origin. As one of the main transit countries for migrants from CIS countries and Southeast Asia to Western Europe, Ukraine is already running into the problem of countering illegal migration and carrying out the procedures necessary for readmission.

The reasons for these problems with enforcing migration control policy lie in the inadequacies of the system for handling

migration in Ukraine. For one thing, responsibility for carrying out this policy is scattered among several state organs. For another, these institutions are unable to respond to current challenges. The State Border Service of Ukraine, for instance, has not yet been transformed into a law-enforcement agency but remains a militarized, soviet-style structure. Reforms intended to transform the Interior Ministry from a police ministry to an organ responsible for internal policy, including the management of migration processes, have still not taken place.

Until there is a single executive body responsible for drafting and coordinating migration policy in Ukraine, other problems of a technical nature will never be resolved. The very lack of such a service is the reason why, despite having been allocated money by the EU, no centers for the temporary detention of illegal migrants have been established to date.

In addition to institutional changes, Ukraine also has to adopt a slew of changes to its legislation for the purpose of improving its system for determining refugee status and granting asylum on its territory. The problems with the asylum system in Ukraine have led to a situation where Ukraine is unable to carry out its international commitments and is continually subject to criticism from human rights organizations. In addition, the Constitution of Ukraine requires the adoption of a law establishing the basis for migration policy. This particular piece of legislation should define the goals and objectives of an integrated migration policy in Ukraine, one of the elements of which is controlling illegal migration. Moreover, the adoption of such a law should be preceded broad-based expert and public debate, in order that this normative act might become a full-fledged strategy underlying the country's policy for managing migration flows.

Ukraine also has to improve the level of security around the country's borders, especially on its eastern and northern territories, where there was no international border during soviet times. Setting up an integrated border security system is impossible without equipping the Border Service with modern surveillance, transport and communication technology. In addition, Ukraine needs to organize a network of temporary detention centers for illegal migrants as well as places where they can be held temporarily at border crossings and police stations.

At the same time, Ukraine has the right to turn to the EU with a request to share the financial burden for technical provision on the border that it shares with the EU, of training professional staff, and of strengthening the institutional capacities of Ukrainian services, as was done for EU member countries. The Governments of Ukraine and the EU are supposed to review the issue of increasing financial support for those objectives that fall within the framework of TACIS

and of instituting additional instruments to prepare Ukraine to carry out its Readmission Treaty commitments. Ukraine and the European Union also have to join diplomatic forces to set up a consolidated readmission area, that is, a chain of bilateral agreements among countries of origin, transit and destination of illegal migrants. In the first place, such agreements need to be signed between Ukraine and Russia and between Ukraine and Belarus.

Until Ukraine brings about the institutional, legislative and organizational changes discussed, it will find it impossible to carry out the Readmission Treaty in full. So, before the Treaty is ratified in October 2006, Ukraine and the EU need to agree that the Treaty will only partly come into force at this time—as regards Ukraine's own citizens. Norms set in the Treaty as to citizens of third countries or stateless individuals should kick in at that point when both sides recognize that Ukraine is ready to enforce them.

Why controlling illegal migrants is a migration policy priority for Ukraine

What is meant by illegal migration?

The phrase “illegal migration” is a general concept that refers to the movement of individuals across international boundaries in violation of established laws. Although the terms “illegal migration” and “unlawful migration” are used synonymously, “unlawful migration” is used more often in official documents, while “illegal migration” is the phrase used in research and in journalism.

Ukrainian law does not define the terms “illegal (unlawful) migration” and “illegal (unlawful) migrant.” But the essence of the norms set in Ukrainian migration laws, in terms of establishing the relations between the state and foreigners or stateless persons who have entered Ukraine or are staying on Ukrainian territory on an unlawful basis, are in accordance with the concept of “illegal migration” established in international law and EU regulatory documents.

Actually, official UN terminology uses “irregular migration” and “irregular migrant” or “undocumented migrant or alien” rather than “illegal migration/migrant.”¹ These terms reflect a more humane attitude towards the phenomenon of illegal migration, based on the paradigm of human rights. The principles of individual freedom, freedom of movement and freedom of choice as to place of residence underlie this paradigm.

In contrast to international law, national legislation and regulations in the EU are

based on the notion of “unlawful or illegal migration” with the interests of the state as its priority. And these are in conflict with the interests of the individual’s basic human right to freedom of movement. But the main point is that the phenomenon described by these different terms is the same.

According to International Organization of Migration (IOM), unregulated migration is the movement of people that is in violation of the rules of countries of origin, transit or destination. In terms of destination countries, this means illegal entry, stay or employment in that country, which means the migrant does not have the right or the necessary documents required by the immigration laws of the country for such purposes. For countries of origin, this means that the person crossed an international frontier without a valid passport or travel document, or otherwise did not comply with the administrative requirements to exit that country.

EU documents more often use the notion of illegal immigration. In the terminology in the Common Policy for Illegal Immigration, this means illegal entry or stay in member countries. Firstly, illegal migration occurs when the border is crossed illegally or with false or counterfeit documents. Secondly, it occurs in instances when entry and stay were legal, but the individual has stayed beyond the term established in the

¹ International Migration Law—Glossary on Migration, International Organization for Migration, 2004. The current trend in the development of international law is to put limits on the use of the concept of illegal migration for the purpose of designated instances of smuggling or trafficking in people, that is, forms of organized crime.

visa or residence permit. Thirdly, it occurs where residency becomes illegal because the person finds employment or engages in commercial activities not permitted by their entry visa.²

According to the Law of Ukraine “On the legal status of foreigners and stateless persons,” illegal migration takes place when established rules for staying in Ukraine are violated, “that is, residing without the necessary documents permitting such residence in Ukraine; residing on the basis of invalid documents; failing to follow established procedures for registration, movement, choice of place of residency, or employment; refusing to leave after the expiry of the permitted term of residency; and failing to uphold the rules of transit across Ukrainian territory.

For the purposes of this White Paper, the term “illegal migration” will be used in the understanding of Ukrainian legislation and EU regulations.

Among the broader notions of fighting or combating illegal migration, counteracting illegal immigration and preventing illegal migration, none corresponds to current trends in evaluating international migra-

tion. Obviously the state is in no condition to fight undesirable migration, one of the consequences of globalization, just as fighting globalization itself is impossible and makes little sense. Migration processes need to be managed, their negative manifestations neutralized, and their positive aspects taken advantage of, for the benefit of economic growth.

From the point-of-view of this kind of approach, a more useful term to describe the function of the state with regard to illegal migrants is illegal migration control. This makes it possible to regulate irregular migration, to bring it under the control of the law and the state’s law enforcement agencies. In addition, control includes both preventing illegal migration, such as illegal entry, stay and exit, and countering organized forms of illegal migration, such as trafficking in people and intermediating such activities.

It must be emphasized that the approach to controlling illegal migration explored in this White paper is only one component of a comprehensive migration policy that includes managing legal and illegal emigration and immigration processes.

Migration in Ukraine today

The combination of high living standards in developed European countries and the poverty in which the majority of Central and Southeast Asians living are leading to the movement of large masses of people in search of a better life. At the same time, the ethnic, religious and economic strife that has been typical of former soviet countries over the last 15 years has led to waves of their citizens also migrating westwards.

Its crossroads geographic position has turned Ukraine into of the main transit

countries along the path of these migration flows to the EU. Moreover, the flow of illegal migrants from the East continues to grow because of porous borders with the Russian Federation and Belarus. Under bilateral Readmission Treaties with Poland, Hungary and Slovakia, the West returns detained individuals to these countries. Yet, an unfavorable economic situation has made Ukraine itself one of the biggest contributors of illegal migrants to the EU. According to a report from the UN Secretary General monitoring the world population with a focus on

² Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, Brussels, 15.11.2001, COM(2001) 672 final, p. 7.

international migration and development, **Ukraine is fourth in the world in the number of international migrants**—6.8mn international migrants. Based on 2005 data, this accounts for 3.6% of total international migrant numbers around the globe.³

Being both a country of origin and a destination country for illegal migrants, Ukraine is also among those countries who have mixed flows of illegal migrants. What is specific about Ukraine is that it is used both by its own citizens to seek a better future abroad and by those who have illegally and temporarily entered Ukraine with the purpose of moving on, again illegally, to other countries, that is, as a transit territory for their migration.⁴

Ukraine as a country of origin

Ukraine currently supplies significant labor to EU countries, but only an insignificant part of migrant workers from Ukraine become legal migrants in their destination countries. **The majority are working unofficially, making them illegal migrant workers.** A separate group of Ukrainian migrants are victims of criminal rings involved in human trafficking and engage in unlawful activities against their own will.

According to information provided by Ukrainian diplomatic missions, 300,000 Ukrainian migrants work in Poland,

200,000 each are in Italy and Czech Republic, 150,000 work in Portugal, 100,000 are employed in Spain, 35,000 in Turkey, and another 20,000 in the US. According to official information based on the number of permits issued by the Russian Federal Migration Service, some 100,000 Ukrainian citizens work in Russia, although the real number of Ukrainians working there is estimated to be 1mn.⁵

According to information provided by one Portuguese charity organization that specifically studied Ukrainian migrant workers, the largest number of Ukrainian migrants are currently working in Russia, at more than 1mn, 500,000 are working in Italy, 300,000 each are working in Portugal and in Germany, around 200,000 are employed in Great Britain, more than 150,000 each are working in France and Spain, significantly lower but still high numbers of Ukrainians are working in Greece, Turkey and Israel—Greece and Turkey account mostly for seasonal workers—, and smaller numbers work in Northern Europe, the Baltics and the Middle East.⁶

Labor migration has positive and negative aspects. On one hand, the emigration of workers relieves pressure on the domestic labor market and brings investment to the economy through cash transfers from migrant workers. Skilled migrant workers that maintain a connection with their

³ “World population monitoring dedicated to international migration and development,” a report of the UN Secretary General presented at the 39th Session of the Commission on Population and Development, 3–7 April 2006, p. 5. According to the UN definition, international migrants are persons who leave their country of origin or of habitual residence, to establish themselves either temporarily or permanently in another country.

⁴ O. Khomra, “Illegal migration in Ukraine: Situation, evaluation of consequences, prospects,” at <http://www.dep.kiev.ua/confer/Conference%202002/Section%2005/Khomra.pdf>, p.1.

⁵ O. Levtsun, “Outward Labor Migration in Ukraine as a Demographic Problem.” See http://dialogs.org.ua/project_ua_full.php?m_id=4040 (in Ukrainian).

⁶ Andriy Kyrchiv, “Labor Migration and National Security in Ukraine.” See <http://www.ji-magazine.lviv.ua/kordon/migration/2004/kyrchivo7-10.htm> (in Ukrainian).

country of origin can help transfer both capital and technologies.

On the other hand, the emigration of skilled workers can also seriously undermine development prospects in countries of origin. The emigration of skilled workers tends to be accompanied by deteriorating demographics in the home country: shrinking population numbers, the graying of the population and a brain drain. In addition, there are widespread negative social phenomena: growing numbers of divorces and widespread “social orphans.”⁷

Ukraine as a transit country

Ukraine is part of the Central European route—one of the five main routes of global illegal migration that lead to EU countries, as identified by specialists from the EU Center for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi). Going through Russia, Ukraine, Poland, and Slovakia to Western European countries, this route is used by migrants from the Far and Middle East, Southeast Asia, and the CIS. According to the estimates of European experts, this is currently not one of the most threatening routes for Europe. Nevertheless, the existence of such a route entails serious negative consequences for Ukraine.

In addition to the main point that the country lacks a fully functioning immigration control system, among the other reasons transiting illegal migrants give for choosing the path through Ukraine to Western Europe are opportunities to take advantage of loopholes in refugee status procedures, relatively low prices for basic

consumer goods, and the option of earning extra money in the unofficial economy. Those migrants transiting illegally through Ukraine typically are not prepared to just any kind of work for pay, but primarily work that offers pay or income that is not controlled by state structures. Whereas in destination countries, most illegal migrants tend largely to work in construction, renovation, building maintenance, restaurants and hotels, housework, seasonal work in such sectors such as farming, tourism and entertainment, the transitory nature of illegal migrants in Ukraine limits their employment to one area: sales and brokering services in trade.⁸

According to data from the State Border Service for the last three years, **the number of illegal migrants who transit through Ukrainian territory has been growing.** The total number of illegal migrants detained by MIA and State Border Service units was 25,539 in 2004 and 32,726 in 2005. According to IOM data, there is reason to believe that, every year, many thousands of illegal migrants manage to transit through Ukraine and only 5–10% of all illegal migrants transiting through Ukrainian territory are detained by the Ukrainian government. Most often, illegal migrants enter Ukraine across the Russian border and exit via the Ukraine–Slovak section of the border.

The ethnic composition of transit migrants has also been shifting. In 2003, the majority of transit migrants were Southeast Asian and African nationals. **Today, the majority of transit migrants are CIS nationals.** Most significant among these are Russian nationals of Chechen origin, Moldovans, Georgians, Uzbeks, Azeris, and Armenians,

⁷ H. Revna, *Ukrainian Labor Migration: Roots and Consequences (1991–2005)* (in Ukrainian). “Social orphans” are children who have lost parental care although their parents are still alive. These are children whose parents are unable to take care of them for a variety of reasons, including because they have gone abroad long-term.

⁸ O. Khomra, “Illegal Migration in Ukraine: Situation, evaluation of consequences, prospects,” p. 2.

accounting for 70% of total numbers of detained illegal migrants. Analysis shows that far more men—over 75%—illegally transit through Ukrainian territory. Some of them have considerable financial resources, which allows them to pay for carriers. As a rule, the objective of their migration is to improve their well-being and standard of living.

Another important group of migrants consists of individuals whose goal is migrant work, that is, they want to move to countries with a high level of economic development and social protection in search of better living conditions. The third and smallest group of migrants includes refugees and asylum-seekers who are forced to make the decision to migrate as a family.

Illegal migration is also a form of transnational organized crime. According to IOM estimates, almost half of illegal migrants get to the territory of other countries by entering illegally or as the objects of human trafficking.⁹ A variety of individuals are involved in various capacities in the illegal transportation of migrants or human trafficking—from those who only provide transport to cross a border to international crime rings that provide a wide range of services, including forged documents, transportation, assistance in crossing the border, accommodation and employment in destination countries.

According to MIA information, the organizers of “human smuggling” pay guides nearly US \$5,000 for transferring one illegal migrant across the Ukrainian border with neighboring countries along the CIS–Europe route, while the profits of such organizers for transporting one individual along the entire “country of origin–Western Europe” route are in the range of US \$10,000–15,000.

Although the means and mechanisms of those organizing the movement of illegal migrants change from time to time, their basic approaches remain unaltered. As a rule, the majority of illegal migrants say that they arrived in Moscow, where they came directly from their country of residence or the place where the primary flows of illegal migrants are formed. In Moscow, their foreign national “friends” form groups that are then illegally transported across the Russian–Ukrainian or Belarusian–Ukrainian border. To get illegal migrants through the border crossing points, these carriers of migrants resort to a number of measures: they hide illegal migrants in trucks in-between cargoes, use faked documents, use well-equipped hiding places, hideouts and cavities built into various transport vehicles and cargo containers.

According to Ukrainian experts, the general flow of illegal migrants to Ukraine can be divided into **several routes of illegal migration based on the nationality of the migrants:**

- **The Vietnamese channel.** Vietnamese nationals who earlier landed in the FSU republics originally as contract workers overstayed their welcome, effectively becoming illegal migrants. Currently, there is a tendency for growing numbers of such individuals to attempt to cross the Ukrainian state border using fake documents, such as service passports or work permit-based passports for Vietnamese nationals made in Moscow.
- **The Pakistani–Indian channel.** Indian and Pakistani nationals get Ukrainian and Russian tourist visas in Delhi. Afterwards, groups of these “visitors” move through Ukrainian territory to Europe, becoming illegal migrants.

⁹ World population monitoring, p. 36.

- **The Sri Lankan–Bangladeshi channel.** Nationals of Sri Lanka and Bangladesh move across the border in western Ukraine with the help of guides who are Ukrainian, Polish, Hungarian, and Romanian nationals.
- **The Afghani channel.** These are refugees from Afghanistan who have been granted asylum in Ukraine, Russia or Central Asian countries. Their fellow nationals who are legal residents of Kyiv, Moscow and other major CIS cities and are involved in commercial activities make a business of collecting and arranging fake documents for and dispatching groups of illegal migrants.
- **The Chinese channel.** Groups of Chinese nationals are formed by recruiters, mostly Malaysian and Vietnamese nationals, and arrive in Moscow legally on tourist visas. They are then moved illegally through Ukrainian territory to Western Europe. According to information of law enforcement bodies, a special center located in Prague coordinates the movement and activity of these groups of Chinese migrants.
- **The Kurdish channel.** Since 1995, after the beginning of hostilities in Kurdistan, the number of Iranian, Iraqi and Turkish nationals of Kurdish origin who arrive in Ukraine with invalid documents or with the help of international organizations has grown.
- **The Uzbek and Tajik channel.** As a result of ethnic armed conflicts and religious persecutions, the flow of migrants from Uzbekistan and Tajikistan who emigrated to Russia and are trying to get to Western European countries through Ukrainian territory has grown significantly.
- **The Chechen channel.** This channel opened up in late 2002 and many Russian citizens of Chechen origins are

using it to reach Eastern European countries such as Poland, Slovakia and the Czech Republic, where they hope to be granted refugee status.

Ukraine as a destination country

Ukraine is not only a transit country, but also a destination country for illegal migrants who remain in Ukraine for various reasons. Vietnamese, Iranian, Arabian, Chinese, Turkish, Indian, and Pakistani diasporas have already developed in Ukraine. Currently, a community of emigrants from African countries is being formed. According to the official data, some 8,000 Chinese, 6,000–8,000 Vietnamese and about 6,000 Afghani nationals reside in Ukraine today. However, practically no studies have been carried out to evaluate these communities of illegal migrants in terms of their real numbers, their socio-economic standing and their level of influence on the socio-economic and criminal situation.

Foreign migrant workers in Ukraine can be divided into several groups. The first group is legal migrant workers arriving in Ukraine under a labor contract that, as a rule, companies from their countries of origin sign with them. The second group consists of candidates for low-paid jobs, frequently without official registration. The third group consists of migrants who come to their fellow-countrymen who have already settled down in Ukraine. Such communities are often somewhat involved in illegal or semi-legal spheres where they do not allow Ukrainians.

The main activity of the Chinese, Vietnamese and Afghani diasporas in Ukraine **continues to be retail trade** in the largest markets of Kyiv (Troyeshchyna), Kharkiv (Barabashov) and Odesa (7th Kilometer). As practice shows, the tendency for refugees and illegal migrants not to mingle and the lack of permanent places of residence and employment make

it easier for criminal gangs to extend their influence to newcomers. So individuals belonging to these groups are recruited to organized rings, and the overwhelming majority of ethnic minorities are involved in the “shadow” business. The criminal business of such diaspora communities often consists of transporting illegal migrants through Ukrainian territory to EU countries.

Nonetheless, some members of these communities have started up their own, often

fairly large legal businesses in Ukraine. An example of such a business is the Kharkiv-based TekhniKom Corporation set up by some Vietnamese. This corporation includes five factories manufacturing food products.

At the same time, the experience of developed countries shows that immigrants can be a source of labor when the national population is declining rapidly due to a natural decline in population numbers and emigration, as is happening in Ukraine today.

World trends in immigration management

The population of Europe would have begun to decline back in 1995 were it not for net migration. In the next few decades, migration will be the main factor slowing population declines in EU countries. In addition, sustained immigration can slow the ageing of a population and reduce the number of dependants. On the whole, the net economic impact of international migration is positive for countries accepting migrants. Although the presence of migrants can have a slight negative impact on the salaries and wages of non-migrants, it does not lead to growing unemployment and, as a rule, provides recipient countries with tax revenues in the medium and long terms.¹⁰

The Government of Russia, where the demographic situation is similar to that of Ukraine, has identified immigration as the only way to replenish its declining population. Some specialists have calculated that if the current birth and death rates persist, Russia will need to take in almost 70mn migrants over the next 50 years to maintain population numbers at the current level of 145mn.¹¹

Out of 78 countries that wanted to lower the level of immigration in 1996, 35 countries are currently saying that they would like to maintain immigration at the current levels. Such a change reflects an improved understanding of the impact of international migration and a growing recognition on the part of Governments of the need to manage migration processes instead of restricting them. The trend is for Governments of developed countries to implement a deliberate policy to facilitate the entry of skilled and, when necessary, unskilled migrants on a temporary basis. Today, some 30 countries across the world have strategies promoting the immigration of skilled workers. At the same time, these countries are paying ever more attention to the integration of migrants, which reduces social tension in their societies.¹²

Given the competition for human resources, the lack of comprehensive immigration policy, including such aspects as the return of migrant workers, the attraction of certain categories of foreign migrants, and the social integration of such migrants, and the provision of information to Ukrainians about various aspects of migration, Ukraine is likely to see a “shortage” of labor, which is a threat to sustainable economic growth.

¹⁰ Ibid, p. 24.

¹¹ Olena Malynovska, “The Main Principles for Ukrainian Migration Policy and Future Scenarios for Its Development.” *Migration Problems*, Vol. 7, Issue 1(19), 2002 (in Ukrainian).

¹² World population monitoring, p. 29–30.

The need to control illegal migration arises primarily out of the threats it poses. Unregulated migration can, among others, spur in the spread of infectious diseases, strengthen organized crime that specialize in “human smuggling,” increase corruption among officials, and stimulate a black market for fake documents, housing, transport,

and other services. Illegal migration is seen as a disruptive, conflict-engendering factor, setting up additional conditions for conflict: between the local population and illegal migrants, between illegal migrants and governments, among representatives of various ethnic and national groups of migrants, and within and among criminal groups.¹³

Migration control as a priority for Ukraine–EU cooperation

The European Commission and the Government of Ukraine have recognized migration control and effective border management as a priority for Ukraine–EU relations. The pace of development of Ukraine–EU relations in facilitating people-to-people contacts and opening the common border for the free movement of people will depend on Ukraine’s ability to control its borders and to address illegal migration, human trafficking, smuggling, and international organized crime.

According to the Ukraine–EU Action Plan for 2005–2007, **a mandatory condition for simplifying visa requirements for Ukrainian citizens** and for eventually canceling them altogether **is the signing of the Readmission Treaty between Ukraine and the European Union**. At the moment, the parties are at the last stage of negotiations and it is expected that this Treaty will be initiated in October 2006.

In the Readmission Treaty, the signatories commit themselves to receive their own citizens, citizens of third countries and stateless persons who have entered the territory of one of the signing countries in transit through the another signing country in

those cases where such individuals have not satisfied the requirements for entry and stay on the territory of Ukraine or that of the EU member country. Obviously, this Treaty is largely targeted at Ukrainian citizens who have illegally entered and are residing illegally in EU countries, as well as illegal migrants who are citizens of third countries, who entered EU territory directly through Ukrainian territory.

However, before signing this Treaty, the Ukrainian Government must evaluate its own capacities to implement it. Analysis of the situation with managing migration in Ukraine shows that, at the moment, **Ukraine is not prepared to fulfill this Treaty entirely**. Ukraine does not have the capacity to accept, detain and transfer nationals of third countries to their countries of origin after being returned from the EU. To properly fulfill this Readmission Treaty, Ukraine must develop more better government policies to combat illegal migration than those that have been implemented in recent years. The need to admit illegal migrants from the EU should be used as a powerful incentive for qualitative changes in managing migration, as happened in Poland in the early 1990s.

¹³ M. Tovt, “Legal Protection for Refugees in the Context of Combating Illegal Migration: The case of Zakarpattia.” *Migration Problems*, Vol. 6, Issue 2(16), 2001 (in Ukrainian).

Policy problems in controlling illegal migration

The first part outlines the problems that arise in carrying out the procedures required by current bilateral readmission treaties between Ukraine and its EU neighbors, Poland, Slovakia and Hungary. Moreover, extrapolating these problems on the basis of a Treaty with the EU makes it possible to see the shape of the challenges that will inevitably become new problems if Ukraine fails to eliminate the underlying causes of existing prob-

lems before the EU Readmission Treaty kicks in.

The second section discusses the causes of the problems that arise when Ukraine attempts to implement its readmission policies in terms of controlling illegal migration and carrying out the necessary procedures for proper readmission. The analysis makes it clear that these problems are systemic and comprehensive in nature.

Problems and challenges of a Readmission Treaty with the EU

Admission

Admission and transfer based on current bilateral treaties with Western neighbors

So far, the admission of illegal migrants from Ukraine's western neighbors—Poland, Hungary and Slovakia—has been based on bilateral agreements on the admission and transfer of individuals who have illegally crossed a common state border. These agreements call for the admission of individuals who were detained while crossing the border and regarding whom there is explicit evidence proving that this offence was committed.

Establishing a base of evidence of illegal entry across a border has turned out to be the biggest obstacle in trying to establish procedures for reception and hand-over. As a rule, the main evidence is the fact that the migrant was detained at the border immediately after crossing the state boundary when there are traces on the borderline itself of these individuals or groups of individuals having crossed. In such instances, joint investigation groups carried out a joint enquiry into the case and, based on their results, individu-

als were transferred or transfers were denied.

This transfer procedure caused many misunderstandings between Ukrainian border guards and their counterparts from neighboring western countries over 2001–2003. Thus, when groups of illegal migrants were not detained within the immediate vicinity of the border, but far enough from it and after a lapse of time or when direct evidence (traces on the borderline) were lost due to time- and weather-related factors, Ukrainian border guards refused to admit illegal migrants even in situations when they themselves testified to the fact that illegal migrants had arrived from Ukraine. In some instances, traces were deliberately destroyed in order not to admit groups of illegal migrants.

Moreover, in informal conversations, representatives of the State Border Service of Ukraine have indicated that the other side also tried to falsify the number of people who crossed the border from Ukraine. In particular, there have been instances when groups of individuals that were transferred from Poland or Slovakia included individu-

uals who illegally crossed the border along some other portions (for example, from Belarus and Hungary). These kinds of incidents did little to help establish trust on both sides of the border.

After border patrols on the eastern borders of Poland, Slovakia and Hungary went through a major technical overhaul and were supplied with contemporary special heat imaging video equipment, they gained the capacity to capture most illegal border crossings, which the Ukrainian side accepts as unquestionable evidence. In addition, joint patrols initiated at the Ukrainian–Polish border have increased the level of mutual trust in the actions of border patrols.

Readmission of individuals according to the draft Treaty with the EU

The draft of the Readmission Treaty between Ukraine and the EU was based on a boilerplate readmission treaty with standard provisions. During the last year, the EU signed four Readmission Treaties containing such provisions.

One of the main objectives of a Readmission Treaty is to establish a procedure for rapid, efficient identification and safe, organized deportation of individuals who do not meet the requirements for entering and staying on the territory of Ukraine or EU Member States, as well as for the regulation of transit as part of such cooperation.

The Readmission Treaty with the EU will apply to nationals of countries who are parties to the Treaty, nationals of third countries, and stateless individuals. The two sides will commit themselves to re-admitting their own nationals at the request of any Treaty signatory whose territory those nationals have entered or on whose territory they are staying illegally. The country that is the recipient of a readmission request shall, without delay, provide the

necessary travel documents for individuals subject to readmission or extend the validity of a travel document if it is impossible to complete readmission within the designated term.

Currently, **the text of the Readmission Treaty with Ukraine has been generally agreed, but there are four critical points left** that establish key provisions for the admission and transfer of individuals to Ukraine. The two sides have different positions on these points.

Firstly, the approach to documenting readmitted individuals is one main divergence between Ukraine and the EU. The EU proposes that the Ukrainian side provide illegal migrants with documents within 14 days and if Ukraine fails to do that, the EU provides them with its own travel documents. This applies primarily to citizens of third countries whose identity has not been clearly established. Ukraine insists that the EU handle their identification and grant them travel documents suitable to their country of citizenship or residence. The EU prefers to give such individuals standard EU travel documents for individuals from third countries, which does not involve an identification procedure.

How the documentation issue is resolved will define the burden of the Treaty for Ukraine. If the EU handles identification of migrants, Ukraine will only have to pay for admitting and returning them to their country of origin. **If Ukraine also has to handle the identification procedure on its own, there is a high risk that illegal migrants admitted from EU countries will accumulate in Ukraine.**

Secondly, Ukraine and the EU have different positions on the provision regulating **accelerated readmission procedures.** Ukraine insists that one condition for accelerated readmission must be that the illegal migrant is detained within 48 hours

of illegally crossing the border. The EU proposes applying this procedure in cases when a migrant was detained in a region that is close to the border. The EU position is unfavorable for Ukraine, as **there is a risk that migrants will be deliberately detained *en masse* in those regions adjacent to a border and handed over to Ukraine via accelerated procedure.**

Thirdly, Ukraine and the EU also diverge on the timing for the submission of a readmission application. More specifically, Ukraine insists that such an application bemissible up to 18 months after nationals of third countries and stateless individuals illegally cross the border and 12 months after it is determined that the conditions under which such individuals are residing in a country do not meet current requirements for staying on the territory of a party to the Treaty. The EU proposes that an application for readmission bemissible with 12 months after it is determined that the conditions under which such individuals are residing in a country do not meet current requirements for staying on the territory of a party to the Treaty. This means that **EU member states would have 12 months within which to transfer illegals detained on their territory, regardless of how much earlier they actually crossed into the EU.**

The Treaty stipulates that the party receiving an application respond within 30 days of receipt, and within 2 days under the accelerated procedure. If there is no response, it can be considered that this transfer has been approved and it will be carried out according to the Treaty. Any denial of readmission must be justified. When a positive decision is reached, readmission is carried out according to the Treaty.

Authorized agencies of the signatories must agree in advance the date and place of transfer, the options for providing an escort, and other necessary details, in writ-

ing. Countries are encouraged to use any available form of transport. All transport costs related to readmission and transit to the border of the destination country must be borne by the country that requested the readmission.

Fourthly, Ukraine proposes including in the Treaty a **mandatory check into whether the person** subject to readmission **applied for refugee status or asylum** and what decision was made by EU country authorities. Thus, **the Treaty would include the transfer of individuals who are seeking asylum or are in the process of being granted refugee status.** Ukraine's proposal is supported by UNHCR, the UN High Commissioner for Refugees.

The base of evidence envisaged by the Treaty **fairly reliable protects individuals from erroneous readmission, except for a clause** that the EU insists on. This allows **for testimony from witnesses** who can confirm the fact of staying in one of the countries and of crossing the border. Given that the majority of illegal migrants heading for the EU from Southeast Asia do not have enough geographic knowledge and mostly cross the border between the CIS countries—for example, Russia–Ukraine, Russia–Belarus—in closed vehicles and cannot identify their route with any certainty, it is possible that there will be erroneous readmissions of individuals who arrived in the EU across other borders. Although the Treaty provides for the repatriation of migrants who have been readmitted in error, the mechanism is quite complicated and involves incredible red tape.

The Treaty establishes that the signatories commit themselves to providing mutual assistance in implementing and interpreting the Treaty. For this purpose, a joint readmission committee is set up to fulfill key objectives and exercise certain powers, according to the provisions of the Treaty: to monitor implementation, to regularly exchange information, to propose changes

and amendments, and to resolve other procedural issues. The decisions of this committee are binding for all parties. Members of this committee shall be representatives of Ukraine and the EU, in the person of the European Commission.

In essence, the enforcers of the Treaty are the relevant competent bodies of Ukraine and EU member countries. The Treaty does not anticipate any technical assistance instruments to institute the procedures connected to readmission, such as identification, detention, voluntary repatriation or forced deportation. The Treaty does, however, anticipate that all costs connected to these procedures will be taken on by the side responsible for carrying them out. Obviously, for Ukraine this burden will be unfairly high.

Identification

Every year, Ukraine's police and units of the State Border Service detain up to 30,000 illegal migrants. The majority of illegal migrants who come to Ukraine destroy their own documents or leave them with the middlemen involved in the transfer, which makes it impossible to immediately identify them at the time of detention. The embassies of countries of origin and local ethnic communities are not always willing to cooperate in identifying illegal migrants and returning them to their home countries. This makes the identification of individuals who are staying on Ukrainian territory illegally and their deportation fairly drawn-out.

Cooperation between diplomatic institutions and law enforcement agencies is based on widely accepted international legal norms that establish the responsibility of embassies to protect their nationals on the territory of any country, and on bilateral Readmission Treaties that outline the responsibilities of embassies to identify their nationals and grant them travel documents.

In practice, in cases where there are no bilateral treaties on readmission, cooperation depends entirely on the good will of diplomatic missions. The majority of the countries that are sources of illegal migrants in Ukraine are low-income and often highly overpopulated ones, so these countries are happy to see their nationals migrate to more highly developed countries. According to UN data, 11 countries are keen to see more emigration: Bangladesh, India, Indonesia, Jordan, Nepal, Pakistan, Thailand, Tunisia, Tuvalu, Vietnam, and Yemen. Furthermore, cooperation between Ukrainian authorities and the embassies of these countries is affected by the lack institutional and financial capacity of some of these embassies to identify their nationals and bring them back home.

These two trends are amply evident in practice: the most difficult task for law enforcement agencies is to prove the identities of illegal migrants from Afghanistan, India, Pakistan. Yet cooperation between law enforcement agencies and Chinese diplomatic missions is generally positive. In those regions of Ukraine where the biggest numbers of organized groups of illegal migrants from this country have been detained—Kharkiv, Khmelnytskyi, Kyiv, L'viv, Volyn, Zakarpattia oblasts and the City of Kyiv—, the embassy of the People's Republic of China handles in as short a time as possible the identification of detained Chinese nationals, provides them with repatriation certificates, and takes on the costs of expulsion for some detained persons.

When it comes to identifying, issuing documents for and deporting illegal migrants who come from CIS countries, Ukraine's police do not have any particular problems, as they have a historically had good cooperation with the authorities of these countries. **Identifying illegal migrants from beyond CIS borders who are detained at the Pavshyne detention center is more problematic.** They mostly come from Afgha-

nistan, China, India, Iraq, Liberia, Pakistan, Palestine, Somalia, Sri Lanka, and Vietnam and want to migrate to Western Europe. Their identification is overly protracted, sometimes lasting more than five months. If the authorities fail to identify them within six months, illegal migrants are released and given a document. However, they soon show up at Pavshyne again—detained during yet another attempt to cross the border illegally. Some fugitives have found themselves in Pavshyne up to five times.

If there are no diplomatic missions of the country of origin in Ukraine, as is the case with Sri Lanka and Bangladesh, **there is almost no chance that illegal migrants will be identified**. In addition, diplomatic offices of many countries, such as Vietnam and China, are reluctant to go to Pavshyne to help identify detained individuals and give them the necessary documents.

Cooperation between law enforcement agencies and migr communities of countries of origin often goes beyond verifying the identities of detained illegal migrants. Foreign diasporas also provide financial support for the return, warm clothes, translation services, help filling forms, and legal advice.

When it comes to deported individuals, those with residency permits and those who have legally entered Ukraine, **databases available in Ukraine do not make it possible to verify the identity of an illegal who has entered the country for first time**. Apart from checking through databases, the verification of detained foreigners is done through interviews, although the lack of translators for rare languages can cause difficulties. **The State Border Service cannot afford to hire outside translators and interpreters because the official rates for their services do not match the reality of what they charge**. According to the Cabinet Resolution regulating these rates, the State Border Service can pay no more

than UAH 1.70 for one hour of translation and interpreting services.

Detention

Administrative detention for more than 72 hours of foreigners and stateless individuals who have illegally crossed Ukraine's border or violated the rules for staying on Ukrainian territory and **detention for the purpose of deportation are permissible only by court decision**. Yet, **the administrative courts** responsible for these decisions **cannot handle such a huge flow of the cases in a short time**, especially in border regions.

Moreover, although the Law of Ukraine "On the legal status of foreigners and stateless individuals" calls for such facilities to be functioning, **Ukraine officially did not have detention centers for temporarily holding foreigners and stateless individuals while awaiting a decision regarding deportation** to date.

The need to set up such centers is mentioned in the State Program to Counter Illegal Migration for 2001–2004 approved by the 18 January 2001 Presidential Decree № 22/2001. In response to this Decree, the Cabinet developed a "Standard regulation for centers for the temporary detention of foreigners and stateless individuals who are in Ukraine illegally" that was approved by the 17 July 2003 Resolution № 1110. **To this day, detention centers have not been established, although the European Commission already allocated funds for their establishment a year ago** and the Ukrainian office of IOM, which is to administer this program, is ready to go ahead.

The reason for this delay was protracted uncertainty over the institutional organization of the migration service in Ukraine and, hence, to what agency such centers would be attached. So far, the Ministry of Internal Affairs and the State Committee for Nationalities and Migration

have been wrangling over this. The final decision to transfer the assets of detention centers to the Ministry of Internal Affairs from the State Committee of Ukraine on Nationalities and Migration was approved on 5 April 2006. On 17 April, MIA issued an internal instruction to set up commissions to transfer these properties within 30 days and continue with their reconstruction. The Ministry plans to set up four temporary detention centers. Setting up longer-term centers will depend on further funding.

So far, foreigners and stateless individuals in this category are detained in the only detention center, located in Pavshyne in Zakarpattia oblast for which the State Border Service is responsible. This category of foreigners are also detained in centers for temporary detention run by units of the State Border Patrol and in in-take and processing centers belonging to MIA. However, **the Office of the Prosecutor General has prohibited detaining illegal migrants in jails and has given instructions that they be detained at special detention points that currently do not exist. In short, MIA is actually unable to detain illegal migrants properly.**

The Pavshyne temporary detention center, which is formally run by the Border Service, was transferred to the Office of the MIA in Zakarpattia oblast in January 2006. Yet for the last five years, the State Border Service, with no budget funds, maintains this center thanks go charitable donations from non-governmental and international organizations.

Conditions at Ukraine's points for temporary detention do not meet European or Ukrainian requirements and standards. Many of these points are overcrowded and social support is not even at the minimum level. As there is no budget funding, the state cannot guarantee detained

migrants the necessary clothes, meals or medical aid.

Both the Human Rights Watch report and the report of the EU Justice, Freedom and Security Assessment Mission (JFSAM) to Ukraine mention unsatisfactory conditions for detaining illegal migrants and violation of human rights regarding individuals detained in Pavshyne and similar places. It is indicated that detained individuals can freeze, be without the facilities to maintain personal hygiene, go hungry, and get sick. The absence of alternatives to detention for vulnerable groups such pregnant women and minors is viewed by human rights organizations as a major shortcoming in Ukrainian law.

Moreover, the report of the EU JFSAM to Ukraine states that, **as long as detention facilities, practices and procedures for handling migrants are not up to standard, Ukraine cannot be considered a safe country for repatriating** foreign migrants and asylum-seekers who have been denied asylum.¹⁴

To some extent, the reproaches of human rights organizations reflect reality. Representatives of the State Border Service point out that nutrition standards were only approved in 2006, while standards for material support and healthcare for detained foreigners still do not exist. As a result, **conditions for detaining foreigners depend entirely on the assistance provided by charity organizations.**

The practice of detaining foreigners subject to deportation for six months in Ukraine has some negative aspects. Because there are no effective identification methods and the detention term cannot be extended, foreigners who have not been identified are given a document that identifies them based on the passport data

¹⁴ The EU Justice, Freedom and Security Assessment Mission to Ukraine, Final Report, May 2006, p. 29.

they have provided and they are released from detention. Once free, such foreigners generally try again to migrate to EU countries and, sooner or later, fall under the eye of criminal groups that organize illegal transfers across state borders. As a result, some foreigners from China and India have been detained several times by the State Border Service for attempting to cross the state border illegally, yet are released once more when the detention period is over.

Deportation

Administrative deportation of foreigners and stateless individuals detained within controlled border regions for attempting or crossing the Ukrainian border illegally is handled by the State Border Service and in other instances by the Interior Ministry, in accordance with a number of laws and regulations. The body that has made such a decision oversees the proper, timely enactment of the deportation.

Instances of voluntary repatriation, the preferred approach to expulsion, are exceptional in Ukraine. Although every year MIA gets funding to support voluntary repatriation, there are virtually no programs in this area. The IOM office in Ukraine also has its own program for voluntary repatriation. Since the start of the program in November 2004, 39 individuals have been assisted to go home voluntarily, a small number compared to the total numbers of illegal migrants detained.

The number of illegal migrants who have been deported is growing. During 2001–2003, this figure ranged between 1,300 and 1,500 people a year, but it rose to 1,800 in 2005. **Illegal migrants are deported largely at the cost of the State Budget.** Over 2002–2005, the State Budget allocated UAH 3mn for such measures. And while that is not big money, two years were finished with a surplus, indicating the inefficient use of voluntary and forced expulsion

procedures. Meanwhile, the number of illegal migrants in Ukraine is growing.

For the most part, illegal migrants come from poor countries whose embassies are unable to cover the costs of repatriation. However, there are plenty of success stories involving cooperation between MIA and foreign diplomatic missions and diasporas in Ukraine.

Because of the effective absence of centers for foreigners to stay temporarily in Ukraine, during which time it would be possible to identify and document a person, only 10–15% of these individuals are deported.

Refugee status and other forms of protection

Refugee status

Having joined the Geneva Convention on the Status of Refugees in January 2002, Ukraine committed itself to admitting asylum-seekers to the procedure for granting refugee status, to admitting and housing recognized refugees, and to helping them to adjust to a new environment.

Zakarpattia oblast serves as an example of **how few individuals obtain refugee status in Ukraine.** Thus, according to the information of the State Nationalities and Migration Committee, no one was given refugee status in Zakarpattia oblast in 2005. Moreover, compared to the number of individuals who submitted applications, the number regarding whom a decision was made to prepare documents to determine the granting of refugee status is tiny: 25 out of 797 applicants or 3.1%.

Some illegal migrants submit applications for refugee status in order to legalize their stay in Ukraine. After obtaining such status, they try to reach Western European countries, legally or illegally.

This is often the result not just of a tactic on the part of such migrants to take advantage of refugee status in order to be free to move on to the West. This is tied into the reality that asylum-seekers often have no material base whatsoever to enable them to stay in Ukraine, starting with a roof over their heads, and also because of the low rate at which refugee status is granted and the lack of alternative forms of protection for people who need it. **Having nearly unlimited freedom of movement, they are quite likely to succeed in their efforts to exit Ukraine. Because of the lack of a common database between Ukraine and the EU on persons who have applied in the past or have received refugee status, migrants can even apply for refugee status in Ukraine and other European countries simultaneously.**

EU countries that are signatories to the Dublin Convention share a database called EURODAC that stores the fingerprints of all individuals who have applied for refugee status. Within 15 minutes of taking the fingerprints of an applicant, any authorized person from an EU Member State can get all the information online: whether this individual submitted an application before and what decision was made in any other EU country.

Law enforcement agencies have raised the issue of restricting the freedom of movement of individuals who are in the process of applying for refugee status, as there are instances when such individuals abused this freedom of movement. However, **the recommendations of international organizations point out that detention is not desirable as a precautionary measure in such instances**, while the Guidelines of the Office of the UNHCR state specifically that it is inadmissible to detain asylum-seekers, except in exceptional cases. In addition, **the process of decision-making to grant status can last for more than two years, so to detain an asylum-seeker for this peri-**

od would constitute a gross violation of international, universal and regional legislation.

Since 2002, Ukraine has been developing an interdepartmental system of databases called “Arkan,” but it has not yet instituted it in full. As regards data on foreigners, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the State Border Service, the National Security Service, and the State Nationalities and Migration Committee are hooked up to this system. Once this system is fully operational, identifying foreigners who have been repeatedly detained or who have applied for refugee status will be much easier.

The Law of Ukraine “On refugees” contains several provisions that are viewed as a seriously flawed by the Office of the UNHCR. Firstly, **the law allows recognized refugees to be stripped of their status without recourse to the courts** (Art. 15). Secondly, this Law also fails to define the principle of non-refoulement— not subjecting to deportation individuals who qualify as “war refugees” or as unable to return because of a serious risk of torture or inhuman or degrading treatment and punishment (Art. 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Art. 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Protecting these categories of individuals is the absolute responsibility of the state.

In addition, **the Law establishes an overly complicated system for issuing documents to asylum-seekers who are in the middle of applying for refugee status.** This leads to refugees and asylum-seekers being detained at the point when they exchange documents, a detention that can last up to 30 days. During this detention, the asylum-seeker has essentially no documents. In general, the Law needs to be revised in order to simplify the process of

issuing documents to asylum-seekers and providing protection to individuals who are applying for refugee status.

Additional protection

The lack of additional protection in Ukraine makes it difficult to accept foreigners and provide them with protection if they are not subject to the 1951 Convention on Refugees yet they cannot be deported for various reasons, such as their identity cannot be established or they are at risk of being subjected to inhuman treatment and torture in their home country or country of residence. Ukraine can only grant foreigners and stateless individuals refugee status based on this Convention.

Granting refugee status according to the Geneva Convention can be grounds for regulating the legal status of a very limited circle of individuals. Only around 5% of applicants receive such status.¹⁵ At the same time, the evolution of human rights legislation changes the requirements to provide protection for war refugees, persons under threat of the death penalty, torture, natural disasters, and so on.

After signing certain international conventions, such as the 1984 UN Convention Against Torture or the 1950 European Convention on Human Rights, Ukraine committed itself not to return a person to a country where that person is likely to become a subject of torture, including capital punishment. At the same time, **Ukraine is unable to carry out its international obligations, as its legislation does not provide mechanisms for protecting such individuals.**

Human rights

Certain human rights organizations are against the signature of Readmission Treaties. In their opinion, these Treaties cannot be signed at all, as their terms violate the rights of asylum-seekers. The German branch of PRO ASYL, a human rights organization that deals with refugee issues, says that, for instance, it makes absolutely no sense to sign a Readmission Treaty with Russia because of the conflict in Chechnya, which has turned Chechen refugees into one of the largest groups of asylum-seekers heading to the European Union. To send these refugees back home would be in violation of the Geneva Convention.

According to the 1990 Dublin Convention, which is a part of EU law and, besides the EU states, is also signed by Switzerland, applicants for refugee status must be reviewed by a signatory to the Treaty whose border that individual crossed to get into the EU. In practice, this means that responsibility for an illegal migrant who has come, for example, to France through Germany and Poland must be borne by Poland and this country has to review that person's application for political asylum. Some are of the opinion that the EU would like to get Ukraine to join this Convention because, based on the Readmission Treaty, it would make it even simpler for countries located on the borders of the EU to legally repatriate illegal migrants to Ukraine, because this country is considered "a safe third country."

In its 2005 report, **Human Rights Watch proposed that the Readmission Treaty with the EU include a guarantee that**

¹⁵ According to calculations by ICPS specialists that are based on 2004 statistics, provided on the official site of the State Committee for Nationalities and Migration.

individuals will not be transferred to Ukraine in violation of their basic human rights or their right to seek asylum in the EU. The Readmission Treaty must provide the necessary resources and timeframes to adjust Ukrainian legislation on migration

and asylum and to upgrade facilities for the admission and detention of illegal migrants. This kind of Readmission Treaty would not come into force until Ukraine fulfilled its international and European human rights commitments.¹⁶

The roots of migration control problems

In this section, an attempt is made to determine the reasons for the problems described in this Paper that arise in the course of procedures that are necessary for proper readmission. For this purpose, the entire state system for managing migration and external borders has been analyzed and those weaknesses brought to the fore that have the greatest impact on the effectiveness of illegal migration control policy.

No single government agency responsible for migration policy

Three separate agencies deal with migration control in Ukraine: the State Department for Citizenship, Immigration and Registration of Private Individuals under the Ministry of Internal Affairs, the State Border Service, and the State Nationalities and Migration Committee.

Managing legal migration to Ukraine is the responsibility of the State Nationalities and Migration Committee (SNMC). This executive body cooperates with other executive bodies to regulate legal migration processes. It specifically develops policies related to immigration and refugees, examines applications for refugee or asylum-seeker status, provides for the detention of such individuals in centers for the temporary accommodation of refugees, facilitates the voluntary repatriation of such individuals, and develops programs for the integration and reintegration of refugees into Ukrainian society.

In addition, SNMC works with the Ministries of Labor and Social Policy, Internal Affairs, Health, and Foreign Affairs, and the State Border Service to resolve the problems of refugees and legal immigrants.

In terms of countering illegal migration, the coordinating role belongs to the Ministry of Internal Affairs in close cooperation with the State Border Service and the SBU, the security service. The State Border Service is an autonomous body that, as a result of reforms in 2003, has begun to change from border troops into a law enforcement service.

The coordination of migration policy has been repeatedly transferred from one agency to another. Over 15 years, SNMC has gone through seven dissolutions and reorganizations. However, until now, Ukraine has not set up a single body that would be responsible for enforcing migration policy. The main reason is resistance on the part of top officials, who want to keep their positions in various executive bodies, to the basic decision to set up a single migration service.

The lack of a single migration service makes it impossible to fulfill the basic tasks of migration control, such as coordinated control over the entry, temporary residence and exit of foreigners and interdepartmental information exchanges regarding individuals with entry visas who have crossed the border and those who have been prohibited to enter Ukraine.

¹⁶ Human Rights Watch, Vol. 17 № 8 (D).

The division of responsibilities between the State Border Service and the Ministry of Internal Affairs for deporting illegal migrants—those who illegally entered Ukraine, which is the responsibility of the State Border Service, and those who legally entered Ukraine, but failed to leave Ukraine after the specified period of stay was over and thus became illegal migrants, which is the responsibility of the Ministry of Internal Affairs—makes migration control less than effective.

The Assessment Team from the EC in its report also stated that a review of the institutional foundations of those agencies that are involved in migration and asylum is considered the most urgent task and a pre-condition for resolving many more technical issues.

Legal shortcomings

Ukraine has a sufficiently evolved and at the same time multifarious legislative base for migration policy, including: the Law “On immigration” (2001), the Law “On refugees” (2001), the Law “On Ukrainian citizenship” (2001), the Law “On legal status of foreigners,” (1994, with the last edition 2005), the ratification of the 1951 Convention on the Status of Refugees and the 1967 Protocol (2002), the Law “On the State Border Service of Ukraine” (2003), and the Law “On amending certain legislation due to the adoption of the Law ‘On the State Border Service of Ukraine’” (2003) that came into force on 1 August 2003. The mechanisms for implementing these laws are numerous Cabinet resolutions that regulate specific issues.

On the one hand, Ukraine has liberal migration legislation, especially the

Laws “On refugees” and “On Ukrainian citizenship.” The norms establishing responsibility for illegal attempts to cross the state border and for illegal stays in Ukraine are also liberal. Unlike neighboring Poland, foreigners are accountable for these offences on the same terms as Ukrainian citizens and are not viewed as felons. This has an effect on the way they are treat and detained. IOM has evaluated Ukrainian legislation as one of the most evolved among CIS countries.¹⁷

On the other hand, the Laws on refugees and on the legal status of foreigners contain serious flaws that make it impossible to carry out Ukraine’s international legal commitments or lead to an ineffective migration control system. These shortcomings have already been laid down in detail on pages 21–23.

In addition to this, Ukraine still does not have a regulatory document that would lay the foundation for Ukraine’s migration policy, identify its goals and objectives, establish the mechanisms and instruments for its implementation, and provide the basis for funding. According to Item 10, Art. 9 of the Constitution of Ukraine, the basis for regulating demographic and migrational processes is only through laws. Over the more than 10 years of independence, Ukraine’s migration policy followed events and reacted to them instead of being based on studying the situation and looking for the best ways to achieve policy goals.¹⁸

Ukraine has not developed a Concept for migration policy that might be a comprehensive mechanism for tackling migration problems. For lack of consensus on the essence of migration policy meant that the

¹⁷ *Regulating Migration in the CIS Countries: Legislation and Transborder Cooperation*, Open Forum of the International Organization for Migration, 2002, Special Issue № 3, p. 1.

¹⁸ O. Malynovska, “The Main Principles for Ukrainian Migration Policy and a Future Scenario for Its Development,” *Migration and Labor Markets of Poland and Ukraine*, Warsaw 2003, p. 83.

attempt to introduce the conceptual part of the State Migration Program, under development since 1998, was also not successful and during the process of harmonization, this part was completely emasculated. Meanwhile, the document itself has not yet been approved, even in its very abridged version.

Two draft laws on the general principles of the Ukrainian migration policy have languished in the Verkhovna Rada. The first one, № 4227, was submitted by the Government, the second by deputies I. Haidosh and M. Shulha (№ 4227-1). After going through first reading, the second bill was supported and directed to the Verkhovna Rada Committee on Human Rights, Ethnic Minorities and Interethnic Relations for additional work.

The main conclusions that can be drawn from this bill is that it is not suitable to the important objectives it is designed to address. Most of its provisions are little more than declarations and in practice practical, this law would be unenforceable.¹⁹

Inadequate level of border policing

An analysis of MIA and SBS data regarding of the detention of illegal migrant groups shows that the majority of illegal migrants are detained inside the country or on its western borders during attempts to cross the border between Ukraine and the EU countries illegally. Still, according to other information from these two agencies, the majority of illegal migrants enter Ukraine through the Ukrainian–Russian and Ukrainian–Belarusian borders, which indicates that the policing of the state border is not effective enough along its northern and eastern sections.

The Ukrainian–Russian and the Ukrainian–Belarusian borders were once internal borders in the Soviet Union that simply marked off administrative regions and their infrastructure was kept to a minimum. The porousness of these borders is a serious hindrance to the capacity of Ukraine to combat cross-border crime and illegal migration.

One of the main routes for transferring illegal migrants to the European Union is through legal entry into Russia and illegal transit through Ukraine. According to the SBS of Ukraine, illegal migrant flow across Ukraine’s borders breaks down thus: **to Ukraine:** 15% across the Russian–Ukrainian section, 1% across the Belarusian–Ukrainian section, 1% across the Moldovan–Ukrainian section; **from Ukraine:** 67% across the Ukrainian–Slovak section, 16% across the Ukrainian–Polish/Ukrainian–Hungarian sections.

Currently, **the density of border patrol units, that is, the number of units per section of the state border, is inadequate.** It averages about 1 unit for every 30–35 kilometers of border, which is way below the European standard of 1 unit/20 km. In addition, **Ukraine’s border patrols are inadequately supplied with modern equipment** for controlling trespassers. Given that there are no concrete structures along the border, border patrols need to be supplied with the latest in infrared, video, radio-locating, and other equipment that would allow them to track the movement of people and vehicles.

In addition, border regions are generally economically depressed and have fairly high rates of unemployment. With few opportunities to find a permanent job, many locals fall under the influence of criminal rings and become accomplices in the capacity of guides for illegal migrants. There is a need

¹⁹ *Does Ukraine need a special migration agency?* The Laboratory for Law Initiatives, 13 January 2005, <http://migration.org.ua/index.php?module=pages&act=page&pid=93> (in Ukrainian).

to develop legal mechanisms for involving residents of border regions in working with law enforcement bodies to counter illegal migration and for providing suitable incentives for this kind of cooperation.

The EU JFSAM to Ukraine report draws attention to a number of problems related to the **inadequate level of infrastructure and equipment at Ukraine's borders**. Specifically, video surveillance systems used to monitor a section of border were installed at more than 10 border crossings and devices for reading travel documents were installed at passport control booths. However, a large number of passports are not machine-readable. For one thing, Belarusian passports and Russian internal passports, which are valid only on CIS territory, are not designated to be machine-readable, while some reading devices cannot properly read machine-readable passports from certain countries, such as the Baltics.

An automated system for checking car license plates is in use at only 10 border crossing points. This system was to have been installed at other border crossings as well, but this depends on available funding.

Although the number of available databases is quite large, today, there is no communication among various databases in the country's police departments. There is not even interactive communication between border crossings and the Ministry of Foreign Affairs or diplomatic missions and consular offices that issue visas, and there is no unified national visa register.

If the necessary offices—diplomatic missions, consular offices and border checkpoints—need additional data and visa-related information, the inquiry is first transferred to a higher authority and then to the highest unit of the department. Afterwards, the inquiry is transferred to the relevant bodies. Even central offices of a given body do not have interactive communication in

place. There is no database that can be simultaneously used by all the related bodies. Thus, one agency cannot find out why another agency made a certain decision without serious time delays.

Insufficient funding

The deportation of illegal migrants is not properly carried out because of inadequate funding for this activity in the State Budget. Timely deportation of illegal migrants is also affected by the fact that, so far, there is no effective mechanism for getting funds for this purpose, primarily from the EU Member States that are the destination of illegal migrants, as well as from international organizations working on the regulation of migration processes.

Because Budget funding to police the state border has been inadequate, TACIS technical assistance instruments have practically been used up. This means that new instruments need to be developed to attract technical assistance from the EU for patrolling the border and implementing the new Twinning training programs. This should be one of the Government's priority objectives.

The 2006 State Budget allocated UAH 924mn to the State Border Service, which covers only 60% of operational costs, given the growing requirements for reliable patrolling of the state border. Every year, international technical assistance from TACIS, UNDP, the US Defense Threat Reduction Agency (DTRA), and IOM programs altogether adds up to less than US \$5mn. To develop Poland's eastern border, by comparison, the EU has invested up to EUR 60bn over the last five years, over and above to Polish State Budget allocations. The majority of this money went to develop the border infrastructure and re-equipping border patrol units.

Budget funding for the detention of illegal migrants and their deportation from

Ukraine is provided according to a residual principle, which means it is not possible to

fully support the necessary measures to effectively combat illegal migration.

Table 1. Projects financed by European Commission. Budget for Ukraine, millions EUR

Area	2000	2001	2002	2003	2004	2005	Total
Border management	2.7	11.5	14.0	3.0	8.1	16.6	55.8
Asylum and migration	0.2	—	2.5	5.4	0.5	—	8.6
Human trafficking	—	—	1.9	—	—	—	1.9
Drug trafficking	—	2.2	2.5	1.5	—	—	6.2
Total	2.9	13.7	20.9	9.9	8.6	16.6	72.5

No treaties with countries supplying illegal migrants

Ukraine has not settled the issue of returning illegal migrants, not to their immediate countries of origin, but to adjacent countries through where they usually enter Ukrainian territory illegally—primarily the Russian Federation and Belarus. This is because there are **no international Readmission Treaties** between:

- **Ukraine and countries through which illegal migrants transit**—Russia and Belarus. This makes it impossible to return illegal migrants to those countries as soon as possible and at minimum cost.

- **Ukraine and countries of origin of illegal migrants**, especially Bangladesh, China, India, Pakistan, and Vietnam. As a result, there is no mechanism for cooperation between Ukraine’s law enforcement agencies and the embassies of these countries in terms of identifying illegal migrants from these countries, allocating funds for their deportation, and so on.

Ukraine has signed and ratified 12 readmission treaties, with: Bulgaria, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Slovakia, Switzerland, Turkey, Turkmenistan, and Uzbekistan. Currently, there are no centralized statistics on how these treaties are being applied.

Changes needed in controlling illegal migration

Policy to control illegal migration can only be optimized in the context of developing an integrated state migration policy. As this Paper has shown, Ukraine does not have a general strategy for managing migration today.

State migration policy should be formulated as a set of legislative, institutional and organizational measures aimed at ensuring effective state control over migration processes, sustainable demographic and socio-economic growth, stronger national security, integration into a common European migration policy, the conditions necessary for migrant rights, freedoms and legal interests to be freely exercised, migration control that is aimed at preventing and overcoming negative the consequences of migration, and the prevention of violations of the rights, freedoms and legal interests of migrants and Ukrainian citizens in the process.

A migration policy should be grounded in eight main principles:

- Ensuring national security and national interests, and a national-scale approach;
- Protecting the rights, freedoms and legal interests of Ukrainian citizens, foreigners and persons without citizenship; rejecting the establishment of groundless privileges or advantages that would give the latter groups privileged status over Ukrainian citizens;
- Barring any manifestations of discrimination and xenophobia; establishing conditions for migrants to enjoy their rights, freedoms and legal interests, and to perform duties set in Ukrainian law;
- Ensuring that everyone who legally resides in Ukraine has freedom of movement and of choice of residence, the right to leave Ukrainian territory freely—except for restrictions set by law;
- Preventing mass spontaneous and uncontrolled migration processes both within the country and across its borders by developing special socio-economic, national and cultural programs based on a statistical forecast of migration flows, in the context of the current and forecast socio-economic and socio-political situation;
- Preventing illegal migration, illegal employment of migrants and human trafficking;
- Interacting with and coordinating activities between executive agencies and NGOs on migration issues, at both the national and international levels;
- Cooperating equally with partner states on migration issues according to generally-accepted principles and norms in international law.

Institutional changes

In order to improve state control over migration, there is a need to:

- identify a single state agency that will be charged with developing and implementing migration policy in Ukraine;
- separate the functions of developing policies on ethnicities and nationalities, migration, and handling repatriation among different state bodies;
- legislate the development and implementation of migration policy to be in internal affairs, which is covered by the Ministry of Internal Affairs;
- make the State Border Service more professional and hand it certain police functions.

The State Migration Service

A migration **service under the Ministry of Internal Affairs**, similar to those in place in most European countries, is to be created. This service would cover these main tasks:

- examine applications for Ukrainian citizenship;
- accept applications and subject foreigners and stateless individuals to the proper procedures for obtaining refugee status in Ukraine;
- accommodate and detain individuals who are going through the process of obtaining refugee status;
- track and deport individuals who are on Ukrainian territory illegally or who have lost the right to a legal stay;
- detain, categorize and identify individuals detained for illegal entry or stay on Ukrainian territory.

This Service will be formed with specialists from the Migration and Refugees Department under the State Nationalities and Migration Committee and the State Department for Nationality, Immigration and Registration of Private Individuals under the Ministry of Internal Affairs. The SNMC will be eliminated, while the functions of working with national minorities and the Ukrainian diaspora abroad will be handed over to the Ministry of Culture and the functions of registering and issuing passports to citizens will be handed over to the Ministry of Justice. The Migration Service will include departments for nationality, refugees and policing foreigners.

This change will avoid duplication of functions by different state bodies. The whole focus of migration control will be concentrated in one body that is in charge of domestic affairs, MIA.

This will redistribute tasks and responsibilities for migration policy between functionally autonomous departments of the Migration and Border Services. The tasks of developing a holistic state policy by one agency and distributing responsibilities will be assigned to Ministry staff as a policy agency and not as the director of functional departments.

In addition, subordinating this new body to the Ministry will make it possible to preserve the infrastructure, resource base and HR potential of the two previous structures. However, such institutional reforms should be taken on only after the Ministry of Internal Affairs itself has been reformed.

The new entity should maintain the functions of the current Department for Citizenship, Immigration and Registration of Physical Persons, which registers citizens and issues passports and, thus, to be not an immigration but a migration organ that

also deals with the issue of its own citizens' travel and emigration.

Setting up a single migration service under the MIA is less costly than setting up a separate state agency on migration, which would be neither absolutely new or based on the current State Committee on Nationalities and Migration. This makes it possible to avoid significant financial losses and needless sharing of functions with law enforcement agencies.²⁰

The first intermediary report of the EU JFSAM to Ukraine recommended setting up a consolidated state service that would deal with legal migration, asylum-related issues, the accommodation and settlement of asylum-seekers and legal migrants, repatriation of illegal migrants, general coordination of the fight against illegal migration, research and analysis, and take overall responsibility for social integration programs, as well as international cooperation in this area.

According to EU recommendations, this new government structure for migration and asylum-related issues should have a central body to develop policies, but practical management and day-to-day decisions must be handed over to the level of local departments. The central department should coordinate practical measures and training programs for staff, as well as support for management at the local level, and so on.

Reforming the State Border Service

The process of reforming the State Border Service into a law enforcement body should be pushed forward. This reform is necessary to meet the requirements of a modern border management system that has no military features and is based on EU standards and best practice. Reforms should be implemented with the aim of switching from a system of protection to a proper system for border management that reinforces the policing functions of the State Border Service.

A modern integrated system for guarding the state border needs to be set up by creating unified units on the border that are responsible both for patrolling the "green" portion of the border and for controlling the movement of people, goods and cargos. These specific units will be responsible for continuous technical and physical policing of the state border.

Policing the "green" parts of the border must be improved by way starting to collect, recover and implement advance information about the situation on the border, expanding the latest surveillance and communication systems, instituting patrols and applying biometrical control systems. There should also be joint control with the relevant agencies of neighboring countries.

²⁰ As proposed by Bill № 2446 "On the State Migration Service in Ukraine" submitted by deputies Oleksandr Bandurka, Volodymyr Moisyk and Stepan Havrysh in 2002. The draft envisages a new system of special state agencies with the task of implementing state migration policy. The newly created migration service was to be given the some of the powers of agencies that were already in place: MIA units, the State Border Service, the State Committee on Nationalities and Migration, the Ministry of Labor and Social Policy, and consular offices, which are subordinated to the Ministry of Foreign Affairs. In addition, it was proposed to vest migration service units with powers of compulsory actions, including permits to carry and use weapons and special equipment. See The Laboratory of Legislative Initiatives. "Does Ukraine need a special migration agency?"

An especially important aspect is to expand the powers of investigation bodies under the State Border Service to the entire territory of Ukraine by giving them the rights and powers of anti-crime units and increasing the effectiveness of activities implemented by these units to curb corruption in the State Border Service itself. The State Border Service must be in charge of the transport police and be responsible for maintaining law and order in airports and in the railway system as channels for international communication. It should also be granted the right to carry out pre-trial investigations.

In addition to expanding the law enforcement component of the State Border Service, its HR potential should be improved by switching to contract-based staffing and a different system for training personnel. This system must be based on primary acquisition of professional skills by junior personnel at special educational centers and on training mid-level personnel from among individuals who have a higher specialized education in related areas—mainly in jurisprudence and law—along with in-depth learning of professional disciplines in a specialized educational facility. Another necessity is to provide full support for social guarantees and to raise social standards for the staff of the State Border Service.

The majority of European countries tackled the problem of law enforcement activities implemented by border services by merging these services under the Ministry of Internal Affairs and extending full or limited rights and powers of the domestic police to the staff of these services. Currently, the question of placing the State Border Service under the Ministry of Internal Affairs is already being considered, but this institutional change should be complemented by the reformation of the MIA itself.

Before the work on reforming state agencies in charge of implementing migration

policy starts, a common database for all authorities needs to be set up and include information on foreigners who:

- have been granted the right to enter the country;
- have been granted the right to work in Ukraine;
- are in the process of getting refugee status or were denied this status;
- have violated the rules of stay on Ukrainian territory;
- entered Ukraine illegally and were deported according to the procedure defined by law;
- who have been granted temporary asylum in Ukraine.

Such a database would make it possible to coordinate the activities of different agencies in countering illegal migration.

Overcoming obstacles in the way of implementation

Naturally, the institutional changes proposed cannot be approved entirely without any reservations on the part of the state bodies that are to be dissolved or to lose autonomy. One possible argument from the State Committee on Nationalities and Migration could be that uniting law enforcement and humanitarian functions in a single body could lead to conflicts of interest among functional departments of the entity.

But the experience of European countries shows that this can be avoided through proper observance of laws by the officials of state agencies. If conflicts should arise, they can be solved in court according to law. And these court decisions are final and binding.

Another reservation that might be voiced by representatives of the State Border Service concerns the impracticality of putting this body under the administration and control of the Ministry of Internal Affairs. SBS officials argue that demilitarizing this body could lead to poorer administration, increased corruption pressures, and a reduction in the professionalism of the personnel as they are replaced by police officers.

The main resistance to these reforms is likely to come from the current managers, who may not see themselves and their roles in the reformed agencies as they are effectively demoted in the civil service and lose influence over the activities of these bodies.

This can be avoided by instituting the suggested changes under the reform of the executive branch and the implementation of the Law "On ministries and other central executive bodies." The Law should allow functional departments to operate under ministries as autonomous administrative units that work professionally, have their own budgets and pursue their own HR policy, independent of the political preferences of any minister.

The first stage of implementing such reforms should be amending laws that regulate migration and the activities of bodies in charge of this. Institutional reforms could be implemented within six months of amending legislation.

European integration and institution-building

The process of European integration is a powerful impetus for institutional change in migration policy. For candidate countries, it was one of the requirements of the EU

before acceding.²¹ In the process of implementing the Partnership and Cooperation Agreement (PCA) between Ukraine and the EU, in particular under the Justice and Home Affairs section, Ukraine committed itself to setting up a migration service that will focus on the main issues of migration policy. Meeting this requirement is necessary for Ukraine to join NATO, as, under the Ukraine–NATO Target Action Plan for 2006, Ukraine agreed to pass a law on creating a consolidated migration service.

The EU requirement that candidate countries go through institutional reforms means that such a country ought to incorporate not only the letter but also the substance of the *acquis*, ensuring active co-operation with the Justice and Home Affairs administrative systems and operational services of Member States. Recognizing that coordination among government institutions was essential to implement accession obligations in managing migration, the EU monitored the progress of establishing a single institution throughout the process, emphasizing its priority in several progress reports.

For candidate countries, the EU accession process also prompted a **clear allocation of responsibilities** among various ministries and operational services. It was soon recognized that, to attain the broad objectives of effective border management, the entire process needed to be divided into stages that, in turn, had to be separated by task and allocated to specific departments and agencies.

To strengthen institutional capacities to control illegal migration, candidate countries had to ensure the coordination of border security during the negotiation process. Accession country governments

²¹ For example, in Poland the sole government agency responsible for activities regarding migration and the residence of foreigners was formed only at the time when the EU accession was underway. The requirement to set up an Office for Repatriation and Aliens (www.uric.gov.pl) was part of the EU's negotiation position.

had to develop strategies on integrated border management. In Poland, the government created an Inter-Ministerial Group for the Management of the State Border that developed and approved a number of strategic documents on border security.

The Polish *Strategy of Integrated Border Management*, issued in 1998 and updated in 2000, was the first document of a strategic nature that comprehensively presented the tasks that the Polish Administration needed to fulfill in the period to 31 December 2002, so that the eastern border of Poland might become an external border of the EU.²² Three years prior to the planned accession, the document included a detailed description of the competencies and tasks of particular departments with regard to border management, the experience of cooperation with other neighbor-

ing countries, and the policy and the principles for planning and allocating financial resources for border infrastructure development. Notably, the concept of the Strategy was elaborated by the Polish Government, and the document was later praised as a model coordination tool, mobilizing internal resources and helping identify the gaps for which external funding was needed.

Although Ukraine so far has no prospects for membership, the goal of a visa-free regime with EU countries will require the Ukrainian government to put efforts into migration control and border management. The experience of Poland shows that such integration starts with signing a Readmission Treaty, which brings about challenges that can be addressed only by internal reforms.

Legislative changes

Legislative changes envisage:

- Drafting and passing the Law of Ukraine “On the principles underlying a migration policy for Ukraine” by the Verkhovna Rada.
- Passing a new version of the Law “On the legal status of foreigners,” incorporating the norms in the law on refugees and adding the norms on additional protection.

In terms of migration management, a **special law “On key principles for Ukraine’s government migration policy”** needs to be drafted that would identify the main principles for formulating policy, the means for achieving results, standards for protecting human rights, and other key areas of government measures to implement migration policy. A necessary condi-

tion for adopting such a law is broad debate of the bill among all stakeholders: lawmakers, government agencies running migration policy, international organizations, and non-government and human rights organizations in Ukraine.

The need for this law is dictated by the Ukrainian Constitution and the mess in migration policy today, especially in regulating legal migration, attracting migrant workers, and returning Ukrainian migrant workers from abroad.

The top priority change is **adopting a new version of the Law of Ukraine “On the status of foreigners.”** The European practice of applying laws of this kind is to include in it norms that regulate all the aspects of the legal status of foreigners of all categories who are staying in the country. A new version of the Law should contain:

²² “Poland. The Strategy of Integrated Border Management,” Ministry of Interior and Administration, Warsaw, June 2000.

- rules for the entry of foreigners onto Ukrainian territory and their departure from Ukrainian territory;
- rules for staying on Ukrainian territory;
- responsibility for violating the rules of entry and stay and the procedure for prosecution;
- procedure for appeals against prosecution;
- procedures for compulsory and voluntary deportation and their appeal in the courts;
- provisions to regulate the procedures for the arrest and detention of foreigners who have violated the law on the legal status of aliens;
- provisions to regulate refugee status and procedures for its granting and divestment in Ukraine;
- provisions to regulate the granting of additional protection and asylum;
- provisions to regulate the rights and powers of officials responsible for implementing this law.

Such a structure will make it possible to include all the norms that regulate the legal relationship between the state and a certain category of individuals, foreigners, in one piece of legislation.

The section on the protection of refugees should define the principle of non-refoulement, that is, the refusal to deport, that would prevent the expulsion, administrative expulsion or extradition of persons if their life or freedom are under threat according to the Geneva Convention or the

provisions of the European Charter of Human Rights. The procedures for documenting asylum-seekers and granting protection to persons under review should be simplified. Judicial examination of a denial to grant asylum should be guaranteed. Other criticisms of the Law “On refugees” by UNHCR should also be taken into consideration.

In order to prevent abuse of the right to obtain refugee status, the Law should have certain restrictions on the freedom of movement of such persons until a decision is made to issue documents granting refugee status. For example, this could be a requirement not to cross the borders of the administrative area on the territory of which the application for refugee status was submitted.²³

EU recommendations

According to recommendations provided in the report of the EU JFSAM to Ukraine, **the system of asylum must be based on adhering to basic international principles and instituting key elements of best EU practice.** This includes:

- 1) the right to asylum;
- 2) adherence to the principle of refusing to carry out compulsory repatriation;
- 3) the option to use independent legal assistance;
- 4) appropriate accommodation conditions while undergoing asylum procedures;
- 5) simplified procedures for issuing documents and ID cards to all asylum-seekers that are valid for the duration of the asylum process;

²³ Y. Tyshchenko, “Questions of freedom of movement in the Law of Ukraine ‘On refugees,’” *Migration Issues*, Vol. 7, № 3 (21), 2002 (in Ukrainian).

- 6) transparent review of applications, including justified decisions, even if the application was rejected as unacceptable or unsubstantiated during an accelerated process;
- 7) the right of the applicant to study their case, except for classified documents, as a feature of transparency;
- 8) a properly functioning process for submitting appeals;
- 9) simplified, standardized and transparent procedures for returning asylum-seekers who have been denied asylum and illegal migrants.

The EU recommends reforming the decision-making process related to the asylum-granting process. In the future, decisions should be made directly at local departments of the migration service and be based on recommendations by the employee who held the relevant interview. The central department should provide practical coordination, professional training, support for local managers, and so on.

Moreover, there may be good reason to increase the period of an illegal migrant's temporary detention when arrested for deportation to 12 months to increase the positive identification and guaranteed deportation according to the procedure set by law. However, the Constitution of Ukraine and the European Convention on the Protection of Human Rights and Fundamental Freedoms say that such arrests must be authorized by court decision.

So far, attempts to introduce these institutions in Ukraine were unsuccessful. The Verkhovna Rada rejected the Bills "On humanitarian protection" and "On political asylum in Ukraine." Today, a new Bill "On refugees and individuals needing additional temporary protection" is being reviewed by the Ministry of Justice. This bill plans to apply a systematic approach to the

revision of the current Law "On refugees" and to combine the determination of refugee status and additional forms of protection into a single procedure, based on similar recommendations from international organizations.

Individuals who cannot be returned to their country of origin for practical reasons should probably be offered some kind of temporary status as an additional form of protection. At the moment, an individual who cannot be deported is not granted any status, despite the obligation to release them from the place of detention after a maximum of six months.

Instituting additional protection in Ukraine was one of the recommendations included in the report of the Ludwig Boltzmann Institut mentioned in the EU JFSAM report on Ukraine. **The EU report proposes supplementing the Law "On refugees" with new provisions on subsidiary, humanitarian and temporary protection, and either the Law "On immigration" or the Law "On refugees" must include provisions on the legal status of asylum-seekers who have been denied asylum and who, for objective reasons of a general nature, cannot return to their country of origin or to their previous place of residence.** Ukrainian government bodies should consider the possibility of introducing a single procedure that would combine the process of granting refugee status and additional forms of protection.

Polish experience

Poland has several years of experience with additional forms of protection for foreigners, such as "tolerated status."

However, in adopting this form of additional protection for Ukraine, those problems that are evident in Poland need to be prevented from the outset. Persons with such status should have an opportunity to inte-

Poland: “Tolerated status” as additional protection

In Poland, “tolerated status” is granted on the basis of the Law on the protection of aliens on the territory of Poland. This status is granted if a foreigner has been detained for more than one year and if deportation:

- 1) would be to a country where the foreigner’s right to life, freedom and personal safety would be jeopardized, where they would be subjected to torture or inhumane and degrading treatment or punishment, where they would be deprived of the right to a fair trial in court or subjected to punishment without a legal basis, as specified in the European Convention on the Protection of Human Rights and Fundamental Freedoms;
- 2) is unenforceable due to reasons that are beyond the power of the institution making the decision on deportation or beyond the power of the foreigner themselves;
- 3) can be executed only to a country to which the foreigner’s repatriation is inadmissible because of a court ruling or a decision of the Minister of Justice regarding a denial to transfer them to that country;
- 4) should be carried out for reasons other than a threat to the national security and defense or public order and security, but the foreigner is married to a Polish national or to a foreigner holding a permanent residency permit.

“Tolerated status” is granted for one year with the right to extend. The introduction of “tolerated status” was an important improvement both for Poland’s capacity to regulate the status of individuals who could not be either granted refugee status or returned to their country of origin without the risk of persecution and for foreigners who otherwise would remain without status. Currently, the majority of individuals receiving tolerated status meet one of the two conditions: (1) they are Russian Federation nationals of Chechen ethnicity; or (2) they are migrants without any document whose identity cannot be confirmed.

grate into the society: minimal financial support, access to education and health-care, language and professional courses, i.e. all the support that recognized refugees have. Although it is clear that this will involve additional Budget expenditures, without this kind of support, such persons are doomed to misery, with no possibilities to either integrate into the society or leave the country legally and then the issue of a special law on foreigners will remain unresolved. When granting such status, the government should be prepared for the financial burden of additional protection for this category of aliens.

Adopting changes to legislation will lead to Government resolutions to implement them. One step by the Government could be the State Program for Integrated Border Management in Ukraine. By adapting Ukrainian migration legislation to EU norms, the government should reaffirm

the goals and priorities in this area in the schedules in the Ukraine–EU Action Plan on security and justice. This should be done during the preparation of the extended cooperation plan, starting in 2007.

When amending legislation, Ukraine should bear in mind, even at this stage, the need to adapt to the law of the European communities. When introducing the *acquis communautaire* in the area of migration policy in candidate countries, Poland, in particular, unified its general principles and rules for treating foreigners with EU ones while leaving domestic laws with more room to maneuver in determining procedures for treatment and other specifics, based on an understanding of domestic legal practice. Thus, for example, with common legal grounds for detaining foreigners, the domestic legislature can set different periods and conditions for detention in different types of facilities.

Ukraine can make use of the experience of Poland and other Central European countries and the EU in negotiating the Justice and Home Affairs section only to a limited extent, since the Commission staff have learned a number of lessons from their lengthy negotiations with eight Central and East European states and, more recently, with Romania and Bulgaria. It is reasonable to assume that the EU side will communicate requirements for migration and border controls much more clearly this time.

Interviews with Polish and Hungarian officials participating in these negotiations indicate that candidate states significantly underestimated both the length of the negotiations and scope of the obligations involved in the accession process. Officials had expected negotiations on this section to be a relatively quick and technical exercise, mostly consisting of incorporating the *acquis*, article by article. However, hopes that the harmonization of domestic legislation to the *acquis* would take little time proved unrealistic. Early adjustments to the initially modest EU legal framework presented at the outset of negotiations were soon expanded by additional requirements.

Unlike in Central European states, which could afford to gradually improve their capacity for controlling borders and migrants, Ukraine will be asked to achieve

real technical capacity in this regard as a precondition for obtaining concessions from the EU. The post-2004 unwillingness of the Union to overlook any elements of a candidate's readiness implies that the Commission is unlikely to break up the process of technical capacity-building and leave some of the tasks to be completed later. It had done this in 2002 for the Central European candidates, who were required to demonstrate their readiness to join the Schengen area only four years after, during the evaluation missions.

Ukraine's position is further complicated by the fact that far larger sums were disbursed to the candidates both during the period of accession negotiations and since 2002—notably in the form of the EUR 280 million Schengen Facility. Although negotiations for accession with Poland and other first-wave candidates were characterized by strong conditionality and control through periodical progress reports, demands were matched with generous financial transfers.

Ukraine's bargaining position is also weakened by the fact that, unless the country joins other candidate states for EU accession, its efforts to strengthen border security and combat illegal migration will not be encouraged, verified and supported in this tested and proven framework.

State policies and programs

Main policy directions:

- Putting into operation a voluntary return program for persons staying on the Ukrainian territory illegally. Individuals who take part in this program are not subject to penalties.
- Considering the application of migration amnesties to foreigners who have stayed on Ukrainian territory illegally and see their future in Ukraine.

- Elaborating a liberal visa policy with strict rules of entry and additional checks during visa procedures in countries of origin of illegal migrants.

Voluntary return programs

Currently, there is a voluntary return program in place in Ukraine that is administered by the IOM office in Ukraine. This program is open to those who have applied for refugee status here, but were turned

down or wish to quit the process and return home, and to those who have no grounds for staying in Ukraine.

The IOM helps with filling out the documents for return and pays for the necessary travel. The estimated cost of returning one person is about US \$700—including the cost of documents, medical check-ups, tickets, and a small reintegration allowance. The program has operated since November 2004 and, as of 22 May 2006, 43 of 57 applicants to the IOM program returned home. Most migrants decide to return for a combination of two reasons: their status in Ukraine, where they are not legal and have little possibility of integrating into local society, and a change or improvement in conditions in their country of origin.

The MIA has budget funds earmarked for voluntary return, but two years in a row it was left with unused money. That is why **any state program for voluntary return should be administered by a body that is different from the one that grants asylum, yet has direct links with asylum-seekers** in Ukraine, say, at the time of their reception or detention in temporary stay centers. Once the necessary institutional changes have taken place, this can be done by the State Migration Service under MIA.

Migration amnesty

Given a liberal visa policy, the implementation of migration amnesty should be based on an in-depth analysis and evaluation of its consequences. **Government policy should continue to be consistent so that migrants will feel the commitment and responsibility that are implied with legalization.** Migration amnesty should not become incentive for a new wave of migration.

Ukraine has some experience with migration amnesty. At the time when the Law “On Immigration” of 2001 was passed, Georgian citizens of Abkhaz ethnicity and

Vietnamese who had come to Ukraine as far back as soviet times were granted an amnesty. At the moment, MIA does not see other large groups of foreigners who might be suitable for amnesty, so this issue needs further analysis.

Migration amnesty can serve a mechanism for legalizing foreigners who have stayed in the country for a long time and have been successful in integrating into local communities. Many countries have applied amnesties: migration amnesties in Spain and Portugal allowed some 400,000 individuals to be legalized, of whom more than 200,000 were Ukrainian citizens.

Visa policy

Visa policy should be liberal, yet accompanied by strict measures to counter illegal entry to or departure from Ukrainian territory with a stated purpose that differs from the real one. **A cash deposit as guarantee to enter Ukraine** to work or study should be established for countries that tend to supply illegal migrants. For all the categories of citizens, there should be a rule for the minimum amount of money a visitor should have per day of stay in Ukraine.

MIA and State Border Service professionals should be involved in the work Ukrainian embassies in granting entry visas in those countries that supply illegal migrants. They can assess applicants as to whether they are potential illegal migrants or persons who pose a threat to Ukrainian national interests. Ukrainian airlines can contract with the State Border Service to check passengers and interview them in departure airports. Such practice is common in many European countries and has proved effective.

With its 1997 Law “On foreigners,” Poland introduced stricter conditions for the entry of aliens on private trips or as tourists. **No visa is required, but visitors must register all invitations and other documents**

Poland's migrant amnesty

Poland's experience with offering amnesty to illegal migrants has been limited to simply regularizing the residence of those who overstayed. The program was not a product of long-term reflection, but was included in the last amendment of the Aliens Act prior to EU accession. It reflected the need to establish status for those who had entered the country legally but did not leave in time and could demonstrate that they were able to enter normal procedures for legalization.

Candidates had to meet several criteria: length of stay, financial stability and secure accommodation. Regularization was available to those who could demonstrate residence in Poland dating back to at least 1997, the date of the first EU accession-driven amendment of the law on aliens, and sufficient financial resources to obtain a 12-month residency permit. These restrictions were in line with the cautious approach of the Polish authorities, who did not want to encourage immigration.

Only 3,508 migrants used this opportunity to legalize their status. Among them, the two major ethnic groups were Armenians (46%) and Vietnamese (38%). The program was reopened until November 30, 2004, during which an additional 2,413 migrants obtained permits. Again, Armenians and the Vietnamese comprised 44% and 41% of the total.

Although the program resolved the issue of irregular migrants in those two established ethnic groups, it did not address the problem of growing irregular transit migrants or the rising numbers of more recent overstayers. The program for regularization was not accompanied by active efforts by the state to integrate, leaving responsibility for securing lodging and sources of income to migrants themselves. Thus, transit migrants originating from non-neighboring states, especially from those with established diasporas in Western Europe, such as Afghanis and Pakistanis, were not discouraged from seeking migration further westward.

The failure of the regularization program to curtail irregular migration stems from the fact that Polish state policy was limited to monitoring the entry of foreigners and that a relatively liberal visa policy persisted towards residents of neighboring CIS states. While the policy of welcoming people from neighboring states with cultural and historic links to Poland has been successful in foreign policy terms, it has disguised the growing issue of foreigners who, following their arrival on short-term visas, take up residence and employment in the country.

Polish experience with shuttle migration from neighboring countries indicates that people coming into the country either stick to the shuttle-migration pattern or end up in a prolonged state of illegality. Only a very few try to obtain legal status, despite that fact that their irregular status deprives them of open access to social services, other than emergency medical services. Their children are also able to enroll in public schools, as the Polish Constitution guarantees the right to a universal basic education to all persons residing on the territory of Poland, and schools only occasionally check residency status.

confirming transport reservations and accommodation. The requirement to carry a minimum amount of money to cover the cost of traveling, staying and leaving was also introduced.²⁴ The prerogatives of the Border Service were extended to include checking whether the regions (Voyivods) were registering the funds and invitations of foreigners. A group of inspec-

tors began to work whose task was to uncover illegally employed persons at market-places and other places of employment.

Two key elements in all this are two-way communication between the consular offices that issue visas and border checkpoints, and a national visa register. In addition, funding should be provided to

²⁴ Act of Ministry of Interior and Administration effective 1 January 2000.

expand a pilot project to issue visas using biometric data—fingerprints and photo—, which is currently being implemented in Ukraine’s consular offices in China, India, and Vietnam.

Visa policy and European integration

The Polish experience of integrating with the EU shows that visa policy is an area where Ukraine will enjoy more room to maneuver in relations with the EU. Firstly, the country will not need to align domestic practice with the list of countries whose nationals are required to obtain visas to enter the EU until just prior to EU accession. This was confirmed when several candidates for accession managed to delay the introduction of visas for certain key neighbors until just months before the EU entry, i.e., Hungary and Poland towards Ukraine in 2003 and Bulgaria towards Macedonia in 2006.

However, as practice during 2004 and 2007 accession waves has shown, the EU is going to demand that any international agreements that are incompatible with the list of countries whose nationals require visas be terminated. The governments of candidate states were asked to provide a timetable for the termination of any visa-free agreements with their neighbors and the process was reviewed annually in the Commission’s progress reports.

Secondly, the issue of maintaining visa-free regimes with Ukraine’s two close neighbors, Belarus and Russia is not going to be problematic in the way that the visa regime between Poland and Ukraine has been since 2003—and even more so since Poland joined the Schengen area. The EU’s conclusion of readmission agreements with Russia and Ukraine opens long-term prospects for removing its eastern neighbors from the visa blacklist.

This is of crucial importance for two reasons. On the one hand, the prospect of a

liberalized visa regime between the EU and Russia—and by implication, Belarus—means that Ukraine’s integration efforts are not going to carry the cost of weakening people-to-people, cross-border ties with its northern and eastern neighbors. On the other hand, the removal of Ukraine from the list of nationals requiring visas will not only be a tangible demonstration of the EU’s trust but will also mark the inclusion of Ukraine in the cooperative system of migration management.

The latter may be implied from Polish experience, as the introduction of visa-free movement between Central European states and the EU in the early 1990s represented the first step in shifting the perception of those states from being “outsiders” and sources of illegal migration to key “insider” elements of a pan-European system for combating irregular migration from third countries.

Meanwhile, the technical aspects in visa policy are going to be binding on Ukraine as well. The EU’s common visa policy includes not only a common list of the countries whose citizens must have a visa when entering the EU territory (the so-called blacklist) and a common list of countries whose citizens are exempted from visa requirements, but also a common visa stamp and format that are soon to be supplemented with biometric data and an information exchange system regarding undesirables called the Schengen Information System. As part of accession preparations, Polish legislation was expected to comply with the EU *acquis* on the general format of visas and with Common Consular Instruction, which outlines a unified formal procedure for administering Schengen-format visas.

Changes to legislation were also needed to incorporate elements of a working asylum system through the implementation of the 1990 Dublin Convention. This outlined an accelerated procedure for dealing with manifestly unfounded applications, the

conclusion of readmission treaties with major countries of origin, and measures to be taken towards applicants who have failed to present their applications within a certain timeframe.

Throughout the accession process and beyond 2004, the effectiveness of the Polish consular services in controlling immigration from third countries has been closely monitored and all consuls have to comply with the Common Consular Instruction once Poland full joins the Schengen system in 2007. To ensure the smooth operation of its consulates, a Coordination Group was appointed to prepare the Polish Foreign Service by coordinating activities at the headquarters and in the field.²⁵

Changes in infrastructure

Improving border control

Main policy directions:

- Speeding up the demarcation of state boundaries with Russia and Belarus.
- Setting up a modern integrated system for protecting the border and Ukraine's sovereign rights in its exclusive commercial maritime zone by refitting the units that manage the border with modern equipment.
- Activating the process of raising EU money to re-equip the state border.
- Facilitating domestic manufacture of modern equipment for guarding the state border by ensuring state procurement contracts for such equipment.
- Setting up a common database on foreigners who: (1) have an entry permit for

Although Ukraine is not likely to build its consular network to the extent that Poland did—Poland needed to accommodate the rise in visa applications from the Belarusian, Russian and Ukrainian nationals—, some estimates of the cost of modernizing the consular infrastructure may be relevant. By 2003, the Polish Foreign Ministry's investment was estimated at nearly PLN 30 million, or close to EUR 8 million. PLN 6.5 million were spent on communications and computer equipment and PLN 15 million for employing and retraining additional staff. The latter remains an important item as wages continued to be paid in subsequent years.²⁶

Ukraine; (2) have a working permit for Ukraine; (3) are in the middle of applying for refugee status or have been denied this status; (4) have violated the rules for staying on Ukrainian territory; (5) have illegally entered Ukrainian territory and have been deported according to the procedure established by law; (6) were granted temporary asylum on Ukrainian territory;—and instituting two-way communication between border checkpoints and visa-issuing offices.

Unless a state boundary is marked physically, it is impossible to hold trespassers responsible for crossing the border illegally, since it is almost impossible to determine *corpus delicti*. For this reason, it is very hard to prevent illegal migration across the sections of Ukraine's border with Russia and Belarus.

Establishing an integrated system for patrolling the state border is also virtually

²⁵ Decision № 21 of the Minister of Foreign Affairs dated 21 December 2001, *Journal of Law of the MFA*, 2002, № 1, Item 16.

²⁶ Z. Lentowicz, "Polskie wrota Unii" [Polish Gate to Union], *Rzeczpospolita*, 24 February 2003.

impossible without **equipping border patrols with modern surveillance equipment**, including equipment that works regardless of restrictions on visibility. The essential equipment that needs to be purchased includes **vehicles to make border patrols mobile and devices for detecting persons who cross the border illegally.**²⁷ Infrared vision and night vision equipment is widely used by Ukraine's colleagues in the EU.

This equipment should be part of integrated surveillance systems that include radar and access control through seismic and radio sensors. But using such systems effectively is impossible without **modern systems for communication and data transfer** that have all the available databases linked to them, including those containing biometric data on individuals, and a network for surveillance and control over the entire length of the Ukrainian border.

Over 1999–2002 alone, Poland spent around EUR 30mn on developing the infrastructure and technical equipment of its Border Service in order to control the future external border of the EU. Modernization also included communication, special technical equipment such as scanners for passports, nightvision eye gear and all-weather uniforms, weapons, computer equipment, short-range radio systems, standby power systems, and vehicles for transporting detained individuals.

The development of infrastructure on the Ukrainian border must move towards the EU standards. According to these standards, the average distance between watchtowers must be 20–22 kilometers, while the length of a section of border covered by one border patrol must average no more than 25 kilometers.

²⁷ The scale of investment can be demonstrated by the fact that in a single year, 2002, the Polish Border Patrol purchased 6 air surveillance systems with nightvision, 6 airplanes equipped with nightvision devices, 6 light sailing units, 106 cars, 13 buses, 15 vans, 13 snowmobiles, 6 vehicles for transporting detainees, 114 motorcycles, 30 trucks, special equipment, and 110 retransmission stations for UKF systems. See <http://www.sg.gov.pl/>.

Temporary detention centers for foreigners and stateless persons

Main policy directions:

- Analyzing what is needed to set up temporary detention centers for foreigners and stateless persons, including such aspects as geographic location and per center capacity.
- Constructing and equipping centers before the Readmission Treaty with the EU comes into force.
- Setting up open centers to accommodate asylum-seekers and refugees;
- Improving social guarantees for short-term (10 days or less) detainees held at centers at border checkpoints and police stations.

Setting up temporary alien detention centers in Ukraine is a necessary pre-requisite for the Readmission Treaty with the EU. Currently, Ukraine is absolutely not ready to detain admitted foreigners properly. The State Border Service can accommodate 800 individuals for up to 10 days. The MIA has no right at all to hold foreigners in its jails.

The legal basis for setting up temporary detention centers are provided by the Law “On the legal status of foreigners and stateless persons” and in the State Program for the Control of Illegal Migration for 2001–2004, which was approved by Presidential Decree. However, because of inconsistencies in institutional changes, up until April 2006 responsibility for such centers kept shifting back and forth between MIA and the State Committee on

Nationalities and Migration, so their construction has not begun, despite the availability of budget funds. Now that MIA will be in charge of setting up and running these centers, there should be no more obstacles to their construction.

Today, plans are to build and equip two centers with a capacity of 500 each, one in Volyn and one in Chernihiv oblast. The European Commission has allocated EUR 3.6mn for the purpose, to be administered by the IOM office in Ukraine. Still, the location and capacity of these centers requires a more thorough analysis, although at this point, the Ministry of Internal Affairs, which obtained the premises to be reconstructed into detention centers, cannot change their locations. It is expected that the first section of the Chernihiv center, with a capacity of 50, will start operating before the end of 2006.

As Poland's experience shows, **it is more useful to place such centers in regions close to the border.** Bearing in mind the prospect of stricter border control on the northern and eastern sections, placing these centers in regions that are the main entry points for illegal migrants makes sense. That will make it possible to cut the time and costs for transporting foreigners and the overall cost of expulsion. Moreover, this is a requirement of the EU, which wants to strengthen external borders while agreeing to transparent borders internally. The capabilities of the transport infrastructure, such as the presence of an international airport, and the availability of consular services also matter. From this point-of-view, one center should be near Kyiv and Kyiv oblast.

Having **only two centers with a total capacity of 1,000 is clearly not enough to carry out the requirements of the EU Readmission Treaty.** Even at the current level of 20,000 illegal migrants annually, it is evident that about 30% will be held in long-term detention.

Moreover, detention and oversight over 500 persons in open-type centers, that is, where there is unrestricted freedom of movement around the territory of the complex, is an enormous challenge. Yet this is just the type of centers it makes sense to build in Ukraine. Ukrainian experience with detaining migrants at the Pavshyne center and Polish experience prove **that only open-type detention centers can guarantee observance of rights of detained migrants who are not criminals.** The relative freedom of foreigners during their stay in a center and the possibility of spending time outdoors are very important. These are the things that foreigners in Poland lack, even in an open-type center like Lesznawola, let alone in deportation arrest centers that are essentially jails. Relative freedom avoids adding the psychological problems associated with long-term stays in detention centers.

In Poland, where the majority of centers are closed-type ones—in effect, jails—human rights organizations have poured out criticism concerning the detention of migrants. In particular, a report for the Government of Poland prepared by the Committee Against Torture in 2004 states categorically that detained people should be closed in cells for 23 hours a day, with only one hour of activity in the open air, without additional social programs.

The report said that people detained in centers for deportation in Poland lack purposeful activities, medical treatment and psychological support that are needed during long-term detentions. As a result, the Government of Poland was advised to create “other detention centers that are specially suited for housing citizens of other countries who had been detained according to legislation on aliens.” However, **open-type centers for a large number of people need greater security and discipline. That is why the question of building centers for 500 detainees needs to be examined closely.**

Ukraine can also expect some of this to be funded by the EU, which is interested in shifting the burden of controlling illegal migration to its neighbors, in exchange for facilitating the visa regime. Poland, which now maintains part of the EU external border, was given EUR 8mn under the Schengen Action Plan to construct new centers for migrants and modernize existing ones.

HR development

In general, there is currently no special training for personnel for SBS and MIA units that work with foreigners. Specialized training for State Committee for Nationalities and Migration staff is completely lacking.

The professional development of existing staff should be concentrate **on the Twinning programs with experienced migration services officials from EU countries**. Special training programs are needed at the education institutions associated with MIA and SCNM to prepare specialists in migration matters.

Finally, there is enormous need for **specialists in oriental languages to work in migration management agencies**. The Ministry of Foreign Affairs has tackled this problem by concluding agreements with post-secondary institutions to prepare such specialists. Having paid for the training of these specialists, the Ministry can then hire qualified professionals for permanent positions in the diplomatic service.

Technical assistance: Twinning and EC grants

The bad news for Ukraine is that Poland's experience during preparation for accession suggests that the main burden needs to be borne by the country wanting to meet EU standards. The costs were significant: for instance, in 2003 alone, PLN 72mn, or

The State Border Service and the Ministry of Internal Affairs also need to **build centers for administrative detentions of up to 10 days**. The SBS needs to have one such center for each its 25 border detachments. At this time, 11 such centers are operating.

Improving the professionalism of the Border Service should be acknowledged as a key precondition for proper border management, although, as the experience of neighboring countries shows, it is not an easy task. The SBS needs to be given police powers: to search cars, to fine, to initiate prosecution in court, to control illegal work, and to use police methods when tracking illegal migrants.

The absence of police powers, lack of work experience, and high staff turnover due to the short period of service limit the service's capacity to control the border effectively. Once again, the European Union could become a driver for changing staff policy, as it requires candidate countries to make their border services more professional.

At the same time, **corruption and bribery in law enforcement agencies** need to be countered by **improving the social security of employees, combined with strict punishment for those who break the law**.

around EUR 18mn, were allocated in the domestic budget for training, employing and equipping the new Border Patrol, the majority of whom would be guarding the EU's external border.²⁸

²⁸ Op. cit., Lentowicz.

In fact, budget problems made the process of building a modern border service difficult. By the time Poland completed negotiations over the Justice and Home Affairs section in 2002, it was apparent that a lot remained to be done in the next few years so that border security might meet EU standards. To close this section, as the last of the candidates, Poland had to make a commitment to invest more funds in border control, to increase its border patrol force by 3,200 by 2006, to hire 5,300 professional border guards and 1,000 more civil servants while phasing out the 3,100 conscripts deployed at that time. In all, the new force was projected to number 18,000 professionals.²⁹

According to Ministry of Interior and Administration estimates, Poland needed to spend around EUR 257mn on border control over 2004–2006 in order to adjust to EU requirements, while the EU assistance in this field was initially expected to amount to only EUR 94mn.³⁰ Considering this gap and problems with the Polish budget, EU member states decided at the European Council in Copenhagen to grant an additional EUR 108mn for the support of Poland's eastern border.³¹

About 30% of the money of the PHARE Program that Poland has received every year has been directed to institution-building, including consultations, expert know-how and training and was carried out using the Twinning instrument. This involved day-to-day cooperation between EU institutions and their colleagues in candidate countries and was aimed at approximating public administration in this countries to EU standards.

As part of the Twinning projects, which last at least 12 months, an EU Member State provided an Accession Country with the pre-accession advisor responsible for project implementation, who became a Twinning advisor after accession. Over 1998–2004, Poland's Interior Ministry implemented 14 projects at an average cost of EUR 1.7mn, dedicated to border management, migration policy, asylum policy, and combating organized crime.

Building the capacity of Polish services in migration policy was the objective of several PHARE Twinning programs.

Training under the “Strengthening the Administration of Home Affairs and Border Management” project run with the United Kingdom in 2001 at a total cost of EUR 1.5mn, involved the officials of the Office for Repatriation and Aliens and the Consular Department of the Foreign Ministry. The topics covered included identifying fraudulent documents, legal and technical aspects of the SIS, visa procedures, and improving the collection and processing of data on foreigners.

The agenda of the training conducted in 2002 for these two offices as part of the Twinning scheme with Germany and the Netherlands, at a cost also of EUR 1.5mn, covered migration policy, emergency response, data collection and processing, the SIS, and human resource management. 40 officers of the Polish police were trained by their Dutch counterparts on Schengen procedures. Migration and visa policies were dealt with in a Twinning project with Austria in 2003, costing EUR 1 million, which also involved the police. Migration and consular services participated in the largest Twinning

²⁹ S. Castle, “Poland bows to EU and creates new ‘iron curtain’,” 21 July 2002, <http://www.independent.co.uk/story.jsp?story=319994>.

³⁰ The Strategy of Integrated Border Management in 2003–2005, Ministry of Interior and Administration, 2002.

³¹ J. Pawlicki and R. Soltyk, “Unia nasza” [Our Union], *Gazeta Wyborcza*, 14–15 December 2003.

program, coordinated by German partners at the cost of EUR 3mn, which targeted the capacity to secure the external EU border.

Border guards were the primary target of several workshops in the Twinning framework. In the PHARE program implemented in 2000–2002, EU partners focused on the capacity of border guards to secure the future external EU frontier. Topics included the technical aspects of border security and systems for managing security efforts at the central level. The first Twinning program, carried out in 1999–2000, focused on reviewing EU regulations on the organization of border patrol units, internal control in Border Service structures, control over the quality of service rendered to the public, and methods for detecting fraudulent documents.

As part of the preparation for issuing visas compatible with the Schengen format, Polish consular officials delegated to fieldwork were trained within the Foreign Ministry on the Schengen Implementation Agreement and Common Consular Instruction. Additional training was provided by diplomats from EU member states, covering the visa systems in the EU. Since 1998, Polish consuls have attended meetings with their EU counterparts in various third countries, at which visa statistics and predictions regarding the risk of migratory pressure are exchanged.

Unlike the Border Guards, who have their own schools for professional training, the staff of the migration service, called the Office for Repatriation and Aliens, a relatively new service, are trained at other establishments under the Interior Ministry. Office staff also took part in specialized training organized by NGOs, which covered various aspects of work with target groups.

Ukraine should propose to the EU to increase financial support for programs to equip the common border, train officials, and strengthen institutional capacities among Ukrainian services. The main instrument for tackling the last two issues should be **two specialized technical assistance instruments Twinning and TAIEX (Technical Assistance Information Exchange Unit)** that have recently become available to Ukraine.

Given its status as a neighbor and a partner of the EU and growing commitments on the part of Ukraine to the EU in terms of improving the level of border management, **Ukraine should obviously raise the issue of significantly increasing and expanding sources of funding for the relevant assistance programs.**

At the moment, practically the only source of funding that Ukraine can use as part of the European Neighborhood Policy (ENP) is the TACIS program. Specifically, starting in 2006, Twinning projects began to be implemented in Ukraine out of the TACIS budget.

Today, the State Border Service has already said that it is willing to consider the possibility of implementing a project on border management. However, the limited funds of the TACIS program and the fact that the European Commission is highly interested in implementing projects in other areas of cooperation with Ukraine, such as energy, transport, finance, and so on, make it difficult to secure financing for a serious number of projects dealing with migration and border services over the next few years. **The Ukrainian Government should address the EU with a request to introduce other financial instruments besides TACIS.**

A consolidated readmission area

In this area, such actions are needed:

- Along with signing the Readmission Treaty with the EU, accelerating the process of signing similar agreements with Russia and Belarus.
- Increasing diplomatic efforts aimed at signing Readmission Treaties with countries that supply illegal migrants.

Ukraine submitted its proposals to begin negotiations on Readmission Treaties with Russia and Belarus at the same time as it launched similar negotiations with the EU. In 2002, Russia refused to talk, arguing that it had not finished equipping 7,000 kilometers of its state border with Central Asian countries—Kazakhstan and Uzbekistan. After Ukraine's insistent proposals regarding the need to sign bilateral treaties, negotiations with Russia and Belarus began in 2003.

These countries have a consolidated position to exclude nationals of third countries from negotiations and from Readmission Treaties. Their arguments are the same: Russia is not capable of securing reliable patrolling of its Central Asian borders. Unless these Treaties include the possibility of returning nationals of third countries to Russia, they will do little to ease migration pressures on Ukraine. But if these Treaties do materialize, even in a somewhat abridged version, they will make it possible for Ukraine to continue negotiations to extend them to nationals of third countries.

During a scheduled round of negotiations in 2005, the Russian side agreed to the pos-

sibility of putting this issue on the agenda. In the end, after the last round of negotiations in February 2006, the parties signed the text of a Treaty that also contains provisions on readmitting nationals of third countries, but these provisions will come into force only three years after the Treaty has been signed.

On one hand, this can be considered diplomatic success for Ukraine. On the other, if the country signs Readmission Treaties with Russia and the EU at the same time, Ukraine will be unable to repatriate to Russia all the illegal migrants who transit through that country to Ukraine and head to the EU for the three years.

Belarus has adopted a wait-and-see attitude in this matter and is not participating in any negotiations before signing a similar Treaty with Russia first. Hopefully, after signing a Readmission Treaty with Russia, Belarus will be more cooperative and a Readmission Treaty can be negotiated and signed fairly quickly with it. Belarus is not likely to want to increase migration pressures on the Ukrainian portion of its border.

Signing a multilateral Readmission Treaty with the CIS is of little advantage for Ukraine and intrinsically a step backwards in negotiations with Russia and those CIS countries that already have bilateral treaties with Ukraine, that is, Georgia, Moldova, Turkmenistan and Uzbekistan. The only way to deal with readmission is to sign bilateral treaties with all the countries along the illegal migrant route.

Related reforms: The MIA and the judiciary

Reforming the Ministry in the context of reforming the executive branch

Before a single migration authority is set up under MIA, the Office of the Ministry should be reformed into a policy body charged with all the aspects of regulating migration, including border security. This is part of administrative and law enforcement system reforms.

In developed countries, the Ministry of Internal Affairs is responsible for a much broader range of issues than just maintaining law and order. A similar ministry needs to be developed in Ukraine, which would be responsible for government policy in seven key areas:

- maintaining law and order;
- governing inter-ethnic and inter-faith relations;
- managing migration and asylum;
- overseeing regional development;
- overseeing the activities of community associations;

- securing the border;
- handling emergency situations.

Without any doubt, setting up such a system in the Ministry of Internal Affairs alone is not the work of one year, but a matter of overall institutional reform in Ukraine, which could last five–ten years, given adequate funding.

Reforming the judiciary

Under judiciary reform, **administrative court judges should be allowed to specialize in cases involving migration law.**

The Code of Administrative Procedures came into force in 2006. This Code places the responsibility for making decisions regarding the detention of foreigners and stateless persons and on their deportation with the country’s administrative courts. At the same time, practice shows that, today, the administrative court system is not prepared for this kind of work, especially in the border regions. This is with respect to rulings on compulsory deportation—decisions on administrative detentions are not being made at all, as this is a new area for judges that has not been written up in Ukrainian legislation.

Recommendations

For the Government of Ukraine

1. *In signing a Readmission Treaty with the EU:*

As Ukraine is not prepared to implement the Readmission Treaty with European Union, during the negotiations it should insist **on separating the effective dates of provisions on the readmission of Ukrainian nationals and those on the readmission of nationals of third countries and stateless individuals.**

- 1) Treaty provisions related to Ukrainian nationals should come into force simultaneously with the Agreement on simplifying the visa regime for Ukrainian nationals;
- 2) Treaty provisions related to nationals of third countries and stateless individuals should come into force only after Ukraine has instituted the legislative, institutional and infrastructural changes that will make it possible to implement these provisions.

2. *In legislating:*

- 1) **develop and approve a new wording for the Law “On the legal status of foreigners”** as a single legislative document that will regulate one aspect of legal relations between the state and all categories of foreigners, including refugees and individuals requiring additional protection.

The new wording of this Law should include these provisions:

- rules for foreigners to enter and exit Ukrainian territory;
- rules for staying on Ukrainian territory;

- responsibility for violating the rules for entering and staying on Ukrainian territory, as well as the procedure for making trespassers accountable;
 - procedures for appealing against accusations of illegal entry or stay;
 - procedures for compulsory and voluntary deportation and for appealing against compulsory or voluntary deportation through the courts;
 - regulations for the procedure for arresting and detaining foreigners who are in violation of the law on the status of foreigners;
 - regulations for the status and procedures for granting or depriving individuals of refugee status in Ukraine;
 - regulations for the granting of additional protection and asylum;
 - regulations for the rights and powers of officials and government employees responsible for implementing this Law.
- 2) **initiate expert debates involving all stakeholders** (lawmakers, executive bodies working under migration policy, international organizations, non-government and human rights organizations, and independent specialists) to discuss **a Concept of State Migration Policy** that includes issues related to the control of illegal migration and the protection of refugees and asylum-seekers, as well as immigration policy.
 - 3) **develop a Bill “On basic principles of migration policy”** based on the results of these debates **and submit it to the**

Verkhovna Rada. This Bill must include and define the main terminology that is used in migration policy, identify policy formulation principles, goals and objectives, ways to achieve these goals, standards for protecting human rights, and other areas of government activities to implement migration policy. The adoption of this bill is required by the Constitution of Ukraine.

3. *At the institutional level:*

- 1) **implement reforms in the Ministry of Internal Affairs** that will change the Ministry into a body that handles policy-making in domestic affairs, including migration and border management.
- 2) **set up a Migration Service under MIA only after the Ministry itself has been reformed.** This Migration Service should be based on the State Department for Nationality, Immigration and Registration of Private Individuals and the Migration and Refugees Department under the State Nationalities and Migration Committee, incorporating specialists from the relevant departments of other ministries and offices that deal with migration issues.

This Migration Service will have five main functions:

- examining issues related to Ukrainian citizenship;
- accepting applications and processing them so that foreigners and stateless individuals may be granted refugee status in Ukraine, and providing them with additional protection;
- housing and supporting individuals who are applying for refugee status;

- detecting and deporting individuals who are staying on Ukrainian territory illegally or who have lost the right to a legal stay;
- detaining, categorizing and identifying individuals detained for illegal entry or residence in Ukraine;
- coordinating programs for the social integration of recognized refugees and asylum-seekers.

- 3) **include the State Border Service into the structure of the Ministry of Internal Affairs, but only after the Ministry itself has been reformed,** and accelerate reforms in the State Border Service to change it into a law enforcement body responsible for border management. Expand the policing functions of the SBS: grant it the powers to carry out investigations, detective work and pre-trial investigations to combat illegal migration across Ukrainian territory, and professionalize the personnel in the Service by changing the training system to focus more on the policing functions of the SBS.

4. *Infrastructure and equipment*

- 1) accelerate the demarcation of state borders with Russia and Belarus and develop the infrastructure on these sections of the state border;
- 2) set up a modern integrated system for protecting the border and Ukraine's sovereign rights in its exclusive commercial maritime zone by refitting the units that manage the border with modern equipment;
- 3) analyze the parameters (geographic location, per center capacity) for setting up, build and equip a network of centers for the temporary accommodation

of foreigners and stateless individuals in preparation for deporting them prior to the coming into force of the provisions of the Readmission Treaty with the EU in this area;

- 4) build and equip a network of centers for administrative detention of under 10 days for border detachments and police departments;
- 5) build open centers for the accommodation of asylum-seekers and refugees;
- 6) improve social guarantees and ensure the protection of the rights of individuals who are detained in existing places for short-term detention of up to 10 days and temporary detentions up to 6 months;
- 7) set up a consolidated database for all bodies dealing with migration issues, on foreigners who: (1) obtained an entry permit for Ukraine; (2) obtained a working permit for Ukraine; (3) are in the middle of applying for refugee status or have been denied this status; (4) have violated the rules for staying on Ukrainian territory; (5) illegally entered Ukrainian territory and were deported according to the procedure established by law; (6) were granted temporary asylum on Ukrainian territory.

5. *Procedures, policies and programs*

- 1) the system for granting refugee status and providing additional protection should ensure adherence to basic international principles and the implementation of key elements of EU best practice. These include: the right to asylum; adherence to the principle of refusing to carry out compulsory deportation; the option to use independent legal assistance; appropriate housing conditions during the asylum process; simplified

procedures for issuing documents and ID cards to all asylum-seekers that are valid for the entire period of the asylum process; transparency; transparent review of applications, including justified decisions, even if the application was rejected as unacceptable or unsubstantiated during an accelerated process; the right of the applicant to study their dossier, except for classified documents, as a feature of transparency; a properly functioning procedure for submitting appeals; and simplified, standardized and transparent procedures for returning asylum-seekers who have been denied asylum and illegal migrants;

- 2) institute voluntary return programs for individuals who are staying on Ukrainian territory illegally, without applying punishment to such individuals, in accordance with the principle of priority of voluntary return over compulsory deportation;
- 3) analyze the possibility of offering migration amnesty to foreigners who have been in Ukraine for a long period of time and consider their future in Ukraine;
- 4) introduce a visa policy towards the countries that supply illegal migrants that include the institution of strict rules for entering Ukraine and additional inspections at the time of issuing visas for nationals of these countries, such as: mandatory registration of invitations and other accompanying documents, providing cash deposits, and so on, jointly with the Ministry of Internal Affairs, the Ministry of Foreign Affairs and other stakeholders.

6. *Cooperating with international partners*

- 1) raise the issue with the EU on increasing financing for programs dealing with

the equipment of common borders, for professional training, for strengthening the institutional capacities of Ukrainian services; on introducing other financial instruments, in addition to TACIS, to finance Twinning and TAIEX projects;

- 2) engage diplomatically with the EU in order to set up a common readmission area along the line “EU–transit countries–supplying countries;”
- 3) increase efforts to sign bilateral Readmission Treaties with Russia and Belarus, as well as with other countries supplying illegal migrants;
- 4) complete the process of demarcating the state border with Russia and Belarus and further expand transborder cooperation with other countries. When implementing current and concluding new agreements on transborder cooperation and readmission, examine the issue of the extent and means of exchanging information. At the central level, the State Border Service should cooperate

with its counterparts from neighboring countries in order to modernize border checkpoints and related infrastructure.

7. *Ongoing public awareness campaigns...*

...in order to raise the level of informedness among Ukrainian nationals regarding state migration policy, migration and the demographic situation in Ukraine and to prevent the spread of such negative phenomena as xenophobia and religious or ethnic intolerance in Ukrainian society.

8. *Initiate studies...*

...for the purpose of understanding the migration situation in Ukraine and determining the goals of its migration policy. Among the latter, it is necessary to include a count of the real number of illegal migrants, their socio-economic status, and the level of impact of the diaspora of countries of origin on the socio-economic and criminal situation.

For the European Union

1. *Not to insist...*

...that provisions of the Readmission Treaty with Ukraine related to nationals of third countries and stateless individuals come into force before Ukraine is ready to implement the Readmission Treaty or before a Readmission Treaty between Ukraine and Russia on third persons and stateless individuals has come into force.

2. *Expand financing...*

...for programs to equip common borders between Ukraine and the EU, for profes-

sional training, for strengthening institutional capacity among Ukrainian services; introduce other financial instruments, in addition to TACIS, in order to help Ukraine prepare to implement a Readmission Treaty with the EU.

3. *Aim diplomatic efforts...*

...at signing readmission treaties with countries of origin of illegal migrants and encourage, through Ukraine’s diplomats, the signing of Readmission Treaties with Russia and Belarus.