



*The Danish Centre  
for Human Rights*



**European Commission**

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**STUDY ON THE FEASIBILITY OF PROCESSING  
ASYLUM CLAIMS OUTSIDE THE EU AGAINST THE  
BACKGROUND OF THE COMMON EUROPEAN ASYLUM  
SYSTEM AND THE GOAL OF A COMMON ASYLUM  
PROCEDURE**

**Final Report**

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**Dr. Gregor Noll, Danish Centre for Human Rights  
Jessica Fagerlund, LL M, Danish Centre for Human Rights  
Fabrice Liebaut, LL M, Danish Refugee Council**

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## Executive Summary

With the development towards comprehensive and more sophisticated border control regimes, the problem of protection seekers' access to EU territory has increasingly come into focus. Disorderly movement is presently the main avenue to safety in the EU, and human smugglers act as important facilitators. Single European states have sought ways out of this dilemma, and pioneered techniques of externalised processing. One of them is the operation of Protected Entry Procedures from the platform of diplomatic representations, allowing a non-national

- to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Provided they are well-crafted, Protected Entry Procedures could drain parts of the market for human smuggling, attract *bona fide* refugees who presently opt for the smuggling services and thereby decrease the total number of disorderly arrivals and partially eliminate the problem of returning the rejected caseload. An obvious security advantage for states is to know in advance who wishes to enter their territory. In addition, important synergies with integration and labour immigration policies can be created.

In the longer term, Protected Entry Procedures contribute to the establishment of a dialogue with would-be migrants at the earliest conceivable stage of the migration continuum. The pivotal element of such Procedures is a redistribution of risks between protection seeker and potential host state. For select groups, Protected Entry Procedures could indeed deliver “more protection for the Euro”.

There is clearly an added value in using the EU as a platform for developing Protected Entry Procedures. The Conclusions by the 1999 European Council in Tampere contain a clear reference to the issue of access to territory, thus sending out a strong signal on the need to balance border control and refugee protection. Conclusion 3 states that for those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes.

Reacting to this impulse, the European Commission adopted its November 2000 Communication signposting the way “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”. Under the heading “Access to the territory”, the Commission suggests that processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme, may be ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or smuggling gangs or having to wait years for recognition of their status. This option, as the Commission sees it, must be complementary and without prejudice to the proper treatment of individual requests expressed by spontaneous arrivals. The Commission subsequently launched the idea of commissioning the present feasibility study on the processing of asylum requests made outside the European Union.

Recently, Ruud Lubbers, the UN High Commissioner for Refugees, suggested that embassy procedures in both countries of origin and in neighbouring countries be considered when Member States seek to address mixed flows.

Legal obligations under human rights instruments such as the ECHR suggest that states may find themselves obliged to allow access to their territories in exceptional situations. Where such access is denied, claimants may rely on the right to a remedy. These are further reasons supporting the conception and operation of formalised Protected Entry Procedures, which offer a framework for handling such exceptional claims. Protected Entry Procedures would be coherent with the *acquis* as it stands today. Nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. Furthermore, there is a Community competence for developing a joint normative framework.

Theoretically, Protected Entry Procedures can be offered either as an exclusive channel to protection in a host state, as a complementary channel, or as an exceptional practice to be activated *ad hoc*. The exclusive approach entails legal and practical problems to such a degree that it has already been considered inadvisable by earlier studies looking into the feasibility of regional processing centres. This conclusion still stands today. Due to its limited predictability, the exceptional approach is unable to interfere with human smuggling. Therefore, the study concludes that Protected Entry Procedures should be conceived as a complement to ordinary asylum procedures on the territory of Member States, and be well integrated with them.

Presently, one third of the fifteen EU Member States practise Protected Entry Procedures on a formalized basis as a complementary channel (Austria, France, the Netherlands, Spain and the UK). Denmark belonged to this group until June 2002, when its Protected Entry Procedure was abolished. Beyond the EU, Switzerland can be added to this category. Six Member States allow access in exceptional cases and in an informal fashion (Belgium, Germany, Ireland, Italy, Luxembourg, Portugal). The remaining Member States (Greece, Finland and Sweden) as well as Norway declares that it does not facilitate access, although empirical evidence suggests that it has done so on specific occasions.

The practice of European states and of the three non-European resettlement countries included in the study indicates that a differentiated battery of filter elements is available, which allow for sophisticated modelling and steering of Protected Entry Procedures. Presently, their quantitative contribution to the total delivery of protection in Europe is minor, if we choose to compare with disorderly arrival systems. However, this has to be ascribed to the cautiousness of states in the field of information policies as well as inadequacies in the design of their Protected Entry Procedures, rather than to the viability of the concept as such.

Already today, Switzerland provides an example of what a serious attempt to design and operate Protected Entry Procedures might look like. Switzerland is an important recipient of disorderly arrivals, and assisted a major share of Bosnian refugees seeking protection in Western Europe. It has maintained and developed its Protected Entry Procedures in spite of peak demands in the segment of disorderly arrivals. The Swiss example proves that Protected Entry Procedures can be managed both qualitatively and quantitatively, and that fears of massively boosted caseloads are unfounded. Without pretensions of perfection, its system offers a number of features and safeguards worthy of emulating in a wider European context. In proportional terms, Swiss Protected Entry Procedures identify significantly more “genuine refugees” than the ordinary territorial procedures,

and should thus correspond to former UK Home Secretary Jack Straw's programmatic demands at the 2000 Lisbon Conference.

The present diversity and incoherence of Member States' Protected Entry Procedures diminishes their actual impact. There is a strong case for a harmonisation, which will most likely result in an exponential boost of their protection capabilities, as well as their competitive edge vis-à-vis the smuggling sector. In particular, common and harmonised information policies should have good prospects of establishing Protected Entry Procedures as a persuasive alternative to irregular entry and, together with resettlement, the only way out for those who cannot receive adequate protection in the region, while sending strong signals of dissuasion to non-qualifying cases. Harmonisation should pick up on existing practices and mould them step-by-step into the *acquis*. Against the backdrop of our findings, Protected Entry Procedures presently constitute the most adequate response to the challenge of reconciling migration control objectives with the obligation of protecting refugees.

This study suggests that EU Member States consider Protected Entry Procedures as part of a comprehensive approach, complementary to existing territorial asylum systems. This approach would offer three different, but interlinked types of contribution to refugee protection in extraterritorial settings:

1. Assistance to regional first countries of asylum to handle larger quantities of protection seekers in full compliance with international norms.
2. Protected Entry Procedures offered by a single Member State, catering for individuals whose needs cannot be met by the first country of asylum due to qualitative limitations in its protection offer, and who possess specific links to that Member State, as well as to urgent cases.
3. A resettlement quota offered by EU Member States through a central agency, e.g. UNHCR. This quota would be used to cater for protection needs which cannot be met either in the first country of asylum or through self-selecting extraregional solutions. The quota would be exclusively protection-oriented, and thus free of utilitarian considerations benefiting Member States.

The study concludes by presenting five proposals which Member States could consider when developing Protected Entry Procedures in the future:

1. Flexible Use of the Visa Regime
2. Introduction of a Sponsorship Model
3. Towards an EU Regional Task Force and EU Regional Nodes
4. Gradual Harmonisation through a Directive Based on Best Practices
5. Towards a Schengen Asylum Visa

All proposals are inspired by best practices of European states, by the structure and language of the *acquis* as it stands today, as well as the relevant draft instruments tabled by the European Commission and presently under negotiation. The first, second and third proposals sketch different developmental strategies which Member States could pursue. While the first proposal seeks to enrich existing visa policies with a protection dimension, allowing for a cautious step-by-step approach, the second proposal focuses on the joint creation of protection places by civil society and governments, suggesting shared responsibilities in the areas of selection, funding and integration.

The third proposal, in turn, attempts to offer a platform for the regional presence of the EU, integrating different dimensions of migration (determination procedures, protection solutions, labour migration and return, as well as assistance to the region of origin) in a single tool allowing the EU to “speak with one voice”.

In contrast to the first three proposals, the fourth and fifth proposals are legal by nature, and attempt to depict two different levels of European integration in the field of Protected Entry Procedures. They are developed at greater length to mirror how complex the detailed modelling of Protected Entry Procedures will be in practice.

The fourth proposal aims at the Union-wide dissemination of best practices, while largely retaining a unilateral focus. It has been given the form of a directive. The fifth proposal is more ambitious: it seeks to regulate the allocation of responsibility to process applications for protection visas among Member States. It has been cast in the form of a Regulation. Once adopted, it would piggyback onto the first proposal, precisely as the Dublin Convention has piggybacked onto domestic asylum procedures in Member States. If Member States wish to engage only in a limited degree of harmonisation, they could consider adopting the Directive alone. If Member States wish to move forward towards a highly integrated and multilateral system of granting protection visas, they could choose to adopt both the Directive and the Regulation in one and the same negotiation process.

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## Table of Abbreviations

ACHR	American Convention on Human Rights
OA	Asylum Ordinance 1
APD	Asylum Procedures Directive (to be adopted)
AWR	Forschungsgesellschaft für das Weltflüchtlingsproblem
BO	Branch Office
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCI	Common Consular Instructions
CEAS	Common European Asylum System
CIA	Central Intelligence Agency
CEAR	Spanish Commission for Refugee Assistance
CIAR	Inter-ministerial Eligibility Commission on Asylum and Refuge
CIC	Citizenship and Immigration Canada
CRC	Convention on the Rights of the Child
DAPD	Draft Asylum Procedures Directive
DIMA	Australian Department of Immigration and Multicultural Affairs
DIMIA	Australian Department of Immigration, Multicultural and Indigenous Affairs
DQD	Draft Qualification Directive
DRC	Danish Refugee Council
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ERF	European Refugee Fund
EU	European Union
FAO	Federal Asylum Office
FBI	Federal Bureau of Investigation
FC	Fourth Geneva Convention
FOR	Federal Office for Refugees
FY	Fiscal Year
GA	General Assembly
GC	Geneva Convention
HCR	High Commissioner for Refugees
HEP	Humanitarian Evacuation Programme
HLWG	High Level Working Group on Asylum and Migration
HTP	Humanitarian Transfer Programme
ICCPR	International Covenant on Civil and Political Rights
ICD	Integrated Casework Directorate
ICMPD	International Centre for Migration Policy Development
IGC	Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia
ILPA	Immigration Law Practitioners' Association
IND	Immigration and Naturalisation Service
INS	Immigration and Naturalization Service
IOM	International Organization for Migration

IPPR	Institute for Public Policy Research
JVA	Joint Voluntary Agency
MFA	Ministry of Foreign Affairs
MPG	Migration Policy Group
MVV	Machtiging tot voorlopig verblijf (provisional sojourn)
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OAR	Office for Asylum and Refuge
ODP	Orderly Departure Programme
OFPRA	French Protection Office for Refugees and Stateless Persons
OJ	Official Journal
OP	Operational Instructions
PAM	Procedures Advice Manual
PVD	Protection Visa Directive
RO	Regional Office
SAC	Special Assistance Category
SC	Schengen Convention
SHP	Special Humanitarian Program
SIS	Schengen Information System
SOU	Statens Offentliga Utredningar
TEC	Treaty of the European Community
TP	Temporary Protection
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States of America
USRP	United States Resettlement Program
VTC	Vienna Convention on the Law of Treaties

## **Foreword**

The present feasibility study has been commissioned by the European Commission and carried out at the Danish Centre for Human Rights with the Danish Refugee Council as an implementing partner. It draws on the knowledge base and network of the Refugee Research Programme. The authors would like to extend their sincere gratitude to all persons and institutions that have contributed to this endeavour. In particular, we would like to thank the members of the internal and external reference groups, and experts with international and non-governmental organisations and in academia who have been consulted in the course of our work. The realization of the study proved to be critically dependent on their constructive advice. This notwithstanding, the responsibility for any error remains entirely with the authors.

For the authors

Dr. Gregor Noll  
Research Director, Deputy Director General  
The Danish Centre for Human Rights





# 1 Introduction

## 1.1 Background

For more than a decade now, industrialised states have used considerable resources to exercise their personal sovereignty and to control the arrival and entry of non-nationals on their territory. These policies have been described and analysed elsewhere and their potential negative effects on the interests of persons in need of international protection highlighted.

A common feature of these policies has been a tendency to intercept potential refugees en route to the territory of destination states. By combining visa requirements with carrier sanctions and pre-frontier assistance and training, destination states seek to stop unauthorised entry attempts at the earliest possible stage. As a matter of fact, migration control has been increasingly externalised and is now to a significant proportion exercised in states of departure.

In its present form, the externalisation of migration control is problematic. Unlike domestically applicable aliens legislation, it usually does not *differentiate* between persons in need of protection and other categories of migrants. But access to the territory of a potential host state is a precious good for persons in need of protection. This is true in a double sense. First, access to territory, even if only in the form of border territory, means at least temporary physical security.<sup>1</sup> Second, such access also enhances legal protection. A number of important protective norms of international law presuppose territorial contact for their applicability.<sup>2</sup> Hence, the lack of differentiation in externalised migration control has far-reaching effects when it comes to the applicability of human rights and refugee law.<sup>3</sup>

As the problem of externalised migration control is the lack of differentiation, it is only natural to inquire whether this lack can be remedied within the framework of existing systems. If border control is pushed into the territories of departure states, one might ask if refugee determination procedures could – at least in part - follow that move. Historically, such a development would appear logical. The key concepts of migration control have been developed in the 1980s and early 1990s, in reaction to protection demands by increasing numbers of asylum seekers. Since then, numbers have largely stabilised and even declined, and systems of migration control have gone into a phase of consolidation and refinement. The reactive development of migration control has not been matched by an analogous adaptation of protection systems.

In the EU context, the harmonisation process offers new windows of opportunity for introducing refinements in existing asylum and migration policies at comparatively low transactional costs. The 1999 European Council in Tampere stated that the “freedom based on human rights, democratic

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<sup>1</sup> Chapter 3 contains a comprehensive analysis of the applicability of protective norms.

<sup>2</sup> See e.g. art. 2 (1) of the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [henceforth ICCPR].

<sup>3</sup> Apart from downgrading the legal standing of would-be refugees, the externalisation of migration control pushes would-be refugees into criminalisation. First, due to the lack of legal avenues, such persons may resort to the illicit services of the black market (bribes to visa officials, use of counterfeit documents and resort to human smugglers). Second, once they have managed to arrive in a potential host state, the refugee will typically attempt to collude travel itineraries to avoid return to states along the transit routes. This strikes against her overall credibility and may distort the outcome of determination procedures.

institutions and the rule of law”, to which European integration subscribes, cannot be denied to “those whose circumstances lead them justifiably to seek access to the territory of the European Union”. On the same occasion, the European Council agreed to develop a “Common European Asylum System” in a two-step approach, and asked the European Commission to prepare a Communication relating to the second step. With this Communication, made public in November 2000, the Commission signposted the way “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”, and addressed the issue of access to territory as part of a future Common European Asylum System.<sup>4</sup> Against the background of these normative developments, it seems appropriate to discuss how the negative effects brought about by externalised migration control could be remedied, thereby increasing both the fairness and efficiency of EU asylum and migration policies.<sup>5</sup>

## 1.2 Objective of the Study

Meeting protective demands outside state territory is no new phenomenon. The institutions of diplomatic asylum and resettlement, the notion of reception in the region, and the debate on temporary protection all point to the fact that states have already extended the reach of their protective systems outside the limits of their own territorial borders. The named concepts and notions have been analysed in detail elsewhere, and the present study shall not repeat this analysis. Rather, we intend to focus on ways and means *to complement the present system of extraterritorial migration control* in the EU with mechanisms allowing for the differentiation between persons in need of protection and other categories of migrants *before* they reach the border of potential host states. What sets out Protected Entry Procedures from traditional resettlement is precisely the fact that *the individual is directly engaging the potential host state* in a procedure aiming at *the securing of physical transfer and legal protection*. In this mechanism, the *individual autonomy* of the protection seeker is accorded a central role.

A significant number of EU Member States already operate some form of such a mechanism, or have experimented with it over a number of years. Asylum-related entry requests are received, and, to some extent, processed in the country of origin or in a third country, which may lead to an authorised entry of the applicant into the territory of the requested state. Diverse as they may be, these practices give proof of the fact that differentiating forms of migration control are perceived as a natural refinement of the current system. Against this background, the present study will seek to

- take stock of the existing Protected Entry Procedures within EU Member States and a number of important countries not Member of the EU,
- analyse the fairness and efficiency of such practices as well as their relationship to obligations imposed by international law,

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<sup>4</sup> For a full account including references, see Chapter 2.2.4 below.

<sup>5</sup> In this context, it is worth mentioning that traditional immigration countries have a long experience with differentiating migration control regimes. EU Member States are now increasingly debating the need for labour immigration, which calls for a number of changes in policy and law. While it must be underscored that economically motivated immigration differs starkly from flight and refuge in a number of respects, EU Member States could seize the opportunity to think over migration control in a comprehensive manner and to look into techniques of differentiation even in the area of forced migration. See Chapter 5.7 *supra*.

- inquire into the potential for harmonising these procedures on the EU level, looking inter alia into its consistency with the existing EU *acquis* in the area of migration and asylum, and to
- offer blueprints for future harmonisation within the EU.

### 1.3 Methodology

In pursuit of the objectives set out above, empirical research, analytical models from political science and legal analysis shall be combined in a multidisciplinary approach. The study starts out by offering definitions of central concepts (Chapter 1.4) and an initial delimitation of various forms of externalised processing (Chapter 1.5). In Chapter 2, the history of Protected Entry Procedures is tracked, reaching back to practices during World War II. A legal inquiry follows in Chapter 3, looking both into the extraterritorial applicability of protective norms in international law and the consistency of Protected Entry Procedures with the existing EU and Schengen *acquis*.

Chapter 4 is dedicated to the various choices states are faced with when modelling Protected Entry Procedures, while Chapter 5 seeks to expound their benefits and drawbacks, drawing on the perspective of states, NGOs and individuals.

Chapter 6 investigates state practice. It offers information on legislation, classes of beneficiaries, procedures, case law, statistics, and, in select cases, the practice at diplomatic representations. The EU Member States are all featured in this chapter. Norway and Switzerland have been added, due to their geographical vicinity as well as their close cooperation with EU Members in the area of asylum and migration. To provide a comparative backdrop, the practices of three traditional immigration and resettlement countries - Australia, Canada and the US - will also be presented.

Information on legislation and practice in the countries covered by the study has been procured in multiple steps. First, the study drew on basic information provided in an earlier study on Protected Entry Procedures, financed by UNHCR.<sup>6</sup> Second, a questionnaire was sent out to governments of each of the included European countries.<sup>7</sup> An adapted version of that questionnaire was also sent to NGOs working with asylum and refugee issues in each of the listed countries.<sup>8</sup> Third, field visits were made to Austria, France, the Netherlands, Spain, Switzerland and the United Kingdom, where experts from authorities, NGOs and local UNHCR offices were personally interviewed. Where necessary, those interviews were followed up by telephone interviews or through e-mail exchanges. European governments, NGOs and local UNHCR offices have been given the opportunity to read and comment drafts of country chapters, and the authors have carefully considered all comments received. UNHCR has been consulted on a number of occasions<sup>9</sup>, and visits have been paid to ICMPD, IGC and IOM Headquarters. In addition, experts at the Canadian Embassy and US Embassy, both Vienna, have been interviewed.

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<sup>6</sup> Gregor Noll with Jessica Fagerlund, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests*, Danish Centre for Human Rights, April 2002. Available in full text at <www.humanrights.dk> or <www.unhcr.ch>.

<sup>7</sup> A sample government questionnaire is reproduced in Annex 2.

<sup>8</sup> A sample NGO questionnaire is reproduced in Annex 3.

<sup>9</sup> These consultations involved experts from the Bureau for Europe and the Department for International Protection, as well as staff at regional and branch offices.

Chapter 7 firstly synthesises state practice by means of a comparative analysis. Secondly, it develops a normative toolbox, inspired by the principle of subsidiarity, and featuring several blueprints for future harmonisation. In the final chapter, the results of the study are concluded.

## **1.4 Defining Protected Entry Procedures and Related Concepts**

Throughout the study, the term ‘Protected Entry Procedures’ will be employed as an overarching concept for arrangements allowing a non-national

- to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Each of the two elements of this definition – extension of asylum procedures to third countries or countries of origin and access to a protective territory – reflects a problem dimension. First, the need for asylum or other forms of protection must be assessed in a manner different from ordinary asylum procedures, and, second; the physical entry into the territory of the host state needs to be secured. It is the interplay between substantive decision-making on the merits of a protection claim and the formalities of migration that makes Protected Entry Procedures special, and lets them transgress the compartmentalisation of asylum on one hand, and migration on the other. As our ensuing analysis will show, there are many possible configurations between both elements.

It has taken decades for international lawyers to develop robust bodies of norms in the areas of migration, asylum and diplomatic relations. States engaging in Protected Entry Procedures draw on all three of them. The extraterritorial outreach of such procedures raises a number of legal and practical intricacies, which cannot be addressed by simple analogies to territorial processing of asylum claims. In fact, the asylum system is partially extended into foreign territory, which begs new responses to the old questions of jurisdiction, security, efficiency and costs distribution.

In the following, it will often be necessary to compare the position of aliens outside state territory with that enjoyed by aliens being on the territory of a potential host state (typically when identifying differences between Protected Entry Procedures and ordinary asylum procedures for ‘spontaneous’ asylum seekers). Reference to ordinary or territorial asylum procedures encompasses both procedures within the territory of a potential host state, and procedures at its borders. Technically, both procedures are subject to those human rights norms which are owed by a given state to anyone having contact with its territory. This is the case even at land borders, as checkpoints at land border crossings are placed on the territory of the state from which entry is sought.<sup>10</sup>

As flight is the result of a long causal chain, and is predictable to a certain extent, the term ‘spontaneous’ is placed in inverted commas, to flag the inadequacy of an expression often used by states in the North.

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<sup>10</sup> See Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon, Oxford 1996 [hereinafter Goodwin-Gill 1996], p. 75.

With regard to the various countries involved in the migration chain, the study distinguishes between three main categories. ‘Potential host state’ or ‘destination country’ denotes such countries which the protection seeker seeks to enter through Protected Entry Procedures. ‘Country of origin’ or ‘country of habitual residence’ denotes the country from which the protection seeker originates, and where primary threats are located. ‘Third country’ denotes any country in which the protection seeker is present, and which does not belong to the categories earlier named.

## ***1.5 Convergence Areas between Protected Entry Procedures and Other Protection Regimes***

Protected Entry Procedures are a hybrid. They combine features of resettlement regimes (in particular their geographical reach and bypassing of migration control obstacles) with the characteristics of individual asylum procedures conducted within the territory of a potential host state. Protected Entry Procedures cover a broad array of state practices, which are often described as ‘in-country processing’ or ‘the grant of humanitarian visas’. The major difference in these practices is the degree to which asylum procedures are placed outside state territory. Some states use their diplomatic representations merely to receive, but not to process, asylum claims. These claims are then sent to relevant authorities placed within state territory, decided on by the latter, and communicated back to the diplomatic representation. On the other extreme of the spectrum, some states send trained staff to selected representations to conduct refugee determination abroad.

It may be objected that the Protected Entry Procedure shares its two definitional elements with a number of other protective practices, such as resettlement, diplomatic asylum, reception in the region or evacuation and dispersal in temporary protection schemes. Hence, there is a need to be more specific in characterising Protected Entry Procedures.

Let us start with a comparison between Protected Entry Procedures and diplomatic asylum, resettlement and evacuation and dispersal. In search for distinctive elements, one will find differences of degree, rather than differences of principle. Diplomatic asylum and Protected Entry Procedures typically share a focus on the individual, while resettlement, reception in the region as well as evacuation and dispersal in temporary protection schemes are best characterised as collective instruments, reflected by the fact that fixed quotas are set. This notwithstanding, resettlement as well as evacuation also focus on the individual case in actual processing. Furthermore, resettlement schemes of traditional immigration countries typically require the individual to actively approach the potential destination state, which is an important similarity to diplomatic asylum and Protective Entry Procedures. Diplomatic asylum and evacuation surface as exceptional practices<sup>11</sup> and are, as a rule, not based on a set-up of rigid legal rules, allowing them to be described as a ‘system’.<sup>12</sup> By contrast, Protected Entry Procedures and resettlement cater for normalcy, and typically operate with a fixed normative framework. Finally, the focal points of each

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<sup>11</sup> This is clearly spelt out in art. 2 of the Temporary Protection Directive: “For the purposes of this Directive: (a) ‘temporary protection’ means a procedure of exceptional character [...]”. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 7 August 2001, OJ L 212/12 [hereinafter Temporary Protection Directive].

<sup>12</sup> It should be recalled that the EU Temporary Protection Directive offers a negotiation procedure rather than a predetermined legal obligation to coordinate the reception of a mass influx on the territories of Member States and to share the protective burdens linked thereto. See arts. 24 and 25 of the Temporary Protection Directive.

practice are perhaps most telling. Diplomatic asylum is characterised by the confrontation between the territorial state (usually the potential persecutor) and the state represented by the embassy. Resettlement is special in that it aims at alleviating limbos in third countries where the quality of protection is insufficient. Evacuation and dispersal in the context of temporary protection is marked by the wish to respond to situations of mass flight and to bring about a form of burden sharing.<sup>13</sup> To a limited degree, Protected Entry Procedures can share the characteristics of all three other responses. However, they are primarily typified by the *desire to offer individual protection seekers legal alternatives to illegal migration channels, thus preventing disorderly departures as well as disorderly arrivals*.

It might also be helpful to concentrate on the place where claimant and destination country meet, and where critical decisions are made in each of the four protective practices – something we could call their *locus*. In the case of diplomatic asylum and Protected Entry Procedures, it is clearly an *embassy*. The locus of resettlement is usually a *processing centre* or even a *refugee camp* in a third country, visited by a selection committee. Finally, the *refugee camp* in a third country is also pivotal to evacuation and dispersal schemes in the context of temporary protection. Quite naturally, the locus of all systems is placed outside the territory of the destination country. Table 1 offers an overview of the commonalities and differences between all four approaches.

	<b>Diplomatic asylum</b>	<b>Protected Entry Procedures</b>	<b>Resettlement</b>	<b>Evacuation and dispersal</b>
<b>Primary focus</b>	Securing protection <i>in situ</i> against the will of the territorial state	Offering alternatives to illegal migration for protection seekers	Alleviating protection limbos in third countries	Alleviating acute protection crises in situations of mass flight
<b>Typically geared towards</b>	Individuals	Individuals	Individuals as well as Groups	Groups
<b>“Locus”</b>	Embassy	Embassy	Processing centre/refugee camp	Refugee camp
<b>Normal or exceptional practice?</b>	Exceptional	Normal	Normal	Exceptional
<b>Quantitative limitations?</b>	No	No	Quotas	Quotas

**Table 1 - The Characteristics of Protected Entry Procedures Compared to Other Practices**

<sup>13</sup> The Humanitarian Evacuation Programme operated during the Kosovo crisis offers a good example of the linkage between protection problems arising in the country of first asylum (Macedonia) and the practice of burden sharing (in this case a combination of sharing people and bringing resources to Macedonia) to alleviate these problems. See Michael Barutciski and Astri Suhrke, *Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing*, Journal of Refugee Studies, Volume 14, Issue 2: June 2001, pp. 95-134. See also the Temporary Protection Directive.

Protected Entry Procedures should also be distinguished from Orderly Departure Programmes (ODP). While both share the goal of offering alternatives to illegal migration, ODPs represent a collaboration between countries of origin and potential destination countries. Access to asylum presupposes that both countries have given clearance to migration.<sup>14</sup> In practice, this allows countries of origin to veto departure. Different from Protected Entry Procedures, decision-making is left to the cooperating states, and the impact of individual autonomy is low.

How, then, do Protected Entry Procedures relate to the notion of reception in the region? The latter notion is, for the time being, not defined in a precise manner, and its broad usage reveals that it still means different things to different actors. First, the term is employed when alluding to local integration in the country of first asylum. But there is also a second, and less straightforward understanding according to which the term merges the ideas of extraterritorial procedures, processing centres and a certain degree of burden sharing in a single practice. “Reception in the region” is often used in a manner suggesting that a group of states should cooperate in erecting a processing centre in a region struck by forced displacement and unable to cater for the emerging protection needs by itself, to receive claims there, to evacuate *bona fide* claimants and to disperse them in an equitable manner among the cooperating states.

Protected Entry Procedures could be developed to mean all these things too, but their bottom line is much less ambitious. They make sense already when operated by one state alone, using existing administrative outposts (such as its embassies), and drawing on existing administrative structures (such as its visa processing system and its asylum procedures). Compared to the grand scheme of reception in the region, it is a *lean solution*, which benefits from international cooperation, but does not depend on it to the same degree.

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<sup>14</sup> Susan F. Martin, *Global Migration Trends and Asylum*, UNHCR Working Paper No. 41, UNHCR Geneva, April 2001, p. 7, available at <<http://www.unhcr.ch/refworld/pubs/pubon.htm>>, accessed on 27 March 2002.



## 2 Processing Asylum Claims Outside the EU: Historical Precedents and Current Debates

The idea to reach out beyond state borders to offer protection to individuals is not new. States have practiced it regularly with regard to their nationals abroad, and developed an important normative body of international law dealing with that subject. The gamut of responses has stretched from straightforward protection of state citizens on foreign soil to complex rescue and evacuation actions. In a distinct line of development, we can follow how states increasingly attempt to protect non-nationals, culminating with multiple incidents of enforcement action to avert massive violations of human rights directed against non-nationals. The subject matter of this study is but one single facet in the genealogy of protective ambitions beyond the borders of states. However, it is a focal one. It may very well be that the prism of Protected Entry Procedures allows us to capture the idea behind asylum in a new manner, and to develop different designs for its implementation.

### 2.1 *Protection and Evacuation by Embassies during the Holocaust*

In a number of cases, the extermination of the European Jewry during the Second World War as well as Nazi persecution of political opponents brought about significant counterstrategies by foreign diplomats and embassy staff. Best known is perhaps the example of Swedish diplomat Raoul Wallenberg, who served at the Budapest legation in the critical end phase of the German occupation of Hungary. In collaboration with staff at the embassy and the Swedish foreign ministry, and with the support of the Swedish government, he saved thousands of Hungarian Jews from falling victim to persecution by German occupants and members of the Hungarian Arrow Cross Movement. Recent research has mapped the interaction between actors and structure behind this historical endeavour, launching the concept of “bureaucratic resistance” to describe the role of protectors assumed by civil servants.<sup>15</sup>

Wallenberg and his colleagues issued documents which shielded their holders – at least temporarily – from harm by persecutors. Their protective power rested on the implication that the carrier was a presumptive Swedish citizen on her way to Sweden.<sup>16</sup> As actual emigration to Sweden was impossible for Hungarian Jews in 1944 due to the effects of war and occupation in Central Europe, the willingness of Sweden to deliver on its promise of presumptive citizenship was never fully tested in reality. This does, however, in no way detract from its value. At the very least, the Swedish authorities endorsed the use of these novel instruments *although* parts of the domestic debate in Sweden was inimically disposed towards refugees, and an actual immigration of Hungarian Jews in the thousands might have resulted in a refuelling of anti-Semitic sentiment in Sweden. Hence, the diplomats and civil servants involved – including the Foreign Minister – indeed took professional risks when assisting those who sought the protection of the Budapest Embassy. In May 1944, the Hungarian government was considering whether it should allow all “foreign Jews” to be repatriated to the countries claiming them, which raised the question of the actual value of presumptive

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<sup>15</sup> Paul A. Levine, *From Indifference to Activism. Swedish Diplomacy and the Holocaust; 1938-1944*, Acta Universitatis Uppsaliensis, Uppsala 1996.

<sup>16</sup> “The passport stated that the holder was to go to Sweden within the framework of repatriation authorized by the Swedish Foreign Office, and until departure, the carrier and his property were under the protection of the Swedish legation.” H. Rosenfeld, *Raoul Wallenberg*, Holmes & Meier, New York 1995, p. 34.

citizenship. The Swedish Foreign Office was asked by the legation whether it was prepared to accept “Swedish Jews... and also other people with a close connection to Sweden?”<sup>17</sup> It gave an unambiguous positive response.<sup>18</sup>

Did Sweden issue protective documents to anybody asking for them? Most certainly, such a liberal attitude would have quickly depleted respect for the documents. Therefore, the Swedish legation operated a procedure for processing claims, which was based on Wallenberg’s written instructions to the decision-makers. In September 1944, affirmative decisions were limited to applicants proving family relations, business connections or membership in the cultural and administrative elite, on condition that the latter provided “something outstanding for Sweden”.<sup>19</sup> Thus, the beneficiaries were defined in a detailed manner, inspired by both communitarian and utilitarian ideas. It is reported that until 15 October 1944, 8.000 applicants were dealt with under the procedure, and, out of those, “more than 3.500 applicants” received a protective document.<sup>20</sup>

The Swiss legation in Budapest took upon itself a critical role in a similar arrangement. First, Switzerland took over the interests of El Salvador, and, after lengthy negotiations with the Hungarian government, was allowed to grant documents giving its holder the status of “citizen of El Salvador”.<sup>21</sup> Second, in its role as representative of British interests, the Swiss legation had assumed the role of issuing certificates to those Jews who had been granted entry into Palestine. While actual emigration again was blocked by the German occupation, the Swiss consul amplified the protective effect of the certificates by issuing legitimations to its holders, which stipulated that its bearer was under the protection of the Swiss legation until such time that the journey to Palestine could begin.<sup>22</sup> Again, these efforts must be appreciated against the backdrop of Swiss refugee policy before during the war, which produces an image full of contradictions and incoherence.<sup>23</sup>

Similar protective techniques were used by other diplomatic representations in Hungary.<sup>24</sup> The estimated numbers of persons saved through these efforts are considerable, one quote for the Swedish rescue activities in 1944 being some fifty thousand persons.<sup>25</sup> Levine’s detailed study

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<sup>17</sup> Letter by the Budapest legation to the Swedish Foreign Office, quoted by Levine, *supra* note 15, p. 270, note 96.

<sup>18</sup> Levine, *supra* note 15, p. 270, text accompanying note 97.

<sup>19</sup> The instructions were remarkably detailed and also contained rules on evidence. They are reproduced in Jenő Lévai, *Raoul Wallenberg. His Remarkable Life, Heroic Battles and the Secret of his Mysterious Disappearance*, White Ant Occasional Publishing, Melbourne 1988, p. 81-2. However, not meeting the requirements did not necessarily mean being denied protection by the Swedish representation in Budapest. The representation sent applicant’s names to the Foreign Ministry in Stockholm, which returned them split up in two categories, one featuring persons with stronger links to Sweden, the other those with weaker links. Apparently, no names were struck out from the list, and listing persons with “weaker links” did not amount to an instruction to the embassy staff not to deal with those cases. Personal interview with Paul Levine, 3 September 2002.

<sup>20</sup> Lévai, *supra*, at p. 83.

<sup>21</sup> *Supra* note 16, pp. 33-4.

<sup>22</sup> *Ibid.*

<sup>23</sup> In this context, one should recall that the Swiss government had struck a deal with Germany in 1938 to the effect that the passports of German Jews be stamped with a ‘J’, making it possible for Swiss border police to turn back would-be Jewish refugees, while maintaining visa-free travel for non-Jewish Germans. For an overview with further references, see Gregor Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, The Hague 2000 [hereinafter Noll 2000], pp. 2-4.

<sup>24</sup> Rosenfeld, *supra* note 16, p. 37, naming efforts by the Portuguese *chargé d'affaires* Carlos de Lix-Texeira Branquinho and by Spanish *chargé d'affaires* Miguel San-Briz.

<sup>25</sup> Rosenfeld, *supra* note 16, p. 37.

refrains from estimates, and points to the fact that quantification would require a research effort in its own right.<sup>26</sup>

The Swedish and Swiss approaches exploited the fact that German and Hungarian authorities still respected the minimum protective standards it owed to aliens of neutral states being diplomatically represented in Hungary. The ‘protective passports’ and similar documents played a subtle game with this lacuna in the system of annihilation, stretching the concept of citizenship to its very extremes and beyond. These practices indicate once more that state protection is not a simple binary affair, where citizens are in, and aliens are out, but that shades, nuances and moving margins are crucial to the history of the concept – even outside the territory of the protecting state.

However, protection needed not go as far as extending a presumptive citizenship through a protective passport. There are other examples, where the use of visas was sufficient to facilitate emigration. Japanese diplomat Chiune Sugihara issued transit visas to Lithuanian Jews threatened by persecution during the German occupation of the Baltics in 1940. Such visas were a precondition for its holders being able to cross the Lithuanian-Soviet border.<sup>27</sup> In the same year, Portuguese diplomat Aristides de Sousa Mendes issued Portuguese entry or transit visas to Jews and other persecuted persons fleeing the threats of seizure after the French defeat. de Sousa Mendes acted contrary to express instructions by the Salazar government, who ordered his immediate recall and dispatched two emissaries to escort him home. His rescue efforts led to his dismissal. In 1988, he was fully rehabilitated by the Portuguese National Assembly.<sup>28</sup> These examples add another aspect to the mosaic of paperwork protection, giving the term “bureaucratic resistance” a sharper edge. De Sousa Mendes not only resisted the persecutors’ project of extermination, he also resisted the insulative policies of his own government.

What is to be learned from these rescue attempts? First, there is an interesting correlation between non-access policies stopping flight attempts and diplomatic activities. When diplomats tried to help, regular emigration had long become impossible. Before the war, and in the wake of the 1938 pogroms in Germany, all important destination countries were limiting their reception of refugees or even sealing off their borders. The outbreak of the war meant additional hurdles to the movement of persons, and, at the same time, the proper extermination of Jews began. In other words, the desperate rescue attempts of diplomats came at a stage where access to protective territories was blocked long ago, and refugee policies had turned into anti-immigration policies. The memory of this failure should inform policy choices even today, where access to protective territories is regularly blocked by would-be states of asylum.

Second, the examples show how many lives can be saved through the powers diplomatic representations actually enjoy even in the most desperate of situations. All of the named examples put the role of the decision-maker at the diplomatic representation in the limelight. The Swedish examples especially illustrates that this does not mean complete discretion or arbitrariness. On the contrary: rescue efforts imposed a selection of beneficiaries upon diplomats, and, to that effect, a set of rules and procedures was developed in a very tense and difficult work situation. This heritage would be well administered, if future policies would transform the experience of courageous diplomats into an everyday practice – as rule-governed, predictable and transparent as possible. On

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<sup>26</sup> Levine, *supra* note 15, p. 277, note 127.

<sup>27</sup> Dr. David Eagleman, *The Sugihara Project*, available at <<http://www.eagleman.com/sugihara/sugimain.html>>, accessed on 31 August 2001.

<sup>28</sup> Entry on Aristides de Sousa Mendes, in *Encyclopaedia of the Holocaust*, Macmillan, New York 1990.

the other hand, reliance on rules should not obscure the fact that the single decision-maker remains central to the process of protection and rescue. Any future scheme for Protected Entry Procedures should take this experience into account, and entrust sufficiently trained and experienced persons with this crucial role.

Finally, it might be relevant to recall how much contemporary constructions of European identity owe to persons as Raoul Wallenberg and Aristides de Sousa Mendes. But merely celebrating them as hero personalities ultimately risks diverting attention from the ethos that Europe now claims as its own. Against this background, ways should be sought to transform the significant heritage of protective passports and transit visas into a permanent element of the international system for transnational human rights protection.

## **2.2 *Post-War Practices and Debates***

### **2.2.1 The 1986 Danish Initiative before the UN**

A relevant starting point for unravelling the debate on reception in the region is a draft resolution proposed by Denmark in the UN General Assembly in 1986. In the draft, the burden falling upon the region of origin was appreciated. The need to compensate those countries was emphasized, *inter alia* through the establishment of regional United Nations processing centres administering resettlement.<sup>29</sup> The Danish proposal favoured the idea of exclusive processing in the region, stating that “asylum seekers who arrive irregularly in third countries outside their region should in principle be returned to the UN processing center of their home region to have their case examined.” Obviously, the favoured solution presupposed agreement on a number of difficult issues, such as burden sharing, the stipulation of norms and redistribution of legal responsibility for processing centres under UN auspices, and the logistical difficulties to be expected. The draft failed to attract necessary support from other states, and never led to the adoption of a resolution.

### **2.2.2 The Danish Visa Office in Zagreb**

The Bosnian refugee crisis during the early Nineties caused many potential destination states to introduce visa requirements for Bosnian nationals. Denmark merits closer attention in our context, as it introduced a compensation mechanism almost simultaneously with the introduction of visa requirements. Due to its focus on the individual applicant, it may be taken as a relevant example for the practice of Protected Entry Procedures.

While access to Danish territory was largely blocked for Bosnians after the introduction of visa requirements, certain groups determined by narrow criteria could be granted a residence permit by a Danish representation in the capital of neighbouring Croatia. This representation was operational from 1 September 1993 until a Danish embassy was set up 1996 in Sarajevo.

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<sup>29</sup> UN General Assembly, International procedures for the protection of refugees: draft resolution / Denmark, 12 November 1986, U.N. Doc. A/C.3/41/L.51.

The background and objectives of the Danish mechanism were as follows. A special law on Temporary Protection entered into force on 1 December 1992 in Denmark. Para. 1 provided for the following "invitation order":

Subject to agreement with the United Nations High Commissioner for Refugees (UNHCR) or a similar international organisation, the Government may invite a number of particularly distressed persons from former Yugoslavia to stay in this country for the purpose of receiving medical treatment or other help that cannot be provided in the area where such persons are staying.<sup>30</sup>

Parallel to this preferential mechanism for a vulnerable group, protection seekers who already had reached Danish territory could be accorded a temporary residence permit.

In the beginning of 1993, the Danish Aliens Directorate and the Police Board examined the migration moves of a number of 578 spontaneously arriving protection seekers from Bosnia-Herzegovina. The study indicated that the majority had been staying in a third country for longer periods previous to their entrance into Denmark. The average stay outside Bosnian territory lasted 7-8 months. Of those cases whose stay in a third country had lasted more than 7 days, 25 % had been staying in Serbia, 19 % in Croatia, 17 % in Montenegro, 14 % in Macedonia, 17 % in Turkey, 3 % in Hungary and 2 % in Poland. Accordingly, 75 % of all refugees had been fleeing to another part of the former Yugoslavia first. In the ensuing political debate, it was argued that the majority of spontaneously arriving refugees was not anymore in need of protection in Denmark. Accordingly, a new mechanism capable of supporting the most needy categories had to be developed.

This mechanism came into place during the summer of 1993. On 26 June 1993, visa requirements were imposed for citizens of Bosnia-Herzegovina, Serbia-Montenegro and Macedonia. As a consequence, the number of persons entering Denmark dropped from an average of 1.350 per month for the period June 1992 to June 1993 to 366 per month for the period July 1993 to September 1994.<sup>31</sup> Although the Danish Home Office claimed that "the objective of the introduction of visa requirements was not to receive less refugees than before"<sup>32</sup>, the actual effect was precisely a decline in numbers.

By way of compensation, the invitation order was given a broader scope. Its core was the newly introduced art. 15a of the aforementioned law:

(1) A person from former Yugoslavia who is in former Yugoslavia or its close environment can be granted a residence permit pursuant to this Act, in, on the background of information provided in co-operation with the United Nations High Commissioner for Refugees (UNHCR), it must be assumed that owing to acts of war or similar disturbances the person in question has an immediate need for protection.<sup>33</sup>

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<sup>30</sup> Aliens Consolidated Act No. 563 of 30 June 1995 of the Danish Ministry of the Interior, Indenrigsministeriet, Udlaendigeafdel., j.nr. 1994-3701-647.

<sup>31</sup> Source: Information provided by the Danish Refugee Council.

<sup>32</sup> Indenrigsministeriet, *Redegørelse til Folketinget vedrørende ordningen om midlertidig opholdstilladelse til personer fra det tidligere Jugoslavien*, 27 October 1993, p. 21. As the objective was to protect a group of "vulnerable persons" rather than anyone in need of protection (see text accompanying note 30), the decline could very well have been described as an objective, or, at the very least, as a foreseeable consequence of the objective.

<sup>33</sup> Ibid.

The consolidated act had entered into force on 30 June 1993, while the representation in Zagreb became operational on 6 September 1993. In part, the eligibility procedure had been moved to the region of origin, as the representation's staff was competent to decide on residence permits for six months (which could be prolonged in Denmark). The individual protection seeker filed his application with the representation, which in turn presented the case to UNHCR for comments. If UNHCR did not affirm an immediate protection need, the application would be turned down. Unlike the procedures on Danish territory, no appeal could be lodged against the decision of the representation. As of August 1995, 17.600 persons were staying in Denmark under a temporary residence permit. In 1993 and 1994, a total of 6.043 persons were granted such a permit through the Zagreb representation.<sup>34</sup>

While the Danish representation was located in the region of origin, it was certainly not located in the country of origin. Bosnian citizens who wanted to apply for such a visa still had to cross the border to Croatia. Croatia was unwilling to let refugees access its territory who did not produce a document of a third state guaranteeing admittance. While Bosnians inside and outside Bosnia profited from the old order without visa requirements, those profiting from the new order were mainly Bosnians already on Croatian territory. It is open to dispute which threshold is higher - the legal entry into an extraregional country such as Denmark or the illegal entry into neighbouring Croatia. Apart from its extraterritoriality, the unique feature of the Danish mechanism was that the protection seeker could apply individually without any quota limitation being set. This is to be compared with the Swedish mechanism, which contained a quota ceiling.

Its focus on the individual and the numerical openness of the Danish practice suggest that it be categorised as an example of a Protected Entry Procedure. However, one should be aware of the deviational traits as well. Denmark did not introduce a general protection system based on representations in crisis regions, but focused on one single group of potential beneficiaries - namely Bosnians in Croatia. Once its mission was regarded as completed, the system was dismantled, and not used in other contexts.

### **2.2.3 The Discussion on Reception in the Region during the 1990s**

In 1993, the Netherlands put the topic of reception in the region of origin on the 1994 agenda of the IGC.<sup>35</sup> This initiative should be seen against the backdrop of a 1993 speech made by the former Dutch State Secretary for Justice, Mr. Aad Kosto, where he outlined the possibility of reception in the region of origin, and proposed discussing a system where “all asylum seekers would be sent back to reception centers in their own region of origin” for the processing of their claims.<sup>36</sup> He underlined that “both the reception country and the administrative bodies concerned should be given sufficient resources to allow this system to work properly”.<sup>37</sup>

The IGC secretariat disseminated its working paper on reception in the region of origin in September 1994, collected the input of participating states and subsequently compiled a follow up paper to be published in August 1995. In both documents, a considerable scepticism towards the

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<sup>34</sup> Supra note 31.

<sup>35</sup> Secretariat of the IGC, *Working Paper on Reception in the Region of Origin*, Geneva 1994 [hereinafter IGC 1994].

<sup>36</sup> Speech by Dutch State Secretary of Justice Aad Kosto at the Fifth Conference of European Ministers Responsible for Migration Affairs, Athens, 18-19 November 1993 [reprinted in IGC 1994, p. 52].

<sup>37</sup> Ibid.

idea of exclusive regional processing is voiced. Extrapolating the intentions behind it, the Secretariat went further and discussed temporary protection in the region, in particular through internationally protected areas. Some elements of the Secretariat's analysis are discussed further in chapter 4.1.1 below.

The Kosovo refugee crisis is often cited in discussion of regional processing. While it can be doubted whether this qualification is entirely appropriate, the Kosovo case is first and foremost characterized by its military component. It is not in every refugee crisis that NATO's credibility is at stake, which gave the alliance and its Members good reasons to address protection issues.<sup>38</sup> The viability of future processing systems has to be independent from such preconditions, and it is doubtful whether the Kosovo experience at large can be copied over to permanently operating externalised processing systems. Chapter 3.2.5 addresses certain legal aspects epitomised by the Kosovo crisis.

## **2.2.4 Recent Developments within the EU**

The Conclusions by the 1999 European Council in Tampere are generally regarded as catalysts in the development of European asylum and migration policies. They contain a clear reference to the issue of access to territory, thus sending out a strong signal on the balance between border control and refugee protection. Conclusion 3 addresses the issue, and states that for those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes. These common policies must be based on principles which are both clear to EU citizens and also offer guarantees to those who seek protection in the EU or access to it.<sup>39</sup>

The debate on externalised processing was given a new impulse by the speech of former UK Home Secretary Jack Straw at the 2000 Lisbon Conference on Asylum.<sup>40</sup> Straw underscored the importance and potential of reception in the region, and pointed to the recent Kosovo experience as an example of how to cope with "a particularly acute situation".<sup>41</sup> However, many refugee advocates perceived his intervention as a further step in Western European burden-shirking. A closer look at its content, and the elaborations which Straw made on a later occasion,<sup>42</sup> indicate that the Home Secretary's suggestions were far more differentiated than many earlier proposals.

Straw's 2001 suggestions feature three elements: assisting countries in the region of origin, improving access to asylum for genuine refugees and dissuading those who are not refugees from

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<sup>38</sup> In addition to the military component and the comport of the Former Yugoslav Republic of Macedonia, the handling of the Kosovo crisis was also influenced by the lessons learned in Bosnia and the then ongoing discussion on Temporary Protection.

<sup>39</sup> European Council, Presidency Conclusions, Tampere European Council. 15/16 October 1999 [hereinafter Tampere Conclusions], Conclusion 3.

<sup>40</sup> Speech by UK Home Secretary Jack Straw at the European Conference on Asylum, *Towards a Common Asylum Procedure*, Lisbon 16 June 2000, available at <<http://www.ind.homeoffice.gov.uk/default.asp?PageId=92>> (accessed on 17 September 2002).

<sup>41</sup> Ibid.

<sup>42</sup> Jack Straw, *An Effective Protection Regime for the 21 Century*, Speech to the IPPR, 6 February 2001, available at <[http://www.guardian.co.uk/Refugees\\_in\\_Britain/Story/0,2763,434341,00.html](http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763,434341,00.html)> (accessed 15 September 2002).

benefiting from the 1951 Refugee Convention. The second element merits a full quote: “[We] must make it easier for genuine refugees to access the protection regimes of Europe and other Western States, for example by making their journeys less hazardous.”<sup>43</sup> In developing this element, Straw focussed on resettlement schemes, and expressed his support for the endeavours of the European Commission in that area. As a whole, Straw conceived regional processing as complementary to ordinary territorial processing. However, his interventions indicated a strong concern with numbers: “Any moves towards the implementation of ideas for processing of claims overseas or substantial resettlement programmes will have to be in parallel with driving down the numbers of unfounded applications.”<sup>44</sup> This shall not be understood to imply that an externalised processing scheme must bring down the number of spontaneous arrivals to be seen as successful. Rather, Straw sought to make clear that externalised processing must be part of a comprehensive package, which should also contain measures countering unfounded applications.

An important contribution to the debate on forms and content of a Common European Asylum System was offered by the European Commission in November 2000. It adopted a Communication, which intended to signpost the way “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”<sup>45</sup>. Under the heading “Access to the territory”, the Commission suggests that processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme may be ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or smuggling gangs or having to wait years for recognition of their status. This option, as the Commission sees it, must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals.<sup>46</sup> The Commission subsequently launched feasibility studies on the matters of asylum requests made outside the European Union and resettlement schemes at EU level.

The Communication triggered a number of responses, and not all of them were supportive of the Commission’s strategy. The Committee of the Regions “doubted the relevance of options such as resettlement.”<sup>47</sup> A strong signal of concern and qualified support was sent out by UNHCR. The Office pointed out that “the Tampere European Council’s commitment to the absolute respect of the right to seek asylum is in jeopardy if no adequate safeguards are put in place to mitigate the negative effects of migration control measures on people who need protection and are seeking access to safety in the European Union. The question of access to territory is indeed key to any asylum process; [...]”<sup>48</sup> The Office encouraged the further exploration of possibilities to facilitate the visa procedure in specific situations, including the delivery of “humanitarian visa [sic] to individuals who are at risk in their country of origin and in need of international protection”.<sup>49</sup> With regard to processing in the region, the Office insisted that this should be seen as a complement to, and not a replacement of territorial processing. UNHCR’s comments are limited to regional

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<sup>43</sup> Supra, at para. 30.

<sup>44</sup> Supra, at para. 49.

<sup>45</sup> European Commission, Communication of 22 November 2000, *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM (2000) 755.

<sup>46</sup> Supra, at Chapter 2.3.2.

<sup>47</sup> European Commission, *Communication from the Commission to the Council and the European Parliament. On the common asylum policy, introducing an open coordination method*, Brussels, 28.11.2001, COM (2001) 710 final, p. 27.

<sup>48</sup> UNHCR, *Towards a Common Asylum Procedure and Uniform Status, Valid Throughout the European Union, For Persons Granted Asylum*, Geneva, November 2001, para. 8.

<sup>49</sup> Supra, at para. 10.



processing as part of either resettlement or assistance to regional host countries in conducting determination procedures.<sup>50</sup>

In its 2001 Communication on the common asylum policy, the Commission again referred to the externalised processing of asylum claims in the second of five guidelines:

***Second guideline: Developing an efficient asylum system that offers protection to those who need it, according to a full and inclusive application of the Geneva Convention, in particular:***

...

j. by evaluating the merits of resettlement programmes, the possibility of processing asylum applications outside the Member State, the use of cessation and exclusion clauses and the system and arrangements for transferring protection.<sup>51</sup>

The guidelines are intended to direct the development of policy within the so-called open coordination method, structuring progress temporally and institutionally by a process borrowed from the field of social policy development.

In its 2001 Communication on a Common Policy on Illegal Immigration, the Commission underscores again that “the fight against illegal immigration has to be conducted sensitively and in a balanced way”<sup>52</sup> and goes on to state that

Member States should, therefore, explore possibilities of offering rapid access to protection so that refugees do not need to resort to illegal immigration or people smugglers. This could include greater use of Member States’ discretion in allowing more asylum applications to be made from abroad or the processing of a request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by resettlement scheme. [sic] Such approaches could ensure sufficient refugee protection within and compatible with a system of efficient countermeasures against irregular migratory flows.<sup>53</sup>

When reacting to the Commission’s Communication on a Common Policy on Illegal Immigration, UNHCR took the opportunity to develop its position on visa policies further. The Office suggested inter alia the introduction of the possibility of processing asylum applications in countries of origin in cases “where the feared harm emanates from non-State agents and there is no State complicity, but the State is unable to provide the necessary protection in any part of the country.”<sup>54</sup>

Recently, the UN High Commissioner for Refugees recommended that embassy procedures in both countries of origin and in neighbouring countries be considered when Member States seek to address mixed flows, comprising both persons in need of protection and persons moving for other reasons:

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<sup>50</sup> Supra, at para. 11-13.

<sup>51</sup> Supra note 47, p. 18

<sup>52</sup> European Commission, *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, Brussels 15. November 2001, COM (2001) 672 final, p. 8.

<sup>53</sup> Ibid.

<sup>54</sup> UNHCR, *Communication from the European Commission on a Common Policy on Illegal Immigration COM(2001) 672 final. UNHCR’s Observations*, Geneva, July 2002, para. 19.

I would like to encourage you to explore new protection mechanisms nearer to the origin of refugee movements. One proposal is that EU Member States should offer opportunities for those few individuals who have a need for international protection to make asylum visa applications at embassies in their countries or regions of origin.<sup>55</sup>

It remains to be seen to what extent the High Commissioner's endorsement of Protected Entry Procedures as a useful approach will actually inform legislative developments.

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<sup>55</sup> Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council, Copenhagen, 13 September 2002.

### 3 The Legal Dimensions of Protected Entry Procedures

#### 3.1 *The Relevance of International, Supranational and Domestic Law*

Are practices of Protected Entry Procedures a mere expression of the political benevolence of states vis-à-vis protection seekers, or do they flow from legal obligations of potential host states? In quest for an answer, obligations can be sought in international law, in supranational law (i.e. EC law) and in domestic law. In the area of international law, it is especially relevant to scrutinise protective norms of refugee law and human rights law.

With regard to the law of the European Union (EU and EC law respectively), it is relevant to ask to what extent international obligations have been received in it, and are thus opposable to Member States (and, eventually, institutions). But it is perhaps more relevant to inquire into the potential of Protected Entry Procedures to be integrated into the existing EU *acquis* in the area of asylum and migration.

At the domestic level, constitutional provisions, aliens legislation and administrative law are relevant objects of study.

#### 3.2 *The Applicability of Protective Norms of International Law*

In this section, we shall first explore whether a legally binding right to seek asylum exists, and, if so, whether it has any implications on the practice of Protected Entry Procedures. Second, we shall scrutinise the relevance of explicit prohibitions of *refoulement* in our context, to then move on to take a closer look at norms of human rights law, which may be construed to apply extraterritorially. In the latter category, we shall in particular focus on the ECHR<sup>56</sup> and the CRC<sup>57</sup>.

##### 3.2.1 A 'Right to Seek Asylum'?

At first sight, two formally non-binding instruments appear to be of the utmost relevance for the questions asked in this chapter, namely the 1948 Universal Declaration of Human Rights<sup>58</sup> (henceforth UDHR) and the 2000 EU Charter of Fundamental Rights of the European Union<sup>59</sup> (henceforth the EU Charter).

Article 14 UDHR reads as follows:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

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<sup>56</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953.

<sup>57</sup> Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

<sup>58</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>59</sup> EU Charter of Fundamental Rights of the European Union, OJ C 364 of 18.12.2000, p.1.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

There is no identically or similarly worded successor to Article 14 UDHR in treaty law with a universal scope.<sup>60</sup> The prohibitions of *refoulement* to be presented below are all less sweepingly worded, and none makes allusion to the right to *seek and to enjoy in other countries asylum from persecution*. If this provision turned out to be binding, it might, at best, provide refugee lawyers with raw material to argue for a broader scope of protection than that available under the prohibitions of *refoulement* dealt with below.<sup>61</sup> This would probably not only be of importance for protection obligations owed to persons already on the territory of a potential host state, but also for obligations to allow access to it. Article 14 UDHR could certainly play a role in countering the indiscriminate exclusion effectuated by pre-entry measures such as visa requirements and carrier sanctions, and thus provide a basis for arguing that states are obliged to practice some form of Protected Entry Procedure to counterbalance pre-entry migration control. Given the singularity of the norm enshrined in Article 14 UDHR on the universal level and its potential for the universalist cause, it is reasonable to inquire into its character as binding international law.<sup>62</sup>

Has Article 14 UDHR turned into customary international law? Elsewhere, we have been compelled to conclude that the content of Article 14 UDHR is not legally binding upon states.<sup>63</sup> On the understanding that Article 14 UDHR is something else than just a positive formulation of Article 33 of the 1951 Refugee Convention [henceforth the Refugee Convention] and exceeds the normative content of the latter, there is no basis for a different conclusion. Neither a homogeneous state practice nor a corresponding *opinio juris* can be made out to support a right to access territory in order to seek asylum.

In this context, it should also be addressed whether or not the EU Charter adduces any element of obligation when it comes to Protected Entry Procedures. Article 18 of the EU Charter reads as follows:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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<sup>60</sup> On a regional level, a right similar to, but not identical with, Art. 14 UDHR can be found in Art. 22.7 of the American Convention on Human Rights ('Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.') and Art. 12.3 of the African Charter on Human and Peoples' Rights ('Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.').

<sup>61</sup> However, such universalist arguments could be met with powerful particularist ones, claiming that the UDHR laid down a state obligation to respect the grant of asylum by other states. See, e.g., Å. Holmbäck, *Förenta nationerna och asylrätten*, in 1949 års utlänningskommitté, SOU 1951:42. *Betänkande med förslag till Utlänningslag m.m.*, 1951, Stockholm, p. 292, arguing on the basis of the *travaux*. There would be no point in exploring the value of these arguments within the framework of our inquiry, if the UDHR turned out to be non-binding. Hence, the question of bindingness must be dealt with first.

<sup>62</sup> For a detailed overview of the positions taken by different doctrinal writers, see P.R. Ghandhi, *The Universal Declaration of Human Rights at Fifty Years*, 41 German Yearbook of International Law 206 (1999) pp. 234–50. Ghandhi himself holds that certain provisions of the UDHR have acquired binding force as customary law.

<sup>63</sup> Noll 2000, *supra* note 23, pp. 357–362.

The EU Charter is, at least for the time being, not a binding instrument. But even if it were binding, the formulation of Article 19 raises a number of intricate questions. To begin with, there is no clear-cut definition on the exact implications of a ‘right to asylum’ in the EU Charter or in international law. It should be recalled that the term ‘asylum’ has no operative significance in the Refugee Convention. It is at the very least open to debate whether or not a right to asylum also implies a dimension of access to territory, overriding the personal sovereignty of states. In line with their mandate, the drafters of the EU Charter cannot be assumed to have created new protection obligations, but rather to translate pre-existing ones into the context of the EU discourse on fundamental rights.<sup>64</sup> Second, proponents of a restrictive reading might argue that the express reference to the Refugee Convention and its 1967 Protocol implies that Protected Entry Procedures are clearly outside the scope of the EU Charter. As we will show below, the latter instruments do not encompass a right to territorial access in the absence of territorial contact.

Hence, neither Article 14 UDHR nor Article 19 of the EU Charter entail any legal obligations to provide for a Protected Entry Procedure.

### 3.2.2 Explicit Prohibitions of *Refoulement*

At face value, prohibitions of *refoulement* may be merely taken as a state obligation not to remove a certain group of persons present on its territory to the country of persecution. However, the question is whether such prohibitions shall be interpreted as implying an additional obligation. The question is whether states are bound to admit persons applying for protection from outside state territory, without having contact with it. A right to transgress an administrative border (namely to be admitted to the state community, although in a minimalist sense) is one thing. A right to transgress a physical border is something quite different. If the latter right were a legal corollary of the prohibition of *refoulement*, Article 33 of the Refugee Convention, Article 3 CAT<sup>65</sup> and Article 45 of the 1949 Fourth Geneva Convention<sup>66</sup> (henceforth FC) would contain an implicit right to entry for their beneficiaries, authorising them to physically transgress a state border.

To be sure, it is of importance *where* and *by what means* a state exercises control of its physical borders. Geographical location as well as the degree of control exercised by a given host state are important parameters. Control at a border checkpoint is different from concerted interdiction within territorial waters or at the high seas, which again is different from the rejection of protection claims filed with an embassy of the potential host state. Today, there appears to be ample support for the conclusion that Article 33 (1) of the Refugee Convention is applicable to rejection at the frontier of a potential host state.<sup>67</sup> To what extent the reach of the said norm also covers interdiction on the

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<sup>64</sup> The Drafters of the Charter were given a mandate to consolidate the existing fundamental rights in EU law, not to amend them. See Annex IV of the Conclusions of the Presidency of the Cologne European Council, 3-4 June 1999, European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union.

<sup>65</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>66</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

<sup>67</sup> For a recent discussion, see Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, UNHCR, 20 June 2001, paras 76-86. For a confrontation of inclusionary with exclusionary readings with further references, see Noll 2000, *supra* note 23, pp. 423-432. *But see* N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, Institute for Jewish Affairs, New York 1953, holding on p. 163 that art. 33 does not concern refugees who seek entrance into the territory of a Contracting State.

high seas is contestable, although persuasive arguments have been offered in favour of such interdiction being subject to article 33 of the Refugee Convention.<sup>68</sup> Complicating matters further, some states have placed important elements of their migration control systems in other states (by seconding liaison officers abroad, who at times assist in document control of embarking passengers destined to the seconding state), provoking the criticism of doctrinal writers.<sup>69</sup> With regard to such extraterritorialised forms of immigration control, Lauterpacht and Bethlehem affirm the responsibility of states exercising them:

In principle, subject to the particular facts in issue, the prohibition on *refoulement* will therefore apply to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State.<sup>70</sup>

However, claims at embassies are different from all of the described scenarios (rejection at the frontier, interdiction on the high seas and extraterritorial forms of immigration control). To start with, the applicability of prohibitions on *refoulement* is affected by the fact that embassies and other diplomatic representation are situated outside the territory of the host state (unlike border checkpoints). When interdicting boats on the high seas, the absence of competing authority makes it comparatively easy for an interdicting state to establish control over interdicted boats and their passengers. The situation at embassies is different. First, embassies are placed on the territory of a third state (the ‘receiving state’, in the language of pertinent international norms of diplomatic relations). Second, the degree of control exercised by the sending state is narrowly circumscribed by international treaties and custom, with the principal – or primary – authority being exercised by the receiving state. Third, and perhaps most importantly, the causal chain linking denial of an entry visa and harm relevant under the 1951 Refugee Convention or other instruments is not as easy to establish as in all other situations addressed above, as state control over all factors determining the success of a migration attempt is less dense. As a consequence, the issue of attributability is less clear.

It is true that neither article 33 of the Refugee Convention nor other norms of the Convention contain an explicit territorial limitation.<sup>71</sup> However, certain limitations flow from the wording of

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<sup>68</sup> In the U.S. Supreme Court’s decision in *Sale v. Haitian Center Council*, (1993) 113 S.Ct. 2549, a restrictive reading was endorsed by the majority of the Court (mainly drawing on a contextual reading supported by art. 33 (2) of the Refugee Convention and the Swiss and Dutch delegates’ statements in the *travaux* of the 1951 Refugee Convention), while a dissident concluded that the interception of Haitian refugees by the U.S. Coast Guard indeed constituted ‘return’ in the meaning of art. 33 (1) of the Refugee Convention, basing himself on the wording of art. 33 of the Refugee Convention and the rules of interpretation provided by the VTC. The dissident’s reading must be supported, international law compels states to base their interpretation of art. 33 of the Refugee Convention on the prescriptions of art. 31-33 of the VTC.

<sup>69</sup> See e.g. James Hathaway and John A. Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press, Toronto 1995, pp. 5-17, addressing inter alia the issue whether *non-entrée* policies may constitute *refoulement*. Perhaps most relevant for the present inquiry is that the authors assert that visa requirements and carries sanctions “may not violate Article 33 directly”, while they “increase the risk of *refoulement*, and effectively undermine the most fundamental purposes of the Convention”. But see Lauterpacht and Bethlehem’s qualified statement that obligations under article 33 of the Refugee Convention may indeed be engaged in such situations, text accompanying note 70 below.

<sup>70</sup> Lauterpacht and Bethlehem, *supra* note 67, at para. 61.

<sup>71</sup> At best, art. I (3) of the 1967 Protocol provides inter alia that the Protocol “shall be applied by States Parties hereto without any geographic limitation”. Lauterpacht and Bethlehem point out that this clause could be taken to support extraterritorial applicability of article 33 of the Refugee Convention, they also recognise that it was “evidently directed

article 33 (1) of the Refugee Convention itself, which prohibits Contracting Parties to “expel or return (*refouler*) a refugee in any manner whatsoever to the frontier of territories” where certain specified threats await her. Persons seeking protection at foreign embassies in their home countries or country of habitual residence are not (yet) refugees, as the criterion of alienage contained in the refugee definition is not satisfied. Thus, they cannot enjoy any entitlements under article 33 of the Refugee Convention.

Persons seeking protection at embassies in third states do fulfil this criterion, and the question imposes itself whether the denial of an entry visa could be described as an act of expulsion, return or *refoulement*, without twisting the ordinary meaning of those terms. To support an extensive reading, it could be adduced that article 33 (1) of the Refugee Convention speaks of expulsion, return or *refoulement* to the frontiers of territories, where certain risks prevail (emphasis added). In the light of these words, it appears to be immaterial for the enjoyment of benefits under article 33 (1) of the Refugee Convention whether or not a person is located on state territory, as the emphasis is on the destination of the transfer movement, not its starting point.<sup>72</sup> Further support would flow from the terms “in any manner whatsoever”, implying that the drafters intent was to include a wide array of practices under the prohibition in article 33 (1) of the Refugee Convention. Those wishing to be bold could claim that clarity has been derived from the wording of the provision, thus making it superfluous to resort to its context and *telos*.<sup>73</sup> However, to the present authors, the degree of clarity appears to be insufficient at this stage, which is why resort to contextual and teleological arguments is necessary.

Two contextual arguments militate for a restrictive reading, though. First, article 33 (2) of the Refugee Convention has been adduced to support a restrictive reading by the Supreme Court’s majority in *Sale v. Haitian Center Council*:

Under the second paragraph of Article 33 an alien may not claim the benefit of the first paragraph if he poses a danger to the country in which he is located. If the first paragraph did apply on the high seas, no nation could invoke the second paragraph’s exception with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.<sup>74</sup>

We are not concerned with the applicability of article 33 of the Refugee Convention to interception on the high seas, but to denial of entry visas in embassy situations. The criticism mounted against the Supreme Courts decision notwithstanding<sup>75</sup>, the quoted argument can be soundly transposed to the present context. Article 33 (2) of the Refugee Convention is clearly part of the context of article

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towards the references to ‘events occurring in Europe’ in Article 1B(1) of the *1951 Convention*”. Lauterpacht and Bethlehem, *supra* note 67, para. 84.

<sup>72</sup> The authors are indebted to Ms. Courtney O’Connor for drawing their attention to this aspect.

<sup>73</sup> This would be in conformity with the method implicit in arts. 31-2 VTC. See M.K. Yasseen, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traits*, Recueil des Cours 151 [III] (1976), p. 28.

<sup>74</sup> *Sale v. Haitian Center Council*, *supra* note 68. But see Judge Blackmun’s dissent: “The tautological observation that only a refugee already in a country can pose a danger to the country ‘in which he is’ proves nothing.”

<sup>75</sup> See e.g. Hathaway and Dent, *supra* note 69.

33 (1) of the same convention, and thus admissible as interpretative data according to article 31 (1) VTC. It does not speak of the security of the country to which a refugee *is destined*, but rather of the security of a country where that refugee *is*. An extensive reading of article 33 (1) of the Refugee Convention would force us to assess the security dimension with regard to a third country (i.e. the country in which the embassy is placed) when considering whether a refugee can be denied the benefit of article 33 (1) of the Refugee Convention. It may very well be that a person threatens the security of that third country, or its community, while not threatening the security of the destination country from whose embassy she seeks protection. Given these logical contortions, it is hard to uphold that article 33 (1) of the Refugee Convention possesses an extraterritorial reach covering embassy situations.

Second, article 33 (1) of the Refugee Convention cannot be interpreted in isolation from the norms regulating the exercise of power among nation states in the international system. State sovereignty expresses itself in a state's personal and territorial jurisdiction. Complementing these delimitations, the law of state responsibility places great emphasis on the degree of control that a state *de facto* exercises over a certain conduct.<sup>76</sup> This conception of state sovereignty and responsibility possesses the quality of customary international law. As such, it informs context of article 33 (1) of the Refugee Convention. This flows from article 31 (3) (c) VTC, which relates to "rules applicable between the parties" of an instrument to be interpreted.

Let us assume that a certain state A denies an entry visa to a person X, who claims it at A's embassy in a state B. If state B does not intend to remove X from its territory, but merely exposes her to intolerable reception conditions, there is no question of expulsion, return or *refoulement*, and the responsibility of state A under article 33 (1) of the Refugee Convention cannot be engaged. Consider instead that state B is preparing the removal of X to "the frontiers of territories" where relevant risks await X. In that situation, X is both on the territory and under the jurisdiction of state B; which must be described as the primary agent of removal. This does not preclude that the actions or omissions of state A can contribute to removal or impede it, but, state A will under no circumstances be in control of X. Against this backdrop, it would be unconvincing to describe any action or omission of state B as expulsion, return or *refoulement*, as these terms imply a reference to that territory or those borders which state B controls by virtue of its sovereignty, namely its own. Conversely, it is by no means evident that state B is naturally tasked to control the territory or the border from which the said forms of removal take place, until exceptional circumstances can be shown to exist (e.g. state B being a "client state" of state A).<sup>77</sup> To the mind of the authors, the second contextual argument is stronger than the first one. Together with the ordinary meaning of the terms of article 33 (1) of the Refugee Convention, it produces clarity, and interpretation may end at that point.

It is clear, therefore, that article 33 (1) of the Refugee Convention does not allow for deducing a right to entry for protection seekers at diplomatic representations. In other words, a person demanding an entry visa at the embassy of a Contracting Party cannot invoke it. *Mutatis mutandis*, the second contextual argument also applies to article 3 CAT and article 45 FC. In embassy situations, one cannot speak of expulsion, return, *refoulement* or transfer "to the frontier of

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<sup>76</sup> See International Law Commission, *State Responsibility. Draft articles provisionally adopted by the Drafting Committee on Second reading*, 11 August 2000, A/CN.4/L.600 [hereinafter 2000 Draft Articles on State Responsibility], arts. 6 and 17.

<sup>77</sup> These would be aid and assistance rendered to a third state in committing an international wrongful act, its direction and control or its coercion. See Chapter IV of the 2000 Draft Articles on State Responsibility.



territories”<sup>78</sup> or “to another State”<sup>79</sup> or “to a country”<sup>80</sup> from which the specified threats originate. Accordingly, there is no obligation to provide for a Protected Entry Procedure inherent in these norms.

### 3.2.3 Jurisdictional Protection Obligations

Beyond our consideration of explicit prohibitions of *refoulement*, it may be asked whether norms of human rights law protect a claimant not only inside the territory, but also at the borders of a Contracting State. In contrast to Article 33 of the Refugee Convention, Article 3 CAT and article 45 FC, nothing in the wording of Article 3 ECHR, Article 7 ICCPR and art. 37 CRC precludes an interpretation to the effect that persons wishing to avert the risk of ill-treatment by demanding an entry visa at the embassy of a Contracting Party may come under their ambit. If one concedes that the latter provisions indeed represent an individual entitlement to protection for persons placed outside state territory, it is fully arguable that they imply a right to entry as well.

#### 3.2.3.1 The ICCPR

A closer look reveals that the ICCPR does not provide for such claims. This flows from a contextual argumentation. Article 2 (1) ICCPR expressly requires that the individual claimant be “within its territory and subject to its jurisdiction”. This contextual argument clarifies the matter: Article 7 ICCPR cannot be invoked if the claimant lacks territorial contact with the potential host state. Hence, it offers no basis to argue the existence of a state obligation to provide for a Protected Entry Procedure.

A different line of argument has been taken by the Human Rights Committee.<sup>81</sup> The Committee opines that the phrase “within its territory and subject to its jurisdiction” refers not to the place where the violation occurred, but to the relationship between the individual and the State concerned.<sup>82</sup> In its General Comment No. 27, the Committee referred to its earlier interpretation of Article 2 (1) ICCPR as applying to all individuals “within the territory *or* under the jurisdiction of the state”.<sup>83</sup> In its 1995 comments on the US state report, the Human Rights Committee pointed out that it “does not share the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances”, apparently alluding to the 1994 interception of Haitian asylum seekers on the high seas.<sup>84</sup> The Committee took the position that such an opinion as expressed by the United States government “is contrary to the consistent interpretation of the Committee on this

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<sup>78</sup> Art. 33 of the Refugee Convention.

<sup>79</sup> Art. 3 CAT.

<sup>80</sup> Art. 45 FC.

<sup>81</sup> The authors are indebted to Ms. Courtney O'Connor and Mr. Brian Gorlick for drawing their attention to the Committee's line of argument.

<sup>82</sup> See, e.g., *De Lopez v. Uruguay* (52/1979), Human Rights Committee, Selected Decisions under the Optional Protocol: UN doc. No. CCPR/C/OR/1 (1985), 88-92, para. 12. For further references, see Goodwin-Gill 1996, *supra* note 10, p. 142, fn 115.

<sup>83</sup> Human Rights Committee, The right of minorities (Art. 27), General comment no. 23, 8 April 1994 (emphasis added).

<sup>84</sup> See Brian Gorlick, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law*, 69 *Nordic Journal of International Law* 117 (2000), at 130-3, quoting further dicta of the Committee.

subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a state party even when outside that state territory.”<sup>85</sup>

With all due respect for the authority of the Human Rights Committee, it lacks the power to bind states with its interpretation of the Covenant. Notably, its interpretation of article 2 (1) ICCPR runs counter to the ordinary meaning of its terms (an “and” not being synonymous to an “or”), which puts a high onus of proof on the Committee. In particular, it would need to show that the Contracting Parties did mean “or” when they wrote “and”, thus endowing the word “and” with a special meaning in the sense of article 31 (4) VTC. Alternatively, the Committee could demonstrate that State Parties to the ICCPR have altered the meaning of the article through a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” according to article 31 (3) (b) VTC. To be sure, the Committee would be at pains to satisfy either of these requirements.

One distinguished commentator of the Covenant first affirms that presence on state territory and subjugation to state jurisdiction are crucial for individual protection under the ICCPR. However, he also points at the contradictions inherent in this cumulative requirement (e.g. a state not being formally obliged to allow entry to its citizen present *outside* its territory) and suggests a teleological interpretation to resolve them. Moreover, he proposed that recourse should be taken to the extent of state responsibility when determining the precise meaning of Art. 2 (1) ICCPR.<sup>86</sup> This proposal is, nonetheless, tautological: the extent of state responsibility can only be established by recurring to what constitutes a “wrongful act”, and therewith to the terms of the ICCPR itself. To wit, the proposal of dissolving obvious inconsistencies in the Covenant through a teleological interpretation is sound, and corresponds well with the prescriptions of articles 31-2 VTC. There is an obvious inconsistency between articles 12 (4) and 2 (1) ICCPR, but the prohibition of torture in article 7 ICCPR and the delimitations in article 2 (1) ICCPR are not inconsistent with each other. Hence, the territorial delimitation in the latter norm must prevail.

### 3.2.3.2 The ECHR

The case of the ECHR is a different one. Elsewhere, it has been shown that an interpretation of art. 3 ECHR along the lines of arts. 31 and 32 VTC entails that this article obliges states in certain situations to grant an entry visa through their diplomatic representations.<sup>87</sup> Such situations are characterised by a pressing need of protection in the state from which an entry visa is requested; reasonably, there would be no other options of protection accessible to the claimant. The goal state may be obliged to grant an entry visa, because the processing of visa requests at embassies is within the jurisdiction of the sending state, and thus subject to the obligations flowing from the ECHR.

Why is that so? The ECHR requests in article 1 that Contracting Parties “secure” the rights and freedoms enshrined in its Section I. This obligation is a positive one. Given a sufficiently large risk that a protection seeker would be subjected to treatment contrary to art. 3 ECHR, if denied a visa

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<sup>85</sup> Comments of the Human Rights Committee, Fifty-third session, United States of America, at its 1413rd meeting held on 6 April 1995 (emphasis added).

<sup>86</sup> Manfred Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll. CCPR-Kommentar*, 1989, N.P. Engel Verlag, Kehl am Rhein, p. 45. At first sight, his argumentation could be taken to support a state responsibility to allow access to protection seekers outside its territory. In the opinion of this author, Art. 31 (4) VTC must be taken into account, which would provide a powerful counter-argument to such an extensive reading (the existence of a “special meaning” agreed by the Contracting Parties would need to be shown).

<sup>87</sup> Noll 2000, *supra* note 23, at pp. 441-446.

and thus the possibility to enter the state at question, the latter is under an obligation to allow entry. Yet, this argument does not contend that visa requirements are illegal per se. Rather, it maintains that denying visas to a class of persons protected under positive obligations flowing from art. 3 ECHR is illegal. It should be noted that the above line of argument is applicable not only to art. 3 ECHR, but in principle to all rights guaranteed by the ECHR and its protocols. The limitative element is the scope of the positive obligations under a specific right – which can be assessed only *in casu*.<sup>88</sup> It must be underscored that the grant of an entry visa is not equivalent to the grant of protection. The purpose of the entry visa is solely to avert the imminent risk, and to allow the conduct of a proper determination procedure in a safe place – i.e. the goal country. Clearly, where no sufficient reasons for protection emerge during such determination procedures, the goal state is free to remove the applicant from its territory within due respect to other norms of international law.

Does this imply a limitless responsibility of Contracting Parties, extending to the protection of rights and freedoms guaranteed in the ECHR throughout the world? The answer is a clear “no”, and a closer look at art. 1 ECHR lets the boundaries of responsibility emerge. When delimiting the scope of the ECHR, its drafters discarded the criterion of territorial presence and resorted only to the criterion of jurisdiction. Article 1 ECHR is worded as follows:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

In 1981, the then European Commission of Human Rights delimited the scope of Article 1 ECHR in some detail. Its pertinent reasoning, drawing on the case law of the Court as well as its own earlier decisions, merits quoting at some length.

The Commission recalls that, in this provision, the High Contracting Parties undertake to secure the rights and freedoms defined in Section I to everyone “within their jurisdiction” (in the French text: “relevant de leur juridiction”). This term is not equivalent to or limited to the national territory of the High Contracting Party concerned. It emerges from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad. [...] As stated by the Commission in Application Nos. 6780/74 and 6950/75, the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. In so far as, by their acts or omissions, they affect such line with persons or property, the responsibility of the State is engaged.<sup>89</sup>

In the decades following this explanation, the ECtHR was given a number of opportunities to affirm the principle behind the Commission’s delimitation, while working out its borderlines in greater

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<sup>88</sup> Supra, at pp. 467-474.

<sup>89</sup> *W v. Ireland*, Decision of 28 February 1983, European Commission of Human Rights, Appl. No. 9360/81, D&R 32 (1981) p. 211 (214-216), para 14. To support its reasoning in this passage, the Commission refers back to a number of earlier decisions.

detail. In the landmark case of *Banković and Others*<sup>90</sup>, the Court reiterated its earlier dicta in order to conclude whether or not the bombing of a radio and television station in Belgrade during the NATO air campaign 1999 violated the obligations of those NATO Members who were signatories to the ECHR. The Court ruled that the applicants, all victims of the bombing or close relatives of victims, did not come under the jurisdiction of Contracting Parties in the meaning of art. 1 ECHR and found the application inadmissible.

After establishing the “ordinary meaning” of the term “within their jurisdiction” in Article 1 of the Convention, analysing state practice and seeking confirmation of its interpretation in the *travaux*,<sup>91</sup> the Court was “satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial”.<sup>92</sup> It goes on to identify the exceptions to this principle.<sup>93</sup> In its explicit enumeration, “the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.”<sup>94</sup>

The Court then went on to analyse whether the applicants came under the jurisdiction of the respondent states, which the applicants claimed to be the case, supporting this assertion with an analogy to the *Loizidou* Case.<sup>95</sup> The Court rejected the applicants’ assertion that the positive obligation to protect in Article 1 of the Convention applies proportionately to the control exercised.<sup>96</sup> The Court further underscored that the Convention was operating in “an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States”.<sup>97</sup> However, this rejection must be correctly understood: it concerned the issue whether jurisdiction, and hence obligations under the ECHR, are derivative of the amount of control a state exercises over foreign territory. This rejection does not affect the relevance and applicability of the ECHR based on the *Soering* doctrine.<sup>98</sup>

The message is clear: the term “within the jurisdiction” does not refer to a geographical, but to an administrative boundary, and the administrative reach of a state exceeds its territorial borders.<sup>99</sup> In

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<sup>90</sup> *Banković and Others v. Belgium and Others*, ECtHR, Decision of 12 December 2001, Appl. No. 52207/99.

<sup>91</sup> *Supra*, at paras. 59-66.

<sup>92</sup> *Supra*, at para. 59.

<sup>93</sup> “In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.” *Banković and Others*, *supra* note 90, para. 67.

<sup>94</sup> *Banković and Others*, *supra* note 90, para. 73.

<sup>95</sup> *Loizidou v. Turkey*, ECtHR, Judgment of 18 December 1996 (Merits), *Reports of Judgments and Decisions* 1996-VI, no. 26.

<sup>96</sup> *Banković and Others*, *supra* note 90, para. 75.

<sup>97</sup> *Supra*, para. 80.

<sup>98</sup> In *Soering vs. the U.K.*, the ECtHR spelled out that Contracting Parties are obliged to take into account extraterritorial risks related to Article 3 ECHR when removing a person to a third state. In this particular case, the issue at stake was whether the UK could extradite *Soering* to the US, where he risked being incarcerated on death row pending execution. Given this risk, the Court held that removal by the UK would have amounted to treatment contrary to Article 3 ECHR. This doctrine was developed further in later cases, and made applicable to *inter alia* asylum seekers, refugees, and persons excluded from refugee status. *Soering vs. the U.K.*, Judgment of 7 July 1989, Series A, No. 161.

<sup>99</sup> In parentheses, it is worth recalling that the ECHR is not the only instrument whose scope is limited only by a requirement of the exercise of jurisdiction. Indeed, the ACHR is constructed in the same fashion, and needs to be construed along the same lines. Its Article 1 (1) spells out that States Parties undertake “to ensure to all persons subject to their jurisdiction the free and full exercise of ... rights and freedoms” recognized in the ACHR. Among these rights,

tracking these administrative boundaries, international law provides the benchmarks. In the case of Protected Entry Procedures, the exercise of the sending state's jurisdiction is based on treaty law and custom. First, the Vienna Convention on Diplomatic Relations<sup>100</sup> and the Vienna Convention on Consular Relations<sup>101</sup> provide an explicit base. Second, the pivotal norms of both conventions are reflections of customary law. Therewith, it should be established beyond doubt that the grant or denial of an entry visa at a diplomatic representation forms part of the exercise of jurisdiction in the meaning of art. 1 ECHR, as construed by the ECtHR in *Banković and Others*. In this context, a caveat is in order: where the grant of visas is relegated to 'processing centres', operated unilaterally or multilaterally outside embassy premises, a separate assessment of whether their activities fulfil the requirements of art. 1 ECHR is called for.<sup>102</sup>

In the second step, it may be asked whether other rights than art. 3 are covered by this responsibility. The answer is straightforward. A close reading of the texts entails the conclusion that there is no hierarchy among the rights guaranteed in Section I ECHR and in the Protocols.<sup>103</sup> So far, it has to be concluded that *all* human rights in the ECHR *may* impact the legality of removal. Whether they actually will, depends on other factors, most notably the wording of each specific right.

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we find inter alia a prohibition of torture, inhuman or degrading punishment or treatment in art. 5 (2) ACHR. In the *Coard* case (Inter-American Commission of Human Rights, *Coard et al. v. the United States*, Case No. 10.951, 29 September 1999, Report No. 109/99), the Inter-American Commission of Human Rights examined complaints about the applicants' detention and treatment by United States' forces in the first days of the military operation in Grenada, and explained the limits of extraterritorial responsibility as follows:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. ... Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

Hence, the ACHR is constructed in an analogous manner, and the extent of extraterritorial obligations hinges, again, on the extent of positive obligations inherent in a relevant right and the facts of the case.

<sup>100</sup> Vienna Convention on Diplomatic Relations and Optional Protocols, 500 U.N.T.S. 95, entered into force 24 April 1964.

<sup>101</sup> Vienna Convention on Consular Relations, 596 U.N.T.S. 262, entered into force 19 March 1967.

<sup>102</sup> Where processing centres are operated multilaterally, it must be sorted out who is to assume responsibility under the ECHR. In the *Banković and Others* case, the French Government argued that the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States (para. 32). A similar issue could arise if a visa denial by an EU-operated processing centre would be challenged as a violation of a right contained in Section I ECHR.

<sup>103</sup> For a full argumentation, with further references, see Noll 2000, supra note 23, pp. 458-461, and S. Zühlke and J-C Pastille, *Extradition and the European Convention – Soering Revisited*, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3 (1999). Lamentably, art. 7 of the ILPA/MPG Proposed directive 2000/01f on complementary protection contains a reference to "fundamental human rights" entailing subsidiary protection. This begs the question which rights are fundamental, and exactly how such a separation is supported by the text of relevant instruments. For an excellent theoretical introduction to the difficulties in operating hierarchies in human rights law, see Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 *EJIL* 917 (2001).

First, it should be recalled that the ECtHR has repeatedly stressed the exceptional character of extraterritorial protection under the Convention. It has underscored that its Article 1 ECHR “cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.”<sup>104</sup>

Why is that so? The actor *ultimately* inflicting the harm unto the individual is by definition not the State at whose embassy protection is sought, but a third party outside the territory of that State. For the destination state to be responsible for the infliction of harm, there *must be a sufficient causal link between its actions or omissions and the infliction of harm*. Causality is a matter of degree, and the precise degree needed for the triggering of protection obligations can only be stated after analysing the precise wording of a relevant human rights provision. This brings us to the next step.

Second, and with a certain degree of generalisation, human rights provisions are a composite of negative and positive obligations.<sup>105</sup> Taking the example of torture under the ECHR, it is clear from the wording of art. 3 ECHR that no one shall “be subjected” to torture, and that Contracting Parties are under an obligation to “secure” that right according to art. 1 ECHR. Art. 3 ECHR is an example of a predominantly negative right, backed up by the positive obligation in art. 1 ECHR. The right to life protected in article 2 ECHR requires states not only to abstain from the intentional and unlawful taking of life, but also to adopt appropriate steps to safeguard the lives of persons within its jurisdiction.<sup>106</sup> Moving on to art. 8 ECHR, we note that Contracting Parties are obliged to “respect” private and family life – which covers negative as well as positive obligations. Finally, looking at art. 37 (a) CRC, it emerges that Contracting Parties take upon themselves to “ensure” that no child “shall be subjected” to torture, which provides another example for the combining of negative and positive elements in the construction of human rights. Thus, the degree of positive obligations inherent in the formulation of a right determines the existence and reach of an implicit prohibition of *refoulement*. The more predominant positive obligations are in the formulation of a right, the stronger a claim for non-*refoulement* under that right is.

Third, the concept of positive obligations is an elusive one, and their precise reach can only be assessed *in casu*. Thus, it would be impossible to lay down an exhaustive definition of such obligations *ratione personae* in a future Directive. In assessing whether or not the ECHR permits removal or requires the grant of entry visa, it has to be determined to what extent the facts of the case fall within the extent of positive obligations. The facts of the case are a composite of two elements. The first relates to the degree to which the invoked right is violated upon return<sup>107</sup>, while the second consists of the degree of predictability that this intrusion will materialise.

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<sup>104</sup> *Soering v. United Kingdom*, ECtHR, Judgment of 7 July 1989, Series A, No. 161, [henceforth *Soering*], para. 86.

<sup>105</sup> Positive obligations usually come together with considerable restriction options.

<sup>106</sup> *LCB vs. the UK*, ECtHR, Judgment of 9 June 1998, para. 36.

<sup>107</sup> Arai-Takahashi believes that the ECtHR applies a higher “minimum levels of severity” of speculative ill-treatment in expulsion cases than in cases where ill-treatment takes place within the Member State, and thus a “double standard”. He thinks that the reason for not applying the increasingly “liberal standard” of protection against ill-treatment in an extraterritorial context is that it would “open the flood gate of immigration applications to Member States”. Yutaka Arai-Takahashi, ‘Uneven, But in the Direction of Enhanced Effectiveness’ – A Critical Analysis of ‘Anticipatory Ill-Treatment’ under Article 3 ECHR, 20 Netherlands Quarterly of Human Rights 5, at p. 17. The present authors believe this criticism to be misguided. The named variations do not flow from double standards, but from the dynamic inherent in assessing risks, the strength of causal relationship between state conduct and violation and the interlinkage between intrusion and the triggering of positive obligations.

As rights guaranteed under the ECHR may be engaged in situations where protection seekers approach the diplomatic representations of destination countries, the right to a remedy guaranteed in art. 13 ECHR needs to be taken into account. Where the denial of an entry visa would entail a violation of e.g. art. 3 ECHR, the applicant must be allowed to challenge the decision. Some destination states allow for a renewed application for a visa, others offer the possibility of appealing the denial of a visa. There are numerous ways of complying with this obligation, as long as the remedy offered is an effective one, and provides for a material scrutiny of the protection-related issues of the claim.

### 3.2.3.3 *The CRC*

The CRC provides a further example. Its art. 2 (1) states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction [...]”. Thus, there is no requirement that a child wishing to benefit from the positive obligations enshrined in the CRC is present on the territory of a State Party from which these benefits are sought. To exemplify the source of such obligations, one may resort to art. 37 CRC, which contains inter alia a prohibition of torture and other forms of ill-treatment.

For children seeking an entry visa from the destination state’s diplomatic representation located in a *third* country, art. 22 (1) CRC may also be of relevance.<sup>108</sup> This provision reads as follows:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Thus, the minor visa claimant would benefit from a state obligation to “take appropriate measures to ensure” that he or she “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights”. These rights include the protection of torture and ill-treatment in art. 37 CRC, mentioned earlier. An appropriate measure to ensure freedom from torture or other forms of ill-treatment in an imminent case of non-protection from such risks in the third country could be to grant an entry visa into the goal country.

It should be noted that the UK as well as Singapore introduced reservations upon ratification, which may make the interpretation expounded above inapplicable to them.<sup>109</sup> Germany introduced a

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<sup>108</sup> A child seeking an entry visa at a diplomatic representation located in the country of origin would fall outside the scope of art. 22, as such a child is not outside its country of origin, it is not to be regarded as a refugee in the sense of art. 1 A. (2) of the Refugee Convention.

<sup>109</sup> The UK introduced the following reservation:

“The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.”

Singapore introduced the following reservation:

“Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such legislation and conditions concerning

declaration upon ratification, mirroring its intention to safeguard the area of immigration control from being affected by the CRC.<sup>110</sup> However, both Germany and the UK would still be obligated under the ECHR, which offers an analogous protection not only to children, but to adults as well.

### 3.2.4 Procedural Issues

This subsection seeks to answer the question whether persons applying for protection at embassies enjoy procedural rights of any kind.

No formal provisions regulating the asylum procedure are to be found in the 1951 Refugee Convention or its 1967 Protocol. The effective implementation of these instruments, which aim to protect and assure, without discrimination, fundamental rights and freedoms for refugees, does however imply the establishment of some kind of national procedure. Asylum procedures put in place by states are guided by the Convention and its Protocol, as well as by other international and regional refugee instruments, international human rights law and humanitarian law, and relevant Executive Committee Conclusions.<sup>111</sup> Finally, national judicial and administrative law standards also impact on the form and content of the asylum procedure.

States generally recognize that a fair and efficient asylum procedure is essential for the full and inclusive application of the Refugee Convention. Such procedures offer states the necessary tool to identify persons in need of international protection in accordance with the Convention. An attempt to carve out core procedural standards that would preserve the integrity of the asylum regime as both fair and efficient has been made by the Global Consultations in the paper “Asylum Processes (Fair and Efficient Asylum Procedures)”<sup>112</sup>. It should be kept in mind, though, that neither the paper of the Global Consultations, nor Executive Committee Conclusions are, as such, binding upon states.

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the entry into, stay in and departure from the Republic of Singapore of those who do not or who no longer have the right under the laws of the Republic of Singapore, to enter and remain in the Republic of Singapore, and to the acquisition and possession of citizenship, as it may deem necessary from time to time and in accordance with the laws of the Republic of Singapore.”

Portugal and Sweden objected to the reservations by the Republic of Singapore, as both objecting countries considered that “reservations by which a State limits its responsibilities under the Convention by invoking general principles of national law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international law.”

It could, of course, be asked why analogous objections have not been presented against the reservation by the UK, whose reference to domestic law is not less sweeping than that utilised in Singapore’s reservation.

<sup>110</sup> Germany made the following declaration upon ratification:

“Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.”

<sup>111</sup> See *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations, (EC/GC/01/19), September 2001. In particular Executive Committee Conclusion No. 8 (XXVIII) 1977 (A/AC.96/549, para. 53.6), *Determination of Refugee status*, and Conclusion No. 30 (XXXIV) 1983 (A/AC.96/631, para. 97.2), *The problem of manifestly unfounded or abusive applications for refugee status or asylum* include recommendations which could inform national procedures.

<sup>112</sup> *Asylum Processes (Fair and Efficient Asylum Procedures)*, supra.



In a 1977 conclusion<sup>113</sup> the Executive Committee recommended that states introduce procedures for refugee determination at national level. In the same conclusion, the Committee furthermore outlined basic procedural requirements, including that:

- competent officials should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments,
- applicants should receive necessary guidance as to the procedure to be followed,
- there should be a clearly identified authority examining and deciding upon requests for refugee status,
- necessary facilities should be provided to the applicant, such as interpreters and the possibility to contact UNHCR,
- applicants recognized as refugees should be informed accordingly and issued with documents certifying their refugee status,
- a reasonable time to appeal should be provided if the applicant is not recognised as a refugee, and
- applicants should be allowed to remain in the country until a decision has been taken on the initial request.

It should be kept in mind that the Conclusions of the Executive Committee have been written for the territorial asylum procedure, and if they are considered to express the *opinio juris* of states, this *opinio juris* cannot automatically be extended to extra-territorial procedures such as Protected Entry Procedures.

The amended Commission proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status states in its Article 3 (2) that the “Directive shall not apply to requests for diplomatic or territorial asylum submitted to diplomatic or consular representations of Member States”.<sup>114</sup> This leaves it entirely up to the Member States to regulate their Protected Entry Procedures, however by keeping in mind some minimum requirements as laid down in international instruments, in particular the ECHR. The Commission Directive proposal does not rule out that the Directive may be used, fully or in part, voluntarily by a Member State even for applications submitted at Member States’ representations abroad.

### **3.2.4.1 Right to a Fair Trial**

Does human rights law provide for a right to a fair trial for applicants applying within the framework of Protected Entry Procedures?

#### *UDHR Article 10*

Article 10 UDHR states that “[e]veryone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of her rights and obligations and of any criminal charge against him”. As Article 14 contains the right of everyone to seek and enjoy asylum in other countries, a person requesting such a right to asylum should in accordance with UDHR have a right to a fair and public hearing in accordance with Article 10 in order to challenge a denial of such a right. The UDHR as such is not a binding instrument of international law. Therefore, it appears reasonable to focus on the content of related provisions in the ICCPR and the ECHR.

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<sup>113</sup> Executive Committee Conclusion No. 8, supra note 111.

<sup>114</sup> European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM (2002) 326 final, Brussels 18 June 2002.

## ICCPR Article 14

Article 14 ICCPR states that “everyone shall be entitled to a fair and public hearing” both in criminal charges and in suits at law determining the individual’s rights and obligations. The Human Rights Committee has in its General Comment 13 emphasised that this article has a wider scope than only criminal law, while it applies “also to procedures to determine their [the individuals’] rights and obligations in a suit at law.”<sup>115</sup> However, Article 14(5) stating the right to have a case reviewed by a higher tribunal, expressly only applies in criminal cases.<sup>116</sup> The Human Rights Committee has furthermore stated in the case *I.P. v Finland* (450/91)<sup>117</sup> that the right to appeal does not apply in civil matters. The Human Rights Committee stated that “even were these matters to fall within the scope *ratione materiae* of article 14, the right to appeal relates to a criminal charge, which is not here at issue.” By analogy, one may draw the conclusion that article 14(5) does not imply a right to appeal in asylum cases either, as these are rather administrative than criminal in character.

## ECHR Article 6 and Protocol 7

Article 6(1) ECHR states that “[in] the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing.” In the *Golder* judgement, the European Court of Human Rights outlined the character of Article 6(1), explaining the right to a fair trial as a set of distinct rights which stem from the same basic idea and “which, taken together, make up a single right not specifically defined.”<sup>118</sup> There are two aspects of this right: one concerning the judicial procedure, requiring fair and public hearings, and one concerning the organization of the judiciary, requiring independent and impartial tribunals.<sup>119</sup> The concept “civil rights and obligations” has by the European Court of Human Rights been interpreted not to include the right to asylum. This was restated in the case *Maaouia v. France*,<sup>120</sup> where the Court confirmed that Article 6(1) did not apply to procedures for the expulsion of aliens. This conclusion was reached in the light of the European Commission’s previous decisions, where it has found that “the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights and obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention”.<sup>121</sup>

The possibility to have a case reviewed by a higher tribunal has been included in Protocol 7 to the ECHR. The right to review is, like in the ICCPR, restricted to criminal offences.<sup>122</sup> Therefore, it does not affect the possibility to appeal in asylum cases.

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<sup>115</sup> Human Rights Committee, General Comment 13 on Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc HRI/GEN/1/Rev.1 at 14 (1994), 2.

<sup>116</sup> “Everyone convicted of a *crime* shall have the right to his conviction and sentence being reviewed by a higher tribunal.”

<sup>117</sup> *I.P. v Finland*, Human Rights Committee Communication No 450/1991: Finland. 26/07/93. CPR/C/48/D/450/1991. The applicant complained that there was no way available to him to appeal a decision by an administrative tribunal on the tax assessment.

<sup>118</sup> *Golder v. UK*, Judgement of 21 February 1975, Application no. 4451/70, Series A, no. 18, bullet point 28.

<sup>119</sup> Lauri Lehtimaja and Matti Pellonpää, *Article 10*, in Alfredsson, Gudmundur and Eide, Asbjørn, *The Universal Declaration of Human Rights*, The Hague 1999, p. 223.

<sup>120</sup> *Maaouia v. France*, ECtHR, Judgement of 5 October 2000, Application no. 39652/98, paras. 35-39.

<sup>121</sup> *Supra*, p. 35.

<sup>122</sup> See Article 2 (1) of Protocol 7 stating that “[Everyone] convicted of a *criminal* offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.”

By way of comparison, the American Convention on Human Rights extends the right to a fair trial, not only to civil rights and obligations, but also to the determination of rights and obligations of a “labor, fiscal and any other nature.”<sup>123</sup> The scope of the right to a fair trial granted by the American Convention is consequently broad enough to extend also to asylum procedures.

Even though the ICCPR and the ECHR grant the right to a fair hearing, the provisions including this right have in none of these instruments been interpreted as including a right to appeal in administrative cases. From the outline above, one may draw the conclusion that an asylum seeker cannot base a claim that she has a right to appeal a rejected asylum application on the right to a fair trial. This conclusion means that the right to appeal for applicants who submitted their application at a diplomatic representation abroad also cannot be derived from these provisions. Simply said, an asylum seeker cannot claim a right to appeal based on the right to a fair trial, in case her asylum application has been rejected. The next step will be to analyse whether the right to an effective remedy can be considered to apply also for applicants within the Protected Entry Procedure.

### **3.2.4.2 Right to an Effective Remedy**

#### *UDHR Article 8*

Article 8 UDHR states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” This article does not mention whether the possibility to appeal should be regarded as a part of the right to an effective remedy. However, as Article 8 finds inspiration in the legal principle of *amparo*<sup>124</sup>, in particular endorsed in Spanish and Latin American jurisdictions, it “would include the right to challenge unconstitutional laws, to review of judicial decisions, and to petition against administrative decisions.”<sup>125</sup> There are no indications that such a right to review also covers asylum appeals, but, as asylum decisions normally have an administrative character, appeals should consequently be covered as well.

#### *ICCPR Article 2(3)(a)*

A provision committing State Parties to ensure an effective remedy for “any person whose rights or freedoms as *herein* recognized are violated”<sup>126</sup> can be found in Article 2(3)(a) ICCPR. The word *herein* restricts the right to an effective remedy to apply only to rights and freedoms which are specified in the Covenant. The ICCPR does not include a right to asylum, only a provision

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<sup>123</sup> See Article 8 (1) of the American Convention on Human Rights.

<sup>124</sup> “The word *amparo* literally means favor, aid, protection, or shelter. Legally the word encompasses elements of several legal actions of the common law tradition: writ of habeas corpus, injunction, error, mandamus, and certiorari. There are five types of *amparo* suits: 1) *amparo* as a defense of individual rights such as life, liberty, and personal dignity; 2) *amparo* against laws (defending the individual against un-constitutional laws); 3) *amparo* in judicial matters (examine the legality of judicial decisions); 4) administrative *amparo* (providing jurisdiction against administrative enactments affecting the individual); 5) *amparo* in agrarian matters (protecting the communal ejidal rights of the peasants). The *amparo* suit may be either direct, initiated in the Supreme Court or collegiate circuit courts, or indirect, initiated in a district court and brought on appeal to the previously mentioned courts.” Francisco A. Avalos, *The Mexican Legal System*, available at <[http://www.law.arizona.edu/library/internet/library\\_publications/mexican\\_legal\\_sys.htm](http://www.law.arizona.edu/library/internet/library_publications/mexican_legal_sys.htm)>, accessed on 2 September 2002.

<sup>125</sup> David Weissbrodt, *The Right to a Fair Trial. Articles 8, 10 and 11 of the Universal Declaration of Human Rights*, The Hague 2001, p. 33.

<sup>126</sup> Authors’ emphasis.

prohibiting torture as well as cruel, inhuman and degrading treatment or punishment.<sup>127</sup> Only in this regard is the right to an effective remedy relevant. As the ICCPR lays an obligation on State Parties to guarantee the rights and freedoms in the Covenant only to persons within their territory<sup>128</sup> this right will only be relevant in cases where an alien is threatened by expulsion measures and would phase torture or other cruel, inhuman or degrading treatment or punishment if the expulsion order was effectuated. As a diplomatic representation abroad is located on foreign territory, a person approaching the representation with a request for protection against such treatment or punishment cannot refer to the ICCPR as justifying his right to protection by the state of the representation.

### *ECHR Article 13*

Finally, the ECHR also features a provision on the right to an effective remedy in its Article 13. This article states that “[everyone] whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Analogously to Article 2(3)(a) ICCPR, this provision restricts the right to an effective remedy, to the rights and freedoms as set forth in the ECHR. The ECHR also does not include a right to asylum. This notwithstanding, its prohibition of torture and inhuman and degrading treatment or punishment has been construed by the ECtHR as an implicit prohibition of *refoulement*. As earlier stated<sup>129</sup>, the rights and freedoms in the ECHR shall be secured to everyone within the State Party’s jurisdiction. In accordance with the interpretation presented above, an effective remedy shall therefore also be granted to persons denied an entry visa, who, as a consequence, risk being subjected to torture.

Article 13 ECHR does not require a particular form of remedy. Rather, it offers a certain margin of discretion to State Parties to decide what kind of remedies are in conformity with their legal obligations under this article.<sup>130</sup> The remedies offered at national levels need not be judicial, but they must be effective. Hence, an ombudsman procedure or a non-judicial procedure may well qualify as an effective remedy in the sense of Article 13.<sup>131</sup>

The Committee of Ministers of the Council of Europe has recommended that governments ensure that “[an] effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment”.<sup>132</sup> The recommendation accepts as effective remedies not only judicial authorities, but also quasi-judicial or administrative authorities, provided that they are “clearly identified and composed of members who are impartial and who enjoy safeguards of independence”.<sup>133</sup>

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<sup>127</sup> Article 7 ICCPR.

<sup>128</sup> Article 2 (1) ICCPR states that “[each] State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant [...]”. See Chapter 3.2.3.1 for a deeper analysis of this article.

<sup>129</sup> See Chapter 3.2.3.2.

<sup>130</sup> P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague 1998, p. 706.

<sup>131</sup> C. Ovey and R.C.A. White, *European Convention on Human Rights*, 3rd ed., Oxford 2002, p. 390.

<sup>132</sup> Recommendation No. R (98) 13 of the Committee of Ministers to Member States on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights, Council of Europe, Committee of Ministers, 18 September 1998, para. 1.

<sup>133</sup> *Supra*, para 2.1.

In its case law, the ECtHR has developed its view on what remedies can be considered effective. The efficacy of a remedy, which is not judicial, will be assessed after the powers and guarantees it affords.<sup>134</sup> In the case *Keenan v. UK*, the Court stated that an acceptable remedy must be effective both in practice and in law.<sup>135</sup> In the case the Court stressed the need to take into account the specific circumstances of the case, such as being able if necessary to challenge a decision in a speedy manner, taking into account the possibility “to obtain legal aid, legal representation and lodge an application within such a short time period”.<sup>136</sup>

The Committee of Ministers has emphasised the importance of a remedy to be accessible in order to be considered effective.<sup>137</sup> If a person is unable to make use of the available remedy, a need for automatic review of a decision might be necessary. In the *Keenan* case, the qualification of ‘inability’ was Mr Keenan’s mental status.<sup>138</sup> A less restrictive interpretation of this case could place an obligation on states to offer automatic review in cases where entry visa applicants, who risk being subjected to torture, have severe difficulties in accessing a representation in order to file an appeal.

Finally, the remedy must be sufficiently independent from the authority, which is alleged to be violating the Convention.<sup>139</sup> This indicates that review by the same authority would most likely not be considered as an effective remedy.

We are now in a position to conclude. Within the asylum procedure, as practised at representations abroad, applicants can generally not invoke a right to a fair trial or an effective remedy based on either the ECHR or the ICCPR. However, recalling that Article 1 ECHR obliges states to secure to everyone within their jurisdiction the rights and freedoms as laid down in Section I of the Convention, the authors would like to underscore that Article 13 of the same Convention guarantees an effective remedy in case ECHR rights are engaged by the acts or omissions of state representatives within Protected Entry Procedures (e.g. denial of an entry visa leading to the applicant’s exposure to torture).

### **3.2.5 The Kosovo Case: Reparative Obligations to Provide Alternative Forms of Security?**

A large number of people fled the province of Kosovo during the 1999 war between NATO Member States and the Federal Republic of Yugoslavia. The Former Yugoslav Republic of Macedonia, as well as Albania, experienced a major influx of protection seekers. To exonerate mainly the Former Yugoslav Republic of Macedonia, the Humanitarian Evacuation Programme (HEP) and the Humanitarian Transfer Programme (HTP) were launched by a number of extraregional states, and some 90.000 persons were evacuated from the region. This large-scale evacuation exercise raised a number of legal and practical issues, some of which have been addressed in academic writing. In particular, Barutciski and Suhrke have criticised UNHCR for

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<sup>134</sup> *Leander v. Sweden*, ECtHR, Judgement of 26 March 1987, A.116, pp. 29-30.

<sup>135</sup> *Keenan v. UK*, ECtHR, Judgement of 3 April 2001, 33 EHRR 913, para 122.

<sup>136</sup> *Supra*, para 125.

<sup>137</sup> *Supra* note 132, para. 2.3.

<sup>138</sup> *Keenan v. UK*, *supra* note 135, para 126.

<sup>139</sup> *Silver and others v. UK*, ECtHR, Judgement of 25 March 1983, A.61, para 116.

insisting on the principle of first asylum in the early days of the crisis, thereby allegedly protracting burden sharing solutions. Both authors argue *inter alia* that there is a legal case for not considering first asylum as an unconditional obligation on all states in all refugee situations, and a moral-political case for burden sharing. In particular the first assertion has drawn some fire from other writers.<sup>140</sup> It is beyond the subject of this study to assess the tenability of the conditionality thesis in full.<sup>141</sup> At any rate, it should be noted that HEP and HTP dealt with a large, but calculable caseload, and should be kept apart from an open-ended mechanism as discussed in this study, which is primarily about the protection needs of the individual, rather than the stability needs of a country of first asylum.

However, the Kosovo debate helped the refugee law constituency to refocus on interlinkages between the country receiving a mass influx and other countries. Where the actions or omissions of a state contributed to the advent of a mass influx into a third country through an internationally wrongful act attributable to it (e.g. by disregarding international norms prohibiting the use of force, conventionally labelled *jus ad bellum*), the case can be made that contributing states are legally obliged to afford protection as a means of restitution.<sup>142</sup> Such restitution could take the form of resettlement, evacuation, or the operation of Protected Entry Procedures, thereby exonerating the third country targeted by the mass influx. This line of argument might be politically unattractive to pursue in the case of the Kosovo intervention. However, it indicates that causality chains run across international law as a whole. In the present context, other and stronger arguments for launching Protected Entry Procedures to prevent breaches of law offer themselves.

Beyond the legal dimension, the case of Kosovo illustrates some of the advantages linked to externalised forms of processing. On the empirical level, the HEP and HTP demonstrated the technical capabilities of NATO Members and other contributing countries to mount an evacuation infrastructure and operate programmes within very short delays. Over 90.000 persons were moved out of the region during a crisis period of 11 weeks.<sup>143</sup> This testified to the benefits of a multilateral and coordinated approach. The overall operational feasibility of extraregional processing should be thus beyond doubt, irrespective of the criticism mounted against the actual implementation of both programmes. In all, the Kosovo experience taught important lessons on how to meet protection needs closer to the source, how to marry the diverse capabilities of cooperating countries and how to provide a legal and practical infrastructure for receiving individuals who have not yet migrated

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<sup>140</sup> Barutciski and Suhrke, *supra* note 13, pp. 108-11. Two contributors to the same issue challenge this position (Terje Einarsen and Morten Kjærum), which also features a reply by Barutciski and Suhrke.

<sup>141</sup> The present authors believe that burden sharing is a functional prerequisite of *non-refoulement*, without possessing the quality of a state obligation under international law. See Noll 2000, *supra* note 23, pp. 277-85. The interpretation of article 33 of the Refugee Convention advanced by Barutciski and Suhrke, constructing an implicit exception for mass influxes threatening the security of a country, is inconsistent with interpretative norms set out in arts. 31-2 VTC. In the article and the reply by Barutciski, the authors mainly draw on consequentialist arguments as well as on the *travaux*, the former being outside, and the latter being subordinate in the methodology of interpretation prescribed by the quoted VTC norms. Additionally, a look at the doctrine of necessity, reflected in art. 26 of the 2000 Draft Articles on State Responsibility, may offer additional guidance, and potentially invalidate part of Barutciski and Suhrke's argument. Looking closer at the specific circumstances (Kurdish arrivals from Iraq at the Turkish border, and the establishment of a safe zone in Iraq) might have led the authors to a more discerning approach. For an example, see Goodwin-Gill 1996, *supra* note 10, p. 130.

<sup>142</sup> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed ...". 2000 Draft Articles on State Responsibility, art. 36.

<sup>143</sup> Barutciski and Suhrke, *supra* note 13, p. 101.

out of the immediate region of origin. Some of these lessons could be institutionalized in the form of a EU presence in regions of crisis, as discussed further in Chapter 7.2.2.4 below.

Among the drawbacks, it was noted that the protection offer of extraregional states varied considerably, thus provoking strategic behaviour on the part of refugees.<sup>144</sup> This, in turn, illustrates the necessity of coordinating the protection offer, and thus of incorporating externalised processing into the Common European Asylum System at large. Also, it is clear that some of the operational frictions emerging during HEP and HTP could be avoided in the future, if a predetermined model of coordination is made available. Chapters 7.2.2.5 and 0 are dedicated to ways and means which Member States could consider in this area.

### 3.2.6 Interim Conclusion

In exceptional situations, the obligations of Contracting Parties to the ECHR and the CRC may be engaged when an entry visa is sought to evade harm relevant under convention provisions. Although the obligation to protect is abstract and lacks specification in case law, a number of criteria emerge from analogies to the Soering doctrine:

- the harm feared must relate to a human right protected by the Convention in question
- the harm feared must be attributable to the destination state, i.e. there must be a causal chain linking the rejection of a visa request to future convention-relevant harm
  - in particular, it must emerge that there is no other protection alternative which the protection seeker can be reasonably demanded to utilise in the concrete situation she finds herself in
- the harm feared must be sufficiently intrusive and the likelihood of its materialisation sufficiently high to engage the elements of positive obligation inherent in the right invoked.

It may be objected that the Soering doctrine relates to situations where the claimant is present on the territory of the state to which the protection claim is opposed. Territorial presence is no absolute prerequisite for the existence of protection obligations, as shown above and affirmed by the ECtHR in *Banković and Others*.

How far, then, do positive obligations extend in the context of Protected Entry Procedures? Can the last criterion be formulated more precisely? We have earlier spoken of rights as composites of negative and positive obligations. When a state refrains from removing a person in compliance with its obligations under art. 3 ECHR, one may describe this as compliance with a negative obligation. The state refrains from action. Turning the tables, one could also observe that the state is actually doing something – namely extending a very rudimentary form of protection to a non-citizen. At least when seen in conjunction with other robust entitlements (e.g. basic health care and other subsistence benefits), one may safely speak of the compliance with a positive obligation.

Does this mean that speaking of negative or positive obligations is merely a matter of taste? Not so. But rather than a simple binary opposition (either an obligation is positive, or it is negative), we should construct obligations as being positioned on a scale with two poles – one demarcating inertia, another maximized action. Now, a certain action or omission can be placed on this scale,

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<sup>144</sup> Supra, pp. 104-5.

and the least we can do is to relate it to another action or omission. Clearly, organising an evacuation and perhaps even paying the airfare of a person in need of protection must take a place closer to the positive end of the scale than the mere issuing of a visa (which we could choose to describe as the *de facto* waiver of entry control in the individual case). This implies that it is comparably more difficult to argue for the existence of an obligation to organise evacuation of a claimant. A legal obligation to issue an entry visa in a pertinent case does not automatically imply an obligation to protect the claimant from interference by local authorities when leaving the country.

Hence, compared to the obligation of a state to see to that its police officers do not torture a person in the course of interrogation at a police station, the obligation to provide for a Protected Entry Procedure is a much weaker one. However feeble it may be, it nevertheless obliges states to be observant about the aggregate outcome of their migration and asylum policies. The more efficient states are in blocking access to territory, and the scarcer the protection offer in the region of origin is, the more convincing is an argument to the effect that the grant of a humanitarian visa remains the sole avenue to avoid torture.

### **3.3 Protected Entry Procedures and the Law of the European Union**

While single Member States have provided for Protected Entry Procedures unilaterally, there is presently no instrument promoting or regulating such practices in the European Union. Nonetheless, Protected Entry Procedures could be a relevant item of consideration in the ambitious programme of harmonisation which Member States have set themselves, and which is referred to as the Common European Asylum System (CEAS). This programme is pursued within the framework of the European Community (EC), which represents the supranational layer of cooperation among Member States, and which has been entrusted with far-reaching competencies to harmonise domestic legislation.

With the Temporary Protection Directive, a binding instrument has been created, which features a coordination mechanism for evacuation and dispersal decisions Member States may wish to take in imminent situations of mass influx. It would certainly be in line with the development of a comprehensive multilateral regime covering asylum and immigration, if Member States now considered resettlement and Protected Entry Procedures as possible items for harmonisation. However, this raises a number of questions. First, it must be established whether the EC has been given competence to deal with Protected Entry Procedures. Secondly, we need to address how a legal regulation of a Protected Entry Procedure would fit into the existing *acquis communautaire* in the area of asylum and immigration.

#### **3.3.1 Competence under the TEC**

In search of an EC competency to legislate in the area of Protected Entry Procedures, it is relevant to take a closer look at Title IV of the EC Treaty (TEC), which aims at progressively establishing an area of freedom, security and justice.<sup>145</sup> Recalling that Protected Entry Procedures relate to

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<sup>145</sup> Art. 61 TEC. The Tampere Conclusions have clarified that this area is not an exclusive privilege of Union citizens. Tampere Conclusions, *supra* note 39, paras. 2 and 3. It should be recalled that the Conclusions are not legally binding, while the TEC is.



migration control, in particular the granting of visas, as well as the area of asylum, we find that art. 62 and 63 TEC precisely cover these issues. However, Community competencies under Title IV are not all-embracing.<sup>146</sup> Articles 62 and 63 TEC enumerate the issues within EC competence in an exhaustive manner. Those issues not specified in Articles 62 and 63 TEC remain within the competence of the Member States. As long as the Community has not made use of its competence, Member States remain free to legislate. The competence of Member States is also retained in areas where the Community has adopted measures setting out minimum standards, as long as domestic legislation accommodates those standards.<sup>147</sup> Hence, it is advisable to take a closer look at the components of the Protected Entry Procedures under these premises.

First, the protection aspects of the Protected Entry Procedures can be accommodated under a number of competencies. Let us first look at the *definitional* aspects. Art. 63 (1) (c) TEC allows for the adoption of minimum standards with respect to the qualification of nationals of third countries<sup>148</sup> as refugees. This competency could be used to cover Protected Entry Procedures in third states, but excludes beneficiaries still in their countries of origin, as these are not refugees in the technical sense. The competency to adopt “minimum standards ... for persons who otherwise need international protection” in art. 63 (2) (a) TEC could then be used to legislate on Protected Entry Procedures of beneficiaries in countries of origin, as well as for beneficiaries solely threatened by harm engaging Member States’ obligations under the ECHR and CRC. As the latter provision is rather broad in its wording, it could also offer a basis to draw up adequate Protected Entry Procedures. Otherwise, it should be recalled that art. 63 (1) (d) TEC allows for the adoption of “minimum standards on procedures in Member States for granting or withdrawing refugee status”. This competency is expressly limited to “procedures *in* Member States” (emphasis added). Hence, this provision can only serve to harmonise those parts of the decision-making process in the Protected Entry Procedure that take place on the territory of Member States. Partially, this limitation can be bypassed by switching to the broader procedural competency in art. 63 (2) (a) TEC. In conclusion, procedural competency is lacking in a very limited area, namely to legislate on the Protected Entry Procedure with regard to persons who are refugees only, and not concurrently within the protective scope of the ECHR and the CRC. As we will see, this rather technical lacuna can be compensated for by shifting over to the competencies in the area of migration control.

In that area, the grant of an entry visa is central, and, for reasons of migration control, the primary focus is on short-term visas. The EC is competent to legislate on the granting of short-term visas according to article 62 (2) (b) (ii) TEC. It entitles the Council to legislate on “procedures and conditions for issuing visas by Member States”. This entitlement offers a basis for EC institutions if they wish to launch a common procedure for granting humanitarian entry visas in the course of a coordinated Protected Entry Procedure.<sup>149</sup>

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<sup>146</sup> Kay Hailbronner, *Die Neuregelung der Bereiche Freier Personenverkehr, Asylrecht und Einwanderung*, in Hummer, W., *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, Manz, Vienna, p. 180.

<sup>147</sup> Art. 63 TEC specifies this repartition of competencies further. Measures on immigration policy and measures defining the rights and conditions under which nationals of third countries which are legally resident in one Member State may reside in other Member States do not prevent any Member State from maintaining or introducing national provisions which are compatible with the TEC and with international agreements.

<sup>148</sup> The term “nationals of third countries” in the EC Treaty alludes to persons not being nationals of a Member State.

<sup>149</sup> The short validity of such a visa does not pose a problem. Once an asylum application has been filed on the territory of the destination state, it will provide for an independent and sufficient base for a provisional stay during its processing.

The Tampere Conclusions affirm the outcome of our analysis. For those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes.<sup>150</sup> This understanding reflects a holistic perspective, which does not fall foul of the separation of asylum and migration as two unrelated issues, and supports the development of protection-minded migration legislation – inter alia through the development of a Protected Entry Procedure.

In line with the approach taken by the European Council in the Tampere Conclusion, the European Commission has proposed that “requests for asylum made outside the European Union and resettlement” be considered in the second stage of developing common procedural standards.<sup>151</sup> The rationale would be to offer an alternative to unauthorised entry for *bona fide* protection seekers, but the Commission also underlines that Protected Entry Procedures and resettlement are complements to, and not replacements for, the ‘spontaneous’ seeking of asylum on the territory of Member States.<sup>152</sup>

At present, EC competencies in the area of Protected Entry Procedures have not been made use of. Hence, Member States are still fully competent to devise unilateral solutions, as long as these do not encroach on binding instruments of EC law in other competency areas.

### **3.3.2 Coherence with the *acquis communautaire***

#### **3.3.2.1 *The Migration Dimension***

The Community has fully harmonised its visa requirements by means of Council Regulation No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.<sup>153</sup> Regulations are the most interventionist form of Community law-making: they leave no discretion whatsoever to Member States as to the transposition of norms into domestic legal systems. The Regulation leaves no room for exempting persons in need of protection from visa requirements, as this category is not contained in the exhaustive listing in its art. 4. It follows that the only conceivable way to provide for a Protected Entry Procedure would be to grant humanitarian visas in cases where the nationality of the protection seeker is subject to visa requirements under the Regulation. The Regulation’s operative articles do not address the reasons on which a visa is granted, but para. 8 of its preamble states that “[i]n specific cases where special visa rules are warranted, Member States may exempt certain categories of persons from the visa

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<sup>150</sup> Tampere Conclusions, *supra* note 39, Conclusion 3.

<sup>151</sup> European Commission, *supra* note 45, p. 8.

<sup>152</sup> “Processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme are ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or trafficking gangs or having to wait years for recognition of their status. Only four Union Member States currently operate resettlement schemes, in conjunction with the HCR. The USA has a typical two-tier asylum procedure: one for spontaneous arrivals and one, very different, based on a resettlement scheme, based on tight internal coordination between the various public authorities involved and cooperation with NGOs and the HCR. This option, as the Commission sees it, must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals.” *Ibid.*

<sup>153</sup> Council Regulation No. 539/2001 of 15 March 2001, OJ 81/1, 21.3.2001.

requirement or impose it on them in accordance with public international law or custom”. As we have seen above, there is a basis in international law for exempting certain categories of protection seekers from visa requirements. In addition, the European Commission has underscored the need to take account of the specific needs of asylum when formulating visa policies, raising the question whether “facilitating the visa procedure in specific situations to be determined” could be an adequate common approach.<sup>154</sup>

How does the grant of a visa link to the right to entry? To start with, the possession of a visa does not entitle its holder to entry. It merely entitles the holder to *seek* entry or transit at a border post, and the border post may still reject the alien in possession of a visa.<sup>155</sup> On the other hand, entry to the territories of the Contracting Parties must be refused to any alien who does not fulfil all these conditions and, where required, is in possession of a visa.<sup>156</sup> Nonetheless, there is an opening for protection-related cases in Article 5 (2) of the Schengen Convention<sup>157</sup> [henceforth SC]: where a Contracting Party considers it necessary, it may derogate from that principle on humanitarian grounds or in the national interest or because of international obligations. In such cases permission to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.<sup>158</sup> Article 15 SC states explicitly that these rules shall not preclude the application of special provisions concerning the right of asylum.

For the three exceptional reasons enumerated in Article 5 (2) SC, a Contracting Party may not only allow entry to its territory, it may also issue a visa. However, in cases where a Contracting Party makes use of its right to exceptional derogation, it shall restrict the validity of the visa issued to its own territory and inform the other Contracting Parties of its decision.<sup>159</sup>

Can a Schengen state be represented by the diplomatic representation of another Schengen state when it comes to visa application on protection grounds? In principle, this should be possible according to the relevant procedures laid down in the Common Consular Instructions. Due to the fact that core documents remain confidential, it is at present not possible to give a full account of how the grant of humanitarian visas by proxy could work out in practice.<sup>160</sup>

For protection seekers, the message boils down to the following. Provided that ‘international obligations’ flowing from refugee law or human rights law enshrine a right to entry or, at least, a right to non-rejection for protection-related grounds, this right shall override exclusionary rules of the Schengen Convention. If such obligations can be shown to exist in international law, the Contracting Party concerned *must* allow entry in such cases. Beyond that, a Contracting Party *may* allow entry on humanitarian grounds or in the national interest.

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<sup>154</sup> European Commission, Communication of 22 November 2000, *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM (2000) 755, p. 9.

<sup>155</sup> Common Consular Instructions to the Diplomatic Missions and the Consular Posts of the Contracting Parties to the Schengen Convention, which are Headed by Career Consular Officers [hereinafter CCI], para. I.2.1.

<sup>156</sup> Article 15 SC.

<sup>157</sup> Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, OJ L 239, 22.9.2000, p. 1.

<sup>158</sup> Ibid.

<sup>159</sup> Article 16 SC.

<sup>160</sup> Annex 5 to the CCI (*List of visa applications requiring prior consultation with the central authorities, in accordance with Article 17(2)*) is a confidential document. Therefore, it cannot be concluded whether protection-motivated visa applications come under the ambit of the consultation procedure according to paras. V.2. CCI.

### 3.3.2.2 *The Protection Dimension*

With regard to protection, the *acquis* is still very much in a stage of development, and the present normative framework remains incomplete. A multilateral system worthy of being classified as a Protected Entry Procedure does not exist.

To start with, there is no binding instrument on asylum procedures as of yet. The proposed Draft Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>161</sup> places practices of Protected Entry Procedures outside its scope. Its article 3 (2) states that “[t]his Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States”. An identical provision has been included in the Draft Directive on reception conditions.<sup>162</sup>

Applications outside the territory of Member States are also excluded from the scope of the draft instrument defining the beneficiaries of protection in the Union (Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Refugee Convention and its 1967 protocol, or as persons who otherwise need international protection).<sup>163</sup> Its article 3 reads: “This Directive shall apply to all third country nationals and stateless persons who make an application for international protection at the border or on the territory of a Member State and to their accompanying family members and to all those who receive such protection.”

### 3.3.2.3 *Interim Conclusion*

To be sure, nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. From a technical perspective, it is a good thing that the draft directives mentioned above exclude Protected Entry Procedures. First, Member States can continue with unilateral practices in that area, although territorial asylum procedures are harmonized multilaterally. Second, if Protected Entry Procedures were to be the subject of future harmonisation, legislation could be concentrated to a single instrument, or a couple of instruments (see Proposals 4 and 5 in Chapter 7.2.2 *supra*), and other directives need not be amended.

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<sup>161</sup> European Commission, *Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM (2000) 578 final, Brussels 20 September 2000.

<sup>162</sup> European Commission, *Proposal for a Council directive laying down minimum standards on the reception of applicants for asylum in Member States*, COM (2001) 181 final, Brussels 3 April 2001, art. 3 (2).

<sup>163</sup> European Commission, *Proposal for a Council directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection*, COM (2001) 510, Brussels 12 September 2001.

## 4 Modelling Protected Entry Procedures

What are the choices states are faced with when formulating a Protected Entry Procedure scheme? Three dimensions are relevant when addressing this issue:

- The positioning of Protected Entry Procedures vis-à-vis other elements of refugee protection regimes
- The choice between unilateral and multilateral solutions in framing Protected Entry Procedures
- The overall degree of inclusiveness and formalisation of Protected Entry Procedures

As we will see, the current practice of states converge in that Protected Entry Procedures are operated as *unilateral* systems *complementary* to the territorial seeking of asylum. With regard to inclusiveness and formalisation, important differences have surfaced during our empirical inquiry, shunning generalisation. Therefore, it appears reasonable to close in on

- The filter elements used to gauge inclusiveness of a given Protected Entry Procedure

The following sections will discuss each of the four items in consecutive order.

### 4.1 Protected Entry Procedures and its Relation to Other Systems of Refugee Protection

What role shall Protected Entry Procedures play within a states' system for refugee protection? Three principal choices can be made out:

- Protected Entry Procedures as an exclusive channel to protection in a host state – *the exclusive approach*
- Protected Entry Procedures are complementary to other channels (as 'spontaneous' arrivals entering territorial procedures, or resettlement) – *the complementary approach*
- Protected Entry Procedures are an emergency practice, to be activated in situations of perceived need – *the exceptional approach*

The first two approaches suggest that Protected Entry Procedures are operating on a permanent basis, while the third could either be permanently open, or activated and deactivated according to perceptions of need. In the following, the characteristics of each approach shall be discussed. The focus will be mainly on the relation to territorial processing, which is the main, if not exclusive channel to protection in most states. Depending on their precise formulation, Protected Entry Procedures could reduce the demand on other protective regimes such as resettlement, diplomatic asylum and evacuation schemes. However, it is not advisable to postulate such interrelations in the abstract. From a policy perspective, focus has been clearly on territorial applications, which is the main, if not exclusive channel to protection in most states. Therefore, the following discussion will focus on the interrelation between Protected Entry Procedures and the territorial filing of asylum applications.

### 4.1.1 The Exclusive Approach

This approach foresees the operation of one, rather than two protection systems, with ‘spontaneous’ arrivals being transported back to processing centres or other access points in the region of origin. The exclusive approach to Protected Entry Procedures is at times embraced in political discourse<sup>164</sup>, while experts have persistently displayed a fair dose of scepticism.

In theory, the primary advantage of the exclusive approach would be that the existing territorial system could be scrapped altogether. A related disadvantage is that persons arriving on the territory of a state operating an exclusive system must be identified and sent back to an appropriate processing centre, which presupposes a sufficiently dimensioned infrastructure and would consume considerable resources (to be sure, this infrastructure exists only in its rudiments today).

Optimistically, exclusive processing in the region of origin would lead to a lasting discouragement of unauthorized migration for the purpose of seeking protection. However, persons arriving as asylum applicants today could also choose to simply go underground tomorrow, and bypass any form of system whatsoever. A certain permeability of European borders is beyond dispute today; launching Protected Entry Procedures as an exclusive response to protection needs would force states to migration control arrangements emulating Europe’s totalitarian past. In the end, the question is whether the exclusive approach would shift rather than solve any problem of abuse.

At first sight, the exclusive solution appears simple to communicate and determined in its posture. However, already in a 1994 IGC study<sup>165</sup> spawned by a Dutch initiative, substantial legal and practical problems were flagged, which shall be elaborated in consecutive order.

In the legal domain, the IGC study raised concerns about the safety of countries in the region to which applicants may be returned, thus triggering possible collisions with obligations under article 33 (1) of the Refugee Convention.<sup>166</sup> To this valid preoccupation, the present authors may add an additional reflection. Protection seekers arriving on the territory of a state operating the exclusive solution will inevitably argue that return to the country where the processing centre is located would not be safe for her, and thus violate prohibitions of *refoulement* in international law. As international law guarantees a right to remedy, some form of appeal proceedings would need to assess this claim, which raises the issue whether removal will be suspended while a final decision is pending. In reality, this would amount to a parallel system, now dealing with the safety of return to regional processing centres rather than with the protection claim proper. A duplication of efforts appears inevitable, if international law is to be respected, and the clear-cut message of the exclusive solution will be forfeited.

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<sup>164</sup> The Dutch Party VVD (Free Democrats), provoked by the advent of a populist party LPF (List Pim Fortuyn) has promoted first reception and exclusive asylum processing in the region during its 2002 electoral campaign. Working Group on International Refugee Policy, *Reception and Processing in the Region of Origin*, The Hague, 22 February 2002, p. 24. In 1994, the issue of exclusive processing in the region was placed on the agenda of the IGC at the request of the Netherlands.

<sup>165</sup> IGC, *supra* note 35.

<sup>166</sup> *Supra*, at p. 7.

On the practical level, the 1994 IGC study identified a number of serious problems:

- The suggested exclusive processing centres would “most probably exercise a strong pull-factor, attracting large number of people, as was the case in Indo-China”.<sup>167</sup>
- Apart from a considerable processing load for states operating processing centres, the return of rejected cases would constitute another obstacle.
- The influx of large numbers of protection seekers to countries where processing centres are located could destabilise them as well as the whole region.
- States might not wish to send back spontaneously arriving high-profile protection seekers to regional processing centres, where they “might feel unsafe or not at ease”, thus undermining the rationale of the system.<sup>168</sup>

Extrapolating the analysis presented in the IGC study, one might wish to imagine the comparatively large number of caseloads to be dealt with at processing centres. What is otherwise dispersed over a multitude of bureaucratic units in the territorial procedure will now be centralised. Who shall take responsibility for the groups of persons waiting in the vicinity of such centres? Camps will probably emerge, and it is open to dispute who should take charge for their functioning – the territorial state, on whose soil they are placed, or the state whose processing centre attracts them? While diplomatic representations processing small quantities of protection seekers can invoke the protection of international law for such normal consular activities, processing centres are clearly beyond this regulatory framework.

It is reasonable to presume a strong resistance being mounted by countries where regional processing centres might be placed. The experience of enlargement indicates that it demands considerable political and fiscal incitements to overcome the trepidation of transit countries to take charge of *bona fide* cases and to remain stuck with a residual caseload of the rejected ones, whose return is practically not feasible. These fears would be all the more justified under the exclusive approach, due to the attraction a processing centre would exercise on potential applicants both regionally and extra-regionally. Addressing such fears would be rather costly – after all, the bargaining chips available under the EU enlargement process were unique, and cannot be replicated on a global scale. The resistance of transit countries to agree to readmission arrangements regarding third country nationals is indicative in this regard.

A 1995 follow-up-report by the IGC reflected a profound scepticism amongst governmental and other experts. Its conclusion merits quoting in full:

Comments to the 1994 IGC Report from a variety of sources indicate that the suggestion of protection in an ‘exclusive’ location faces significant moral (political and humanitarian) and legal obstacles. Politically, it is a controversial scheme that would possibly have a very negative impact on public opinion. Moreover, it contravenes a number of relevant provisions of International Law and also seems to be incompatible with Constitutions and internal systems in many participating States. On the practical side, it may encourage human trafficking on forged identities and nationalities. Careful examination of these impediments therefore lead to the conclusion that the “exclusive” option is not feasible and as such, does not deserve further elaboration.<sup>169</sup>

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<sup>167</sup> Ibid.

<sup>168</sup> Supra, at pp. 7-9.

<sup>169</sup> IGC, *Reception in the Region of Origin. Draft Follow-Up to the 1994 Working Paper*, Geneva, August 1995, p. 7.

Seven years later, this conclusion still stands. As the development of the CEAS is bound to observe the limitations set by the 1951 Refugee Convention and the ECHR by virtue of article 63 (1) TEC, it appears inadvisable to pursue the exclusive approach further.<sup>170</sup>

*Core Features of the Exclusive Approach:*

- Clear-cut posture with appealing simplicity
- Impossible to deliver on the promise of exclusivity in practice
- Concentration effects may result in large caseloads to be processed
- Strong resistance to be expected by countries where processing takes place

#### 4.1.2 The Complementary Approach

The complementary approach assumes that Protected Entry Procedures do not replace existing asylum systems, but offer a parallel mechanism. Hence, it will still be possible to apply for asylum at the border or on the territory of European states (or, for the few states practicing resettlement, through the appropriate resettlement channels). This means that the complementary approach enters into a competition with irregular channels, and attempts to convince protection seekers of the benefits inherent in opting for regular access. This approach is costly in that two parallel tracks to protection must be entertained. Integrating both tracks with each other may mitigate some of the costs.

Once this approach is chosen, further choices offer themselves. Should Protected Entry Procedures develop into the *dominating* channel in the long run, catering for the majority of protection seekers and clearly relegating the spontaneous arrivals to second rank, should it operate more or less *en par* with the existing asylum system, or should it only serve a *minority* of protection seekers, with the majority still opting for applications on the territory?<sup>171</sup>

Going for the first option implies that Protected Entry Procedures are gradually developed into the main channel leading to protection. This development can only be brought about if protection seekers find it favourable to select Protected Entry Procedures over the smuggling option.

With certain reservations, the Australian model lends itself as an illustration. Although its “offshore component” of refugee reception is a quota-limited resettlement offer, and not a numerically unconstrained asylum mechanism, an analogy appears permissible. Australia strongly desires to redirect protection claims to its resettlement programme, and to discourage the use of smugglers with confluent ‘spontaneous’ arrivals on its shores to the maximum extent possible. To this end, the Australian government has launched a comprehensive package of disincentives, putting ‘spontaneous’ arrivals in a markedly disadvantageous position compared to resettled refugees.<sup>172</sup>

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<sup>170</sup> While the term of reference of the present study instruct the authors to address the issue whether regional processing centres could be considered, it also makes clear that externalised processing should be a complementary solution.

<sup>171</sup> See also Chapter 5.2 below.

<sup>172</sup> This policy assumes that spontaneous arrivals had bypassed protection alternatives on their way to Australia, and seeks to punish them as queue jumpers seeking migration outcomes, rather than protection in itself. The number of spontaneous arrivals actually impacts the number of resettlement places – where spontaneous arrivals are high, they entail a reduction of the resettlement offer. Finally, the method of dissuasion presupposes that the movements of



The bottom line of the approach is to make the competing protection offer ('spontaneous' arrival) unattractive by radically downgrading its benefits. The problem with this strategy is twofold. First, the attractiveness of the smuggling option lies in that it offers an immediate and numerically unconstrained solution. By contrast, resettlement is clearly limited by a numerical ceiling, and can entail lengthy processing periods. Protected Entry Procedures would be better suited to compete with the smuggling alternative, as there are no numerical constraints, but the temporal element would still be of critical importance. Second, by maximising the dissuasive components (e.g. through the systematic detention of 'spontaneous' arrivals), the Australian model may lead to practices colliding with international law.

This raises the question of whether the dominance of Protected Entry Procedures over the smuggling option could be sought by expanding its incentives rather than by the systematic punishment of spontaneous arrivals. States can make Protected Entry Procedures more attractive than being smuggled by delivering authoritative decisions as quickly as possible at the front-end of the system, and by stressing the security of passage for qualifying applicants. Ultimately, this brings us to the discussion of benefits and drawbacks of Protected Entry Procedures, which will be pursued in Chapter 5 below.

Strikingly, a number of states included in this study pursue a model according to which Protected Entry Procedures are designed to be *en par* with applications at the borders or on the territory. Both the Spanish and the Swiss legislation may serve as examples.<sup>173</sup> In the Swiss case, this approach is supported by an appropriate infrastructure. It must be stressed, however, that this *en par*-approach is not reflected in statistics, where the widespread ignorance of legal alternatives leads to the vast majority of arrivals using the smuggling channels.

In sum, the *en par* approach appears best suited to fulfil a central goal of Protected Entry Procedures, namely to effectively compete with smuggling as a channel to protection without spawning legal and practical problems of a magnitude calling its viability into question.

Another fraction of states operating Protected Entry Procedures clearly conceive them as a minor complement, with the majority of claimants still applying at borders or inside their territory. The UK and France are clear-cut examples. In these countries, Protected Entry Procedures appear to be designed as a security valve, occasionally allowing in the odd case, without its existence being generally known by a larger public or potential protection seekers. The capability to compete with the smuggling channel is very limited, if at all existent, which is perhaps the main drawback

*Core Features of the Complementary Approach:*

- Best long-term potential in competing with irregular channels
- Frames protection seekers as actors capable of rational decision-making
- Can be formulated flexibly, allows states a fair degree of discretion
- Costly to operate two channels

protection seekers are centrally governed, and that individual protection seekers have the opportunity to make informed decisions on the choice of channels to protection. Arguably, this is not the case. For details, see Chapter 6.3.1 on Australia.

<sup>173</sup> See Chapter 6.1.5 on Spain and Chapter 6.1.4 on Switzerland below. Both countries accord Protected Entry Procedures the role of a normal access channel, side by side with applications at borders or on the territory.

### 4.1.3 The Exceptional Approach

Protected Entry Procedures can also be used to facilitate access in exceptional situations only. States would activate them at discretion, operate them for a period of perceived need, to then phase them out. While in operation, Protected Entry Procedures would not exclude other channels, which makes it different from the exclusive approach considered above. At best, the exceptional approach allows for a massive intervention into a particular refugee crisis. Its multilaterally coordinated use in conjunction with other channels (resettlement, evacuation) could allow the EU not only to mitigate suffering in individual cases, but actually to move closer to the resolution of a crisis at large.

One contemporary example is the Swiss regime for Temporary Protection. Once Temporary Protection has been launched, Swiss representations may function as access points for individuals applying under the TP scheme.<sup>174</sup> A further array of historical examples should be recalled: the Danish representation in Croatia, processing visa applications in co-operation with UNHCR, the Humanitarian Evacuation Programme catering for the access of Kosovars to protection outside the region, and, beyond the European context, the processing centres created for Indo-Chinese refugees. While the Swiss TP scheme caters for individual applications, the historical examples were, to varying degrees, characterised by group processing.

The exceptional approach is closely related to discussions on temporary protection, and the existing *acquis* offers a starting point for further elaboration. While not exhaustively regulating the issue of access to Member States' territory, the TP Directive indirectly presupposes some form of Protected Entry Procedures. Its article 8 (3) provides as follows:

The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.

Provided that visa requirements are not abolished outright for a source country, Member States could facilitate the acquisition of a visa through speedy Protected Entry Procedures in the region of crisis. If the latter approach is used by a Member State, it needs to have a rudimentary infrastructure in place to comply with the prescription of the quoted provision. Hence, an efficient implementation of the TP Directive in a situation of crisis presupposes that the problem of access be addressed in advance. A discussion on the contribution potential of Protected Entry Procedures might be appropriate in this context.

It is clear, however, that the exceptional approach has only a limited capacity to compete with smuggling alternatives. After launching it, it might develop a considerable attraction, but it should be kept in mind that there is no long-term confidence building with protection seekers as in permanent models expounded earlier. From a bureaucratic perspective, the lack of predictability is problematic: as Protected Entry Procedures are only operated in an ad-hoc fashion, states have to choose between having resources on long standby periods, or to accept that procedures will be slow and inefficient in an initial phase of operation, due to the lack of preparedness. This problem does not pose itself for states who have opted both for a permanent mechanism catering for a core

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<sup>174</sup> See Chapter 6.1.4.2 below.

category, and an exceptional one to serve additional categories. The bureaucratic routines built up for the former may as well serve the latter in an emergency.

The exceptional approach is, however, not a simple one. It requires thorough preparations, ideally comprising legislation at the Community and domestic level, responsibility allocation among and within Member States, training of staff and the reservation of financial and material resources. Also, the Kosovo experience appears to suggest that a greater degree of material harmonisation of protection benefits among Member States is desirable to avert the emergence of strategic behaviour. Finally, against the backdrop of the cases of Bosnia and Kosovo, there is the question of ensuring that the exceptional approach is driven by the protection need rather than the desire for media exposure. In the medium term, states would have to formulate political principles on when to activate the exceptional approach. A practice of a purely ad hoc-character would be hard to justify, and perhaps evoke criticism on grounds of an unfair distribution of protection resources. Formulated political policies would limit state discretion, and augment predictability for the individual in need of protection.

*Core Features of the Exceptional Approach:*

- Concentrates protection efforts on one crisis, which brings resolution of that crisis within reach
- Maximises state discretion, while reflecting a stand-by commitment to protect
- Can be combined with other channels, with the *acquis* related to Temporary Protection, and with permanently operated Protected Entry Procedures
- Future mechanisms can benefit from lessons learned during the Humanitarian Evacuation Programme and earlier precedents
- Necessitates thorough preparations (legislation, infrastructure, training)
- Low predictability, limited competitive edge *vis-à-vis* irregular migratory channels
- May strain bureaucracies when activated, due to its ad-hoc character
- Risk for media-driven decision-making
- Requires the formulation of political principles for its usage in the medium term – pure ad-hocism is hard to justify

## **4.2 Unilateral Approaches or Multilateral Cooperation?**

The second dimension to be considered is to what degree Member States wish to cooperate with each other, and with other states, when operating Protected Entry Procedures. This dimension co-determines the complexity of procedures in many ways. Four main constellations of inter-statal behaviour can be identified:

### *Unilateral Practice*

A single host state uses its diplomatic representations to facilitate access to protection. No formal cooperation with other host states or with countries in the region of origin is foreseen. European states operating or having operated Protected Entry Procedures have opted for this approach, which draws on their existing resources and does not demand any coordination with other states. It appears to be appropriate as a “testing ground”, which allows states to gather experiences with a new channel to their asylum systems.

Its limitations are equally obvious. In principle, protection seekers could deliver successive applications to all states offering Protected Entry Procedures, and the latter have no mechanisms for either controlling the occurrence of multiple applications, or to allocate responsibility to one of the seized states. The shared resource of a representation network is used in a fragmented manner.

### *Multilateral Cooperation among Host States*

Two or more host states cooperate on the usage of their diplomatic representations to facilitate access to protection. No formal cooperation with other host states or with countries in the region of origin is foreseen. Presently, there is no example for states pursuing this approach. However, it is interesting to note that Denmark and Sweden closely coordinated their reception activities in Croatia during the earlier years of the Bosnian refugee crisis. The discussions on joint EU processing centres reflect that this form of cooperation is broadly within terms of the conceivable.

However, it must be differentiated exactly which degree of multilateralism is envisaged. Again, a gamut of choices exists, listed in order of their complexity:

- *Harmonisation of minimum standards:* Member States could jointly agree on a limited number of minimum standards to be observed when operating Protected Entry Procedures. This would merely aim at a rudimentary harmonisation of the protection offer, offering a basis for coherent information policies vis-à-vis protection seekers.
- *Disseminating information:* Member States could jointly disseminate information on Protected Entry Procedures among potential applicants, stressing in particular their advantages over irregular entry channels. This would presuppose that at least a basic level of harmonisation of Member States' practices has been achieved.
- *Pooling information on applications:* Member States' representations or territorial authorities or both contact each other and exchange information on applications. This could take place within the framework of local consular cooperation, or, more ambitiously, using a joint database. The experiences gathered with SIS and Eurodac could be usefully related to.
- *Pooling diplomatic representations:* Member States represent each other as access points to Protected Entry Procedures. Such a mechanism is envisaged within the Schengen *acquis*, but has hitherto not become fully operational. As Member States' representation networks differ in size, an agreement on the sharing of costs would be called for.
- *Determining responsibility for claims:* Member States jointly operate a fixed mechanism allowing them to allocate a given claim to a single Member State. To a limited extent, such a mechanism could attempt to transfer the lessons emerging from the Dublin Convention to a new context. This choice would presuppose a discussion on responsibility sharing, and a coordination of close links-criteria used by Member States.
- *Joint processing centres:* a new physical and administrative infrastructure is created outside Member States' territories. This is the most demanding choice; it would presuppose an agreement on allocative mechanisms and the sharing of responsibility for protection seekers, on the sharing of costs for operating the centres, and, finally a delimitation of state responsibility under international law born by each Member State for the activities carried out at the centre.

### *Bilateral Cooperation: Host State – Country in the Region of Origin*

A single host state cooperates with a country in the region of origin to facilitate access to protection. This cooperation could take the form of a processing centre placed in and run with the explicit consent of the country in the region of origin. It should ensure that Protected Entry Procedures would not cause tensions between a state operating them and the territorial state where access points are situated. Remarkably, bilateral agreements have also been used to facilitate the departure of resettlement beneficiaries from countries of origin.<sup>175</sup>

### *Multilateral Cooperation between Host States and Countries in the Region of Origin*

Two or more host states cooperate with one or more countries in the region of origin to facilitate access to protection. This cooperation could take the form of a processing centre placed in and run with the explicit consent of the country in the region of origin. Where joint processing centres are envisaged, such an agreement appears to be essential. It could, *inter alia*, address the question of how to handle the problem of rejected claims. Historical lessons can be drawn from the operation of the CPA and from the HEP in Macedonia.

These four constellations have focussed on the degree of inter-statal cooperation. In addition, it should be considered to what degree the cooperation between states operating Protected Entry Procedures and *other actors* could be developed. To be sure, *international organizations* may play an important role. UNHCR already contributes informally to existing Protected Entry Procedures, apart from its role in resettlement schemes. Already today, IOM facilitates resettlement transfers, and it might be considered, to what extent the organization could contribute to Protected Entry Procedures as well. The role of *non-governmental organizations* merits a detailed discussion. After all, these organizations play an important role in counselling individuals claimants and securing quality in territorial procedures. A transfer of these functions to the domain of Protected Entry Procedures is not unproblematic: different from states, NGO's possess no extraterritorial representations, and would first need to build up an appropriate infrastructure. Finally, *private donors* should also be considered as partners. The Canadian practice allows individuals to sponsor resettlement places, and one might question whether this model is transferable to Protected Entry Procedures, i.e. when considering the closeness of links. States wishing to develop Protected Entry Procedures further might wish to consider the role any of the three categories of actors could play in them.

## **4.3 Inclusiveness and Formalisation**

As has been demonstrated in the legal analysis<sup>176</sup>, Protected Entry Procedures allow for a considerable – although not total – freedom in defining beneficiaries and formulating procedural rights. This raises the question of how to calibrate the needle's eye, through which the protection seeker's case has to pass. Obviously, the choice is between more exclusive and more inclusive solutions. Some states limit Protected Entry Procedures to refugees in the sense of the 1951 Convention, others frame the group of beneficiaries wider than that. Some states consider applications filed in countries of origin, others do not. In certain states, visas are granted after a

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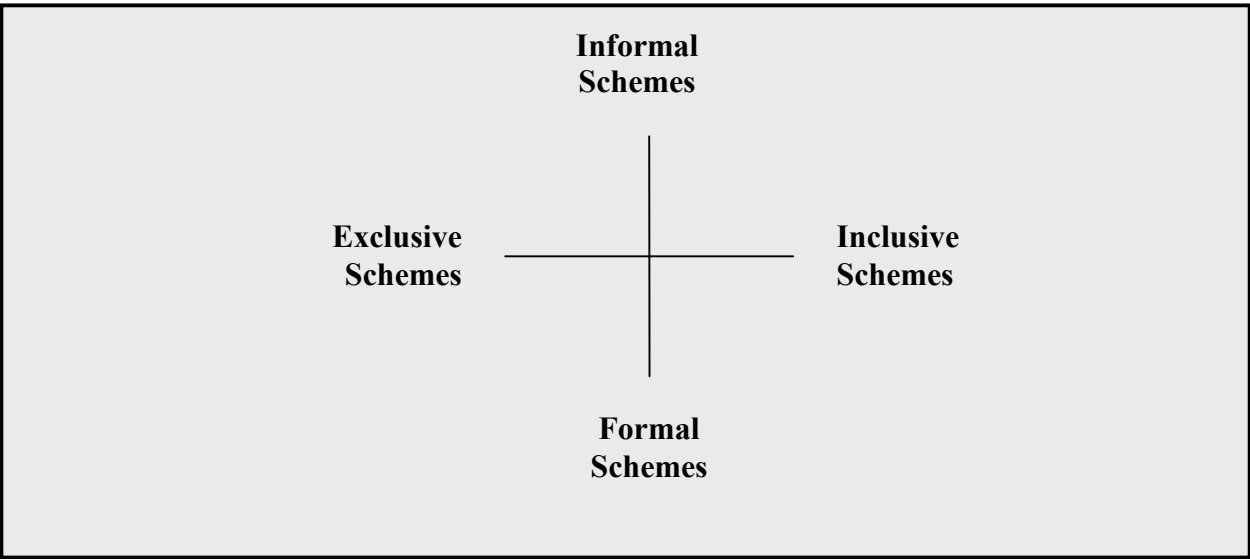
<sup>175</sup> The US has approached authorities in countries of origin to negotiate agreements facilitating in-country processing and departures. See Chapter 6.3.3.4 below.

<sup>176</sup> See Chapter 3.2.4 below.

prima facie assessment. The technical choices in determining the degree of inclusiveness will be considered below – what interests us here is the principled choice. To the extent comparison is possible, shall Protected Entry Procedures be less inclusive, equally inclusive or more inclusive than territorial procedures of which ‘spontaneous’ claimants avail themselves? To the degree they deviate from territorial procedures: what categories shall they cater for, and what rights and benefits shall they offer?

The material question of inclusiveness begs, in turn, a procedural question: should Protected Entry Procedures be conceived as formal, transparent and predictable procedures, or rather as informal, flexible, discretionary and discrete practices? Opting for a formal procedure might entice states to calibrate the needle’s eye narrowly, while resorting to informal practice could open up for a more generous approach in reality. On the other hand, informal and opaque decision-making may also result in an excessively restrictive approach, ultimately beyond democratic and institutional control. In the end, the leeway of informal schemes can be used both for and against protection seekers, and both in accordance with, as well as in defiance of, the intentions of constituencies.

The latter choice replicates neatly the overarching dichotomy of law and politics, of fixed norms and bureaucratic discretion. The interrelation of both choices can be graphically represented in a grid chart (Figure 1), which facilitates a comparison of the actual practices of states.



**Figure 1 – Modelling Protected Entry Procedure Schemes**

Any state practising a form of Protected Entry Procedure could, theoretically, be linked to a specific point in the chart. However, informal schemes are difficult to research and analyse, as information is scarce, and practice fluctuates much more than in formal schemes. Therefore, an observer will have to make certain allowances before drawing hard conclusions in such cases.

A reminder is in order. It would be improper to conclude on the ‘restrictiveness’ or ‘generosity’ of a state based on an assessment of its Protected Entry Procedures alone. This must always be seen in conjunction with its ordinary protection system based on territorial processing, with the norms and policies regulating access to its territory, and with other protection schemes such as resettlement.

Quite another matter is what international law demands of states, and what moral obligations they are under with regard to the protection of refugees.

## **4.4 Filter Elements in Protected Entry Procedures**

Protection systems feature a quantitative as well as a qualitative aspect. States wish to protect the ‘right’ people in the ‘right’ way, which confronts them with the challenge of allocating resources to those deemed to be most needy. This presupposes answers to the questions “how many beneficiaries shall the system protect?”, “who shall be deemed a beneficiary?” and “how shall beneficiaries be protected?”. On the quantitative level, the absence of quota ceilings suggests that the gauging of filter elements remains the only steering device. Clearly, filters have an impact on the quality of protection as well. By way of example, it makes a difference whether or not a Protected Entry Procedure diminishes the temporal exposure to persecutory threats by offering a fast track in urgent cases. From the perspective of the individual applicant, protection is an issue from the very initiation of the procedure, long before any material decision on status is taken. Hence, filter elements let systems identify a desired beneficiary and protect her in a desired manner. In the context of Protected Entry Procedures, it is reasonable to distinguish between the dimension of making procedures accessible, the dimension of delimiting and identifying beneficiaries, and the dimension of distributing risk during the procedure.

At the end of this section, an overview of the filter elements discussed will be offered in Figure 2.

### **4.4.1 Making Procedures Accessible**

#### *Information Policies*

The first dimension of accessibility is about the availability of knowledge. To make use of Protected Entry Procedures, potential beneficiaries have to be aware of their existence. Therefore, it is reasonable to ask whether potential beneficiaries are informed about the possibility to approach diplomatic representations to apply for a protection visa. How widely is such information spread, and what means of dissemination are used?

The full latitude of choices emerges when UK and Australian information strategies on asylum-related issues are compared with each other. As a matter of policy, the UK limits information dissemination on its Protected Entry Procedure<sup>177</sup>, and merely publishes relevant instructions on the official Internet site of the Home Office.<sup>178</sup> This could be compared to the efforts of the Australian government to discourage ‘spontaneous’ arrivals on its shores by disseminating multilingual warning leaflets at Indonesian hostels frequented by potential clients of human smugglers.<sup>179</sup> Quite clearly, placing instructions on the Internet is not the best way to inform potential protection

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<sup>177</sup> Interview with Iain Walsh, UK Home Office, 16 May 2002.

<sup>178</sup> See text accompanying note 437 *infra*.

<sup>179</sup> These information campaigns directed at potential migrants are complemented by efforts to convince Indonesian elites on the negative impact of smuggling activities on Indonesian society. See Anna Carlson, *Interception of Asylum Seekers. A Minor Field Study on the Co-operation between Australia and Indonesia*, Masters’ thesis, Lund 2002 [hereinafter Carlson 2002]. Forthcoming in autumn 2002 at <<http://web1.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/EssayBySubject?Open&ShowCategory=Folkr%E4tt>>.

seekers. At best, it would reach narrow educated middle-class segments with an exceptionally developed understanding of the UK immigration system. Leaflets distributed along the travel routes reach a different, and assumedly much wider clientele. What outcomes were to be expected, if the UK government would chose to inform on its Protected Entry Procedures by leaflet dissemination in countries from which protection typically depart towards the UK? Or, if EU governments would choose to inform on a harmonised system of Protected Entry Procedures through a multi-channel exercise, addressing diasporas (which prove to be important information intermediaries) as well as potential migrants themselves? These questions serve but to illustrate choices not reflected in current practices. After all, information dissemination is outcome-critical.

This brings us to the question of whether governmental information policies can compete with manipulative information dissemination by human smugglers. The institution of seeking asylum has become generally known in broad layers of the migration-inclined world population, and using smugglers' services is likely to be seen as the only way to access asylum. Placed at the front-end of the migratory chain, human smugglers are important information providers, sometimes *de facto* possessing an information monopoly. The information they disseminate is strategically adapted to marketing needs; it does not reflect the real risks and exaggerates opportunities of access. Not disseminating information means leaving the field to human smugglers outright. Where governments opt for information dissemination, the choice is between mere discouragement and the referral to legal alternatives to being smuggled. The potential target group will then be able to evaluate whether the legal alternative is a realistic option. This, in turn, is not only a question of marketing, but also one of content – the offer must meet the core needs of the beneficiaries the system is set to attract.

However, information policies are not only about reaching potential migrants. In practice, it is not self-evident that representation staff and the migration control apparatus possess sufficient knowledge about the existence and functioning of Protected Entry Procedures. At the Austrian Embassy in Tehran, one protection seeker was informed by locally employed staff that no “programme” existed for the processing of protection claims, although Austria had operated law-based Protected Entry Procedures for years.<sup>180</sup> A Spanish NGO reported that it had been contacted by a Spanish diplomatic representation, whose staff wondered what to do with a person demanding protection.<sup>181</sup> Within the UK Home Office, senior staff of UK Visas (which oversees visa practices) appeared to be unaware of the existence of a possibility to grant an entry permit to the UK on asylum-related grounds.<sup>182</sup> Quite clearly, the effective operation of Protected Entry Procedures presupposes a corresponding information and training effort, so that decision-makers and other staff in contact with applicants and their claims can implement them.

Presently, the non-dissemination of information on Protected Entry Procedures performs an important filter function, at times consciously employed by governments. While such a policy is unhelpful in filtering out the right beneficiaries, it undoubtedly diminishes the grand total of applicants under Protected Entry Procedures. The question remains whether this transforms into a gain for the market of human smuggling.

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<sup>180</sup> See note 269 *infra*.

<sup>181</sup> Interview with CEAR staff, 29 May 2002.

<sup>182</sup> Not disseminating information on the possibilities to apply for entry clearance on protection-related grounds has been described as a policy decision by the Home Office. Interview with Iain Walsh, Asylum Unit, UK Home Office, 16 May 2002.



### *Number, Location and Physical Accessibility of Representations*

Accessibility is also determined by physical factors. Protected Entry Procedures work with radically different preconditions compared to ordinary asylum procedures, which merely presuppose territorial contact. The degree of accessibility varies among states. Some allow applications by mail<sup>183</sup>, at face value one of the most liberal approaches to the access problem. Others wish to limit direct contact between embassy and applicant, and employ NGOs or UNHCR as pre-screening agencies to that effect<sup>184</sup>. This notwithstanding, a central role is usually accorded to diplomatic representations of the goal state, which generally operate as access points for the Protected Entry Procedure. This role assignment raises a number of questions.

First, how dense and relevantly located is the network of access points, i.e. how many representations does a given state possess, and are they located where potential beneficiaries can realistically reach them? While larger states usually operate dense networks of representations, smaller states do not. A comparison between Austria and France is indicative in this regard. While France is represented by an embassy in 156 of the world's 193 states/entities, Austria has set up embassies in 78 states/entities. For the protection seeker who has close ties to Austria, but none to France, this difference can be quite decisive. In addition, it raises an issue of burden sharing: a state which is well represented in a certain region will potentially receive a larger share of applications. A related issue is whether protection can be sought at any diplomatic representation of a given destination state, or only at certain designated representations. By way of example, asylum claims cannot be filed at Austrian honorary consulates, while other Austrian representations do accept them.<sup>185</sup> Annex I provides an overview on the number and location of representations competent to receive claims under Protected Entry Procedures for Austria, France and the UK.

The location of access points may also entail additional filtering and selection effects. Conflict situations may lead to the closing down of diplomatic representations precisely when they are most needed as access points for protection seekers.<sup>186</sup> A representation in the majority-dominated capital may be quite useless for a repressed provincial minority. However, it is fully conceivable that geographic obstacles such as these could be overcome under favourable conditions, e.g. by reaching out to accessible provinces through field missions by relevant staff. The initial efforts of states to erect access points for Kosovars in Macedonian refugee camps testify to the potential, but also to the limitations of outreach.<sup>187</sup> In general, such flexibility would perhaps put excessive demands on a mechanism conceived to operate under normal circumstances, and within the framework of pre-existing resources. Hence, diplomatic representations remain natural points of access, and limitations flowing from their location have to be accepted, not at least from a legal perspective.

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<sup>183</sup> Switzerland accepts applications by mail, although only on an exceptional basis. See Chapter 6.1.4.3 below. Portuguese representations receive the majority of applications by mail. As Portugal does not operate a formal system, such claims are decided on a case-by-case basis. See Chapter 6.2.2 below.

<sup>184</sup> Applicants for resettlement to the US are regularly pre-screened by a voluntary agency. Many of the states included in this study accept referrals from UNHCR within the framework of Protected Entry Procedures.

<sup>185</sup> See Chapter 6.1.1.4 below.

<sup>186</sup> The closing of embassies in Pakistan during autumn 2001, coinciding with a regional refugee crisis related to the war in Afghanistan, might serve as an instructive example.

<sup>187</sup> Initially, states willing to receive Kosovars established their own presence in camps. Faced with the enormous practical difficulties to operate unilateral access points, they eventually switched to using UNHCR as an intermediary for offering evacuation places.

After all, it is entirely within a states' discretion to establish or maintain diplomatic presence.<sup>188</sup> This notwithstanding, the filtering effect of their location has to be taken into account.

Secondly, it has to be considered whether applicants can physically access representations. It has been reported that the possession of ID documents is a precondition to enter the premises of certain UK embassies. This filters out considerable groups of persons who could come within the scope of the UK Protected Entry Procedure, inter alia Somalians, who are scarcely in possession of ID documents.<sup>189</sup> Other sources contend that embassies will not allow access to a person who cannot refer to a pre-booked meeting with a staff member. It has also been alleged that guards employed by the embassy requested bribes to allow individuals access to its premises. This raises intricate questions of state responsibility for such conduct. It is clear, however that all types of demands named earlier will narrow down the class of persons who will even manage to present their protection request to the representation staff.

Thirdly, officials of the country hosting the representation may simply inhibit access or make access attempts unacceptably risky.<sup>190</sup> This type of obstacle cannot be attributed to the represented state, and is beyond its control when framing the inclusiveness of a given Protected Entry Procedure.

Difficulties with physical access can be mitigated. NGOs or UNHCR offices could function as access points whose use raises less suspicion with local authorities than contacting a foreign embassy. Also, security routines may be less demanding, thus improving accessibility for claimants. This is one of the advantages of the US resettlement system, where voluntary agencies assume the role of pre-screening entities, physically separated from the much more severely guarded diplomatic representations.

#### **4.4.2 Delimiting Categories of Beneficiaries**

The delimitation of beneficiaries is at the heart of any Protected Entry Procedure, sending out the most prominent message on which persons the regime intends to cater for. Such delimitation will inevitably be compared to that available under territorially available protection arrangements (usually comprising refugee status, subsidiary protection, and, in a given situation, temporary protection, apart from additional categories not grounded in international law).

##### *Definition of Beneficiaries*

Looking at state practices, a minimum approach is to open up Protected Entry Procedures for persons fulfilling the criteria of the *refugee definition* in the 1951 Convention. In this context, the definition's requirement of being outside one's country of origin or habitual residence poses specific problems. If this criterion is uncritically employed in the context of Protected Entry Procedures, it will make all applications filed in the country of origin or habitual residence

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<sup>188</sup> This freedom has to be exercised with due regard to the sovereignty of the receiving state. See inter alia the Vienna Convention on Diplomatic Relations, art. 3 (b) and (d).

<sup>189</sup> The UK embassies in Kenya and Uganda are cases in point. Interview with UNHCR London, 16 May 2002.

<sup>190</sup> In 2001 and 2002, a number of North Korean citizens attempted to enter the premises of foreign representations in China. Occasionally, Chinese police officers hindered their access, which inter alia led to representations by the Japanese government with the Chinese government. The case illustrates that political allies to countries of origin can perform important filtering roles. See, e.g., China: North Korean asylum seekers a challenge, Associated Press, 13 May 2002.

invariably unsuccessful. In fact, this implies a geographical limitation, dealt with more fully in the filter element described below under the heading “choice of countries”.

Some countries also include beneficiaries of *subsidiary forms of protection*. This mirrors very accurately the legal basis of Protected Entry Procedures in international law, namely obligations flowing from the ECHR and the CRC. Also, once *temporary protection* arrangements have been launched for a certain category, Protected Entry Procedures can be used to allow persons falling in under it to apply individually for entry. The Swiss system contains such an option, although it has not been tested in practice. In exceptional circumstances (as the Danish and Swedish initiatives to secure access for certain Bosnians, or the Humanitarian Evacuation Programme for Kosovars), focus has been put on a more vaguely circumscribed “immediate need for protection”<sup>191</sup>, rather than the conventional definitions of refugees or persons falling under subsidiary protection. This offers more leeway to states in decision-making, which may extend protection to each person seeking exit from a conflict region, or limit it to what has been termed “vulnerable groups”.

A number of countries do posit demands additional to those enshrined in the refugee definition or in the delimitation of subsidiary protection. Such demands do not relate to protection needs, but focus on the existence of ties to the country from which entry is sought. Family linkages, linguistic commonalities and previous work or study in the destination country are among the factors used to establish the existence of such *close ties*. Inevitably, a requirement of ‘close ties’ narrows down the beneficiary group further. It reflects an attempt to craft a rudimentary form of global responsibility allocation for persons in need of protection, hampered by the fact that close ties-requirements are unilaterally imposed and not coordinated among states. In some cases, *utilitarian criteria* as the availability of housing<sup>192</sup> or the capacity of the applicant to integrate<sup>193</sup> are taken into account during selection.

### *Choice of Countries*

A major water-shed is whether applications are accepted at representations in any country, including the *country of origin* of the applicant, or whether countries of origin are excluded as access points. Some countries formally exclude applications in countries of origin, while others will formally accept them, but their chances for success are very low or nil. This filter is interrelated with the accessibility of the system, expounded earlier. Not accepting applications from countries of origin excludes an important group of persons potentially in need of protection, and implies catering only for those resourceful enough to emigrate to a neighbouring country.<sup>194</sup>

US resettlement practices illustrate that the choice of countries serving as access points may very well be inspired by considerations of foreign policy. The US does not accept resettlement claims filed in countries of origin, but makes an exception for cases submitted in Cuba, the countries of the Former Soviet Union or Vietnam. Canadian practices reflect another approach to the issue of

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<sup>191</sup> See the Chapter 2.2.2 *infra*.

<sup>192</sup> See Chapter 6.1.2.8 on France.

<sup>193</sup> See Chapter 6.1.4.3.3 on Switzerland.

<sup>194</sup> One governmental interlocutor interviewed in the course of this study perceived claimants applying from their country of origin as “not credible” solely by virtue of the fact that they had not emigrated. This position should be reconsidered. Non-emigration can have many causes, as e.g. emigration restrictions or lack of funds to finance travel, which do not necessarily allow conclusions on the fear held by the applicant, or its well-foundedness.

selecting countries of origin, perhaps putting more emphasis on protection needs than the US system does.<sup>195</sup>

A crucial issue for the assessment of claims filed under Protected Entry Procedures is the issue of *protection elsewhere*. One country does not accept claims filed in countries where a UNHCR or UNDP representation exists, the underlying assumption being that resettlement is available through these organisations.<sup>196</sup> Another approach is to assume countries of first asylum to be sufficiently 'safe' for a person seeking entry to an extraregional state through Protected Entry Procedures, which then allows for turning down her request.<sup>197</sup> While it is beyond dispute that the genuine availability of protection elsewhere is per se a good reason for a protection system not to deal with a case, once again, the described mechanisms operate with abstract assumptions to a degree which might lose sight of real and concrete protection needs. In fact, they narrow down the choice of countries from which an application with reasonable chances for success can be filed. If Iran would be deemed generally safe for Afghans, there are few scenarios imaginable where Protected Entry Procedure could make an authentic contribution to alleviate global protection problems while dissuading individuals to use human smugglers. Similarly, the concept of protection is put under duress, where referral is made to countries not signatories to the 1951 Refugee Convention.<sup>198</sup> In general, the issue of 'protection elsewhere' merits continued close scrutiny, and it is perhaps in this area that common standards are most needed, if Protected Entry Procedures are not to gradually degenerate into mere window-dressing of deflection policies.

#### 4.4.3 Distributing Risk during Procedures

Protected Entry Procedures differ starkly from territorial asylum procedures when it comes to the distribution of risk between the protection seeker and potential host state. Protected Entry Procedures put much, if not all of the risk-taking on the claimant, until she actually is allowed to enter her host state. The *length of the waiting period before entry* is a parameter of utmost importance, as the diplomatic representation has few, if any possibilities to reduce the risks with which the claimant may be faced. Hence, the exposure to risk and the length of procedure are closely related.

A filter element of major importance is whether applicants are allowed to enter the host country after a rapid and preliminary assessment of her case (a form of *urgent transfer mechanism*), or whether she has to wait in the country where the diplomatic representation is located for the whole

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<sup>195</sup> See Chapter 6.3.2.3 on Canada.

<sup>196</sup> See Chapter 6.1.3.5 on the Netherlands. The Swedish government has repeatedly used a similar argumentation when arguing that EU deflection policies do not block off protection seekers from safety. Needless to say, the capacity of UNHCR resettlement programmes is too limited to serve all qualifying cases after a reasonable waiting period. This is well known to governments, and the Dutch and Swedish governments must be aware of the fact that the assumption on the availability of international protection in countries with UNHCR or UNDP presence is counterfactual.

<sup>197</sup> This technique was used by Austria with respect to some 5000 Afghans seeking protection in Austria through the Austrian embassy in Tehran in 2001. A mission was dispatched to Iran by the Austrian Ministry of the Interior, which came to the conclusion that Iran was safe for Afghans. On the basis of this assessment, the claims were decided negatively. See Chapter 6.1.1.5 on Austria.

<sup>198</sup> An important element of Australia's Pacific solution is its interception cooperation with Indonesia, which has not signed the 1951 Refugee Convention. The Australian government co-finances Indonesian immigration control infrastructure in an effort to render interception more effective. Intercepted cases are often unable to find a durable solution in Indonesia, as resettlement places are scarce, and Indonesia itself offers no local integration. See Carlson 2002, *supra* note 179.

length of in-depth determination procedures. Many of the countries scrutinised in this study display a willingness to accommodate urgent cases, either through a formal fast track, or through informal steps. In essence, urgent procedures either mean prioritising a certain case, or reducing the depth of scrutiny and accepting that facts are replaced by assumptions to a greater extent. Shortening procedural length shifts risks over to the destination state (which either risks allowing in cases not sufficiently qualified or allocating valuable processing resources to the wrong cases), while lengthy procedures augment the risks of the applicant (whose temporal exposure to e.g. persecutory risks is increased with each day of waiting). Theoretically, there will be a break-even point, where the risk of waiting for the outcome of Protected Entry Procedures is even or greater than the risks of smuggling, to then enjoy the relative safety of territorial procedures. Protected Entry Procedures need be crafted in such a fashion that this break-even is not reached, if defections to human smugglers are to be discouraged.

Reducing the *depth of scrutiny* to expedite procedures may work both for and against the applicant. Austria has deliberately opted for a simplified procedure, where the applicant fills in a questionnaire, which is the basis of Austria's decision to allow entry or not. The narratives in the questionnaire were tested against the standard of whether the facts of the case allow for the conclusion that granting asylum would have been 'likely' in territorial procedures. Clearly, this worked as a filter element; territorial procedures allow for a much richer material to be compiled during procedures. Only strong and clear-cut cases will emerge from such a selection mechanism. On the other hand, ambitious processing schemes with scheduled interviews and the possibility to ask for and communicate clarifications between determining authority, representation and applicant are time-consuming and thus risk-augmenting from the perspective of the applicant.

Apart from the depth of scrutiny, other elements must be named. Especially pertinent are issues of *language adaptation* – shall all documents be translated into the language of the applicant, or is it the applicant's responsibility to adapt to the official language(s) of the destination state? The availability of *legal aid*, as well as of *appeals* against negative decisions is a further element which may perform filter functions.

The choice between speed of procedures and procedural safeguards is a real dilemma. Let us assume that refugee advocates were to insist on full scrutiny and a number of procedural guarantees matching those available in territorial procedures. States operating Protected Entry Procedures would be likely to externalise part of the risks and costs connected with such processing, e.g. by keeping applicants waiting for outcomes outside their territory. This, in turn, would augment applicants' exposure. Hence, in the context of Protected Entry Procedures, processing time is an informal filter element of great importance, turning lobbying goals established in territorial procedures on their head. Quick procedures cannot be complex and formal. On the other hand simple and informal procedures give a leeway to decision-makers which may be used to the detriment of applicants.

The *physical transfer* to a state having granted an entry visa merits specific mention. It opens another panoply of choices: who is responsible for organising travel documents, the journey itself

and for covering its costs?<sup>199</sup> Should a *bona fide* applicant *de facto* be unable to access protection, because she is destitute and cannot pay the airfare?<sup>200</sup>

Finally, the *aversion of persecutory threats* through the diplomatic representation needs to be named. Does the representation remain passive vis-à-vis persecutory threats during the waiting period, or is there a possibility of extending rudimentary forms of protection *in situ*? In practice, the possibilities of representations are limited to assisting in an early transfer of the applicant, and probably an escort to the port of departure. Nonetheless, the practice of states illustrates that use is indeed made of the limited choices available in such cases.

- Accessibility of Procedures
  - Information policies
  - Number, location and physical accessibility of access points
- Delimitation of beneficiaries
  - Definition of beneficiaries
    - Refugee definition
    - Subsidiary protection
    - Temporary protection and other categories
  - Choice of countries
  - “Protection elsewhere”
- Distributing risk during procedures
  - Length of procedures before entry is permitted
    - Depth of scrutiny
    - Language adaptation
    - Legal aid
    - Availability of appeals
  - Implementation of physical transfer
  - Aversion of persecutory threats through representations

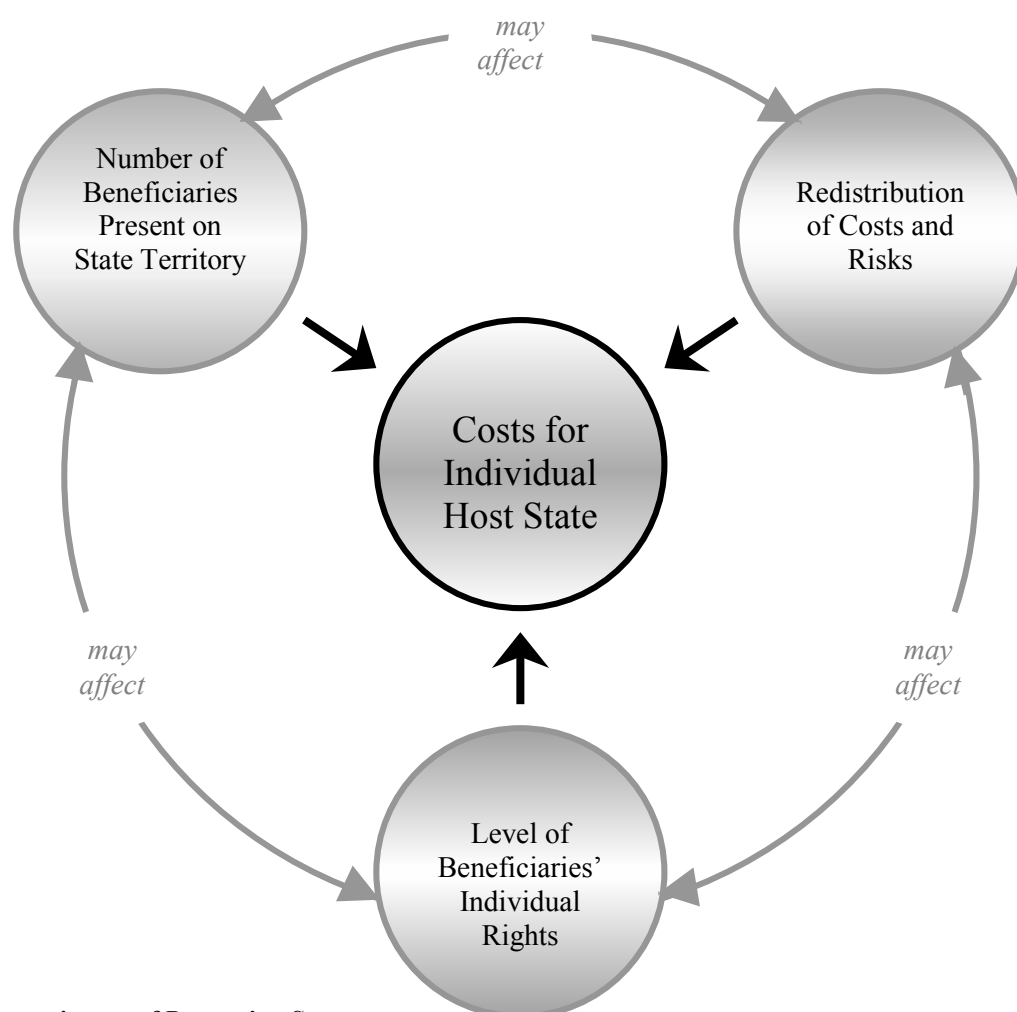
**Figure 2 - Main Filter Elements in Protected Entry Procedures**

<sup>199</sup> Germany usually covers travel costs for cases exceptionally admitted. See Chapter 6.2.2 below.

<sup>200</sup> Inspiration from resettlement systems would imply that the host state assumed responsibility. Insisting on the initiative of the protection seekers would suggest that it is for the applicant to find the means for ensuring physical access.

## 5 Benefits and Drawbacks of Protected Entry Procedures

A constructive discussion on Protected Entry Procedures presupposes a clear idea of what its benefits and its drawbacks will be, once they are integrated into an overall system of refugee protection and migration control. To facilitate our analysis, an adapted version of a three-determinant model focussing on costs for individual host states will be used in the following (Figure 3).<sup>201</sup> A primary interest for host states is to maintain control over the overall fiscal, social and political costs of protection systems incurred by that state. This urge for control stems from the fact that the tax base as well as other resources critical for affording protection is finite. From a host state perspective, three determinants impact the overall costs of protection systems: the number of beneficiaries, the level of rights accorded to them, and the possibilities for redistributing risks and costs.<sup>202</sup>



**Figure 3 – Determinants of Protection Systems**

<sup>201</sup> For a full analysis, see Noll 2000, *supra* note 23, pp. 101-107, and Gregor Noll, *A Theory of Burden Sharing in the Asylum Field*, paper presented at the January 2002 conference of the Network on burden sharing in the European Union, coordinated by the London School of Economics, and currently under review by the *Journal of Refugee Studies*.

<sup>202</sup> In earlier versions of the model, the third determinant was confined to 'burden-sharing'. As burden-sharing is commonly understood to refer to arrangements on cost redistribution between states, the present study needs to widen this determinant somewhat, so that it may also include other actors as international organisations or individual sponsors.

These three determinants are interdependent – to name but one example, a state experiencing an increase of protection seekers on its territory in the absence of burden sharing-arrangements to redistribute part of the costs to states will usually be inclined to react by diminishing the level of rights enjoyed by beneficiaries. As a minimum level of rights is dictated by international instruments (whose abrogation is politically inexpedient) and as reliable and predictable cost redistribution through burden sharing is unavailable today, potential destination states mostly aim to manage their costs through limiting the number of beneficiaries by indiscriminate migration control. Evidently, the mechanisms of migration control, such as visa requirements, carrier sanctions and the posting of immigration liaison officers in third states, aim at reducing the arrivals of undocumented migrants, amongst them potential protection beneficiaries. The discussion on Protected Entry Procedures may provide an opportunity to discuss these dynamics, and to consider alternative configurations among the three determinants.

The two elements of Protected Entry Procedures – legal access to territory after extraterritorial eligibility procedures – can be associated to the determinants “number of beneficiaries” and “level of rights”. In addition, some suggested forms of Protected Entry Procedures may open the door to discussing the issue of burden sharing in a new light. For the sake of the argument, let us suppose that Member States decide to set up a joint processing centre in regions of origin. This presupposes agreement on how eligible cases are to be distributed amongst participating states – which puts the issue of responsibility sharing on the table. Also, the costs for the centre have to be covered, which is about fiscal burden sharing. In the following sub-sections, we shall briefly canvass the development potential, risks and benefits under each of the determinants – numbers, rights and redistribution of risks and costs. We shall add reflections on specific areas promising synergies – integration and labour immigration. In the ensuing section, we shall conclude by identifying cost indicators, allowing for a comparison between Protected Entry Procedures and the status quo of territorial applications. The last section will broaden the picture by asking how multilateral cooperation within the EU would impact benefits and drawbacks of Protected Entry Procedures.

## ***5.1 Enhanced Control and the Gradual Drainage of the Smuggling Market***

The primary advantage of Protected Entry Procedures over a system based on territorial applications is that it allows states a much more comprehensive control over claims and claimants, starting well before the journey to that state has begun. From the moment the applicant contacts the representation of a given state, that state enters into a dialogue with her and starts to collect information, allowing for an enhanced understanding of the whole migratory situation. The ‘control advantage’ contains many facets. It allows states to gather more up-to-date knowledge on persecutory threats directly in the region, temporally and geographically close to their source. This might be helpful not only in the single case, but also in analogous cases, which could emerge from territorial applications. States’ knowledge of migratory patterns may also be enhanced, and deterioration in the regional protection offer can be tracked immediately. In that sense, Protected Entry Procedures contain a built-in early warning system on forced migration. In addition, the security dimension should be of augmented interest to states: Protected Entry Procedures allow them to screen applicants before territorial contact is made. This creates important advantages *inter alia* in the area of exclusion.



The importance of the control advantage can hardly be overestimated. States are presently struggling to gain control over migratory movements of all kinds. To that effect, they cooperate with other destination states, with transit states, and with countries of origin. Even international organisations and non-state actors are drawn into this process. Remarkably, state attempts to influence the behaviour of people on the move are limited, although they are perhaps the most important actors in the process. Unlike resettlement, which is more institutionally oriented, Protected Entry Procedures take migrants' agency serious, and assist in establishing a direct communication with them. This alone should reflect destination states' commitment to work with, rather than merely against migrants.<sup>203</sup>

The control advantage of states is complemented by a control advantage for protection seekers, improving prospects for cooperation between both. Protection seekers enter into direct contact with their potential host state, without the misleading and precarious intermediary of smugglers or 'travel agents'.<sup>204</sup> This allows them access to authentic information on their prospects for receiving protection. From the beginning, procedures are a shared responsibility, and there is no need for the *bona fide* protection seeker to collude facts, as with the usage of irregular channels. In sum, Protected Entry Procedures channel the initiative and assets of the protection seeker into a dialogic behaviour, while irregular modes of seeking protection create an antinomy between state and individual.

This raises the question of the extent to which Protected Entry Procedures can compete with irregular channels, determining whether the mutual control advantages, as well as other advantages, will actually materialise.

## **5.2 Will Numbers Increase, Decrease or Remain Unaffected?**

The spectre of unmanageable caseloads haunts the discourse on migration and protection – most often in deplorably simplistic terms. On the aggregate EU level, the total numbers of applications filed at representations is still insignificant when compared to the total of territorial applications. As the country analysis will show, the number of positive decisions is generally rather limited, and can be expressed in either two or three digits. Assuming that Protected Entry Procedures were to be extended, and knowledge on its existence to proliferate, what scenarios are conceivable?

It has been rightly pointed out that global migration needs, for whatever reason, are presently much larger than global migration opportunities. Therefore, it shall be legitimately assumed that there are three categories of applicants in Member States' asylum determination procedures:

- I. Applicants who believe themselves to fulfil, and actually fulfil the prerequisites for international protection;
- II. Applicants who believe themselves to fulfil, but objectively fail to fulfil the prerequisites for international protection; and

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<sup>203</sup> This does not imply that destination states will necessarily be more liberal when it comes to admission. Entering into a dialogue with another actor does not imply endorsement of that actor's demands.

<sup>204</sup> The Irish government believes that Protected Entry Procedures offer "rapid protection to those genuinely in need of protection without those persons resorting to illegal migration and people smugglers". Questionnaire response by the Irish government, received on 24 April 2002.

- III. Applicants who do not believe themselves to fulfil the prerequisites for international protection, but who employ the asylum system for purposes unrelated to international protection.

For the purpose of our discussion, three modes of entry into Member States' asylum systems shall be discerned:

- A. Use of irregular entry channels (human smugglers, counterfeit documents, clandestine border-crossing, corrupt migration functionaries), asylum application filed preferably within the country, alternatively at borders.
- B. Use of regular entry channels (e.g. a tourist visa) and ensuing application for asylum on the territory of the Member State (category-swapping).
- C. Use of Protected Entry Procedures.

If the number of persons employing mode A could be decreased, the gains for states as well as for individuals involved would be substantial. Individuals would be spared from the *acute security and exploitation risks* usually linked to this informal sector, and an enormous *capital destruction* could be avoided. States, in turn, could, in the long run, *save additional investments into the struggle against illegal forms of migration*, which presently represents a growth sector. Hardware as well as staff expenses could potentially be diminished. So could political costs emerging from stricter border control.

The principal question would now be whether Channel C would merely bring in *additional numbers*, and thus augment the grand total of persons either accorded protection or in a removable position; or whether Channel C would *lead to a decrease* in the usage of the other two channels A and B. Do changes in the usage of the three channels amount to a zero-sum game? Are Protected Entry Procedures an alternative, or merely an addition to existing channels?

The answer will depend on which category we choose to focus on. Theoretically, it should be possible to convince applicants in categories I and II of the advantages of Protected Entry Procedures over the irregular and risky entry channel A. In practice, this will further depend on a number of details to be discussed elsewhere.<sup>205</sup> In this segment, an expansion of Protected Entry Procedures makes much sense from a numerical perspective, not to speak of the qualitative one. The choice of channels should indeed approximate a zero-sum game for categories I and II.

However, it is not as evident that expanded Protected Entry Procedures could out-compete, and decrease the usage of channel B. After all, both share the advantage of safe access to the territory of the destination state. To be sure, channel B offers an additional advantage of increased safety while waiting for the outcome of procedures. Moreover, for category II, applicants who wrongly believe themselves to fulfil the prerequisites for international protection, being on the territory of a Member State offers the additional advantage of defection after a final and negative decision has been taken. After all, this group believes in its own protection need, and could react desperately upon rejection, although this reaction would bring them into conflict with domestic aliens legislation.

In this context, it should also be considered whether persons who have been rejected in Protected Entry Procedures before entry would subsequently opt for channel A or B to try their luck once again. Presently, cases are known where such rejections have been granted protection upon irregular

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<sup>205</sup> See Chapter 7.1.

entry into a destination state, which is mainly due to the limitative effects of close tie-requirements.<sup>206</sup> This would certainly imply a duplication of efforts. However, a properly designed Protected Entry Procedure could, at least to an extent, address this risk by replicating or even *exceeding territorially available benefits*, by handling the second application as a *repeat application*, and by *coherent return practices* with regard to the rejected caseload.

Lamentably, it is safe to assume that the numbers pertaining to category III would be unaffected by the extension of Protected Entry Procedures. After all, applicants in this category miss out important opportunities if they are kept at arm's length from destination states' territory. Therefore, channels A and B will be more attractive to them.

Now, assessing the probable numerical impact of an expansion of Protected Entry Procedures would presuppose the availability of statistics on the magnitude of the three categories. Such statistics are not available, and their production would meet considerable difficulties. Therefore, much is left to current assumptions and speculations. A point of departure could be the number of persons granted some form of protected status in Member States according to international law (27,4 percent in 2001).<sup>207</sup> *At least this group of persons would have very good reasons to opt for Protected Entry Procedures in the future*, and the dominant nationalities in the recognized caseloads would presumably be candidates for an early switch-over among channels. This is a minimalist and perhaps overcautious assessment, and whether winning this group over from channels A, and possibly also B, is considered worthwhile by states, depends on a number of other factors, as the size of investments to be made when expanding Protected Entry Procedures.

But it would be myopic to develop scenarios exclusively on the basis of rational choice. Applicants' actual behaviour is influenced by the information on choices actually available to them. The accuracy of such information may vary, and the emotive aspects may outweigh facts. In the medium to long term, it is fully conceivable that a concerted information effort could establish Protected Entry Procedures, rather than smuggling channels, as the standard mode of seeking protection. Ultimately, it is a question of marketing, and no testing has been done in this area. Paradoxically, it could precisely be an unreflected fear of overwhelming numbers that keeps states from conducting more outreach information campaigns and from extending Protected Entry Procedures. Such states have sown, but seem afraid to cultivate the crop, thereby denying themselves a potentially much larger harvest.

But it is not only the accessibility of information to potential clients that suggests that statistics on the usage of Protected Entry Procedures will change over time. It is to be expected that the very institution in itself will need to mature before producing a satisfying output. This has been the case with territorial procedures as well as with resettlement, and Protected Entry Procedures will be no exception. To see it as a quick fix would be erroneous – the Swiss example demonstrates that it needs to be developed with care over a number of years, before it starts to return on investments.

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<sup>206</sup> See Chapter 4.4.2 for details on close tie-requirements.

<sup>207</sup> UNHCR, Statistical Yearbook 2001. Refugees, Asylum-seekers and Other Persons of Concern – Trends in Displacement, Protection and Solutions, Geneva, October 2002, p. 58. It should be underscored that this percentage adds positive decisions in first instance and review instance(s), and refers to both convention status and humanitarian reasons. The latter category may also bring in cases where a positive decision is taken *merely* on compassionate grounds, with the case being outside the ambit of any international obligation to protect.

Finally, another lurking risk is that states might excessively rely on Protected Entry Procedures in the future, and prematurely block ‘spontaneous’ arrivals. As Barutciski and Suhrke have noted with regard to the experiences gathered with the 1999 evacuations in Macedonia: “In terms of universal refugee protection standards, extra-regional evacuations may harm refugees generally in the sense that they encourage governments to develop effective selection systems and quotas which could ultimately undermine and replace the availability of protection for individual or spontaneous asylum seekers.”<sup>208</sup> In the worst case, the interest in externalised processing – be it in the form of evacuation or Protected Entry Procedures – may entail an aggregated reduction of the prospects of reaching safety for those in need of it, outweighing the benefit of greater precision in the targeting of needy beneficiaries.

### **5.3 Trade-Offs in the Area of Beneficiaries’ Substantive and Procedural Rights**

#### *Will the Right Persons Benefit?*

In this area, there are reasons to assume that Protected Entry Procedures are better suited than other channels to allowing the right persons in.

First, to be smuggled, one must be able to pay the smuggler. The low-end range of smuggling services also demand that candidates can cope with physical hardship. Unlike smuggling channels, Protected Entry Procedures do not discriminate on the basis of income or physical ability. They are, in theory, equally open to all persons in need of protection, which must be seen as a major step forward in *securing equitable access to asylum*. The flip side of this advantage is that access to diplomatic representations is accorded a decisive role. Not everybody is capable of overcoming this hurdle, and it is reasonable to assume that there will be cases still who are structurally excluded from Protected Entry Procedures.

Second, territorial procedures have a serious drawback: they bring in persons into the country who are rejected, but cannot be removed. This group draws on resources, which could otherwise be used for better purposes, e.g. the needs of *bona fide* claimants. To be fair, a comparison between both channels will need to take into account that Protected Entry Procedures are systemically better prepared to avoid this problem.

Let us now consider the *definition of beneficiaries* in the technical sense. One should be aware that Protected Entry Procedures move decisive parts or the totality of processing outside state territory. Many protective norms of international law presuppose territorial contact – the prohibition of *refoulement* in the 1951 Refugee Convention<sup>209</sup> being the most prominent example. Hence, destination states enjoy a considerable freedom in defining beneficiaries of Protected Entry Procedures. Protection seekers are thus faced with a *trade-off between access and protection*: better prospects for legal access are swapped against a deteriorated legal standing.

This trade-off is linked to the second determinant of protection systems, namely the level of rights accorded to the applicant. However, one should not go so far to conclude that Protected Entry

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<sup>208</sup> Barutciski and Suhrke, *supra* note 13, p. 104.

<sup>209</sup> Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

Procedures take place in a legal *terra nullius* – diplomatic representations are definitely subject to the jurisdiction of the relevant destination country, which in turn triggers a minimum of legal obligations.<sup>210</sup> But international law does not offer unambiguous categories of persons to be protected. In practice, this will allow states a considerable margin of discretion when crafting categories of beneficiaries. Whether this is regarded as an advantage allowing for numerical steering by states or a drawback exposing applicants to oscillating protection offers is a matter of perspective.

### *Procedural Safeguards, Credibility and Determination*

Overall, Protected Entry Procedures *diminish the layer of procedural safeguards* enjoyed by the applicant as well as the *access to intelligible information, legal aid, counselling and multiple-tier appeal* in a quite decisive manner, which must be considered a *main drawback*. As has been seen, some of the states practising some form of Protected Entry Procedure do not allow negative decisions at diplomatic representations to be appealed. But even where appeals are possible, reliable procedural information, interpretation and legal aid remain difficult to access, which diminishes the prospects for success compared to those enjoyed by a protection seeker filing her claim on the territory of the destination state. So far, none of the countries scrutinised in this study has succeeded in addressing these concerns fully. This notwithstanding, some of the drawbacks could be compensated through the thoughtful design of Protected Entry Procedures and an enhanced collaboration with NGOs, international organisations or both. The main elements of such a design should be transparent and user-friendly information policies and the gradual development of a counselling network assisting candidates to cope with the formal exigencies of the procedure. Inspiration can be drawn from the example of the US Resettlement Programme, which funds Voluntary Agencies to provide a regional presence and to prepare cases to be adjudicated by the INS.<sup>211</sup> Member States could consider investing in information and counselling services provided by a number of European NGOs, to be implemented with regional or local partner organizations. It should be realised, though, that this is more than a financial issue, and poses a considerable challenge to the NGO which would engage in such a scheme.

But there are also advantages to be gained in the procedural field. First, and foremost, it is of interest both for potential host states and the protection seeker that the question of *the travel itinerary becomes to a large degree irrelevant* for determination procedures.<sup>212</sup> In that sense, Protected Entry Procedures may reorient determination towards the substance of the case and thus simplify and accelerate procedures. By contrast, much time is spent in territorial procedures on identifying the itinerary of the claimant, who has been instructed by human smugglers to collude it. Also, travel route identification interferes with the *assessment of credibility* to a considerable degree; this interference can be avoided under Protected Entry Procedures.

As Protected Entry Procedures will be run as a complement to territorial procedures, care must be taken that the existence of the former does not develop into a new theme of interrogation under the latter, with an exclusionary potential of its own. Not using Protected Entry Procedures does not per se render a disorderly arriving protection seeker a bogus case. States may legitimately ask a “spontaneously” arriving protection seeker why she did not turn to an embassy instead of choosing

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<sup>210</sup> See Chapter 3.2.3 *supra*, in particular the argumentation relating to the ECHR and the CRC.

<sup>211</sup> See Chapter 6.3.3.1 *infra*.

<sup>212</sup> A reservation has to be made for cases where applicants have skipped protection opportunities *en route* to the embassy where they filed a claim under Protected Entry Procedures.

disorderly arrival. But they should be satisfied with very rudimentary responses (lack of knowledge, lack of opportunity) and refrain from formal or informal retaliation against disorderly arrivals.

The potential for enhancing the quality of information on the country of origin and the case has already been named, and resurfaces in the procedural context, serving states and claimants alike. On the other hand, where substantive decisions are taken by staff located on the territory of the potential host state, the *geographical distance between claimant and decision-maker* also entails disadvantages. Each clarification entails a new round in a complex communication process, channelled through diplomatic courier and embassy staff. In the following sub-section, we shall seek to address this major drawback of Protected Entry Procedures. Conversely, where competent decision-makers are seconded to embassies, it is reasonable to expect a qualitative boost in the collection of country-of-origin information and overall decision-making.<sup>213</sup> The Swiss model exploits the potential of seconding decision-makers, who not only assess individual applications, but also engage in other *sur place*-activities related to migration and asylum.

### 5.3.1 Overcoming Physical Distance through On-Line Interviews?

Immediacy is an important asset in legal hearings. For the decision-maker, the way an applicant's narrative is delivered may be as important as its factual content. After all, credibility assessments are often decisive in refugee determination procedures. Hence, the personal interview normally conducted in territorial procedures is an important advantage: the decision-maker is physically confronted with the claimant, obscure part of the latter's narrative can be immediately clarified through additional questions, and elements that are hard to verbalize are given a chance to emerge (e.g. bodily signs of fear, insecurity or unease).

Where decision-makers are seconded to representations abroad, the immediacy of interviews can be maintained even within Protected Entry Procedures. However, secondment will not cover all emerging needs; at least smaller embassies will usually lack specialised staff. In such cases, a complex communication process is triggered, where the applicant is interviewed by embassy staff not qualified to make decisions, a transcript is made and sent to territorial authorities, where another person – the decision-maker – will read the protocol, communicate back residual questions, and take a decision upon receipt of answers. While this might work acceptably well for the factual elements of determination, it certainly does not allow for an assessment of credibility comparable to that in territorial procedures. Perception and decision are divided – the interviewer will not be able to judge and communicate impressions on credibility in an adequate manner, and the decision-maker is limited to the written documents alone when considering whether the account is credible or not. Also, the time elapsing between question and answer in a mediated interview is too long, and a texture of meaning and understanding can hardly be woven over an extended period of time.

We have earlier underscored the dialogic potential of Protected Entry Procedures, with states reaching out to potential refugees before the migration process has entered its decisive phase. The question is, whether the interview dialogue, often regarded as the core element of determination

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<sup>213</sup> The historical parallels to protective activities of embassy staff during the Holocaust impose themselves. Living in theatres of persecution appears to have sharpened decision-makers' sense of proportion.. Different from civil servants in their home countries, diplomats in the field had an unmediated idea of the fate awaiting their clients, which must have inspired them to use their discretion in a way that maximised protection. See Chapter 2.1 above.

procedures, can be saved from the adversary effects of physical distance, temporal fragmentation and anonymity?

Apart from so-called circuit rides<sup>214</sup>, solutions to this problem are scarce. Some states simply accept a decreased depth of scrutiny flowing from a written procedure. Interestingly, as earlier mentioned, video recordings of interviews are employed in the French asylum procedure (however, not in the French Protected Entry Procedures). In the Dutch debate, lawyers have suggested the use of video interviews.<sup>215</sup> Beyond the narrow context of asylum, the usage of video recordings to introduce evidence into the courtroom has been on the increase, as they transport richer information content than transcripts of a hearing. Sending videos of interviews with applicants from the representation to the territorial authorities is certainly feasible, but also quite slow. It will not allow for a dialogue to unfold.

Given the fast pace of developments in the IT sector, it should be possible to address the described problem today.<sup>216</sup> The Internet offers an almost universal platform, and contemporary encryption technology would assure states as well as applicants a very high degree of data security.<sup>217</sup> In the global perspective, the main problem would be insufficient network capacity in some parts of the world. Where Internet access with high capacity is available, the embassy could communicate with the territorial determination authority via streaming video, which allows for real-time communication. As any other data sent over the Internet, streaming data can be encrypted, which is essential due to the sensitivity of information thus communicated. However, it can be validly assumed that those representations most likely to assume importance for protection seekers are placed in countries where network capacity is low. Under such circumstances, the state could consider resorting either to digital voice-only communication over the Internet (demanding less bandwidth, while still being encryptable), or to record video files, which are sent to the territorial authorities per e-mail. A swift exchange of video files cannot replace a real dialogue, but approximate it to the maximum extent possible. Again, video files could be encrypted for integrity reasons.

Investments into an on-line solution would be within the realm of the reasonable. The necessary hardware (webcams and microphones to be mounted to standard office computers) is available off-the-shelf. Both streaming technology and video files are largely standardized and can be handled by up-to-date office computers. Encryption technology would necessitate adding both software and, to a limited degree, hardware. A further precondition would be that a secluded room is available at the premises of the representation, where the applicant's privacy during the interview can be secured.

An additional advantage of an on-line dialogue is that it could facilitate the overcoming of local shortages of interpreters. In principle, the interpreter could be at both ends of the line – either at the representation, or at the territorial determination authority.

By way of conclusion, the problem of physical distance between decision-maker and applicant can be addressed with moderate investments, minimizing one of the drawbacks linked to Protected

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<sup>214</sup> See Chapters 6.3.2 (Canada) and 6.3.3 (the U.S.) below.

<sup>215</sup> See Chapter 6.1.3 below.

<sup>216</sup> The authors are indebted to Mr. Magnus Svensson, Faculty of Law, University of Lund, Sweden, for offering his expertise on encryption solutions.

<sup>217</sup> An established solution implies the erection of safe 'tunnels' over the Internet, secured by means of encryption and accessible only to holders of a smart card. The French National Assembly employs such a system.

Entry Procedures. This is not to say, however, that there is no difference between a face-to-face interview and one mediated through the Internet. Although the latter is superior to written transcripts, it is still material that decision-makers are made aware of the specific friction and losses in communication flowing from the new medium.

#### **5.4 Reception During Procedures and the Rejected Caseload**

There are no costs for the reception of applicants during the processing of asylum claims abroad – which contrasts markedly to territorial processing, where waiting periods can be substantial, and amount to one or more years. During that time-span, states usually cover accommodation and sustenance. Seen from the perspective of the protection seeker, this can translate into a precarious situation while she is waiting for a final decision in Protected Entry Procedures. This is a further argument for speedy processing.

Rejection decisions do not entail the physical return of the applicant, and the hardships and costs connected therewith. In the words of the Irish government, Protected Entry Procedures would ensure that “the integrity of the asylum process is not undermined by the failure of national authorities to expel significant numbers of failed asylum applicants from the territory”.<sup>218</sup> This does not mean, however, that rejection decisions are wholly unproblematic. Where some form of Protected Entry Procedures is practised in the territory of a third country, the question of return is actually shifted over to that country. The institutionalisation of safe third country policies in Europe has shown that this issue is indeed a thorny one, and that less affluent third countries typically find themselves unable to address it alone. Hence, the design of large-scale programmes of Protected Entry Procedures in third countries should also take the needs and interests of those countries into account.

#### **5.5 Risk and Cost Redistribution**

The third factor determining costs for a given host state’s protection system is its capacity for externalising risks and costs. Here, Protected Entry Procedures offer more opportunities than territorial procedures. It has already emerged that applicants under the former enjoy less rights, which means that states shift a greater portion of risks onto them (the risk exposure during the waiting period abroad is the best example). But host states also shift risks onto third states – namely those where representations are placed, e.g. by leaving the fate of the rejected cases in their hands. Where multilateral cooperation among host states is considered, e.g. by launching a joint processing centre, further opportunities for risk redistribution open themselves. Finally, as the Canadian example indicates, certain risks and costs can be shifted over to private individuals. Where private donors pay or guarantee travel and integration costs, they are, technically speaking taking a liability upon themselves.

After externalisation, there will be a bottom line of costs borne by the host state. It is, of course, impossible to express this bottom line in numbers. But it appears defensible to deliver a number of indicators, and to combine them in comparison between Protected Entry Procedures and territorial procedures.

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<sup>218</sup> Questionnaire response by the Irish government, received on 24 April 2002.



Before doing so, we must distinguish between the cost per case and the cost for the aggregate system. The latter cost will depend inter alia on how many cases are won over to Protected Entry Procedures from irregular channels. This is a matter of speculation, so we shall content ourselves with flagging the relationship between the two. Also, if Protected Entry Procedures were to be introduced on larger scale, there would be transitory costs, which need to be opposed to operating costs, once the system is up and running. A further question is over what period of time the investment into transitory costs shall be written off.

If we exclude transitory costs, it can be reasonably assumed that a straight comparison of both systems on cost per case would indicate that Protected Entry Procedures is the cheaper choice. While staffing diplomatic representations will cause non-trivial costs, the cost for accommodation and basic welfare benefits during territorial procedures, detention, assisted voluntary return or forcible return are most likely to exceed them.<sup>219</sup> The list of savings could be extended further – suffice it to note the challenges posed by excluded cases which cannot be returned from the territory of the host state for logistical reasons. Apart from staffing, the training of staff, information efforts and, to a certain extent, legal aid and counselling should be added to the list of anticipated expenses.<sup>220</sup>

Official statistics provided by the Danish government support the contention that Protected Entry Procedures can be operated at much less cost per case than territorial procedures.<sup>221</sup> A comparison of processing costs per unit accrued under the Danish Protected Entry Procedure (DKK 1.924) with reception costs per unit accrued under the territorial reception (DKK 125.321) for the year 2001 suggests that Protected Entry Procedures offer substantial savings through the externalisation of the waiting period. For merely maintaining one unit in the reception system, one could process some 65 units in the Danish Protected Entry Procedure. To the costs of the Protected Entry Procedure, one would need to add a share of what it costs to maintain an embassy system. However, to the reception costs, one would need to add policing costs, as well as removal costs, which will widen the gap between both alternatives considerably. It should be underscored, however, that the Danish numbers only provide crude indicators. An extrapolation of these statistics to illustrate costs of a multilateral system of Protected Entry Procedures would seem impermissible without a detailed analysis of how elements of the Danish system affect its costs. The Danish figures do, however, indicate the gap between reception costs in territorial systems and processing costs in Protected Entry Procedures.

If a multilateral form of Protected Entry Procedures were preferred, the list of savings would need to be extended with the elimination of multiple applications (claimants involving two or more states within the same grouping in their application). Also, the concentration of processing should translate into savings in their own right. On the other hand, the process of establishing such centres and the multilateral cooperation behind them will be more costly. In line with earlier reasoning, a cautious prognosis would anticipate that the cooperating states at least take on themselves part of the responsibility for the sustenance of applicants.<sup>222</sup>

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<sup>219</sup> Evidently, this is not to imply that each and every case causes costs under each of the named headings. Far from all applicants in territorial procedures are detained, and only a minority of rejectees are forcibly deported.

<sup>220</sup> Should on-line interviews be employed, expenses for staff and infrastructure need to be added.

<sup>221</sup> The numbers are taken from tables reproduced in full in Chapter 6.2.1.13 below.

<sup>222</sup> As earlier expounded, it is conceivable that camps could emerge in the vicinity of such centres. Although the primary legal responsibility for securing the human rights of its inhabitants would be on territorial states, a fair deal of

There are a number of indirect savings and expenses, which are too remotely connected to the introduction of Protected Entry Procedures to be fully accounted for. There is room for discussion on the possible extent to which draining the resource base of smuggling organisations could translate into very tangible societal benefits. Also, the advantages of early integration, or synergies between protection systems and labour immigration are too volatile to be pinned down in estimations. Those savings and expenses which are directly linked to a launch of Protected Entry Procedures are listed in Table 2.

In fiscal terms, the applicant's position can be analysed very much in the same manner as that of states. The quite substantial expenses for irregular entry can be saved. As explained in the following section, integration into the labour market will be facilitated, which will provide the successful candidate with a personal income at the earliest possible stage (which impacts on pension rights and the possibility to support the home community through remittances). On the other hand, there will be greater expenses during the waiting period, which, however, will be shorter than that endured by the average applicant in the territorial system. In addition, as the standards of assistance are lower than in the territorial procedure, it is reasonable to assume that the applicant will spend funds on translation of documents, legal aid and other forms of assistance. Also, host states may reasonably expect protection seekers allowed entry to pay their own travel costs, provided they are not destitute. Where protection seekers indeed lack the means to pay for airfares, a scheme putting loans at their disposal could be considered. Also, private individuals could assume the role of guaranteeing, or donating the necessary amount.

Savings	Expenses
<i>Host State – Unilateral Solution</i>	
Reception <ul style="list-style-type: none"> <li>• Accommodation</li> <li>• Basic welfare benefits</li> <li>• Detention</li> </ul> Return of rejected asylum seekers <ul style="list-style-type: none"> <li>• Assisted Voluntary Return</li> <li>• Detention</li> <li>• Forcible Return/Escort</li> <li>• Excluded, but non-removable cases</li> </ul> Generation of tax incomes at the earliest possible stage.	Information dissemination  Transitory and operational expenses for externalised infrastructures at representations <ul style="list-style-type: none"> <li>• Staffing</li> <li>• Training</li> <li>• Communications</li> <li>• Legal aid</li> </ul>

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friction and dissent can be expected, if states operating the processing centre would deny any co-responsibility whatsoever.

<b><i>Host State – Multilateral Solution (e.g. Joint Processing Centre)</i></b>	
Same as above	Same as above
Additional savings through elimination of multiple applications at representations of different states	Additional expenses: <ul style="list-style-type: none"> <li>• New premises</li> <li>• Inter-state communication</li> <li>• Contribution to basic welfare of applicants?</li> </ul>
Cheaper than decentralised model (each Member State operating through its own representation)	
<b><i>Individual Applicant</i></b>	
Cost of irregular entry (smuggling, acquisition of false documents etc)	Accommodation and sustenance during waiting period
Early integration, early generation of personal income, pension rights and early possibility to transfer remittances	Possibly increased costs for language adaptation, legal aid
	Travel costs (could be co-sponsored by states, possibly through a loan scheme, or private donors)
<b><i>NGOs</i></b>	
Possibly less demand on domestic aid and counselling services	Building up and operating an externalised aid and counselling infrastructure
Income generation, if states opt for delegating pre-screening and integration to NGOs	

**Table 2 - Protected Entry Procedures: Savings and Expenses**

For NGOs wishing to uphold their capacity for interacting with protection seekers, the introduction of Protected Entry Procedures would be a great challenge in fiscal terms. Very few NGOs have access to an international network which could provide a basis for such outreach. It is reasonable to expect that considerable amounts would need to be invested to set up a rudimentary counselling structure at access points abroad. This conclusion could be reversed, though, if host states decided to accord NGOs the role of pre-screening entities. In that case, expenses would be covered by states.

## **5.6 Potential Synergies with Integration Policies**

As with resettlement, Protected Entry Procedures allow for the start of integration measures immediately upon or shortly after arrival on state territory.<sup>223</sup> This has a number of consequences.

<sup>223</sup> The exact start depends on the model chosen by the state practising Protected Entry Procedures. Where entry is allowed after a preliminary assessment of protection needs, the would-be beneficiary has to wait for the final decision before integration will start.

Typically, the beneficiary may enter the employment market at the earliest possible stage, thus generating income, taxes and remittances. Money otherwise spent on smuggling can now be used to facilitate establishment in the new context, e.g. by starting a small business. By all means, this benefit should be communicated to potential protection seekers – it is a clear comparative advantage, which the smuggler cannot compete with.

In those countries where asylum seekers risk being regarded with suspicion, or where deterrence measures are applied to them<sup>224</sup>, beneficiaries of Protected Entry Procedures would be spared a precarious social as well as material status. In the long term, the public perception of protection seekers – and even aliens at large – could thus be improved. However, the risk must be acknowledged that two classes of refugees emerge. Those entering through Protected Entry Procedures are perceived as authentic, while ‘spontaneous’ arrivals will be typecast as bogus, irrespective of protection need. This phenomenon is known from the experience of resettlement countries, where resettled refugees are looked upon favourably, while others tend to form a B-league in the eyes of the public.

In the integrational context, it is also worthwhile considering the potential of NGOs. In the US, voluntary agencies function both as pre-screening entities, and, for qualified cases, as integration facilitators after arrival on US territory. The US is highly successful in integrating resettled refugees – 95 percent of employable persons among resettled refugees participate in the work force already half a year after arrival.<sup>225</sup> To the extent states wish to accord a role to NGOs in Protected Entry Procedures, it would make sense to involve them both in selection and in integration.<sup>226</sup> This would foster a sense of co-ownership to the whole process, and build bridges to civil society from the earliest possible stage in the process.

Finally, the role of private sponsorship should be considered further. The Canadian practice offers an interesting example.<sup>227</sup> Canadian resettlement places can be expanded by sponsorships assumed by a group of five or more Canadians. This creates a specific sense of responsibility with individual sponsors as well as with the refugee herself. However, it should be noted that such arrangements become vulnerable to rifts in public opinion, with fluctuating intakes as a result. In Canadian practice, such fluctuations have largely been absent.

## **5.7 Potential Synergies with Labour Immigration Policies**

Traditional immigration countries use their offshore representations to serve both their immigration and resettlement programmes. With a number of European states increasingly opening up their societies for labour immigration, the examples of Australia, Canada and the US could be emulated.<sup>228</sup> Investments into the infrastructure and staffing of representations to cater for the operation of Protected Entry Procedures would automatically serve the needs flowing from labour

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<sup>224</sup> By way of example, routine detention of onshore asylum seekers in Australia can be named. It is costly not only in fiscal terms, but also by fostering alienation between applicant and potential host society.

<sup>225</sup> See Chapter 6.3.3.8 below.

<sup>226</sup> The same argument could be analogously applied to private donors, covering e.g. travel costs, to later assist in finding a job.

<sup>227</sup> See Chapter 6.3.2.6 below.

<sup>228</sup> The authors are indebted to Mr. Henrik Olesen for drawing their attention to this aspect.

immigration programmes. After all, both policies share a proactive approach and an outreach to the front end.

Information policies could be coordinated, allowing potential migrants to receive authoritative and exhaustive information on all opportunities, ranging from labour demand to asylum. The cost-effective deployment of qualified staff to representations with a limited workload would be facilitated, as staff could combine protection-related tasks with immigration-related tasks, and thus make up for a full post. Training of staff could be coordinated to a certain extent. Finally, the combination of labour immigration and Protected Entry Procedures might facilitate changes in the current mind-set of Member States' visa officers from a purely defensive to a more differentiating approach. The caveat has to be made, however, that a full integration of both policies is not desirable, as it might lead to the subjugation of protection needs to labour market demands.

## **5.8 The Added Value of the EU in Crafting External Processing Regimes**

Presently, Protected Entry Procedures are operated strictly unilaterally: states direct a rather diverse protection offer to individuals through their diplomatic representations. A limited degree of cooperation with UNHCR, and, to a lesser degree, with NGOs can be observed in some states. But Protected Entry Procedures are by no means confined to unilateral implementation.

In the legal analysis, we have been able to demonstrate that the *acquis* would accommodate Protected Entry Procedures. As has been shown, neither the presently existing instruments, nor the draft legislation under negotiation in the Council, conflict with externalised forms of processing. Technically speaking, the TEC offers a mandate for EC legislation in this area to be drawn up.<sup>229</sup> The mere existence of legislative competency alone is not sufficient. Any competency is to be exercised with due respect for the principles of subsidiarity and proportionality. In particular, the Community legislator must act in accordance with Article 5 TEC, i.e. the Community may take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The development of the *acquis* hitherto bears witness of the Member States agreed objectives in the area of migration and asylum, notably the fight against illegal immigration, in particular human smuggling, and the elimination of multiple applications filed in different Member States. The Tampere Conclusions offer an authoritative restatement of objectives relevant in our context. In Conclusion 3, it is stated that for those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for *consistent control of external borders to stop illegal immigration* and to combat those who organise it and commit related crimes. These common policies must be based on *principles* which are both *clear to the EU citizens* and also offer *guarantees* to those who seek protection in the European Union or access to it.

In the following, each of the emphasised goals shall be discussed.

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<sup>229</sup> See Chapters 3.3.1 *infra* and 7.2.2.1 *supra*.

### *Consistent Control of External Borders*

Harmonised Protected Entry Procedures would ensure that Member States make their territory accessible according to the same standards. The current situation is characterised by widely diverging unilateral practices, which results in differences, and thus potential inconsistencies, in the granting of protection-related visas among Member States. Consistency in this area of border control can only be achieved by harmonisation.

### *Stopping Illegal Immigration*

If unilateral and diverging policies were to be made multilateral and coherent, the competitive edge of Protected Entry Procedures would be increased exponentially. If the whole of the EU, perhaps jointly with cooperating states as Norway, Iceland and Switzerland, would offer a new mode of access to protection, knowledge of this system and its advantages would multiply very quickly. This, in turn, could imply a serious threat to the market for human smuggling. No unilateral action, and no small avant-garde within the EU could bring about a comparable impact. For reasons of scale, the EU must be regarded as the better forum to pursue this objective.

### *Principles Clear to EU Citizens; Guarantees to those seeking Access to Protection in the EU*

EU citizens will be interested in both cost-effectiveness and fairness of a future CEAS. Unilaterally practiced Protected Entry Procedures cannot insure states against the negative effects of multiple applications filed consecutively with different Member States. Within territorial procedures, the Dublin Convention represents a first attempt to solve this problem multilaterally. A multilateral harmonisation of Protected Entry Procedures would allow for the elimination of multiple applications through enhanced information exchange among Member States, and thus contribute to cost-effectiveness. At least in the medium term, a gap will open between the increasingly harmonized asylum practices at Member States' borders and within their territories, and the Protected Entry Procedures unilaterally practiced within the Union. Such a gap would be incomprehensible for protection seekers as well as the general public, and detract from the unity and value of the CEAS. The prevention of this gap would in itself form an argument for EC legislation on Protected Entry Procedures. Finally, and perhaps most importantly, it would be impossible to explain to EU citizens and to protection seekers alike why those entering through irregular channels should enjoy better prospects for de facto protection than those being unwilling or unable to buy smuggling services. Consistency in this policy area can only be achieved through harmonisation.

In addition, normative coherence should be considered as an independent argument for the added value of EU legislation in this area. There is no doubt that a harmonisation of Protected Entry Procedures would fit well into the evolving body of the asylum and migration *acquis*. Core parts of visa policies have been the subject of supranational cooperation among Member States for a number of years, and central building blocks of a Common European Asylum System are successively added to it. By virtue of multilateral as well as bilateral treaties, a network of cooperation on border control and readmission has been built, of which parts are in the process of being transferred to EC legislation. This emerging multilateralism has also drawn the work of diplomatic representations into its ambit, which is particularly visible within the Schengen *acquis*. Also, platforms exist to expand the dialogue with countries on whose territory Member States would situate access points for Protected Entry Procedures. For transit countries as well as countries of origin, the EU at large has achieved increasing visibility in the area of readmission of nationals and third-country nationals.

Also, the High Level Working Group on Asylum and Migration (HLWG) has engaged in drafting holistic strategies to address protection deficits in countries of origin. Protected Entry Procedures could be piggybacked on both processes, demonstrating the will of Member States to share protection burdens in a manner which is acceptable for all parties.

A final note on costs may be in order, although the literature on European integration bears witness to the difficulties in making comparisons between Member States' investments into the Community budget and the benefits they derive from it. As unilateral Protected Entry Procedures bear a strong savings potential compared to territorial procedures, it is reasonable to assume that these savings could be further amplified in a multilateral EU system, mainly due to the elimination of multiple applications and a certain economy of scale under the latter. It is well worth further scrutiny whether these savings could be transformed into "more protection for the Euro".

## 6 Current Systems for Processing Asylum Claims Outside the EU and Selected Host States

### 6.1 Practice in States Operating Formal Protected Entry Procedures

#### 6.1.1 Austria

##### 6.1.1.1 General Characteristics and Legislative Base

Austria operates a highly formalised system, allowing aliens to submit an asylum application at an Austrian diplomatic or consular representation.<sup>230</sup> While applications can be formally filed both in the country of origin and in a third country, the former will be routinely rejected in practice.

A written procedure is employed: applicants fill out a questionnaire, which is forwarded by the Austrian representation to the Federal Asylum Office (FAO) in Austria. The Office proceeds to a pre-screening and assesses the likelihood of the applicant being granted asylum in a territorial procedure. In the case of a positive decision, the representation will issue a visa, the applicant will enter Austria, and submit her case in the ordinary asylum procedure. However, entry visas on mere protection grounds are granted in very few cases - the Austrian procedure mainly serves family reunification purposes.

The possibility of applying at diplomatic representations was introduced in the Asylum Act of 1991.<sup>231</sup> The current legal base of the Austrian Protected Entry Procedure is laid down in the Federal Law Concerning the Granting of Asylum (1997 Asylum Act)<sup>232</sup>, which entered into force 1 January 1998. Differences between the 1991 and 1997 legislation are marginal. The provisions of Article 7 and Article 16 of the 1997 Asylum Act are most relevant in our context:

#### *§ 7. Asyl auf Grund Asylantrages<sup>233</sup>*

Die Behörde hat Asylwerbern auf Antrag mit Bescheid Asyl zu gewähren, wenn glaubhaft ist, dass ihnen im Herkunftsstaat Verfolgung (Art. 1 Abschnitt A Z 2 der Genfer Flüchtlingskonvention) droht und keiner der in Art. 1 Abschnitt C oder F der Genfer Flüchtlingskonvention genannten Endigungs- oder Ausschlußgründe vorliegt.

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<sup>230</sup> The information included in this chapter is based on the content of the chapter on Austria contained in the report *Safe Avenues for Asylum?* published by the Danish Centre for Human Rights and UNHCR in April 2002. The information was completed and updated by means of a questionnaire sent to the Austrian Ministry of the Interior and Caritas Österreich. In addition, interviews were held with the Ministry of the Interior, the Federal Asylum Office, and UNHCR Branch Office Vienna in June 2002.

<sup>231</sup> Section 12 (2), Asylgesetz 1991, BGBl. I Nr. 76/1991.

<sup>232</sup> Asylgesetz 1997, BGBl. I Nr. 76/1997.

<sup>233</sup> An unofficial translation of the article is available on <<http://www.unhcr.at>>: *Article 7. Asylum granted upon application*: Asylum-seekers shall, upon application, be granted asylum by administrative decision of the authority if it is satisfactorily established that they are in danger of persecution in their country of origin (article 1, section A (2), of the Geneva Convention on Refugees) and none of the grounds set forth in the cessation or exclusion clauses in article 1, section C or F, of the Geneva Convention on Refugees is present.



#### § 16. Einreisetitel<sup>234</sup>

1. Asyl- und Asylerstreckungsanträge, die bei einer österreichischen Berufsvertretungsbehörde einlangen, in deren Amtsbereich sich die Antragsteller aufhalten, gelten außerdem als Anträge auf Erteilung eines Einreisetitels.
2. Werden solche Anträge gestellt, hat die Vertretungsbehörde dafür Sorge zu tragen, dass die Fremden ein in einer ihnen verständlichen Sprache gehaltenes Antrags- und Befragungsformular ausfüllen; Gestaltung und Text dieses Formulars hat der Bundesminister für Inneres im Einvernehmen mit dem Bundesminister für auswärtige Angelegenheiten und nach Anhörung des Hochkommissärs der Vereinten Nationen für Flüchtlinge so festzulegen, daß dessen Ausfüllen der Feststellung des maßgeblichen Sachverhaltes dient. Außerdem hat die Vertretungsbehörde den Inhalt der ihr vorgelegten Urkunden aktenkundig zu machen. Der Asylantrag ist unverzüglich dem Bundesasylamt zuzuleiten.
3. Die Vertretungsbehörde hat dem Antragsteller oder der Antragstellerin ohne weiteres ein Visum zur Einreise zu erteilen, wenn ihr das Bundesasylamt mitgeteilt hat, dass die Asylgewährung wahrscheinlich ist.

Apparently, the Federal Ministry of Foreign Affairs is in the process of drafting instructions to Austrian diplomatic representations, which inter alia cover the subject of asylum applications filed with the latter.<sup>235</sup>

Austria does not operate a resettlement programme in addition to its Protected Entry Procedure.

#### 6.1.1.2 Future Developments

At the time of writing, discussions on a comprehensive reform of the Austrian asylum legislation are taking place within the Austrian government. Amongst other issues under debate, is whether Protected Entry Procedures should be formally limited to family reunification cases. Refugees without family linkages in Austria would no longer be able to apply for an entry visa, which would adapt the law to the restrictive practice that has evolved over the years (see below). However, no draft text has been presented at this stage. At any rate, an amendment would need to be adopted through a parliamentary decision, and it is estimated that the earliest date that changes could take effect is 1 January 2003.<sup>236</sup>

The Austrian government would be interested to cooperate with other Member States on a harmonised scheme for externalised processing, on condition that applicants are equitably distributed amongst Member States, and that all Member States would engage in the scheme.<sup>237</sup> Its

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<sup>234</sup> An unofficial translation of the article is available on <<http://www.unhcr.at>>: *Article 16. Entry authorization*:

1. Asylum applications and asylum extension applications received by an Austrian diplomatic or consular authority in whose sphere of administration the applicants are resident shall be additionally valid as applications for the granting of entry authorization.

2. In cases where such applications are filed, the diplomatic or consular authority shall ensure that the aliens complete an application form and questionnaire drawn up in a language understandable to them; the structure and text of the application form and questionnaire shall be determined by the Federal Minister of the Interior, in agreement with the Federal Minister of Foreign Affairs and after consultation with the United Nations High Commissioner for Refugees, in such a way that the completion thereof serves to establish the material facts of the case. Moreover, the diplomatic or consular authority shall make a written record of the content of the document submitted to it. The asylum application shall be forwarded to the Federal Asylum Agency without delay.

3. The diplomatic or consular authority shall issue an entry visa to the applicant without further formality if the Federal Asylum Agency has notified it that asylum is likely to be granted.

<sup>235</sup> Interview with UNHCR BO Vienna, 5 June 2002.

<sup>236</sup> Telephone interview with Mr. Christian Schmid, Federal Asylum Office, 26 August 2002.

<sup>237</sup> Questionnaire response by the Austrian government, received on 31 May 2002.

experience indicates that “slightest differences in the legislation of Member States are made use of” by applicants, which may entail “crisis situations at diplomatic representations”.<sup>238</sup>

### 6.1.1.3 *Classes of Beneficiaries*

The Austrian procedure caters for Convention refugees only. This follows from the wording of Section 7 of the Asylum Act, which relates to the definition in article 1 A. (2) of the 1951 Refugee Convention as well as to the cessation and exclusion clauses in article 1 C and F of the same instrument. Subsidiary forms of protection are reserved for persons filing claims on Austrian territory, or at its borders.

Formally, applications can be filed both in countries of origin and in third countries. In practice, only the latter may succeed, which is a significant limitation effectuated by the Austrian authorities.<sup>239</sup> An information sheet handed out to all applicants states explicitly that a “basic precondition for the processing [sic!] of your application is that you are situated outside your country of origin, or, if you are stateless, your country of habitual residence”.<sup>240</sup> In particular, the authorities rely on the wording of the refugee definition, and its requirement of being outside one’s country of origin or habitual residence. Additionally, officials appear to perceive applicants remaining in their country of origin as not having a credible fear of persecution.<sup>241</sup>

To the present authors, the motivation behind the limitative practice appears questionable. The wording of Section 7 of the Asylum Act merely states that it must be “satisfactorily established that [asylum applicants] are in danger of persecution in their country of origin (article 1, section A (2), of the Geneva Convention on Refugees)”. The wording of the law is unambiguous. Its reference to the refugee definition merely covers the concept of persecution, and not other elements contained in it, as the requirement of being outside one’s country of origin or habitual residence. However, Austrian authorities have interpreted the wording of the legislation in a limitative fashion, reading the requirement of being outside one’s country of origin into the reference to the concept of persecution, and thereby cutting off applicants filing a claim with a representation in their country of origin or habitual residence from any prospect of success.<sup>242</sup> Hence, Austrian practice has developed in a manner more restrictive than the stipulations of the legislator.

UNHCR is unconvinced by the limitative interpretation and believes that applications from countries of origin should not be routinely turned down. Its line of argument is as follows. In applying Section 7 compared to Section 16 (3) of the 1997 Asylum Act, Austrian authorities are set to test whether the grant of asylum in Austria would have been likely (*wahrscheinlich*), had the

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<sup>238</sup> Ibid.

<sup>239</sup> However, applications for “asylum extension” (*Asylerstreckungsanträge*) can succeed, although they are filed in countries of origin. As asylum extension is a method for ensuring family unity, it is outside the scope of this study.

<sup>240</sup> “Grundvoraussetzung für die Behandlung Ihres Antrages ist, dass Sie sich außerhalb Ihres Heimatlandes bzw. wenn Sie staatenlos sind, außerhalb des Staates Ihres gewöhnlichen Aufenthaltes befinden.” Federal Asylum Office, Merkblatt gemäss § 26 AsylG 1997 für Antragsteller bei einer österreichischen Vertretungsbehörde, version of 1 January 1998.

<sup>241</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002. This line of argument presupposes, however, that the applicant has a real choice between leaving and remaining.

<sup>242</sup> Questionnaire response by the Austrian government, received on 31 May 2002. Confirmed in interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

application been filed on Austrian soil. Hence, the test contains a hypothetical element, which concurrently eliminates the requirement of being outside one's country of origin.<sup>243</sup>

In addition to the permanent procedure catering for refugees, Austrian law provides for an exceptional mechanism geared at displaced persons, which can be activated by a governmental decision after consultations with the main committee of the Austrian National Assembly. This competence has been laid down in Section 29 of the 1997 Aliens Act, and encompasses the power to regulate beneficiaries' entry and length of stay. The Austrian contribution to the Humanitarian Evacuation Programme for Kosovars in 1999 was based on this provision, which reveals important similarities to the Swiss mechanism for launching temporary protection.<sup>244</sup>

#### **6.1.1.4 Submission of an Application at an Austrian Representation**

According to Article 16 (1) of the 1997 Asylum Act, an asylum application filed with an embassy shall be automatically regarded as an application for entry authorization. Applications for asylum can be filed at both embassies and consulates, with the exception of honorary consulates. It is immaterial whether UNHCR or UNDP is represented in a country where the application is lodged. According to section 24 (2) of the 1997 Asylum Act, there is no formal requirement for lodging such applications. Apart from oral representations indicating the will to seek asylum in Austria, they can also be filed in writing in any of the official languages of the United Nations. However, representations will generally encourage the applicant to present herself in person.

The Austrian authorities are unaware of particular impediments hindering applicants' access to Austrian representations.<sup>245</sup> Caritas Austria reports a 1998 case, where an applicant lacking a passport was only allowed to access the Austrian embassy in Budapest upon intervention by a Viennese NGO. It also turned out that the embassy was not informed of its role in the asylum procedure, and that the questionnaire form was unavailable.<sup>246</sup>

The questionnaire form is the centrepiece of the Austrian procedure. According to official sources, it is available at all representations in relevant languages.<sup>247</sup> If a certain language version happens to be unavailable, it can be ordered from the FAO. Representations are instructed not to part with the questionnaire, but to ask applicants to fill it in on the spot.<sup>248</sup> This is to avoid abuse of the questionnaire forms.<sup>249</sup>

The questionnaire contains questions relating to personal data, family relations, professional training, criminal record and documents in the possession of the applicant. Of the ten-page form, two-and-a-half pages deal with the travel routes, while two pages are devoted to questions on the

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<sup>243</sup> Interview with UNHCR BO Vienna, 5 June 2002. The understanding of the hypothetical test presented by UNHCR conforms to the description delivered by Austrian authorities. Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>244</sup> See Chapter 6.1.4.2 below.

<sup>245</sup> Questionnaire response by the Austrian government, 31 May 2002.

<sup>246</sup> Questionnaire response by Caritas Österreich, 3 April 2002.

<sup>247</sup> However, our NGO interlocutors hold doubts whether these forms are indeed available at all embassies. Questionnaire response by Caritas Österreich, 3 April 2002.

<sup>248</sup> If the applicant cannot present herself at the representation, a questionnaire will be sent to her, which she is asked to return to the representation.

<sup>249</sup> Allegedly, questionnaire copies have been sold to Afghans in Iran, under the pretence that the questionnaire would allow its owners access to an *Australian* reception scheme. This contributed to the massive caseload of applications at Austria's Tehran embassy in 2001, described below.

reason for flight and for choosing Austria as a country of asylum. Should the applicant lack space to answer questions in full, additional sheets may be used. On each page, the same content is reproduced in two language versions, of which one is German.

There is no interview with applicants on the substance of their claim<sup>250</sup>, and the representation staff will merely see to that the questionnaire form is filled out in a complete manner. There is no interpretation service available to applicants who do not speak the language(s) of the representation. Neither is there a possibility for counselling. Staff will take copies of relevant documents, which are then attached to the questionnaire, and dispatched to the FAO by diplomatic courier for material determination. The representation is not asked to present its personal evaluation of the application. However, if it has doubts about the credibility of the claimant or possesses information relevant for the processing of the claim, it may choose to make these known through a note for the file, which is communicated to the FAO.

There is no liaising with other Member States' embassies in order to identify multiple applications. Neither are there regular contacts with local UNHCR offices. The Austrian authorities are not aware of any evidence of "asylum shopping" through multiple applications filed with different embassies.<sup>251</sup> The applicant will not be protected by the representation while her application is being processed.<sup>252</sup>

It is the prerogative of the FAO alone to carry out the material assessment under the Austrian procedure. The representation has no discretionary power whatsoever and is accorded the role of an intermediary. Should additional questions emerge when the case is processed by the FAO, the representation will communicate questions and answers between the FAO and the applicant. Representation staff is not trained in asylum matters.<sup>253</sup>

#### **6.1.1.5 Processing by the Federal Asylum Office**

Within the FAO, cases filed at representations are forwarded to one branch office, where they are processed to the extent capacity is available. The role of the FAO in Protected Entry Procedures differs from that assumed by the office in territorial procedures. In the Protected Entry Procedure, the office merely carries out an assessment whether the grant of asylum is "likely". If the answer is yes, the applicant shall be granted an entry visa (usually a temporally limited C- or D-visa). If the answer is no, an entry visa shall not be granted. It should be observed that the likelihood standard relates to the applicant's qualification under the refugee definition, and not under article 33 of the 1951 Refugee Convention. The FAO will transmit the outcome of its assessment to the relevant representation, which will orally communicate the decision of the FAO to the applicant.

Although precise statistics are lacking, it is universally accepted that a visa is granted in very few cases.<sup>254</sup> The Austrian authorities "do not exclude" that non-family reunification cases are granted

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<sup>250</sup> However, the representation may choose to conduct an interview to establish the personal identity of a claimant.

<sup>251</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>252</sup> Ibid.

<sup>253</sup> Our NGO interlocutors related one case where staff at the Austrian embassy in Berne, Switzerland, was unaware that the positive prognosis communicated to the embassy by FAO obliged it to issue an entry visa. Questionnaire response by Caritas Österreich, received on 3 April 2002.

<sup>254</sup> See Chapter 6.1.1.8 *supra*.

entry permits, but they describe those as “very rare”.<sup>255</sup> The likelihood test, the decreased depth of scrutiny flowing from a questionnaire-based procedure and the notion of ‘protection elsewhere’ could provide explanations. Each factor shall be addressed in the following.

UNHCR believes that the standard of likelihood employed by the FAO in pre-screening is not sufficiently clear.<sup>256</sup> According to the Austrian authorities, likelihood is established by asking the question “Would the applicant have been granted refugee status, if she had been filing an identical claim in the Austrian territorial procedure?”<sup>257</sup> From the authorities’ perspective, Protected Entry Procedures have to be understood against the backdrop of rules applied in border procedures. The likelihood standard in Protected Entry Procedures is more demanding than the standard applied for entry permits granted in the border procedure, which states that the grant of asylum must “not be unlikely”.<sup>258</sup> The usage of the likelihood test can be further facilitated by resorting to a set of five criteria for designating a case as “manifestly unfounded”, contained in Section 6 of the Asylum Act.<sup>259</sup> If one or more of these criteria is fulfilled, it will normally be regarded as “unlikely” that asylum would have been granted in a territorial procedure.<sup>260</sup> Still, these delimitations do not provide a greater degree of precision.

It is more probable that the reduced depth of scrutiny provides an adequate explanation for the low number of cases passing the likelihood threshold. This is the explanation given by the Austrian authorities, which point in particular to the fact that the procedure rests on written material, the lack of corroboration and the ensuing superficiality of the assessment.<sup>261</sup> To the mind of the authors, a comparison with territorial procedures will be enlightening. As a rule, the material on which a decision is taken is much more rich in substance than the relatively sparse pieces of information contained in the questionnaire. After all, oral interviews with active questioning, preceded by

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<sup>255</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002. Confirmed in interview with UNHCR BO Vienna, 5 June 2002.

<sup>256</sup> UNHCR believes that the likelihood standard should be applied in a manner allowing entry only to “manifestly clear” claims, so as not to create cases which are turned down in the asylum procedure carried out upon entry to Austria. Interview with UNHCR BO Vienna, 5 June 2002.

<sup>257</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>258</sup> Ibid.

<sup>259</sup> Section 6 reads as follows:

“Applications for asylum as provided for in article 3 shall be dismissed as being manifestly unfounded if they clearly lack any substance. That shall be the case if, in the absence of any other indication of a risk of persecution in the country of origin:

1. It clearly cannot be concluded from the asylum-seekers’ allegations that they are in danger of being persecuted in their country of origin, or
2. On the basis of the asylum-seekers’ allegations, the claimed risk of persecution in their country of origin is clearly not attributable to the reasons set forth in article 1, section A (2), of the Geneva Convention on Refugees, or
3. The asylum-seekers’ allegations concerning a situation of danger clearly do not correspond with reality, or
4. The asylum-seekers, despite being so requested, do not co-operate in the establishment of the material facts of the case, or
5. Owing to the general political circumstances, legal system and application of the law in the country of origin, there can generally be no well-founded fear of persecution for the reasons set forth in article 1, section A (2), of the Geneva Convention on Refugees.”

<sup>260</sup> However, the Austrian authorities underscore that this conclusion is not derived automatically, and that there could be cases which fall under Section 6 of the Asylum Act, but where the grant of asylum is regarded as ‘likely’ nonetheless. Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>261</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

counselling of the applicant by her representative as well as the possibility to correct errors do impact critically on the level of detail and relevance of information delivered. In Austrian Protected Entry Procedures, these elements are absent. The applicant is on her own with the questionnaire, there is no qualified counselling, and communication is generally a one-way affair. The sparseness of information constitutes a filter element in itself, which is bound to make the decision-maker reluctant to find that the likelihood standard has been met. Austrian authorities have pointed out to the authors that a more complex procedure would be impracticable, and strongly suggest that EU harmonisation should not demand the introduction of a more demanding model.<sup>262</sup>

In quest for a comprehensive explanation for the low numbers admitted to Austria, the application of “protection elsewhere” arguments might be at least as important. To explain the advent of this notion in the context of Austrian Protected Entry Procedures, a closer look at the 2001 Afghani caseload has to be taken. Throughout the 1990s, the number of asylum applications at Austrian representations was very low, at the most a few hundred yearly; to the extent official statistics exist. In 2001, a total of 5.622 applications at Austrian representations were reported, the vast majority of them being filed by Afghani applicants reporting at the Austrian embassies in Tehran, Iran, and Islamabad, Pakistan. Claimants in Tehran had obviously been misled: rumour had spread that Australia operated a reception programme, and the Austrian representation was mistaken for that of Australia.<sup>263</sup> In Islamabad, 3.000 questionnaires were handed out by the Austrian embassy within a ten-day period in October 2001, of which 250 were returned. However, the embassy was subsequently closed, making the Austrian Protected Entry Procedure practically inaccessible to protection seekers in Pakistan.<sup>264</sup>

The FAO dispatched a two-person mission to Iran in autumn 2001, which was assigned to assess the safety of Afghani protection seekers. Consecutively, the Federal Ministry of the Interior declared that it regarded both Pakistan and Iran as safe countries for Afghans applying for asylum at Austrian representations.<sup>265</sup> Upon that decision, the pile of cases was decided individually.<sup>266</sup> Almost all were rejected, i.e. the FAO stated that the grant of asylum in Austria was not likely, entailing the denial of an entry visa. By contrast, the percentage of positive decisions<sup>267</sup> for Afghans who file their application for asylum on Austrian territory is comparably high (49%, pursuant to the official statistics in the first half of 2001<sup>268</sup>). The fate of one particular applicant amongst the Tehran cases is detailed in Box 1 below.

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<sup>262</sup> Ibid.

<sup>263</sup> *UNHCR-Kritik an heimischer Asylpolitik*, Der Standard of 16 October 2001.

<sup>264</sup> *‘Sicheres Drittland’ Pakistan*, Der Standard, 9 October 2001.

<sup>265</sup> Supra note 263.

<sup>266</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>267</sup> These comprise all forms of territorial protection, ranging from non-removal to refugee status.

<sup>268</sup> This percentage reflects the number of refugees granted Convention status divided by the number of negative decisions. The latter does not include the number of otherwise closed decisions.

### ***The Case of Mr. N.***

Where the cooperation between territorial authorities and embassies is dysfunctional, Protected Entry Procedures will invariably fail. Where Protected Entry Procedures fail, *refoulement* may be the consequence. And, finally, where Protected Entry Procedures fail, human smugglers stand by to take over. Those are the three main lessons of Mr. N's case<sup>269</sup>, which is exposed here at some length to illustrate the importance of securing a smooth function of procedures along the whole chain, stretching from the first contact of the applicant with the embassy to the rendering of a decision.

Mr. N is an Afghani with a background in a well-known leftist party. He was employed as a civil servant under the Najibullah government and worked in a Ministry. When the Mudjaheddin seized power, his family was ostracised, and Mr. N evaded persecution by fleeing to Iran, where he stayed illegally like many other Afghanis.

His presence in Iran was, however, not tolerated. Between 1994 and 2001, Iranian authorities returned him three times to Afghanistan. The third return took place in September 2001, after he had filed an asylum claim earlier the same year with the Austrian embassy in Tehran. Exposed to a precarious situation in Afghanistan, he set his hopes on human smugglers, who brought him to Austria, where his brother lives as a refugee. The smugglers charged him USD 4000 for their services. Once in Austria, he filed an asylum claim, which is currently being processed. In the Austrian territorial procedure, Afghanis are usually not accorded refugee status. For the time being, they are, however, not sent back. By moving to Austrian territory, albeit by illegal means, Mr. N had improved his security situation markedly and averted the threat of persecution awaiting him in Afghanistan.

Once in Austria, he inquired about the fate of his claim submitted earlier to the embassy in Tehran. Although Austrian diplomatic representations are legally obliged to forward all asylum claims to the FAO in Austria, his file could not be tracked and appears to have disappeared. The Tehran representation claims to have forwarded it in due course. Obviously, the disappearance of his file had the most serious consequences, as it inhibited his case from being dealt with, and from being decided in due course. A positive decision could have spared Mr. N his third removal to Afghanistan, and had also done away with the need to flee that country with the help of smugglers.

#### **Box 1 - The Case of Mr. N.**

Resorting to the notion of safe third countries appears questionable: a highly sophisticated legal concept is transposed to a region and context alien to its origins. In territorial procedures, high standards must be met before protection seekers can be referred to third countries without a substantive assessment of their claim. The Austrian legislator laid down a set of criteria in 1998, focussing on the alien's access to asylum procedures in the third country, the individual examination of cases, the opportunity to appeal, and the possibility to remain in the third country

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<sup>269</sup> The presentation is based on *Asylakten spurlos verschwunden*, Der Standard, 22 April 2002, and the notice of 8 February 2002 by Mr. N's attorney to the prosecutor's office at the Vienna District Court, requesting the initiation of criminal proceedings (on file with the authors). According to the newspaper article in Der Standard, Mr. N's case is no singularity. The paper alleges that a similar case exists, where an application filed at the Austrian embassy in Pakistan has vanished.

during the first instance and appeals procedures.<sup>270</sup> At various points in time during recent years, Austrian courts declared the Czech Republic, Hungary, Slovakia and Slovenia not to be safe. Austrian authorities acknowledge that Iran and Pakistan cannot be described as “safe” according to the ordinary standards applicable in the territorial procedure.<sup>271</sup> Hence, a set of double standards is evolving in this field: an explicit one for territorial procedures, and an implicit and discretionary one for Protected Entry Procedures. As there is no appeal in the latter, Austrian courts cannot assist in developing more coherent standards in the manner they did for territorial asylum procedures.

#### **6.1.1.6 The Absence of Appeals and Monitoring Safeguards**

The decision not to grant an entry permit cannot be appealed. As the assessment of the FAO does not entail a formal decision, but only an informal part of the decision concerning the application for the granting of entry authorization, it is not communicated in writing to the applicant. This prevents the decision from attaining *res iudicata* character. According to the technicalities of the Austrian legislation, the case is closed and filed as “lacking objective” (*gegenstandslos*) rather than terminated with a negative decision.<sup>272</sup> This, in turn, entails that no appeal is possible, since there is no negative decision. On the other hand, a negative assessment is completely immaterial, should the applicant apply for asylum on Austrian territory in the future. Hence, it would be rational behaviour for protection seekers who have been denied entry in the Austrian Protected Entry Procedures to use the smuggling channel to make a second attempt. Finally, there is no motivation for a negative outcome of the likelihood assessment.<sup>273</sup>

Although there is an agreement between the Federal Ministry of the Interior and UNHCR, which allows the latter to take part of the internal database on asylum cases run by Austrian authorities, this does not provide a practical opportunity for the regular tracking of applications filed at representations. Such applications are merged with territorial applications in the database, which forces its users to look at each single case to identify where it was filed.<sup>274</sup> By consequence, UNHCR is unable to monitor Protected Entry Procedures. As a conclusion, there is no mechanism compensating for the shortfall of appeals, either in part or in full.

#### **6.1.1.7 Continuation of the Procedure after the Grant of an Entry Visa**

Should an application result in the grant of a visa, it is the applicant’s responsibility to organise travel. The representation is unable to assist with the practicalities of departure, or to provide lacking funds for travel costs. NGO’s have at times been able to mediate, by asking UNHCR for covering travel costs. A precondition for the grant of a visa is the possession of a passport. Where travel documents have been lacking, NGO’s have engaged in securing appropriate Red Cross-documents.<sup>275</sup>

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<sup>270</sup> For an exhaustive presentation of the safe third country-notion in Austrian legislation and practice, see U. Brandl, *Austria*, in *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (R. Byrne, G. Noll and J. Vedsted-Hansen eds.) Kluwer Law International, The Hague 2002, pp. 100-137, at 119-127.

<sup>271</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>272</sup> Section 31 of the 1997 Asylum Act.

<sup>273</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>274</sup> Due to the amount of cases filed in the database, this is practically impossible. Telephone interview with Mr. Christoph Pinter, UNHCR BO Vienna, 28 August 2002.

<sup>275</sup> Questionnaire response by Caritas Österreich, received on 3 April 2002.



Upon arrival in Austria, the applicant will formally file an asylum application, as the preceding involvement of the FAO merely served to assess the likelihood of asylum being granted, without rendering a formal decision on the actual grant of asylum. She is invited to an interview, and the ordinary procedure for territorial asylum applications is pursued, giving access to the usual safeguards and multiple levels of appeals. As earlier mentioned, the grant of an entry visa in no way prejudices the outcome of territorial proceedings, which can be recognition as well as rejection.

#### 6.1.1.8 Statistics and Costs

A statistical assessment of Austrian practices is difficult. Official statistics are scarce and provide little detail.

A 1995 UNHCR study relates official data from the registry of asylum applications, indicating that 18 cases were registered as of 31 December 1993, 34 cases as of 31 March 1994, and 34 cases as of 31 May 1995. The study's authors infer that processing time was relatively lengthy in comparison to territorial asylum procedures, but warned that detailed conclusions could not be drawn from the scarce material.<sup>276</sup> Another source indicates that the number of applications submitted at representations abroad has been around 250 per year.<sup>277</sup>

Austrian authorities merely relate the number of 5.622 applications filed at representations in 2001.<sup>278</sup> According to an NGO source, 5.376 of these were filed by Afghans in Tehran and Islamabad.<sup>279</sup> Of those, 124 have led to an entry permit being granted on grounds of family unity.<sup>280</sup> For the period from 1996-2000, statistics are unavailable. As a consequence, a breakdown into nationalities of applicants cannot be provided.

However, official statistics on negative decisions filed as "lacking objective" exist. These also include the (reportedly small number of) cases asylum applications at the Austrian land border, where the FAO assessed it to be "unlikely" that they will be granted asylum upon entry.<sup>281</sup> Apart from 2001, which must be regarded as a special case, the number of applications range in the lower hundreds, as reflected in Table 3.

	1998	1999	2000	2001
Number of cases closed as 'lacking objective' in the Protected Entry Procedures and the border procedures	208	353	126	5.153

**Table 3 - Cases where Entry to Austria was Denied, 1996-2001**

<sup>276</sup> UNHCR RO Vienna, *Flüchtlingsalltag in Österreich. Eine quantitativ-qualitative Analyse der Vollzugspraxis des Asylgesetzes 1991*, Third Edition, February 1996, pp. 83-4.

<sup>277</sup> ECRE, *ECRE Documentation Service* No 3, July 2001, p. 7.

<sup>278</sup> Questionnaire response by the Austrian government, 31 May 2002.

<sup>279</sup> Questionnaire response by Caritas Österreich, received on 3 April 2002.

<sup>280</sup> Ibid.

<sup>281</sup> See text accompanying footnote 258 above. The statistics were provided in the Questionnaire response by the Austrian government, 31 May 2002.

The average duration of processing from filing the application at a representation to the communication of the FAO assessment is one month.<sup>282</sup> This can be compared to the average duration of two to three months until a first interview is held in cases filed on Austrian territory<sup>283</sup>, and the maximum duration of five days (excluding appeals) in the border procedure.<sup>284</sup>

The Austrian authorities are unable to assess the costs flowing from the operation of Protected Entry Procedures.<sup>285</sup>

#### **6.1.1.9 Evaluation of the Austrian Model**

The Austrian procedure is law-based and thus formalised to a considerable degree. Among the positive elements, the relatively short duration and simplicity of procedures could be listed. The negative features are perhaps best reflected by the low numbers of successful cases, which indicate an excessive use of filter elements to narrow down the caseload. The main filters are:

- the limitation to persons satisfying the refugee definition applying from third countries,
- the decreased depth of scrutiny in an exclusively written procedure,
- the invocation of “protection elsewhere”-arguments, both coupled with
- high demands for passing the likelihood threshold in the FAO assessment, and
- the total absence of appeals and monitoring.

In addition, the procedure seems to be little known, and representations apparently have not in every case discharged the tasks accorded to them under it.

An interesting feature of the Austrian procedure is that its substantive assessment merely represents a pre-screening, and in no way compromises the outcome of asylum procedures conducted, once the applicant reaches Austrian territory. By consequence, persons rejected in Protected Entry Procedures would act rationally, if they were to subsequently resort to the smuggling channel and apply for asylum territorially. Hence, the drafters of the Austrian model have chosen not to fully exploit the competitive potential of Protected Entry Procedures vis-à-vis the smuggling market.

From an observers’ perspective, the Austrian model appears to be highly contradictory, and balances at the verge of self-cancellation. While the legislator opened up a legal access channel, the implementing authorities have closed it again.<sup>286</sup> One could argue that the procedure has already been dismantled in practice long ago, and remains a dysfunctional reflection of the legislator’s original intent. This, however, should not be taken to represent support for formally dismantling it. On the contrary: one could argue that the legislation’s full potential has yet to be tested in practice.

It has to be conceded that the 2001 caseload was exceptional in the European context. So were the measures taken by the Austrian authorities (i.e. the extension of “safe third country” status to Iran and Pakistan in stark contrast to territorially applicable standards). The damage done by the insistence on the safety of demonstrably unsafe regional states is difficult to assess, but it teaches future lawmakers a lesson: standards for “protection elsewhere” must be included in Protected

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<sup>282</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>283</sup> Interview with UNHCR BO Vienna, 5 June 2002

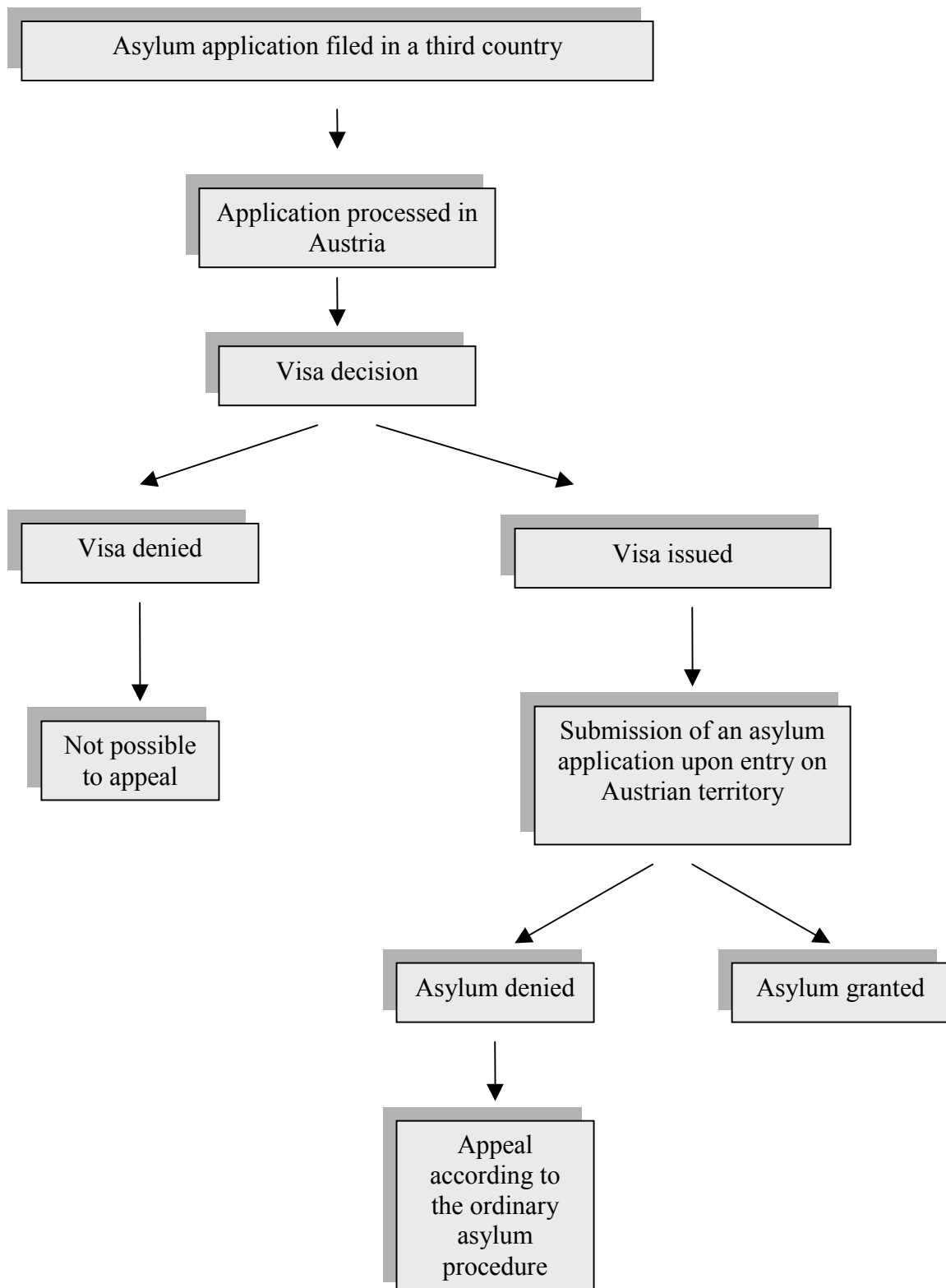
<sup>284</sup> Interview with Mr. Hilbert Karl, Austrian Federal Ministry of the Interior, and Ms. Iris Habich, Federal Asylum Office, 5 June 2002.

<sup>285</sup> Questionnaire response by the Austrian government, 31 May 2002.

<sup>286</sup> Parallels to Danish practice impose themselves. See Chapter 6.2.1 *supra*.

Entry Procedures from the outset, and not produced ad hoc when the size of caseloads and political expediency push decision-makers to resort to drastic solutions. Nonetheless, the authors can agree with the Austrian government in that a European harmonisation of Protected Entry Procedures needs to address the dimension of responsibility sharing.

#### 6.1.1.10 *Procedural Diagram*



## 6.1.2 France

### 6.1.2.1 Legal Regulation and Current Practices of Protected Entry Procedures

Under current French practice, it is possible for persons in need of protection to apply for asylum at diplomatic and consular representations abroad, both in countries of origin and in third countries. The applications will be processed in France. An initial visa decision will be made, and if this decision is positive, the applicant will be issued with a visa and allowed to proceed to France where the asylum procedure officially starts.<sup>287</sup>

However, there are no provisions in French law regulating this procedure. As a principle, the authorities consider that France's obligation to grant protection in accordance with the Geneva Convention is limited to persons being on the French territory, regardless of whether they have entered the country legally or not. As far as persons outside the national territory are concerned, UNHCR is considered to be the main provider of protection and France has no international obligation to grant protection. Accordingly, the decision to accept an applicant from abroad can only be taken within the discretionary power of the State to issue or refuse an entry visa and on an exceptional basis.<sup>288</sup>

Accordingly, no information about the possibility to apply for asylum in representations abroad is made publicly available by the French authorities, either through written material or on the Internet. Authorities justify their discretion by the discretionary nature of the procedure and the fact that it should, in any case, only be applied on an exceptional basis.

Little information is also available on the legal base determining which type of visa should be used. The General Visa Instructions ("*Instruction générale des visas*") apparently offer some guidance on this matter. However, these instructions, which are issued by the Ministry of Foreign Affairs for the diplomatic and consular representations abroad, are of an internal character and not available to the public.<sup>289</sup> Therefore, the content of the instructions remains unknown to the authors, and no conclusions can be drawn on the precise degree of formalisation.

### 6.1.2.2 Earlier Experiences and Future Developments

The French practice regarding Protected Entry Procedure, which is not regulated by law, has remained unchanged for a long time. Due to the limited number of persons concerned and the fact

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<sup>287</sup> The information included in this chapter is based on the content of the French chapter of the report "Safe Avenues for Asylum?" published by the Danish Centre for Human Rights and UNHCR in April 2002. The information was completed and updated by means of a questionnaire sent to the Ministry of Foreign Affairs and Amnesty International (Service Réfugiés). In addition, interviews were held with the Ministry of Foreign Affairs, The French Office for the Protection of Refugees and Stateless Persons (OFPRA), UNHCR Branch Office in Paris and Amnesty International in May 2002.

<sup>288</sup> Interview with the Ministry of Foreign Affairs, 30 May 2002. In his response dated 13 March 2002 to a report on asylum in France published by the Human Rights National Advisory Commission in July 2001, the Government's General Secretary declared "(...) Issuing 'asylum visas' falls under the States' discretionary powers, as the Geneva Convention obliges States to provide protection only regarding persons who are on their territory."

<sup>289</sup> In the same letter, see supra, the Government's General Secretary indicated: "The instructions sent by the Ministry of Foreign Affairs to the diplomatic and consular representations include specific provisions on asylum, which are regularly updated." The non-availability of these instructions was confirmed by the Ministry of Foreign Affairs. Interview with the Ministry of Foreign Affairs, 30 May 2002 and questionnaire response by the Ministry of Foreign Affairs.

that it is seen mainly as a visa procedure, it is not subject to discussion in the public debate regarding asylum currently taking place in France. At the time of writing, there is no plan to modify or abolish this procedure.

### **6.1.2.3 General Principles of the Procedure**

- The French system operates on two, formally separate tiers, first the ‘asylum visa’ (“*visa au titre de l’asile*”) procedure, by which access to the territory is requested, and then the asylum procedure, starting when the applicant enters France and formally applies for asylum.
- Representations abroad have been given a broad margin of appreciation in the visa field. They have the power to refuse or grant a visa requested for protection reasons, or they may forward the case to the Ministry of Foreign Affairs in France for a formal decision. They may also refuse to issue a visa, despite a positive initial visa decision from the French authorities, if circumstances have changed after the initial visa decision was taken.
- An applicant cannot be protected at the diplomatic or consular representation while her application is being processed. She may, however, be transferred to France before the application has been decided upon, if she is in need of immediate protection. Whether such a transfer should take place is decided upon by the Ministry of Foreign Affairs.
- When a positive initial visa decision has been reached, the representation abroad issues an ‘asylum visa’, usually in the form of a regular short-term or long-term visa. If a long-term visa has been issued, it gives the applicant the right to stay in France even if she does not proceed with the asylum application once in France, or if her asylum application is rejected. The applicant will enjoy precisely the same rights as anyone else in possession of a long-term visa.
- Once in France, the applicant can move on to the – formally separate – second tier by filing an asylum application. It will be decided upon either by the French Protection Office for Refugees and Stateless Persons (Convention refugee status) or by the Ministry of Interior (territorial asylum).
- Appeals against negative visa decisions are available, but in practice very difficult to implement. Decisions made on the asylum application itself, i.e. after the applicant has proceeded to France and lodged a formal claim, can be appealed.

### **6.1.2.4 Access to the Representations**

French authorities are aware that accessing their diplomatic or consular representations may be uneasy in some countries, due to security checks set up by the local authorities, by the representations themselves or by both of them simultaneously.<sup>290</sup> These difficulties of access may have increased following the 11 September events and the subsequent reinforcement of the security measures in a certain number of countries. French authorities consider, however, that most persons in need of protection who intend to approach the representations in order to submit a request for protection are able to do so. In some cases, however, this may require a personal contact with a

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<sup>290</sup> The French embassy in Beijing was mentioned by the authorities as an example. Interview with the Ministry of Foreign Affairs, 30 May 2002.

member of the embassy staff. The possibility of directly contacting the Ministry of Foreign Affairs in France, which then will alert the embassy in the country concerned, was also mentioned, although this does not seem to be an option frequently used.<sup>291</sup>

#### **6.1.2.5 Submission of the Application**

A person in need of protection may submit an asylum application at any French embassy or consulate abroad. Applications can be lodged both in countries of origin and in third countries.

No formal distinction or difference of treatment is made according to whether the claim is lodged in the country of origin or in a third country. In reality, the competence of the representation is not strictly regulated, and therefore the procedure followed will depend on several factors, such as the willingness of the representation to process the request, the characteristics of the specific case and the country in which the application is lodged.

#### **6.1.2.6 Registration and Initial Processing of the Application**

There are no specific rules to determine which member of the embassy staff is responsible for receiving and processing applications for asylum lodged at representations abroad. This depends on the embassy's location, size and internal organisation. In practice, applications can be processed by an '*agent consulaire*' or by a civil servant from the representation's political department or another department. In all cases, the person dealing with the request has to be a French citizen.

Staff working at representations abroad receive a very limited training on asylum matters as part of their overall consular training.<sup>292</sup> This does not include training in interview techniques.

Following the submission of her request, the applicant will be asked to provide further information and explanations. This will be done either by means of an interview with a staff member of the representation or by post. Interviews are always conducted by civil servants holding French citizenship, but local staff can function as translators. In order to assist interviewers in performing their task, the ministry of Foreign Affairs has established a list of non-binding questions, which they can refer to. They also have the possibility of contacting the ministry in Paris, including by e-mail, if they need further assistance or advice. According to the authorities, this happens rarely.<sup>293</sup>

#### **6.1.2.7 Processing of the Application by the Representation**

The issuance of visas, regardless on which grounds, is considered as the responsibility of the head of the representation. French representations abroad are therefore given a broad margin of appreciation in the visa field<sup>294</sup> and their competence is quite extensive.

Accordingly, the representation has the authority, on a discretionary basis, to decide whether to refuse the submission of an application and refer the applicant to the local authorities or to UNHCR, or to accept the request and deal with it. Similarly, it can take a decision of granting or refusing a

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<sup>291</sup> Interview with the Ministry of Foreign Affairs, 30 May 2002.

<sup>292</sup> The Ministry of Foreign Affairs is currently introducing a training module on Protected Entry Procedure and asylum (including diplomatic asylum) as part of the regular training of its civil servants.

<sup>293</sup> Interview with the Ministry of Foreign Affairs, 30 May 2002.

<sup>294</sup> Statement by the Administrative Judge Ngako Jeuga, Conseil d'État, 28 February 1986.

visa, including an ‘asylum visa’, without consulting or even informing the Ministry of Foreign Affairs. Finally, it can also, still within its discretion, decide to forward the case to the Ministry of Foreign Affairs in Paris for a formal decision on whether an ‘asylum visa’ should be granted or not.

Only about 120 to 160 applications for asylum lodged at representations abroad are referred each year by the French embassies and consulates to the Ministry of Foreign Affairs (the processing of these cases by the Ministry is described below). According to the authorities, however, the vast majority of French visas issued for protection reasons are granted by the representations abroad, without the involvement of the Ministry. Since the representations have no obligation to register protection cases separately or even to inform the Ministry about them, there is no statistical information on the number of ‘asylum visas’, which they issue directly – out of more than two million visas issued each year. It is likely, however, and confirmed by the authorities, that this number is much higher than the relatively low number of cases processed by the Ministry (see Statistics below). Accordingly, the French Protected Entry Procedure seems to rely on two protection instruments: on one hand a formal and centralised procedure carried out by the Ministry in a limited number of cases; and on the other hand, protective visa policies applied by the representations abroad within their discretionary powers. The latter instrument, although informal and lacking transparency, appears to be rather efficient in terms of numbers of persons concerned.<sup>295</sup>

Embassies may also refuse to issue a visa, despite a positive initial visa decision from the Ministry of Foreign Affairs. However, according to the authorities, this happens rarely and only if circumstances have changed after the initial visa decision was taken.<sup>296</sup>

#### **6.1.2.8 Transmission of the Case and Processing of the Application in France**

When the head of the representation decides that an application for asylum lodged at the embassy should be referred to the Ministry of Foreign Affairs in Paris, the case is forwarded to the Ministry’s Department for Foreigners in France (*“Direction des français à l’étranger et des étrangers en France”*)<sup>297</sup>. This unit is then responsible for making a decision on the granting or refusal of an ‘asylum visa’ to the applicant. The file is sent by the embassy by diplomatic pouch. It includes the interview transcript, an exposé of the case by the embassy as well as all documents relevant for the examination of the claim.

When examining the application, the staff of the Ministry has to take into consideration not only a) the asylum aspect, but also b) the availability of accommodation in France:

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<sup>295</sup> Interview with the Ministry of Foreign Affairs, 30 May 2002. Useful information on the representations’ practice in certain countries can be drawn from the statistical data. As an example, 80% to 90% of the approximately 25.000 Algerians who sought territorial asylum in France in 2001 held regular visas issued by the French representations in Algeria. The proportion of visa holders was almost as high amongst the 2.713 Haitians who applied for asylum in 2001. It is clear that the representations in these countries have issued visas to applicants who either explicitly referred to a need of protection or who could be deemed to be potential asylum seekers (due to the situation in the country, their age, family situation, etc.). It is, however, not confirmed whether this practice results from decisions made at embassy level or from instructions from the Ministry for Foreign Affairs itself.

<sup>296</sup> Ibid.

<sup>297</sup> More specifically, to its Sub-direction for Refugees and Stateless Persons (*“Sous-direction des réfugiés et apatrides”*).

- a) The Ministry for Foreign Affairs does not conduct a substantial examination of the application, but rather a preliminary investigation in order to assess whether the claim falls under the general criteria to be granted refugee status (nature and seriousness of the persecution, individuality of the persecution or the threat, etc.) or territorial asylum in France.<sup>298</sup> In making its assessment, the Ministry usually tries to follow the legal developments taking place in territorial case law.<sup>299</sup>

This examination by the Ministry of Foreign Affairs covers the risk of persecution both in the applicant's country of origin and in the first asylum country, if the application has been lodged in a third country. In this respect, it is different from the practice followed by the OFPRA, which looks only at the situation in the asylum seeker's country of origin.

In principle, the decision to grant or refuse the 'asylum visa' is based on protection issues only. Accordingly, there is no formal requirement to have family or other links with France. In practice, however, the authorities always investigate the reasons why the applicant has chosen to lodge her application with a French representation, and any family or cultural links with France will be considered as a positive element.<sup>300</sup>

The Ministry of Foreign Affairs' decision is based mainly on the written elements contained in the file forwarded by the embassy. In addition, the regional units within the Ministry are often consulted in order to provide background information on the political and human rights situation in the countries concerned. The Ministry also has the possibility of consulting the OFPRA, but this happens only in a very limited number of cases each year.<sup>301</sup> It can also consult the UNHCR Branch Office in France, but here again this happens rarely and normally regarding general issues rather than individual cases.<sup>302</sup> In both cases, the consultations, when they take place, are usually made on an informal basis, most often over the phone. Consultations with OFPRA and/or UNHCR do not bind the Ministry of Foreign Affairs, as the outcome of the procedure is wholly at its discretion.

- b) In order to avoid increasing the pressure on the reception system in France,<sup>303</sup> applicants are normally asked whether they have any accommodation available upon arrival. This investigation is made either initially at the initiative of the embassy, or later by the Ministry of Foreign Affairs. Such accommodation can be ensured by family members, friends or through a French NGO. No formal guarantee or condition of time is imposed on the referees in France, but the Ministry normally contacts them in order to seek confirmation that they agree to accommodate the applicant upon arrival.

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<sup>298</sup> The asylum authority, the French Protection Office for Refugees and Stateless Persons (OFPRA), is responsible for the granting of Convention refugee status only. Subsidiary protection is available in the form of territorial asylum, which is granted by the Ministry of the Interior following a separate procedure. It is possible to apply for refugee status and territorial asylum either simultaneously or subsequently.

<sup>299</sup> This was confirmed during the interview with UNHCR, 30 May 2002.

<sup>300</sup> UNHCR Branch Office in Paris confirms that a link to France is always considered as a 'plus', but the absence of such a link is not decisive for the outcome of the application. Interview with UNHCR BO Paris, 30 May 2002.

<sup>301</sup> According to OFPRA, such consultations are very rare and usually concern general doctrinal issues rather than individual cases, interview on 30 May 2002.

<sup>302</sup> Interview with UNHCR BO Paris, 30 May 2002.

<sup>303</sup> According to the authorities, over 80.000 persons asked for protection in France (both Geneva Convention and territorial asylum, children included) in 2001, whilst the number of accommodation places available in the reception system was only 9.700. Interview with the Ministry of Foreign Affairs, 30 May 2002.



If accommodation is immediately available – and provided the other conditions linked to protection are met – the ‘asylum visa’ will be issued and the applicant allowed to proceed to France. If accommodation is not available through family, friends or NGOs, the Ministry of Foreign Affairs will request a place of accommodation to the Ministry of Social Affairs, which is in charge of the official asylum reception system. In such a case, the ‘asylum visa’ will not be issued until the Ministry of Social Affairs has given a positive answer. Due to the very limited number of places available, this process can take up to eight months. During this period, applicants are supposed to remain in their country of origin or in the third country.

However, if the applicant finds herself in a situation where her life is at danger, the Ministry of Foreign Affairs has the option to ignore the issue of accommodation and to grant an urgent ‘asylum visa’ allowing her to proceed to France without delay. In such a case, the reception of the applicant in France is organised in co-operation between the Ministry of Foreign Affairs and the French Red Cross. Initial accommodation is normally made available in Red Cross’ emergency structures. The evaluation of the applicant’s situation and whether her life is at danger if she remains in her country of origin or in the third country is made by the embassy.

#### **6.1.2.9 Positive Decision by the Ministry of Foreign Affairs and Finalisation of the Asylum Procedure**

When the Ministry of Foreign Affairs reaches a positive decision, it instructs the embassy to issue the applicant with a visa. Since ‘asylum visas’ do not exist officially, applicants are granted different types of visas, including tourist, student, short-term or long-term visas. This decision is made on an individual basis and is based on various criteria including the wish to avoid attracting unnecessary attention from the authorities in the country where the application was lodged. The choice of the visa may have important consequences on the applicant’s future situation in France. A long-term visa, for example, allows for a six-month stay in France and includes the right to work. Persons granted an ‘asylum visa’ generally receive little information from the embassies as to what to do upon arrival in France, but are normally told that they should lodge a formal application for asylum.

Once in France, they have the possibility of finalising the procedure by lodging a formal application for asylum. This is, however, not an obligation and, in the absence of a formal claim, they may remain legally in France for as long as their visa allows.

If they choose to submit an application for asylum while in France, the claim will be examined by the French Protection Office for Refugees and Stateless Persons, which is the first instance asylum determination body. The OFPRA is not specifically informed about ‘asylum visa’ cases, which are thus processed as any other spontaneous applications for asylum. All asylum seekers undergo the same determination procedure regardless of whether they have entered the country with or without a visa and regardless of whether the visa, if there is one, was granted for protection reasons or not.<sup>304</sup> Since the visa issue is not taken into consideration under the determination process, official statistics do not distinguish between asylum seekers with and without entry visa. According to the OFPRA, the recognition rate for applicants with visas is likely to be more or less the same as for

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<sup>304</sup> Over half of the asylum seekers processed each year by the OFPRA have entered France with a regular visa. In most cases, OFPRA officers do not know if the visa was granted for protection reasons or not. The fact that an asylum seeker has been granted an ‘asylum visa’, in cases where this is known, has no impact on the determination process. Interview with the OFPRA, 30 May 2002.

those without. It does not exclude the possibility that applicants who entered France with an ‘asylum visa’ have their claim later rejected under the asylum determination procedure.<sup>305</sup>

Instead of applying for conventional asylum with the OFPRA, it is possible to lodge an application for territorial asylum. This is also the case following a negative decision by the OFPRA or the Refugee Appeals Board. Applications for territorial asylum are processed by the Ministry of Interior under a completely separate procedure.<sup>306</sup> Here again, the issue of whether the applicant entered France with or without a visa and whether the visa, if there is one, was granted for asylum reasons or not is not taken into consideration under the examination process.

#### **6.1.2.10 Negative Decisions by the Ministry of Foreign Affairs and Appeals**

The Ministry of Foreign Affairs’ refusals of an ‘asylum visa’ are considered to be visa and not asylum decisions. Appeals are therefore regulated by the provisions of Decree No. 2000-1093 of 10 November 2000<sup>307</sup> regarding appeals procedure in visa matters. Accordingly, an appeal against a negative initial visa decision may be lodged with the Visa Appeal Commission (“*Commission de recours contre les décisions de refus de visa d’entrée en France*”), whose task is to handle refusals of any kind of visas to enter France.

The Ministry’s initial negative decision is given orally to the applicant by the embassy. She may however request to have the decision in writing as well.<sup>308</sup> The appeal should be submitted to the Visa Appeals Commission within two months from notification of the negative decision. The composition of the Commission and its competencies are regulated in the above-mentioned Decree No. 2000-1093 and in a Statement of 16 November 2000.<sup>309</sup> The Commission is an organ under the Ministry of Foreign Affairs. Its chairman is chosen among former heads of diplomatic and consular representations. Furthermore, the Commission is composed of one member with a judicial background, one representative of each the Ministry of Foreign Affairs, the Ministry in charge of issues of population and migration and the Ministry of Interior. All members are appointed for a period of three years. The diplomatic and consular representations, as well as the Ministry of Foreign Affairs, are obliged upon request to provide the Commission with all the information necessary in order to reach a decision on the appealed application. The Commission may either reject the appeal or recommend to the Minister of Foreign Affairs that the visa applied for should be issued. The Ministry is not legally bound by this recommendation, but usually follows it.

The Commission started to work in the course of 2001 and there is very little case law on ‘asylum visas’ so far. In addition, the Ministry’s decisions on ‘asylum visas’ do not have to be motivated, which makes an appeal rather complicated and limits the prospects of reaching a positive outcome.<sup>310</sup>

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<sup>305</sup> Interview with the OFPRA, 30 May 2002.

<sup>306</sup> It is also possible to apply simultaneously for conventional and territorial asylum. In such a case, however, the processing of the latter claim will be suspended until a final decision has been made regarding conventional asylum. For information on these procedures, see Fabrice Liebaut, *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, 2000, Danish Refugee Council, Copenhagen, p. 88.

<sup>307</sup> Décret n° 2000-1093 du 10 novembre 2000, Journal officiel de la République française du 11 novembre 2000.

<sup>308</sup> Questionnaire response by the Ministry of Foreign Affairs, received 11 June 2002.

<sup>309</sup> Arrêté du 16 novembre 2000, Journal Officiel de la République Française du 19 novembre 2000.

<sup>310</sup> The fact that visa decisions are normally not motivated is an exception to the rule stated in law No. 79-587 of 11 July 1979 “*relative à la motivation des actes administratifs et à l’amélioration des relations entre l’Administration et le public*”. For the following categories this exception does not apply: visas sought by persons who have family members

Rejections by the Commission can be appealed first to an administrative court and further to the Council of State (“*Conseil d’État*”). It is not possible to submit an appeal against the Ministry’s decision to the administrative court without first bringing the case before the Visa Appeals Commission.

In addition to lodging an appeal with the Commission, an applicant whose application has been refused may also use the ordinary administrative remedies. One such remedy is that she may approach the head of the representation with a request for reconsidering the decision (“*recours gracieux*”). Another remedy is to address the Minister of Foreign Affairs in writing with a request to change the decision (“*recours hiérarchique*”).

The ordinary appeals procedure applies for the OFPRA’s negative decisions on asylum applications that have been submitted after the applicant arrived in France. This includes an appeal to the Refugee Appeals Board (“*Commission des recours des réfugiés*”) with the possibility of further bringing the case to the Council of State. Negative decision rendered by the Ministry of Interior on applications for territorial asylum can be subject to administrative review (“*recours gracieux*”) and/or can be appealed to an administrative court and further to the Council of State.<sup>311</sup>

#### **6.1.2.11      *Legal Safeguards and Legal Assistance***

Persons lodging an application for asylum at French representations abroad are not entitled to any legal assistance or counselling, and embassies normally do not provide specific information on the procedure. There is no obligation for the representations to provide interpretation services during the interview. In addition, decisions are usually notified orally to the applicant. The latter, provided she is aware of this possibility, may request a written copy, in French only, of the decision. This lack of legal safeguards, combined with the fact that negative visa decisions are not motivated, may explain the very limited number of cases, which are actually appealed.

Once in France, applicants who have lodged an application for conventional or for territorial asylum benefit from the same legal safeguards and are entitled to the same – limited – legal assistance as any other applicant in France.<sup>312</sup>

#### **6.1.2.12      *Transfer to France***

Once a visa has been issued, French representations normally do not assist the applicants regarding the practicalities of their departure to France. However, if the person has no passport and cannot obtain one, the representation may assist by issuing a *laissez-passer*.<sup>313</sup> Except in exceptional cases, no financial assistance is granted to applicants regarding airfares. In some cases, the applicant herself, or more rarely the French authorities, may request the assistance of UNHCR.

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that are French citizens, student visas, visas sought by persons registered in the Schengen Information Systems or by a persons for family reunion purposes. In these cases the decisions must be motivated. The Council of State (Supreme Administrative Court) has concluded that it is not in contradiction with France’s obligations under ECHR not to motivate visa decisions (CE, 13 November 1996, No. 127301, Rholami).

<sup>311</sup> Appeals rights available under the conventional and territorial asylum procedures are described in Liebaut, *supra* note 306, p.88.

<sup>312</sup> *Supra* note 306, p. 89.

<sup>313</sup> When the applicant is not a citizen of the country where the application has been lodged, a “*laissez-passer modèle B*” can be issued by the embassy. Questionnaire response by the Ministry of Foreign Affairs, received 11 June 2002.

French authorities acknowledge that in some very specific cases, persons holding a French 'asylum visa' may have been prevented from travelling due to the lack of funds or necessary documentation, or may even have been physically hindered from leaving the country by the local authorities.<sup>314</sup>

#### **6.1.2.13 Applicants' Physical Safety during the Procedure**

The French Protected Entry Procedure does not allow for the applicant to be protected at the diplomatic or consular representation while her application is being processed.<sup>315</sup>

The authorities have mentioned the possibility to request UNHCR to place an applicant under mandate, if this can ensure protection to the person concerned until a decision on the visa request has been made. However, no further information was made available on this practice.

In addition, applicants may also be transferred to France before their application has been decided upon, if they are in need of immediate protection. There are no official criteria defining when the transfer is deemed to be urgent, but French officials have mentioned the case of "persons whose life is in danger".<sup>316</sup> The evaluation of the applicant's situation and whether her life is at danger or not if she remains in her country of origin or in the third country is made by the embassy. The decision to urgently transfer the person to France is taken by the Ministry of Foreign Affairs. No information is available on the number of persons concerned by this measure.

#### **6.1.2.14 Statistics**

There are no official statistics on the number of persons processed under the Protected Entry Procedure nor on the number of those eventually accepted in France on this basis. A reason could be that asylum visas are usually given in the form of ordinary short-term or long-term visas and are thus not registered as 'asylum visas'. In addition, French representations abroad issue a large number of visas without informing the Ministry of Foreign Affairs of the protection reasons supporting their decision. Finally, as the persons granted 'asylum visas' are not registered as such, it is not possible to determine the proportion of those who eventually enter France.

The Ministry of Foreign Affairs estimates that only about 120 to 160 cases are forwarded each year by the embassies. Out of these, about two thirds are positively decided. No information is available on the number of individuals concerned.

The UNHCR Branch Office in Paris has requested that the French authorities be more generous in issuing 'asylum visas', as it might be a way of preventing unauthorised entry and trafficking in human beings.

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<sup>314</sup> Questionnaire response by the Ministry of Foreign Affairs, received 11 June 2002.

<sup>315</sup> In April 1998, eight Indonesians from the Aceh province sought refuge in the French embassy in Kuala Lumpur after having been threatened with expulsion by the Malaysian authorities. A few hours later, on the invitation of the French authorities, the Malaysian police evacuated them from the embassy. Commenting on this event, the Ministry of Foreign Affairs indicated in a letter of 2 May 1998 that the French embassy in Malaysia "(...) following consultation with the UNHCR local office, had assessed the situation of these eight Indonesians as resulting from economic considerations". UNHCR indicated later that it had only reminded the French embassy of the asylum seekers' rights and had not been involved in the decision of having them removed by force from the embassy (letter of UNHCR of 30 June 1998).

<sup>316</sup> "Personnes courant des risques vitaux", interview with the Ministry of Foreign Affairs, 30 May 2002, and questionnaire response from Amnesty International's Service Réfugiés.

#### **6.1.2.15      *Relation to other Procedures***

France has no official resettlement programme. In a very limited number of cases, however, it accepts to resettle mandate refugees based on a request from UNHCR.<sup>317</sup> These refugees undergo a formal asylum determination procedure once in France, but are granted refugee status almost automatically and without further investigations.

The Ministry of Foreign Affairs is responsible for processing applications for family reunion lodged at diplomatic and consular representations. Persons granted family reunion are issued with a specific visa. Unlike ‘asylum visas’, decisions on family reunion visas must be motivated. According to the authorities, there are no links or confusion between both procedures.

#### **6.1.2.16      *Evaluation of the French Procedure***

The French procedure cannot be fully assessed due to the withholding of essential information by the authorities, including the content of the instructions given to representations abroad regarding the issuance of visas. The emerging picture reflects a relatively informal procedure, where French representations enjoy a considerable margin of discretion, as they may reject, accept or forward to the authorities in France, requests for visas based on protection reasons. The lack of transparency, exemplified by the fact that visa decisions are not motivated (which makes any possible appeal rather theoretical), might result in people in need of protection refraining from submitting an asylum request at a French representation, as it might seem a hopeless project.

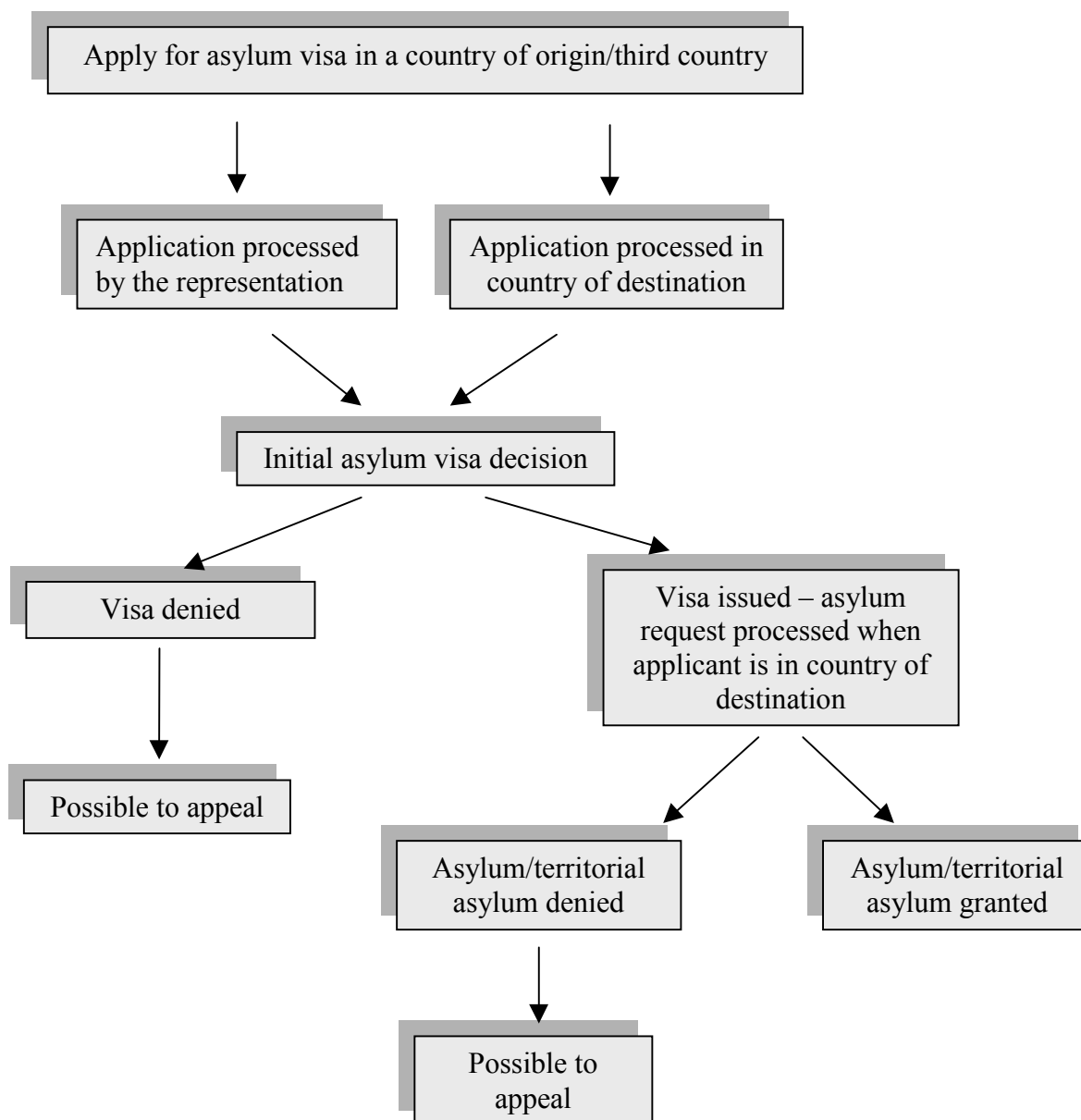
A number of inclusive features can be made out, however. First, like very few other countries, the French procedure extends not only to third countries, but also to countries of origin. Second, the French system diminishes the risks taken by the applicant by allowing her entry before asylum determination has been completed. In fact, the ‘asylum visa’ procedure is formally separated from the refugee status request. This makes the procedure less complicated and accessible to more people in need of protection. The ‘asylum visa’ does not give a right to refugee status, only a right to stay and work<sup>318</sup> (or study) in France, as well as the opportunity to proceed with the asylum application while in France. Third, the fact that visas are not marked out as protection-related visas is a further benefit for the applicant, who might have good reasons to collude the motive of emigration to officials of the country where the representation is situated. Fourth, it remains a positive feature that an appeals procedure is foreseen, although the fact that decisions are not motivated detracts from the value of the appeals system.

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<sup>317</sup> The exact number of persons accepted on such basis varies each year, but it has been so far relatively limited, often below 20 persons per year, interview with the OFPRA, 30 May 2002.

<sup>318</sup> Provided a long-term visa has been granted.

### 6.1.2.17 Procedural Diagram



## 6.1.3 The Netherlands

### 6.1.3.1 Legal Regulation and Current Practices of Protected Entry Procedures

Under current rules, it is not possible to lodge a formal application for asylum from abroad. However, Dutch legislation provides for a Protected Entry Procedure allowing the submission of an application for provisional sojourn ("*Machtiging tot voorlopig verblijf*", henceforth MVV) at representations abroad for the purpose of asylum in the Netherlands.<sup>319</sup>

<sup>319</sup> The information included in this chapter is based on the content of the Dutch chapter of the report "Safe Avenues to Asylum?", published by the Danish Centre for Human Rights and UNHCR in April 2002. The information has been completed and updated by means of a questionnaire sent to the Ministry of Justice and the Dutch Refugee Council. The

Applications for MVV for asylum purposes are forwarded by the representations abroad to the Ministry of Foreign Affairs in the Netherlands and are further examined by the Immigration and Naturalisation Service (“*Immigratie- en Naturalisatiedienst*” – IND, under the Ministry of Justice). If the assessment of the request by the IND shows that the applicant is eligible to be granted asylum, she will be admitted to the Netherlands. Once in the country, the applicant still has to lodge a formal asylum claim. However, this is a mere formality and, in practice, refugee status will be granted very rapidly without further investigation, unless the applicant has withheld relevant information that should have led to a negative decision in the first place.

The relevant provisions regarding the granting of an MVV for asylum purposes are to be found in Part C, Chapter 5, Paragraph 25 (henceforth Chapter C5/25) of the Aliens Regulations of 2000 (“*Vreemdelingencirculaire*”). The Dutch Protected Entry Procedure is formally a procedure conducted by the Ministry of Foreign Affairs and not by the asylum authorities. As such, it is regulated by the provisions of the General Administrative Law Act (“*Algemene wet bestuursrecht*”). The Dutch Aliens Act, which applies to all asylum claims submitted inside the Netherlands, does not apply to applications for MVV lodged abroad.

Although it is possible to find information on the Protected Entry Procedure on the Internet, Dutch authorities do not actively promote its application and the information made available to the public is generally limited. According to the authorities, this discretion is mainly justified by the necessity to ensure that embassies are not overloaded with requests for MVVs for asylum purposes, which would disrupt their other activities.<sup>320</sup>

### **6.1.3.2 Earlier Experiences and Future Developments**

It has never been possible to lodge formal applications for asylum with Dutch representations abroad. Applications for provisional sojourn for the purpose of seeking asylum have been accepted in practice since 1990, but the procedure was not formalised until the Aliens Regulations of 2000.

The section of the Aliens Regulations regarding applications for MVV submitted abroad is currently under review. Under the previous legislation, the Dutch authorities applied a broad refugee definition and applications for MVV were therefore examined regardless of whether they were lodged in the applicant’s country of origin or in a third country. The new Aliens Act, however, refers explicitly to the refugee definition of the Geneva Convention, requiring that persons seeking protection be outside their country of origin. The Dutch authorities intend to modify the Protected Entry Procedure in order to exclude applicants for MVV for asylum purposes still in their own country. Accordingly, only applications for MVVs for asylum purposes lodged in third countries will be accepted. At the time of writing, however, no formal decision has yet been taken on this issue.

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authors held interviews with the Ministry of Foreign Affairs, Ministry of Justice’s Immigration and Naturalisation Service (IND) and Immigration Policy Department, UNHCR office in The Hague as well as with the Dutch Refugee Council and an asylum and immigration lawyer in July 2002.

<sup>320</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice’s Immigration Policy Department, 2 July 2002.

### **6.1.3.3 General Principles of the Procedure**

- The Dutch Protected Entry Procedure is formally divided into a stage of applying for a visa (MVV for asylum purposes), and a stage of applying for asylum, the latter only starting when the applicant sets her foot on Dutch soil. However, protection considerations are preponderant at both stages, which is reflected by the fact that the asylum authority (IND) handles the material core of the application for an MVV.
- The procedure is characterised by the fact that it applies only as far as no other protection option –third country’s authorities or UNHCR/UNDP – is available. Accordingly, its scope of application is limited.
- The Dutch model is based exclusively on protection considerations. Although they may be useful in practice, no family or other links to the Netherlands are required. At the same time, however, the procedure may only benefit to applicants whose claim falls under the provisions of the Geneva Convention or other conventions, such as the European Human Rights Convention or the Convention against Torture (Article 3). Circumstances outside the scope of these conventions – e.g. civil war victims, traumatised persons, etc. are not considered under the Protected Entry Procedure. Only under exceptional circumstances may an MVV be granted for humanitarian reasons.
- On the procedural side, the Dutch practice is relatively formalised and implemented by the central authorities in the Netherlands (IND and, to a lesser extent, the Ministry of Foreign Affairs). Representations abroad have an extremely limited, if any, discretionary power. The procedure offers limited legal safeguards compared to the territorial procedure (absence of interpretation and legal assistance), but it includes a multi-level appeals system.

### **6.1.3.4 Access to the Representations**

The authorities are not aware of any particular impediments hindering applicants’ access to the Dutch representations in specific countries, but acknowledge that physical access to the representations may be uneasy in certain cases, due to increased security measures. However, this is not seen as actually preventing persons in need of protection from submitting their request to embassies and consular offices. Should there be any such impediments, the staff at the representation may consult the internal guidelines, which have been developed for such cases.<sup>321</sup>

In order to lodge an application for MVV for asylum purposes, applicants must physically present themselves at the representation. Applications sent to the embassy by letter are thus not processed. In accordance with the Aliens Regulations, however, the representation must in such a case answer in writing to the applicant informing her about the procedure and the obligation to come in person to the embassy. According to the Ministry of Foreign Affairs, applicants who contact the representation by sending a letter whilst in detention are normally informed that they should present themselves to the embassy once released from prison.<sup>322</sup>

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<sup>321</sup> Ibid.

<sup>322</sup> Ibid.



If the applicant cannot present herself to the embassy because doing so would entail risks to her safety, it should be possible, in principle, to lodge the application for MVV through a lawyer. In practice, however such cases happen very rarely, if ever.<sup>323</sup>

#### **6.1.3.5 Submission of the Application**

In its current state, the Dutch Protected Entry Procedure allows applications for MVV for asylum purpose to be submitted both in the applicant's country of origin *and* in a third country.<sup>324</sup> Applications can be lodged both at embassies *and* consulates.

There is a difference in treatment of the applications depending on whether they are filed in the applicant's country of origin or in a third country. In accordance with the provisions of the Aliens Regulations, applications lodged in third countries are not accepted by the representations if the applicant can be referred a) to the local authorities or, if this is not possible, b) to the local UNHCR or UNDP office:

- a) in third countries, applicants are in principle requested to seek protection with the local authorities. It is only in exceptional cases where these authorities are not willing or able to protect an applicant that she will be allowed to lodge her application with the embassy (provided there is no UNHCR or UNDP office in the country, see b) below).

The Dutch authorities do not operate with an official list of 'safe third countries', but there are general criteria to determine whether a country is considered as 'safe' or not.<sup>325</sup> It is the task of the embassy staff to evaluate the safety of any particular third country based on these criteria. In cases where the third country is obviously not 'safe' or when it is known that protection is not available, the applicant will not be referred to the local authorities.

- b) when the option of referring the applicant to the local authorities is not applicable, she is referred to the UNHCR or UNDP local office, if there is one, and requested to seek protection there. The mere fact that such an office exists is sufficient for the Dutch authorities to refer the applicant and no investigation is required as to whether effective protection is actually available from UNHCR or UNDP.

The decision to refer a person to the local authorities and/or to UNHCR/UNDP is made by the representations on the basis of the Aliens Regulations. The Ministry of Justice is not consulted nor even informed at this stage, unless the embassy considers the case to be exceptional and requires specific instructions. This happens extremely rarely.<sup>326</sup>

Referrals by the embassies to the local authorities and/or UNHCR – which in practice means that the applicant is not allowed to submit her request for protection – are not considered as formal decisions and as such cannot be appealed.<sup>327</sup>

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<sup>323</sup> Interview with an immigration and asylum lawyer, 3 July 2002.

<sup>324</sup> As mentioned above under Chapter 6.1.3.2, the Government is considering amending the regulation in this matter in order to allow only for applications lodged in third countries.

<sup>325</sup> Countries applying the Dublin Convention are automatically considered as 'safe'.

<sup>326</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>327</sup> Although it is argued that it would be possible to object against such referral based on Article 72(3) of the Aliens Regulations), which provides for an objection procedure regarding other act towards aliens than written decision. There

The referral system applied by the representations abroad – first to the third country's authorities, then to the local UNHCR or UNDP office – may explain the relatively small number of applications for MVV for asylum purposes effectively processed by the Dutch authorities (391 decision in 2001, see Statistics below).

#### **6.1.3.6 Registration and Initial Processing of the Application**

Persons lodging a request for an MVV for asylum purposes are requested to fill out an application form available at all Dutch representations abroad, and their case is then registered. The task of the representation is then to gather the most relevant information from the applicant.

An interview is conducted at the embassy on the basis of a standardised set of questions. Among other topics, questions cover the applicant's identity, family situation, family links in the Netherlands as well as the reasons for fleeing her country. Out of 20 questions included in the list, five are related to the protection issue invoked by the applicant. The responsible embassy staff member can request assistance from the IND, formally via the Ministry of Foreign Affairs, if she needs advice on how to perform the interview and/or to ask the relevant questions. According to the authorities, this happens very rarely.<sup>328</sup>

Interviews with applicants applying for an MVV, as any matter related to asylum and/or immigration, can only be performed by civil servants having Dutch citizenship. Staff working at representations abroad normally receive limited training in asylum matters as part of their overall consular training. Interview techniques are not included in this training. In recent years, there has been an increasing tendency to post IND immigration officers at certain Dutch representations abroad, especially in countries where there is a high number of requests related to immigration and asylum in the Netherlands.<sup>329</sup> In such a case, the immigration officer deals with all applications for MVVs.

In principle, the interview is conducted in Dutch. As there is no obligation for the embassy to provide interpretation, applicants are requested to bring their own interpreter. In practice, however, embassies very often assist applicants regarding the language issue.

According to NGOs and lawyers, the quality of the initial processing at embassy level – mainly the interview – is not guaranteed in all cases. This is mainly due to the lack of sufficient training of the embassy staff, especially when no immigration officer is available at the representation. In addition, it appears that interviews are not always conducted in separate rooms, which may jeopardise the necessary confidentiality.<sup>330</sup>

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does not seem, however, to be any case law on such basis. Interview with an immigration and asylum lawyer, 3 July 2002.

<sup>328</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>329</sup> For example in Sri Lanka.

<sup>330</sup> Interview with the Dutch Refugee Council and an immigration and asylum lawyer, 3 July 2002.

#### **6.1.3.7 Processing of the Application by the Representations**

Dutch representations abroad have the possibility – in fact the obligation under the provisions of the Aliens Regulations – to refuse the submission of an application for an MVV for asylum purposes when the applicant can be referred to the local authorities or to the UNHCR or UNDP office. However, once the application for MVV has been lodged, they are not empowered to make any formal decision on the request, which must be forwarded to the central authorities in the Netherlands.

#### **6.1.3.8 Transmission of the Case and Processing of the Application in the Netherlands**

Formally, processing applications for MVV for asylum purposes comes under the responsibility of the Minister of Foreign Affairs. The assessment of the application, however, is done by the Ministry of Justice. This task is performed by the Immigration and Naturalisation Service (IND), under the Ministry of Justice, who then makes the decision of issuing or refusing the MVV.

Once the application has been registered and the interview conducted, the embassy forwards the file to the Ministry of Foreign Affairs. This includes identification documents, any additional documents submitted by the applicant, the application form, the written records of the interview as well as a report by the interviewing officer. In principle, the file should also include a separate letter from the embassy, if it is aware of country-related information which is relevant to the case, as well as the opinion of the interviewer about the application. However, embassy staff are usually reluctant to provide their personal opinion, as they see this as being outside their competencies.<sup>331</sup> In most cases, no opinion is therefore given. Files are sent to the Netherlands by diplomatic pouch. When receiving the file, the Ministry of Foreign Affairs checks that it is complete, but has then no other role than forwarding it to the IND. This is normally done within one week, unless additional documentation has to be requested from the embassy.

All applications for MVVs for asylum purposes are processed by a special unit of about 10 persons at the regional IND Zuid West office, located in Rijswijk.<sup>332</sup> The IND processes the cases on the basis of the written material included in the file. If necessary, it may request from the embassy, through the Ministry of Foreign Affairs, further information or an additional interview with the applicant. According to the IND itself, this happens on a regular basis.<sup>333</sup>

The scope of the IND examination is restricted to assessing whether the applicant applying for an MVV would be granted refugee status in the Netherlands in accordance with the provisions of the Geneva Convention and other conventions ratified by the Netherlands, such as the European Human Rights Convention or the Convention against Torture (Article 3).<sup>334</sup> The IND does not consider whether protection should be granted for reasons outside the scope of these conventions. This limitation is based on the fact that the circumstances which may lead to the granting of subsidiary protection (traumatised persons, generalised violence, etc.) are laid down in national policies, rather

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<sup>331</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>332</sup> The same unit deals also with resettlement cases.

<sup>333</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>334</sup> See chapter C5/25 of the Aliens Regulations.

than in international conventions. As a result, applicants applying for MVVs are subject to a restrictive examination process and their possibilities of being given protection in the Netherlands are more limited than for spontaneous asylum applicants. In principle, an MVV may also be granted for humanitarian reasons, although this appears to happen on an exceptional basis only, if ever.<sup>335</sup>

The granting of an MVV for asylum purposes is linked to the need for protection only and it does not require any family or other ties to the Netherlands. NGOs and lawyers consider, however, that the presence of family members already in the Netherlands is a key element, as they can provide information on the procedure and assist the applicant in receiving legal assistance, which increases the possibility of a positive outcome on the application.<sup>336</sup>

Applications for an MVV for asylum purposes are not prioritised in any way and their processing is done under the same conditions as for any other asylum claim. The processing time varies a lot according to the nationality and the circumstances of each case and therefore no average period is available. As required by the General Administrative Law Act, all applications should be processed within eight weeks or at least within a reasonable period of time. As far as the MVV procedure is concerned, the Aliens Regulation mention a three-month period starting with the reception of the application by the Dutch authorities – normally the embassy – as a reasonable period.<sup>337</sup> According to the IND, this legal time limit cannot be met in all cases, but decisions on applications for MVV are generally reached more rapidly than for spontaneous asylum claims.<sup>338</sup>

#### **6.1.3.9 Positive Decisions by the IND**

When the IND renders a positive decision, the embassy is instructed by the Ministry of Justice to issue the applicant with a visa in the form of a MVV (provisional sojourn). The MVV allows its holder to enter the Netherlands and remain there temporarily until a residence permit is granted. The representation does not have authority to refuse issuing the visa once the Ministry of Justice has given the green light. The MVV inserted in the passport does not mention the reasons why it has been granted.

Once in the Netherlands, the person must lodge a formal application for asylum. However, since the case has already been examined and decided positively, the submission of the application is a mere formality. No further interview or investigation is conducted. Unless it is shown that the applicant has withheld relevant information that should have led to a negative decision in the first place, refugee status is granted very rapidly.

The validity period of the MVV is three months, which allows the applicant to travel to the Netherlands. Once in the Netherlands, the applicant must lodge her application for asylum within three days from arrival. It is still possible to apply for asylum afterwards, but the claim will then be dealt with as a spontaneous application and the process will start from the beginning. In practice,

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<sup>335</sup> This was confirmed by the IND as well as by the Dutch Refugee Council.

<sup>336</sup> Interview with the Dutch Refugee Council and an immigration and asylum lawyer, 3 July 2002.

<sup>337</sup> As opposed to six months for spontaneous asylum applications.

<sup>338</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002. The shorter processing time for applications for MVV compared to spontaneous applications is mainly due to the fact that some necessary investigations, including the interview, have already been done at embassy level. NGOs and lawyers underline that processing times are very long and usually exceed – sometimes largely – the “reasonable” period of three months. Interview with the Dutch Refugee Council and an immigration and asylum lawyer, 3 July 2002.

however, all those granted an MVV for asylum purposes who actually proceed to the Netherlands (only one or two persons every year, see Statistics below) do apply for asylum in due time.<sup>339</sup>

#### **6.1.3.10 Negative Decisions by the IND and Appeals**

In accordance with the provisions of general administrative law, decisions made by the IND on applications for MVVs are notified to the applicants in writing. The language used in the notification is Dutch and there is no obligation for the embassy to provide any translation of the document. The decision is reasoned and includes information on the appeal rights.

Applicants abroad can lodge their appeal either by letter or through a lawyer in the Netherlands. The Dutch representations abroad would normally forward any appeal letters to the relevant administration or court in the Netherlands. According to NGOs and lawyers, it is extremely difficult, if not impossible, for an applicant abroad without family or friends in the Netherlands, who are able to assist in providing a lawyer, to reach a positive outcome in the appeal procedure.<sup>340</sup>

Since the Aliens Act does not apply to requests for MVVs for asylum purposes, appeals against negative decisions by the IND are regulated under the General Administrative Law Act.<sup>341</sup> The first stage of the procedure is a petition for administrative review, which has to be lodged within four weeks following notification. The time limit starts with the notification of the decision to the applicant's lawyer in the Netherlands, if she has one, otherwise to the applicant herself. Formally, the Ministry of Foreign Affairs is responsible for reviewing the decision, but this task has been delegated to the IND.

If the review of the decision by the IND leads to a renewed rejection, an appeal may be brought to the Administrative Court within a similar four-week time limit. Formally, the Aliens Chamber of the Administrative Court of The Hague is responsible for processing these appeals, but, in practice, cases are distributed amongst a large number of administrative courts across the country.

Within one week of notification, negative decisions by the administrative courts can be appealed further to the Council of State. Such appeal has to be motivated and is restricted to points of law, as the Council of State does not review the merits of the case.

In addition to the above-mentioned rules, the General Administrative Law Act also provides for the possibility of appealing directly to the administrative court if no decision has been made by the IND within the legal time limit of three months. It is also possible to ask the President of the administrative court for a provisional ruling, if for any reason a decision must be made very quickly. In practice, due to the lack of information and the difficulty of introducing such proceedings, only those applicants who have a lawyer in the Netherlands are able to benefit from these provisions.<sup>342</sup>

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<sup>339</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>340</sup> Interview with the Dutch Refugee Council and an immigration and asylum lawyer, 3 July 2002.

<sup>341</sup> Chapters 6 (administrative review), 7 (first instance appeal) and 8 (higher appeals) of the General Administrative Law Act.

<sup>342</sup> Administrative courts are usually reluctant to give provisional rulings in MVV cases, as this leads to the transfer of the applicant to the Netherlands before any substantial decision has been made by the IND. However, see The Hague Administrative Court, 16.09.1998, AWB 98/6183 and Harlem Administrative Court, *Nuri case*, 4.03.1998, AWB 98/1373 and 98/1380.

Case law regarding Protected Entry Procedure cases is scarce, as most applicants have no access to legal aid and/or are not in a position to effectively lodge an appeal.<sup>343</sup>

The asylum decision made by the IND once the person has been granted an MVV and has entered the Netherlands can also be appealed, should it be negative. Such an appeal is to be lodged and processed under the provisions of the Aliens Act and not those of the General Administrative Law Act. However, persons issued with an MVV for asylum purposes are always granted refugee status once in the Netherlands and therefore there is no practice regarding appeals of such decisions.

#### **6.1.3.11 Legal Safeguards and Legal Assistance**

Although the procedure for MVVs for asylum purposes should, in principle, include the same legal safeguards as for spontaneous asylum applications processed inside the country, this is not the case.

Dutch representations abroad have no obligation to provide translation and/or interpretation services to the applicants, be it during the interview or regarding the notification of the decisions. Most embassies do their best to assist applicants regarding language issues, but this takes place on an informal basis and may not guarantee that applicants are able, in all circumstances, to understand the procedure and to be understood.<sup>344</sup>

Unlike spontaneous asylum claimants, applicants for MVV for asylum purposes are not entitled to free legal aid at all stages of the procedure. In practice, only applicants who have family or contacts in the Netherlands are able to resort to the services of a lawyer. In the majority of cases, applicants have no access to legal aid and their chances of being granted MVV are considerably reduced.<sup>345</sup>

#### **6.1.3.12 Transfer to the Netherlands**

Apart from issuing the MVVs, the staff at the representations does usually not engage in the practicalities of the departure. However, if the person has no passport and cannot obtain one, the representation may assist by issuing a *laissez-passer*. There have been cases in which the lack of valid passport and/or exit permit has complicated or even made impossible the applicant's departure and travel to the Netherlands. The authorities are not aware of cases where a holder of an MVV for asylum purpose was prevented by the local authorities from travelling to the Netherlands.

Dutch authorities do not finance travel costs to the Netherlands.

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<sup>343</sup> See supra note 339. Another interesting case concerns an asylum seeker who entered the Netherlands with a French Schengen visa and applied for asylum there. In order to avoid a transfer to France on the basis of the Dublin Convention, he referred to his application for an MVV for asylum purposes submitted earlier to the Dutch embassy in Turkey. This was, however, rejected on the grounds that an application for an MVV, although motivated by the wish of being granted asylum, could not be considered as an application for asylum with regard to the Dublin Convention. See *Jurisprudentie Vreemdelingenrecht* 21-02-2002, afl.3, pp. 205-208.

<sup>344</sup> In addition, NGOs and lawyers consider that, in certain cases, the initial processing of the applications at embassy level does not meet basic quality standards: lack of a separate interview room, lack of interview, insufficient training of the embassy staff, etc. The proposed idea of conducting video-interviews of applicants with IND officers sitting in the Netherlands has not been followed so far. Interview with the Dutch Refugee Council and an immigration and asylum lawyer, 3 July 2002.

<sup>345</sup> According to the authorities, whilst the lack of free legal aid may indeed reduce the prospect of a positive outcome in the appeal procedure, it is not prejudicial to applicants in first instance, comments by the Ministry of Justice on the draft chapter received on 16 September 2002.

### 6.1.3.13 Applicants' Physical Safety during the Procedure

Apart from resorting to the granting of diplomatic asylum, there are no specific procedures for ensuring the applicant's physical safety during the processing of the application for an MVV. If there is an urgent need, however, the IND may speed up the examination of the application in order to reach a quick decision. If needed, the decision can be taken almost immediately, for example over the phone. This option, however, does not appear to be used in practice.<sup>346</sup> If the IND does not recognise the urgency of a specific case, the applicant – in practice through her lawyer in the Netherlands – can lodge a request with the president of the administrative court for a provisional decision. This can be obtained very rapidly in urgent cases.

### 6.1.3.14 Statistics

There are no statistics regarding the number of persons approaching the Dutch representations abroad with an asylum- or protection-related issue, as embassies are not requested to register such cases. Consequently, the number of applicants referred by the representations to third countries' authorities or to the local UNHCR offices is not known.

Similarly, until very recently, Dutch representations had no obligation to provide statistical data on the number of applications for MVV for asylum purpose actually submitted. The only data available is thus the number of first instance decisions made by the IND, provided for in Table 4 below.<sup>347</sup> This number is relatively limited.

<i>Applications for MVV for asylum purpose</i>	1998 <sup>348</sup>	1999	2000	2001
Number of first instance decisions by the IND	122	139	141	397
Number of positive decisions	9	8	5	1
Number of negative decisions	99	117	92	366
Number of approved applicants actually entering the Netherlands	n.a	n.a	n.a	n.a
Otherwise closed applications	14	14	44	30

**Table 4 - Statistics on the Protected Entry Procedure in the Netherlands**

Although the Dutch authorities do not provide official statistics on the percentage of positive decisions on applications for MVV for asylum purpose, the above figures tend to show that this is very low. In 2001 for example, out of 397 first instance decisions, only 1 was positive (0.25%), 366 were negative (92.25%) and 30 (7.5%) were neither positive nor negative. The same figures for

<sup>346</sup> Reference was made to a 1999 case concerning a Sri Lankan citizen. Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

<sup>347</sup> The total number of applications for MVV submitted at embassies abroad was not registered until October 2001. The number of first instance decisions made by the IND, which is the only statistical data available, may differ from the total number of applications. The distribution by nationalities and/or by representations is not available either. According to the authorities, nationality groups fluctuate strongly and rapidly and it is therefore not possible to make any reliable estimates.

<sup>348</sup> September to December 1998 only.

2000 were respectively 3.5%, 65.25% and 31.25%. This appears to be considerably lower than the recognition rate for spontaneous applicants.<sup>349</sup>

There are no official data on the number of applicants applying for an MVV for asylum purposes who actually enter the Netherlands following a positive decision by the IND. The authorities estimate though that this number is as low as one or two persons each year.<sup>350</sup>

#### **6.1.3.15      *Relation to Other Procedures***

The current Dutch resettlement programme allows for 500 quota refugees to be resettled in the Netherlands each year. Most places are allocated to refugees recommended by UNHCR, but the Dutch authorities have reserved the right to assess and, if necessary, to reject cases prepared by UNHCR.

Quota refugees are selected on the basis of criteria which include the requirement to be recognised as a refugee and/or specific humanitarian considerations. Although the Dutch authorities recognise that applicants approaching the embassy and referred to UNHCR appear amongst resettled refugees at a later stage, especially if they have family ties in the Netherlands, they do not consider that there are any formal or informal links between the Protected Entry Procedure and the resettlement programme.<sup>351</sup>

Similarly, there are, according to the authorities, no formal or informal links between the procedure for family reunion and the Protected Entry Procedure.

#### **6.1.3.16      *Evaluation of the Dutch Procedure***

At face value, the Dutch approach seems to rest on a clear-cut separation of migration control and refugee protection, as the way to protection is divided into an initial stage of applying for a visa (MVV), and a second stage of applying for asylum once in the Netherlands. In reality, the two issues are intertwined and preponderance is clearly given to protection considerations. The degree of formalisation has to be considered as high.

Considering the exclusionary features of the Dutch system, the named criteria (no protection available by local authorities or by UNHCR or UNDP, personal presence of the applicant) represent a first filter. While the criterion relating to protection offered by local authorities is not unreasonable, much hinges on how it is handled in concrete cases. The mere presence of UNHCR or UNDP appears to remove protection into a hypothetical domain, as it is commonly known that the protection options of international agencies (e.g. by offering resettlement) are far from meeting the actual demand.

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<sup>349</sup> According to IND statistics, the overall recognition rate in 1988, 1999, 2000 and 2001 was respectively 31.6%, 22.2%, 12.6% and 17%. These percentages are difficult to interpret, as they apply only to the total number of decisions made by the IND and not the total number of applications lodged in the Netherlands. Nevertheless, the recognition rate for spontaneous asylum seekers is undoubtedly much higher than the percentage of positive decisions regarding applications for MVV for asylum purpose.

<sup>350</sup> Interview with the Ministry of Foreign Affairs and Ministry of Justice's Immigration Policy Department, 2 July 2002.

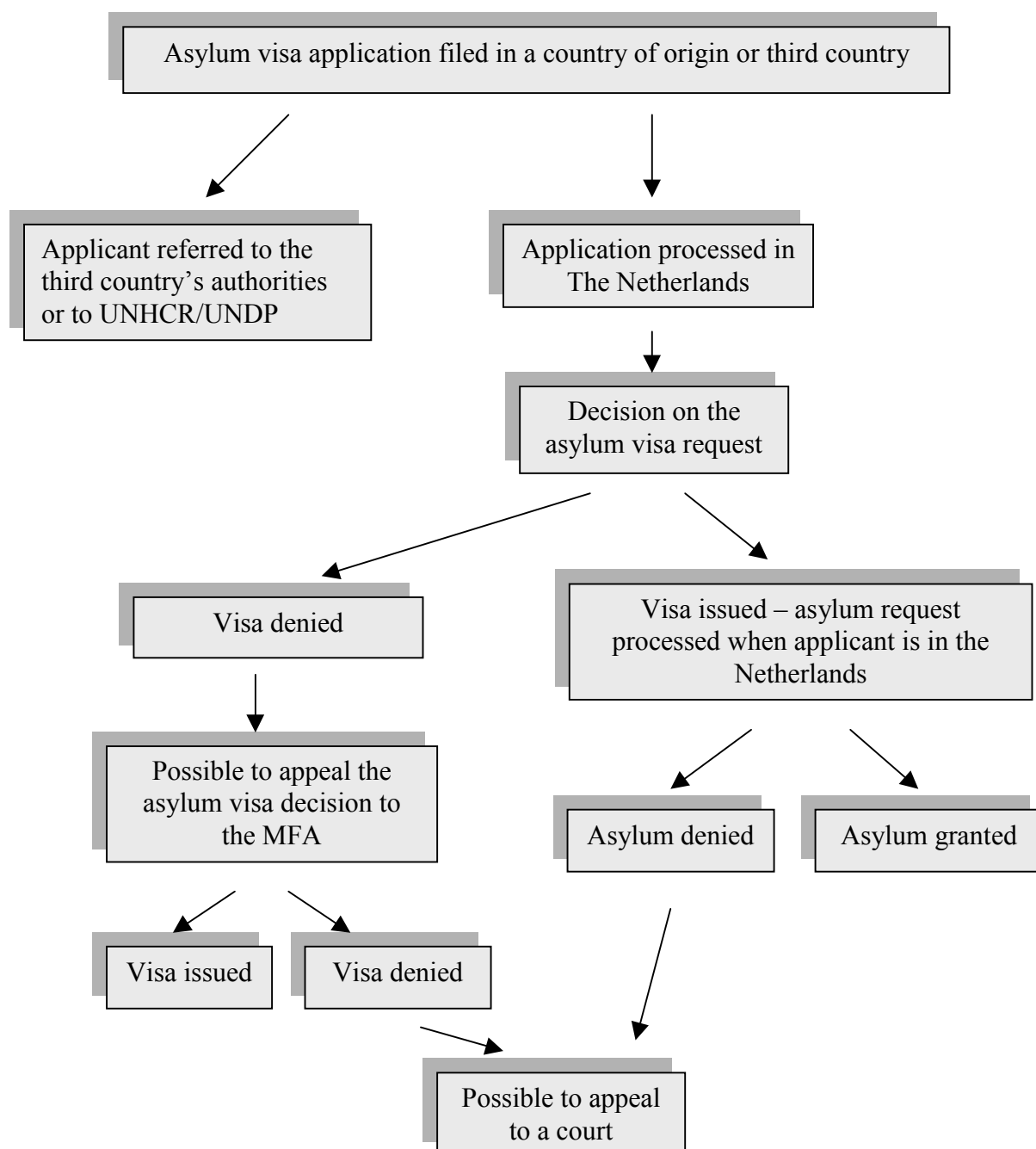
<sup>351</sup> Ibid.



On the procedural side, the Dutch practice illustrates the fact that Protected Entry Procedures will not offer the same level of procedural safeguards as territorial procedures (absence of interpretation and free legal assistance). On the other hand, it should be noted that a multi-level appeals system is at the disposal of the applicant. As a reflection of inclusive features, it should be noted that the procedure extends not only to third countries, but also to countries of origin (although this might be about to change).

With less than 10 positive decisions and only one or two persons actually transferred to the Netherlands each year, statistics indicate that the Dutch system is operating in the domain of the exceptional, offering protection only to an elite of applicants.

#### 6.1.3.17 **Procedural Diagram**



## 6.1.4 Switzerland

### 6.1.4.1 *General Characteristics and Legislative Base*

Switzerland operates a Protected Entry Procedure with a comparatively high degree of formalisation and functional differentiation. It is open to applicants in third countries as well as countries of origin. The Swiss procedure is well integrated into the framework of the territorial asylum procedure, and displays sensitivity to urgent cases. Its core is a prognosis assessment by the Federal Office for Refugees (FOR) on the likelihood that a person would be granted refugee status in ordinary territorial asylum procedures. A positive prognosis triggers an entry visa.

The Swiss Protected Entry Procedure was formally codified through the Swiss Asylum Act of 5 October 1979. In practice, however, the procedure had already been established in 1969, when a circular letter from the Federal Department of Justice and Police, containing principles and guidelines for the reception of refugees and for the asylum procedure, was communicated to the cantonal police and to the Swiss representations abroad. This circular letter also outlined the procedure applicable to asylum applications submitted at Swiss representations.

The currently applicable provisions are contained in the Swiss Asylum Act of 26 June 1998 [henceforth AsylA]<sup>352</sup> and Asylum Ordinance 1 [henceforth OA]<sup>353</sup>. In addition, a Directive on the Asylum Act [henceforth the Directive]<sup>354</sup>, issued by the FOR, instructs Swiss diplomatic representations on how to handle applications for asylum filed with them.

Apart from the system described below, family members of refugees residing in Switzerland can apply for an entry permit at Swiss representations for reunification purposes. This is, however, a different system with different parameters, and beyond the scope of this study.

It appears that a change of the legislation on the Protected Entry Procedure is not envisaged at present.

### 6.1.4.2 *Classes of Beneficiaries*

The Swiss Protected Entry Procedures cater for refugees only. If a first assessment of the application leads the FOR to the conclusion that the applicant is – positively or very likely – exposed to danger relevant under article 3 AsylA (which replicates the refugee definition of article 1 (A) (2) of the Refugee Convention), it will authorise the grant of an entry visa to enable further processing of the case in Switzerland.<sup>355</sup>

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<sup>352</sup> The unofficial English translation used here was provided by the Federal Office for Refugees.

<sup>353</sup> Ordonnance 1 sur l'asile relative à la procédure, 11 August 1999. Version of 31 July 2001. An English version is not available.

<sup>354</sup> Directive relative à la loi sur l'asile sur l'enregistrement et le traitement des demandes d'asile par les représentations suisses à l'étranger, 20 September 1999, Asile 21.3. An English version is not available.

<sup>355</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the Federal Office for Refugees [henceforth FOR], 30 August 2002, on file with the authors, describing the practice of the FOR.

The Swiss procedure remains closed to persons who would benefit from subsidiary protection provisions. According to Swiss law, subsidiary protection is considered exclusively within the framework of removal procedures, which brings it outside the ambit of Protected Entry Procedures.<sup>356</sup> Given the extraterritorial reach of the ECHR, one might have expected a different solution. However, exceptionally, persons exposed to a substantial humanitarian emergency (*schwerwiegende humanitäre Notlage*) can be granted an entry permit, although they do not fulfil the requirements for refugeehood enshrined in the 1951 Refugee Convention or the Swiss AsylA.<sup>357</sup>

Apart from the Protected Entry Procedures geared at refugees, Swiss legislation provides an option for allowing entry to persons who come under the ambit of a temporary protection scheme launched by the Swiss executive authority, the so-called Federal Council.<sup>358</sup> Once the Federal Council has launched such a scheme, the Federal Office for Refugees may then define beneficiaries of Temporary Protection more precisely, and such persons can then apply for protection at Swiss representations, and eventually be permitted entry.<sup>359</sup> It should be noted that this avenue is only open under the precondition that the Federal Council indeed has launched Temporary Protection in a specific refugee crisis. This régime became operational by 1 October 1999, but has hitherto not been used.

The following presentation relates to Protected Entry Procedures for refugees, unless explicitly stated otherwise.

#### **6.1.4.3 Procedure**

Article 19 (1) AsylA states that an asylum application “is to be filed at a Swiss representation, on entry at an open border crossing or at a reception centre”, thus reflecting the fact that representations are but one of three ordinary entry points to the asylum procedure. Procedurally, applications filed in a country of origin are treated in the same manner as applications filed in a third country. Applications can be submitted at any Swiss diplomatic or consular representation, regardless of which country it is situated in. A successful application will automatically entail an entry visa (usually granted in the form of a tourist visa), hence, no separate application for a visa has to be made. Furthermore, there are no formal preconditions for filing an application for asylum, and such an application is not subject to requirements of form.

In exceptional cases – e.g. Switzerland not being represented in a given country where the applicant is situated – asylum applications can be filed by letter.<sup>360</sup> As stipulated in case law, letters sent directly to the FOR will be processed in substance, but the FOR will employ a suitable representation as a channel for further communication.<sup>361</sup>

Article 20 AsylA sets out the general framework for dealing with applications filed at Swiss representations:

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<sup>356</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>357</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors.

<sup>358</sup> Temporary Protection is regulated in Chapter 4 of the AsylA. The precondition of a launch decision by the Federal Council is set out in art. 66 AsylA.

<sup>359</sup> Art. 68 (1) and (3) AsylA.

<sup>360</sup> Swiss authorities name the case of Iraqis applying by letter. In such cases, the Swiss visa has to be picked up at an embassy in a third country. Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>361</sup> EMARK, 1997/15, para. 2 b).

<sup>1</sup> The Swiss representation transmits the asylum application together with a report to the Federal Office.

<sup>2</sup> In order to establish the facts of the case, the Federal Office authorizes the entry of asylum seekers if they cannot reasonably be expected to remain in the country of residence or abode or to travel to another country.

<sup>3</sup> The Federal Department of Justice and Police (Department) may authorize Swiss representations to permit the entry of asylum seekers who credibly claim that there is an immediate threat to their life, physical integrity or freedom for one of the reasons as stipulated in Article 3 para 1.

As ordinary cases, the representation functions merely as a mediator for all communication between the applicant and the Federal Office for Refugees. Entry decisions are taken by the FOR. If the FOR allows entry, the representation will invariably issue a visa. However, as set out in article 20 (3) AsylA, the Ministry of Justice and Policy, of which FOR forms part, may empower a representation to grant entry permits in cases where the applicant is under an “immediate threat” to her life, physical integrity or freedom for one of the five grounds stated in the refugee definition. No such power has hitherto been delegated to a representation.<sup>362</sup>

#### **6.1.4.3.1 Access to a Diplomatic Representation**

The Swiss authorities are unaware of particular impediments hindering applicants’ access to Swiss representations.<sup>363</sup> According to other sources, access to a Swiss representation was occasionally obstructed by the representation’s locally hired guards. In some countries, these guards ask the protection seeker for payment in order to let her enter the premises of the representation. During the Kosovo crisis, this was alleged to have happened at diplomatic representations in Albania. Furthermore, diplomatic representations in countries such as Iran, Kenya, Lebanon and Syria have experienced the same problem according to UNHCR reports.<sup>364</sup> Discreet access to a Swiss representation may be facilitated by UNHCR or other organisations.<sup>365</sup>

#### **6.1.4.3.2 Processing of the Application at the Representation**

As a rule, the staff at the representation will carry out an interview with the applicant for asylum (article 10 (1) OA; para. 1.3. Directive).<sup>366</sup> The Directive adds more detail to these instructions. The interview shall be carried out according to a detailed sample questionnaire comprising eight pages. Within the framework of the interview, the applicant is asked to authorize the Swiss asylum authorities to request information on the existence of asylum applications in third states, and, where applicable, on their outcome.<sup>367</sup> If necessary, a trustworthy person can act as an interpreter after having been obliged to translate truthfully and to observe professional secrecy in accordance with the instructions of the Swiss MFA. Furthermore, the representation takes the fingerprints of the

<sup>362</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>363</sup> Questionnaire response by the FOR, 15 April 2002.

<sup>364</sup> Questionnaire response by UNHCR LO Switzerland and Liechtenstein, received on 20 October 2001. This informal filtering mechanism gives wealthy persons an advantage over less affluent persons with regard to access to protection. Moreover, intricate questions of state responsibility are raised: is the behaviour of local guards attributable to the Swiss authorities, or is it within the private domain?

<sup>365</sup> UNHCR LO Switzerland and Liechtenstein, *supra*.

<sup>366</sup> In contrast to territorial procedures, NGOs have no compulsory observer status during such interviews. Questionnaire response by the Swiss Refugee Council, 6 April 2002.

<sup>367</sup> Interview questionnaire, annexed to the Directive, para. 14 c) aa).

applicant.<sup>368</sup> According to Article 10 (3) OA, the Swiss representation abroad shall transmit the records of the interview, the written asylum application, any other useful documentation, as well as a complementary report with the opinion of the representation on the asylum claim to the FOR in Berne. The Swiss authorities point out that the “complementary report” does not contain an assessment of the applicant’s credibility.<sup>369</sup> Diplomatic courier is used to transmit the file from the representation to FOR, and for any communication between them.

If oral communication is difficult, and it is practically impossible to use the services of an interpreter, the applicant may instead deliver a written account in a language she is familiar with, which is thereafter transmitted by the representation to the FOR. A translated version of the sample questionnaire mentioned above can be used for guidance.<sup>370</sup> Should a written asylum request sent to a Swiss representation prove to be sufficiently detailed, it is not necessary to proceed to an oral interview, and the written request can be transmitted further to the FOR.<sup>371</sup> In cases where an imminent risk in the sense of the refugee definition in article 3 (1) AsyLA exists, a detailed interview can be omitted, and the case can be forwarded to the FOR by the most expeditious means.<sup>372</sup>

For example, of 300 applications sent by the Swiss representation in Colombo to the FOR in Berne during 2001, interviews were held for nearly two thirds of them. All of those who came for an interview were fingerprinted.<sup>373</sup> Conducting interviews raises issues of adequate staffing. FOR liaison officers have been posted permanently at Swiss embassies in Ankara, Colombo and Pristina, and the processing of asylum claims filed there constitutes one of their tasks. If motivated by the size of the workload, FOR may second additional officers to the named embassies, or to representations without permanently posted FOR officers. In 2001, an officer seconded to the Colombo representation devoted between 30 and 35 percent of his work time to interviewing asylum applicants. He conducted some 5 to 6 interviews per week. At the representation in Ankara, some 50 percent of one officers’ working time was devoted to interviewing in 2001.<sup>374</sup> In Tehran, the permanently posted FOR officer spends 30-50 percent of his time on processing asylum applications.<sup>375</sup> To this, one needs to add the secretarial and translator services performed by locally employed staff.<sup>376</sup>

Fingerprinting is used to track possible multiple applications within the Swiss system. In Ankara, Swiss authorities believe that multiple applications occur in Ankara, where persons who have sought resettlement with UNHCR without success then turn to the Swiss embassy. UNHCR does not make files available, but it exchanges information on names of applicants.<sup>377</sup>

Normally, representation staff is trained one day on asylum-related tasks within the framework of regular training sessions held in Switzerland.

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<sup>368</sup> Para. 1.3. of the Directive.

<sup>369</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>370</sup> Para. 1.4. of the Directive.

<sup>371</sup> Para 1.5. of the Directive.

<sup>372</sup> Para. 1.6. of the Directive.

<sup>373</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>374</sup> Ibid.

<sup>375</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors.

<sup>376</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>377</sup> Ibid.

#### 6.1.4.3.3 Processing of the Application after Transmission to the FOR in Berne

It is up to the FOR to take decisions on the entry of the applicant as well as on the substance of the asylum claim. With regard to the authorisation of entry, there are two possibilities.

- The FOR is satisfied that a threat as specified in the refugee definition has been made credible and is immediate, and esteems that the applicant cannot be reasonably expected to await the processing of the case in the state of her residence or abode, or to migrate to another country. In such cases, entry is permitted to allow for the further pursuit of asylum procedures.<sup>378</sup>
- The FOR believes that the preconditions for granting entry are not fulfilled, and takes a negative decision.<sup>379</sup>

It should be underscored that an authorisation of entry does not automatically entail the grant of asylum. Rather, entry is authorised to enable Swiss authorities to make a full assessment of the case, within the framework of the ordinary asylum procedure. The applicant is informed of this important condition.<sup>380</sup>

The preconditions for authorizing entry in the first case have been further developed in a 1997 landmark case of the Swiss Asylum Appeal Commission.<sup>381</sup> The principle laid down by the Commission merits quoting in full:

The preconditions for granting an entry permit are to be circumscribed in a restrictive fashion; the authorities enjoy a wide margin of appreciation. Apart from the necessary dangers in the sense of article 3 AsylA, *inter alia* – that is, neither exhaustively, nor in a cumulative fashion – the following aspects have to be taken into account: the closeness of the applicants' relationship to Switzerland, the possibility of protection being granted by another state, the closeness of relationships to other states, the practical possibility and objective reasonableness of demanding protection elsewhere as well as the presumable possibility for integration and assimilation.<sup>382</sup>

Evidently, neither the fulfilment of the requirements of refugeehood, nor the additional imminence of specified threats, are enough. Indeed, The closeness of the applicant's relation to Switzerland as well as a variation of the "protection elsewhere"-notion are operated as additional filter elements. In that context, it should be recalled that Swiss legislation denies asylum to persons who possess alternative protection options: Article 52 (2) AsylA stipulates that a person seeking protection from abroad can be denied asylum in Switzerland, where it can be reasonably demanded of her to seek access to another state.<sup>383</sup>

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<sup>378</sup> Article 20 (2) AsylA.

<sup>379</sup> See Chapter 6.1.4.3.4 *supra*.

<sup>380</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors.

<sup>381</sup> EMARK 1997/15, 8 July 1997.

<sup>382</sup> *Supra*, Principle 3, based on reasoning in paras 2 d) to g). The Commission partly draws on the *travaux* to the 1979 Asylum Act, partly on doctrine.

<sup>383</sup> For a comment, see Mario Gattiker, *Das Asyl- und Wegweisungsverfahren*, Schweizerische Flüchtlingshilfe, Bern, Oktober 1999, p. 23.

At this stage, a sense of vagueness enters the otherwise clear-cut Swiss procedures. Given such a wide margin of discretion, and the inclusion of utilitarian criteria (integration, assimilation), the range of conceivable outcomes is broadened, and predictability reduced. However, as the Swiss Asylum Appeal Commission underscores, the named criteria are neither exhaustive, nor cumulative. A person without close ties to Switzerland may indeed be allowed access, if Switzerland is the last resort for her.<sup>384</sup> The checking of ties to other states was not required before the quoted decision, and has proven burdensome in practice.<sup>385</sup>

Applications filed at representations are allotted first priority at the FOR, which also processes applications filed at borders and within Swiss territory. Urgent cases can be decided within days to weeks, while non-urgent cases may take up to two months. This is to be compared to the average for in-country applications, where 80 percent of cases are presently decided at first instance within six months.<sup>386</sup>

The Swiss representations normally have no means to protect the applicant while she is waiting for the outcome of the procedure. Nonetheless, in exceptional cases, embassy staff have accompanied vulnerable applicants to the airport.<sup>387</sup> Also, in very exceptional cases, destitute protection seekers have been granted assistance to pay for transportation. Where an application for such assistance is rejected, the decision can be formally appealed. However, in practice, assistance is granted very restrictively. Where an applicant granted an entry visa lacks a travel document, the Swiss authorities can assist by issuing a provisional travel document.<sup>388</sup>

If the protection seeker is destitute, the claim complicated, and a chance of success exists, the FOR can decide to grant legal aid (first instance, appeals proceedings, or both). The applicant's legal representative must have the power of attorney and be a Swiss lawyer.<sup>389</sup> Realistically, the latter requirement limits the opportunity to receive legal aid outside Switzerland. Also, the non-governmental Swiss Refugee Council carries out counselling of protection seekers abroad via letters and e-mail.<sup>390</sup>

Once an applicant has entered Switzerland, access to legal aid is en par with that enjoyed by spontaneous applicants.

#### ***6.1.4.3.4 Rejection and Appeal***

Where an applicant is awaiting the outcome of procedures abroad, a negative decision by FOR contains the following elements:

- Denial of an entry visa
- Rejection of the asylum application
- Instructions on how to appeal.

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<sup>384</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid.

<sup>389</sup> Ibid.

<sup>390</sup> Questionnaire response by the Swiss Refugee Council, 6 April 2002.

The written decision employs one of the three official languages of Switzerland (French, German and Italian). It is communicated through the representation. There is no obligation to offer a translation into a language which the applicant understands.

Appeal procedures are identical with those for territorially filed applications, featuring a system with multiple tiers, and, in principle, including access to legal aid. However, the Swiss Refugee Council is unaware of any cases where legal aid has actually been granted to an applicant located abroad.<sup>391</sup> Appeals may be on points of fact, points of law or unreasonableness, according to article 106 AsyLA. An appeal shall be submitted to the Asylum Appeal Commission within 30 days after the applicant has been notified of the rejection of her application. Formally, an appeal needs to employ one of the official languages of Switzerland. In practice, however, the Commission normally accepts appeals held in English.<sup>392</sup> Two landmark decisions by the Commission in Protected Entry Procedure cases have been published.<sup>393</sup>

The applicant may also lodge an appeal against a rejection of her asylum application once she is within Switzerland. In this case as well, the appeal must be directed to the Asylum Appeals Commission within 30 days.<sup>394</sup>

Given the practical difficulties in filing an up-to-standard appeal, the absence of access to lawyers and counselling networks abroad, the Swiss Refugee Council considers that the possibility to appeal is not an effective one.<sup>395</sup>

#### **6.1.4.4 Statistics and Costs**

The various stages of the Swiss procedure can be tracked by means of detailed FOR statistics covering the period from 1995 to 2001, reproduced in Table 5 below.

The emergent picture for 2000 and 2001 is that roughly one in six applicants is permitted access to Swiss territory to pursue her claim. Of this group, only each second actually enters into Switzerland. A clear majority of entrants succeed in the asylum procedure conducted on Swiss territory and are granted protection. An outright comparison with recognition rates for spontaneous arrivals is not advisable, as too many factors sever the two procedures. However, it should be noted that the Swiss recognition rate for Convention refugees (which is the only relevant category in Swiss Protected Entry Procedures) among spontaneous arrivals was at 5.7 percent in 1999, 6.4 percent in 2000 and 11.7 percent in 2001.<sup>396</sup> Against this backdrop, the conclusion appears justified that *the Swiss Protected Entry Procedures succeed in attracting significantly more qualified applicants than the regime for spontaneous asylum seeking.*

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<sup>391</sup> Ibid.

<sup>392</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors. For these reasons, the FOR believes the appeal instrument to be effective, in contrast to the position taken by the Swiss Refugee Council, as reflected in text accompanying footnote 395 below.

<sup>393</sup> Those are EMARK 1997/15 (already quoted) and EMARK 2002/12. These cases are available at the website of the Asylum Appeals Commission: <www.ark-cra.ch>. The published decisions are sorted by chronology or by subject.

<sup>394</sup> Information by the UNHCR Liaison Office for Switzerland and Liechtenstein, received on 13 November 2001.

<sup>395</sup> Questionnaire response by the Swiss Refugee Council, 6 April 2002.

<sup>396</sup> Source: statistics for the years 1999, 2000 and 2001 supplied by the FOR.



	1995	1996	1997	1998	1999	2000	2001
<b>Number of asylum applications filed at representations abroad (persons)</b>	390	303	418	607	844	601	757
<b>Number of positive initial decisions on admission to Switzerland (persons)</b>	62	79	69	100	144	91	130
<b>Number of negative initial decisions on admission to Switzerland (persons)</b>	328	224	349	507	700	510	627
<b>Number of actual entries and further pursuit of the asylum procedure (persons)</b>	44	60	58	84	100	60	54
<b>Number of applicants granted asylum after admission (persons)</b>	39	49	52	69	44	45	38

**Table 5 - Applications and Outcomes in the Swiss Procedure, 1995-2001**

Why is there a mismatch between positive decisions on admission and actual arrivals? One reason could be that a visa granted in December may lead to entry in January, implying that the yearly statistics cannot capture the whole process. Further, the Swiss representation sometimes encounters difficulties in communicating the grant of an entry visa to an applicant, because the latter has changed her place of abode or left the country. Finally, there are applicants who are granted entry permission to Switzerland, but do not leave their country.<sup>397</sup>

In 1998, Sri Lanka, Iraq and Algeria topped the list of applicant nationalities. Anecdotal evidence suggests that numbers went up at the Colombo embassy after a feature in a local newspaper published in 1995.<sup>398</sup> At the Ankara embassy, Iranians and Iraqis top the list of applicants' nationalities.<sup>399</sup> Further and more detailed information on caseloads at embassies was unavailable. Also, the Swiss authorities were unable to produce a breakdown of costs within the Protected Entry Procedure. Furthermore, they believe that the possibility to apply for asylum at Swiss representations has not impacted the number of applications filed territorially.<sup>400</sup>

#### **6.1.4.5 Evaluation of the Swiss Model**

The Swiss authorities themselves point out one specific advantage linked to the usage of representations as outposts of the asylum system. The whole Protected Entry Procedure can be seen as part of an information system: a person wishing to leave her country of residence or presence may approach the Swiss representation with a request for information about whether she would be granted asylum in Switzerland if she applied. The representation will consider the circumstances in the specific case of the person in question before answering her request. This feature offers the

<sup>397</sup> The FOR offered these three explanations. E-mail communication with Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors.

<sup>398</sup> Interview with Mr. Glauser and Mr. Keusch of the FOR, 22 May 2002.

<sup>399</sup> E-mail correspondence by Mr. Glauser and Mr. Keusch of the FOR, 30 August 2002, on file with the authors.

<sup>400</sup> Questionnaire response by the FOR, 15 April 2002.

asylum seeker an opportunity to clarify her real chances of being granted asylum, before she uses her often limited financial resources for the journey to Switzerland.<sup>401</sup>

The FOR sees further benefits emerging from the Swiss Protected Entry Procedure. The office itself benefits from improved country information, in particular if a FOR officer has been seconded to a representation. Furthermore, it is seen as advantageous that Swiss authorities can react adequately and swiftly to protection demand mediated through UNHCR. Among the drawbacks, the FOR names increased workload and costs, in particular at representations.<sup>402</sup>

The non-governmental Swiss Refugee Council believes it to be good that the procedure exists, as it makes illegal travel obsolete.<sup>403</sup> Also, it considers that the procedure is not sufficiently known by persons in need of protection. It believes that it is no realistic alternative to entering Switzerland “spontaneously”, mainly due to the rigid requirement of close ties, and that the procedure may create expectations about a non-existent opportunity. This is perhaps illustrated by a case where a protection seeker was first denied an entry visa due to insufficient ties. Upon arrival in Switzerland, the person sought and was granted protection.<sup>404</sup>

To an independent observer, the Swiss practice appears to be one of the most persistent, elaborate and serious efforts within Europe to operate Protected Entry Procedures. It is interesting to note that its existence has not been seriously contested during successive legal reform debates, which could perhaps be explained by its relatively stable statistical development. With entry permits granted in roughly 1/6 of all cases in the last years, the Swiss procedure must be regarded as successful in attracting qualified applicants. With a total of 50 entrants under the procedure in 2000, it must be appreciated that it delivers a qualitative, rather than a quantitative boost to the protection of refugees. Processing of applications is prioritised at the FOR, and the turnover appears to be markedly quicker than in spontaneous cases. A clear delimitation of competencies between representation and FOR is a further advantage. There are no indications that lengthy processing is used as an informal filter as in other countries.

Its positive sides notwithstanding, there are features giving rise to concern. First, the procedure seems to be little known amongst potential beneficiaries, in spite of its potential. Second, the wide margin of appreciation of FOR detracts from the predictability of the procedure, and diminishes its competitive edge vis-à-vis smuggling services. Third, applicants have to accept a very limited access to legal aid or interpreter services, which is an endemic problem of Protected Entry Procedures.<sup>405</sup>

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<sup>401</sup> Bundesamt für Flüchtlinge [FOR], *Admission and reception*, available at <<http://www.asyl.admin.ch/englisch/asyl2re.htm>>, accessed on 24 July 2001.

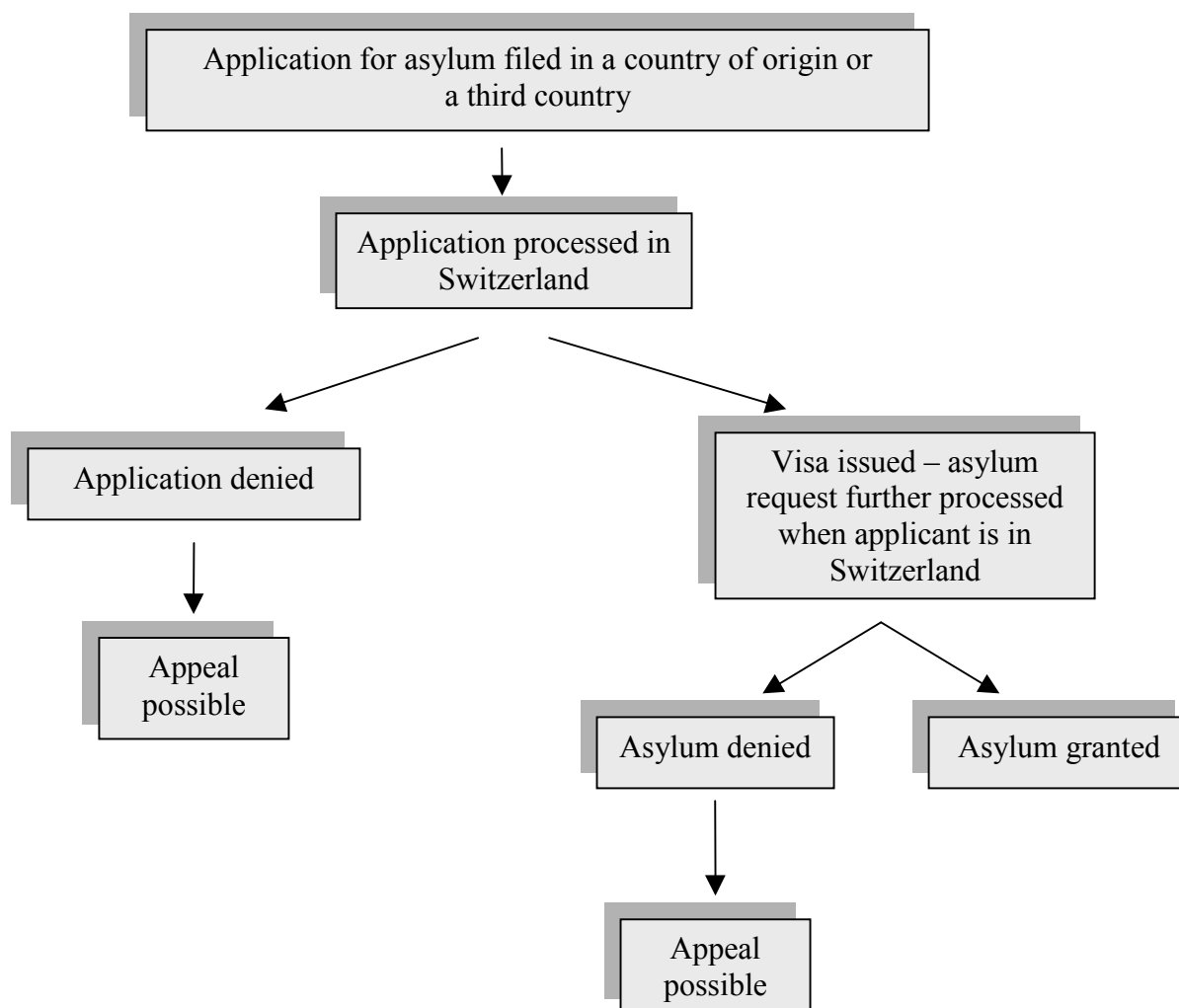
<sup>402</sup> Questionnaire response by FOR, 15 April 2002.

<sup>403</sup> Questionnaire response by the Swiss Refugee Council, 6 April 2002.

<sup>404</sup> Ibid.

<sup>405</sup> See, e.g. the evaluation of Dutch practices in Chapter 6.1.3.16.

#### 6.1.4.6 Procedural Diagram



#### 6.1.5 Spain

##### 6.1.5.1 Legal Regulation and Current Practices of Protected Entry Procedures

Current Spanish legislation allows for the submission of a formal application for asylum at a Spanish diplomatic or consular representation, but only in third countries, not in countries of origin. If the person applying for asylum at the representation is in an extreme risk situation, she may be urgently transferred to Spain while her application is being processed. A negative decision on the asylum request may be appealed.<sup>406</sup>

<sup>406</sup> This chapter is based on the content of the Spanish chapter of the report “Safe Avenues for Asylum?” published by the Danish Centre for Human Rights and UNHCR in April 2002. This information was completed and updated through interviews held with the Office for Asylum and Refuge (OAR), UNHCR Branch office in Spain and the Comisión Española de Ayuda a los Refugiados (CEAR) in May 2002. Interviews took place on the basis of a questionnaire sent beforehand. At the time of writing, the Ministry of Foreign Affairs had not yet responded to the questionnaire.

In contrast to other countries practising Protected Entry Procedure, embassy applications are not considered as “exceptional”, but as one of the three principal avenues into the Spanish asylum system, together with in-country applications and border applications. Provisions regarding asylum claims submitted at diplomatic or consular representations can be found in Law 5/1984 Regulating Refugee Status and the Right to Asylum<sup>407</sup> as amended by Law 9/1994<sup>408</sup>, in Implementing Decree of Law 5/1984 as amended by Law 9/1994<sup>409</sup> as well as in Royal Decree 864/2001 Approving the Implementation Regulation of Law 4/2000 on the Aliens’ Rights and Freedoms and their Social Integration.<sup>410</sup>

***Law 5/1984 as modified by law 9/1994<sup>411</sup>***

*Article 4. Submitting the request for asylum.*

...

4. Requests for asylum submitted before a Spanish Embassy or Consulate are to be processed by the Ministry of Foreign Affairs.

...

***Implementing Decree of Law 5/1984 as amended by Law 9/1994<sup>412</sup>***

*Article 4. Where to submit the request for asylum.*

1. Any alien who wishes to be granted asylum in Spain must submit his request for asylum to any of the following governmental agencies:

...

e) The Diplomatic Missions or Consular Offices of Spain located abroad.

2. When the Representative of the UNHCR in Spain requests that the Spanish Government urgently admit a refugee or refugees recognised under its mandate, because the refugee(s) is in a position of high risk inside a third country, the Ministry of Foreign Affairs, acting through the Spanish Diplomatic Mission, Consular Office or diplomatic mission of another country acting in co-operation with Spain, will avail itself of any means necessary to verify the situation, interview the individual concerned and inform the Interministerial Eligibility Commission. The Ministry of Foreign Affairs will order the issue, if necessary, of visas, official travel documents, safe-conducts or any other arrangements deemed necessary, according to the instructions given by the State Office of Consular Affairs, which is a division of the Ministry of Foreign Affairs, so as to facilitate the individual’s travel to Spain under the terms of article 16 and 29.4 of the Regulation herein.

*Article 6. Sending the request of asylum on to the  
Office for Asylum and Refuge and informing the organisation and entities concerned.*

2. Requests for asylum submitted abroad are to be processed by the Office for Asylum and Refuge through the Ministry of Foreign Affairs, and must be accompanied by the proper report from the Diplomatic Mission or Consular Office.

...

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<sup>407</sup> Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado.

<sup>408</sup> Ley 9/1994, de 19 mayo, de modificación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado.

<sup>409</sup> Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado, modificada por la Ley 9/1994, de 19 de mayo.

<sup>410</sup> Real Decreto 864/2001, de 20 de julio, por el que se aprueba el reglamento de ejecución de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, reformada por la Ley Orgánica 8/2000, de 22 de diciembre.

<sup>411</sup> English translation as provided by the UNHCR Branch Office in Madrid.

<sup>412</sup> Ibid.

*Article 16. Allowing the asylum-seeker to travel to Spain.*

1. If the individual concerned is at risk and has submitted his request for asylum before a Diplomatic Mission or Consular Office in a third country, or if he falls under the conditions stipulated in section 2 of article 4 herein, the Office for Asylum and Refuge may submit the case to the Interministerial Eligibility Commission on Asylum and Refuge, so as to provide authorization for the asylum-seeker to travel to Spain while his file is being processed. Before doing so, the asylum-seeker must obtain the proper visa, safe-conduct of authorization for entry, which will be processed urgently.
2. The Office for Asylum and Refuge will report the decision of the Interministerial Eligibility Commission to the Head Office of the Police, which will send the information on to the proper border point.
3. The asylum-seeker whose travel to Spain has been authorised because he is in a situation of risk must be informed of the rights he is entitled to under section 2 of chapter I of the Regulation herein, and must be informed that he must exercise these rights within one month of his entry into Spanish territory.
4. The competent office of the Ministry of Social Affairs must adopt the appropriate measures so that the asylum-seeker may be received by the public or private institution appointed for that purpose.

*Article 24. General rules for administrative processing.*

...

4. The maximum time period allowed for administrative processing of the file is six months. If this time period expires without an explicit decision on the request for asylum, it is implied that the request has been rejected, without prejudice to the obligation of the Administration to hand down an explicit decision. If administrative processing is carried out through a Diplomatic Mission or Consular Office, the time period of six months will be counted from the time at which the request is received by the Office for Asylum and Refuge.

...

*Article 28. Notification of the decision.*

...

3. If the request was submitted abroad or if an appeal was made on the request while the asylum-seeker was in another country, he will be notified through the competent Diplomatic Mission or Consular Office.

*Article 29. Consequences of the granting of asylum.*

...

4. If the asylum-seeker requested asylum at a Spanish Mission or Consular Office, this office must issue a visa or authorisation to enter and travel to Spain to the individual concerned, who must also be given a travel document, if necessary, under the terms provided for in article 16 herein.

***Royal Decree 864/2001 Approving the Implementation Regulation of Law 4/2000***<sup>413</sup>

*Article 8.*

...

5. The Spanish diplomatic missions and consulates can issue an asylum visa:
  - for persons whose applications for refugee status have been recognised by the government;
  - for refugees recognised by third countries, but for whom Spain has accepted the transfer of responsibility and accepts to provide residence to them;
  - for asylum seekers who have applied for refugee status in Spanish Representations abroad, when due to risk situation it is advisable to transfer the asylum seeker on an urgent basis to Spain.

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<sup>413</sup> Ibid.

All provisions of the Asylum Law, including those applicable in the ordinary asylum procedure that do not explicitly mention asylum applications lodged at Spanish representations abroad, must be observed and applied *mutatis mutandis*. Consequently, provisions concerning issues such as time limits for appeals, communication of decisions and time limit for additional evidence shall also be applied in cases where the applications were submitted abroad.

Being integrated in the Asylum Law and other asylum regulations, the legal provisions for applications submitted at representations abroad are easily available, including on the Internet. The information is generally only in Spanish. The authorities have produced an information brochure on the asylum procedure, in several languages, which is given to asylum seekers upon submission of their claim. The brochure, however, deals exclusively with applications lodged at border points or inside the Spanish territory and does not include any information on applications made at representations abroad. The brochure should, in principle, also be available at embassies and consulates, but it is not clear whether this is systematically the case. It is currently under review.

#### **6.1.5.2 Earlier Experiences and Future Development**

The Spanish Protected Entry Procedure was first established in 1984 with the adoption of the Law 5/1984 Regulating Refugee Status and the Right to Asylum. It has not been changed substantially since then.

In 2000, during the drafting process of the implementation regulation of the new Aliens Law 4/2000, UNHCR suggested the inclusion of a provision that would authorise the issuing of humanitarian visas to persons who are in a risk situation in their country of origin. Such a provision was, however, not included in the implementation regulation finally adopted.<sup>414</sup> At present, a change of law or practice with regard to Protected Entry Procedure is not envisaged.

#### **6.1.5.3 General Principles of the Procedure**

- An essential feature of the Spanish Protected Entry Procedure system is that it is fully integrated into the ordinary asylum system. As a result, asylum claims lodged abroad are, as any other applications for asylum, processed by the asylum determination body, the OAR. In this process, representations abroad have a very limited, if any, power of discretion, and the visa issue is dealt with after a decision has been made on asylum.
- As the authorities consider that Spain's obligation to grant protection does not cover persons still in their own countries, applications for asylum are only accepted in third countries.
- It is not foreseen that applicants could be protected at representations abroad while their application is being processed. However, the applicant's urgent transfer to Spain may be authorised before a substantial decision has been made, if her life and security are in danger.
- Applications lodged abroad are examined without any requirement of having family or cultural links to Spain. However, only applicants whose claims fall under the criteria of the Geneva Convention can be granted protection, since the provisions for subsidiary protection laid down in the internal asylum legislation apply only to applicants already on Spanish territory.

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<sup>414</sup> This proposal was meant as a solution, for example, for Colombians at risk in their own country. Interview with UNHCR BO Madrid, 29 May 2002.

#### **6.1.5.4 Access to the Representations**

Accessing Spanish embassies and consulates abroad may be difficult, due to security measures set up by the local authorities and, in some cases, by the representation it self. For example, the embassies in Cuba, Turkey and Mozambique were mentioned by Spanish NGOs as being difficult to access.<sup>415</sup>

#### **6.1.5.5 Submission of the Application**

Asylum applications may be submitted at Spanish diplomatic or consular representations abroad, provided the applicant is in a third country. The asylum legislation in force is based on a principle of extraterritoriality and Spanish authorities do not consider themselves to have an obligation to protect persons still in their home country. Hence, an asylum application submitted at a Spanish diplomatic or consular representation in the applicant's country of origin would not be accepted.<sup>416</sup> Asylum applications are accepted in a country of origin only for family reunification purposes.

As the law requires the physical presence of the applicant at the representation when lodging her claim, applications presented by a third person or sent by post are rejected, unless the applicant ratifies it by appearing in person later. In some exceptional cases, however, applications have been submitted when the applicant was not able to present herself at the representation. This implies that the representation is willing to assist the applicant.<sup>417</sup>

#### **6.1.5.6 Registration and Initial Processing of the Application**

A person approaching the embassy with a request for protection shall be given asylum information translated into a language she understands, as well as an asylum application form, which is identical to that provided to asylum seekers applying within Spain. The form includes questions on the applicant's identity, family situation, language, education and ethnic background, travel route as well as on the reasons for fleeing her country of origin and for seeking asylum in Spain. There are no specific questions regarding the applicant's situation in the third country. Depending on the embassy or consulate involved, the applicant may be given some assistance in filling in the form, but there is no obligation to do so. Similarly, representations have no obligation to formally interview the applicant, but can do it, if it is deemed useful.

Beside the difficulties encountered in physically accessing the embassies, Spanish NGOs have expressed their concerns as to the large variations in the practice followed by the representations abroad. Whilst some embassies and consulates apply the procedure in a satisfactory manner, other representations are not sufficiently informed about the legal provisions or are reluctant in receiving and processing asylum applications. In the same way, certain representations provide information

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<sup>415</sup> Interview with CEAR, 29 May 2002. In its May 2002 report "*Informe sobre la situación real del racismo y la xenofobia en el Estado Español*", ENAR underlines the difficulties of accessing the Spanish embassy in Senegal, Colombia and India. It has not been possible to obtain information from the Ministry of Foreign Affairs on this issue.

<sup>416</sup> Although legal provisions on Protected Entry Procedure do not explicitly exclude applicants in countries of origin, the OAR and UNHCR confirm that only applications lodged in third countries are accepted. Interviews held on 29 May 2002.

<sup>417</sup> The CEAR referred to a case concerning an applicant detained in Ethiopia. The claim was lodged by his brother, who also filled in the form with the assistance of the Spanish consul. Later, the consul visited the applicant in prison in order to have him sign the application form. The OAR eventually issued a positive decision.

and assistance to applicants, in particular with respect to the application form, where others usually do not.<sup>418</sup> Nevertheless, the awareness amongst embassy staff of the right to seek asylum in representations and the acquaintance with the procedure to be followed is said to have increased in past years, especially since 1995, when the Ministry of Foreign Affairs issued instructions for the representations on how to handle asylum claims.<sup>419</sup>

#### **6.1.5.7 Transmission of the Case and Processing of the Application in Spain**

Once the asylum claim has been lodged, Spanish diplomatic and consular representations have no authority to decide on it. All asylum applications lodged abroad must be forwarded to the Ministry of Foreign Affairs in Spain.<sup>420</sup>

Applications for asylum submitted to representations abroad are sent to the Ministry of Foreign Affairs in Madrid. When it receives the file, the Ministry has no other role than to verify that it is complete and send it further to the Office of Asylum and Refuge (OAR). The OAR, a body under the jurisdiction of the Ministry of Interior, is responsible for examining all asylum claims lodged with the Spanish authorities, be it within the country, at border points, or abroad.

There are no clear indications regarding the time necessary for forwarding a case from the filing of the claim at the embassy to its reception by the OAR, via the Ministry of Foreign Affairs. Files are always sent by diplomatic pouch from the embassies to the Ministry in Spain. The transmission between the Ministry and the OAR is normally made by official mail, but it is possible, if necessary, to accelerate the process by using fax or other similar techniques. The transmission time seems to vary according to the embassy involved and the characteristics and urgency of the case.<sup>421</sup>

The file sent by the representations normally contains the standard application form filled in and signed by the applicant, copy of the applicant's identity documents and all documents submitted by her, the interview transcript (in case an interview was made) as well as a written report from the embassy. This report does not include the embassy staff's formal opinion, but reflects its "impressions" regarding the application. The OAR examines the claim based on the written documents included in the file, and the report of the embassy is considered as an important element.<sup>422</sup> If it has additional questions regarding the case, it may also transmit those, via the Ministry of Foreign Affairs, to the embassy, which will seek the information from the applicant.<sup>423</sup>

The OAR processes the cases received from the Ministry of Foreign Affairs according to the same procedural rules as for any other application for asylum. As an exception, however, applications lodged from abroad are not subject to the admissibility procedure, but are automatically dealt with under the ordinary determination procedure. This non-application of the admissibility stage is not based on law or regulation, but on practice.<sup>424</sup>

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<sup>418</sup> Interview with CEAR, 29 May 2002. Amnesty International's report *El asilo en España: una carrera de obstáculos* of September 2001, p. 22, describes several cases of ill practice at Spanish embassies and consulates.

<sup>419</sup> Interview with UNHCR BO Madrid, 29 May 2002.

<sup>420</sup> See Law 5/1984 amended by Law 9/1994, Article 4.

<sup>421</sup> No information on the transmission time was made available by the authorities. According to UNHCR the transmission time can vary from two days to two months, interview, 29 May 2002.

<sup>422</sup> Interview with the OAR, 29 May 2002.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.



The scope of the OAR's examination is restricted to verify whether the applicant can be granted refugee status under the provisions of the Geneva Convention. Unlike spontaneous applications, there is no obligation for the OAR to assess whether embassy applicants are eligible to subsidiary protection. The reason is that subsidiary protection is, by law, restricted to asylum seekers already in the Spanish territory. Thus, applicants from abroad whose claims do not fall within the criteria of the Geneva Convention cannot be accepted.<sup>425</sup>

The OAR looks only at the protection aspects of the application and there are no requirements to have family, cultural or other links with Spain (although many applicants are originating from Spanish speaking countries, mainly Colombia and Cuba, see 6.1.5.13 below).

Once the instruction of the case is over, the OAR forwards the file, together with an opinion as to the decision that should be taken, to the Inter-ministerial Eligibility Commission on Asylum and Refuge (CIAR).<sup>426</sup> The CIAR has the task of drawing up a proposal for the first instance decision, which is submitted to the Minister of Interior for a formal ruling. It comprises a representative from each the Ministry of Interior, acting as chairperson, the Ministry for Foreign Affairs, the Ministry of Justice and the Ministry for Labour and Social Affairs. The UNHCR representative in Spain acts as a member of the CIAR in a consultative capacity.

The CIAR makes its proposal on the basis of the information and evidence produced by the applicant, the OAR report, and the opinions of UNHCR and NGOs (including CEAR, Amnesty International, etc.). In most cases, the Commission follows the opinion of the OAR. Similarly, although it is not binding, the Minister of Interior follows almost always the CIAR's opinion.<sup>427</sup>

Legally, a first instance decision on the application should be reached within six months from the moment the interview was held. According to the authorities and NGOs, however, the average processing time is 12-13 months.<sup>428</sup>

#### **6.1.5.8 Positive Decisions by the CIAR**

If the decision taken by the CIAR – formally by the Minister of Interior – is positive, the embassy is instructed to issue the applicant with a visa. In view of the time required for the Minister to sign the CIAR's proposed decision, it is possible, if urgently required, to issue a visa after the substantial positive decision has been made, but before it has been formally signed. This is facilitated by the fact that the Ministry of Foreign Affairs is a member of the CIAR and, as such, is already informed about the case.

The authorities are not aware of any cases, where the representation abroad would have refused to issue a visa, although instructed by the Ministry of Foreign Affairs to do so.<sup>429</sup>

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<sup>425</sup> This exclusion results from Article 17.2 of the Asylum Law 5/1984 amended by Law 9/1994, which provides for the possibility, under certain circumstances, to authorise an applicant whose claim does not fall under the conditions of the Geneva Convention to 'remain' in Spain. In a few cases, Spanish authorities have granted subsidiary protection (in various forms) to applicants abroad. This requires both that particular humanitarian circumstances are at hands and the willingness of the authorities to intervene, interview with UNHCR, 29 May 2002.

<sup>426</sup> *Comisión Interministerial de Asilo y Refugio*.

<sup>427</sup> Any disagreement between the CIAR and the Minister of Interior must be settled by the Council of Ministers.

<sup>428</sup> Interviews with the OAR and CEAR, 29 May 2002.

<sup>429</sup> Interview with the OAR, 29 May 2002.

#### **6.1.5.9 Negative Decisions by the CIAR and Appeals**

Decisions made by the CIAR on the asylum application are notified to the applicant through the embassy. The notification is made in writing, and in Spanish only. The decision includes information on appeal rights.

Negative decisions on asylum applications lodged abroad can be appealed under the same procedure as in-country claims. Within two months of notification of the decision, the appeal has to be submitted to the National High Court (*Audiencia Nacional*), whose remit covers judicial review of first instance decisions made by Ministries and Secretaries of State. Once it has received the appeal, the National High Court notifies the OAR, which has then the obligation to transmit the complete file. The time required to process an appeal case before the National High Court is between 18 months and two years, sometimes even more. If the appeal is rejected, the case may be appealed further to the Supreme Court (*Tribunal Supremo*), which examines the legality of the decisions but not the facts of the case. The Supreme Court may uphold or overrule the judgement of the National High Court in part or as a whole. In the latter case, the Court renders a new decision on the application.

Applicants abroad encounter great difficulties in starting appeal proceedings, due to the lack of detailed information on the procedure and the fact that it requires – in practice, if not formally – the intervention of a lawyer in Spain.<sup>430</sup> In addition, the long processing time of their application by the authorities in Spain (12 to 13 months, see above) might discourage many applicants from conducting further proceedings. As a result, the case law is extremely scarce.

#### **6.1.5.10 Legal Safeguards and Legal Assistance**

Based on the provisions of Article 8.4 of Royal Decree 203/1995, which state that interpretation services and legal assistance must be given to “applicants within the national territory”, the authorities consider that such obligation does not exist regarding applicants abroad.

#### **6.1.5.11 Transfer to Spain**

Once the visa has been issued, Spanish authorities are normally not involved in the practicalities of the applicant’s departure, and do not pay for the transfer to Spain. In urgent cases, assistance can be provided through Spanish NGOs – some of them financed by the State – or by UNHCR.

#### **6.1.5.12 Applicants’ Physical Safety during the Procedure**

Persons applying for asylum at Spanish representations abroad are normally not allowed to travel to Spain before they have been granted asylum. Exceptions can be made if the applicant is in a risk situation requiring an urgent transfer to Spain. According to the practice of the CIAR, a risk situation may occur when agents of persecution from the applicant’s country of origin are in the

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<sup>430</sup> It is unclear whether Spanish representations have the obligation to – and do in practice – forward to the relevant court in Spain appeals submitted to them. According to NGOs, this is not the case. In addition, no list of barristers/solicitors is available at embassies. In order to be able to represent his client before the National High Court, a lawyer needs a power of attorney, which has to be legalised at the embassy. Few applicants are aware of this obligation. Interview with CEAR, 29 May 02.

third country and that country is unable to protect the applicant. As a consequence, her life and security may be in danger.

Hence, under exceptional circumstances, an advanced transfer procedure applies, which may lead to the applicant being authorised to travel to Spain while her application is being processed. This procedure is completely separate from the processing of the asylum claim itself, and it is handled as internal questions by the authorities. Applicants usually do not know about the possibility of an urgent transfer and the procedure is most often started at the initiative of the embassy or, in some cases, of UNHCR. This can be done at any stage during the processing of the asylum application.

Applicants are first interviewed by staff from the Spanish representation. After receiving the documentation from the embassy, via the Ministry of Foreign Affairs, the OAR will assess the case and present it to the CIAR, indicating its views on the issue of transfer. The decision on advanced transfer will then be taken by the CIAR. The Commission meets normally once a month but, if there is a need to speed up the process, the decision can be made in writing.

If the decision is positive, transfer will take place as soon as possible and the processing of the asylum application will continue once the applicant is in Spain. Negative decisions on the transfer rendered by the CIAR are not formal administrative decisions. As such, they are not formally notified to the applicant and cannot be appealed. Even though the final decision on the urgent transfer is negative, the assessment of the asylum application will continue at the OAR, while the applicant remains in the third country. A negative decision on the transfer issue does not mean that asylum will be denied as well. It is worthy of note that the procedure deciding whether the applicant shall be transferred in advance is a parallel procedure, and will neither halt nor impact on the asylum determination procedure.

Typically, the advanced transfer procedure is applied both regarding UNHCR mandate refugees, which presupposes that UNHCR has approached the Spanish authorities with a request for resettlement, and regarding applicants for asylum who are not UNHCR mandate refugees.<sup>431</sup> In the latter case, UNHCR is not or only marginally involved. There are no statistics regarding advanced transfers.

#### **6.1.5.13 Statistics**

There are no figures available regarding the number of applications for asylum submitted abroad, as official statistics do not distinguish between applications for family reunion lodged at embassies in countries of origin and third countries and applications for asylum submitted in third countries.

1996	1997	1998	1999	2000	2001
99	83	154	102	179	132

**Table 6 - Number of Applications Lodged at Representations Abroad – Spain**

Source: OAR, 31 December 2001

From 1998 to 2001, the total number of applicants who asked for asylum and family reunion at Spanish diplomatic or consular representations was between 100 and 180 per year. According to the

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<sup>431</sup> The possibility for UNHCR to ask the Spanish authorities to urgently admit a mandate refugee, who is in a high-risk situation in a third country, is explicitly provided under Article 4.2 of Royal Decree 203/1995.

authorities, a vast majority of cases concern family reunion and not asylum as such. UNHCR estimates that out of the 132 persons who lodged an application in 2001, about 20 actually applied for asylum without family reunion considerations.<sup>432</sup>

The relatively low number of persons seeking asylum at Spanish embassies can probably be explained by a combination of factors, including the lack of information about the procedure amongst asylum seekers, the difficulties in physically accessing the embassies as well as the length of the procedure. In addition, this has also to be seen within the context of relatively low total number of applications submitted to the Spanish authorities (7.926 applicants in 2000, 9.490 in 2001).

In the past, most applications were lodged at representations in Cuba, Peru, Iraq, Iran and Vietnam. A few applications have also been lodged at representations in Argentina, Turkey (some years ago) and Cameroon. In 2001, the Spanish representations that received most applications are located in Colombia (for family reunion purposes) and Ecuador (mainly for Colombian and a few Peruvian asylum seekers). According to UNHCR, when it comes to “pure” asylum claims, typical constellations within the last seven or eight years have included Peruvians applying in Argentina, Bolivia and Ecuador and, most recently, Colombians seeking asylum at Spanish representations in Ecuador, Venezuela and Mexico as well as Equatorial Guineans applying in Cameroon and Gabon. Generally the recognition rate for applications lodged at Spanish representations is said to be high. In the present statistical environment, it is hard to substantiate this claim.

The option of advance transfer cannot be properly assessed due to lack of statistics.

#### **6.1.5.14      *Relation to Other Procedures***

There have been ongoing discussions regarding the establishment by the Spanish authorities of a resettlement program, but this has not materialised so far. However, the Spanish Protected Entry Procedure can be seen, in some respects, as allowing for “individual resettlement” in Spain, as many cases are, in practice, channelled through UNHCR (and concern or not mandate refugees). According to Article 4.2 of Royal Decree 203/1995, Spain indeed has the possibility, at the request of UNHCR, to admit urgently a mandate refugee, who is in a high-risk situation in a third country UNHCR plays indeed an important role in cases where urgent transfers are needed (see above).<sup>433</sup> The Protected Entry Procedure allows also for a – very limited – number of cases where UNHCR is not involved to be processed in Spain.

#### **6.1.5.15      *Evaluation of the Spanish Procedure***

The Spanish practice is thoroughly formalised and rests on a quite detailed normative basis and distribution of competencies.

One exclusionary feature is that the Spanish model caters only for persons located in third countries. On the inclusionary side, the Protected Entry Procedure is fully integrated into the ordinary asylum procedure, and shares most of its characteristics. Appeal options are provided with regard to the material decision on protection. In practice, lack of information, difficulties in accessing the representations and lengthy processing appear to hamper the effectiveness of the procedure and may

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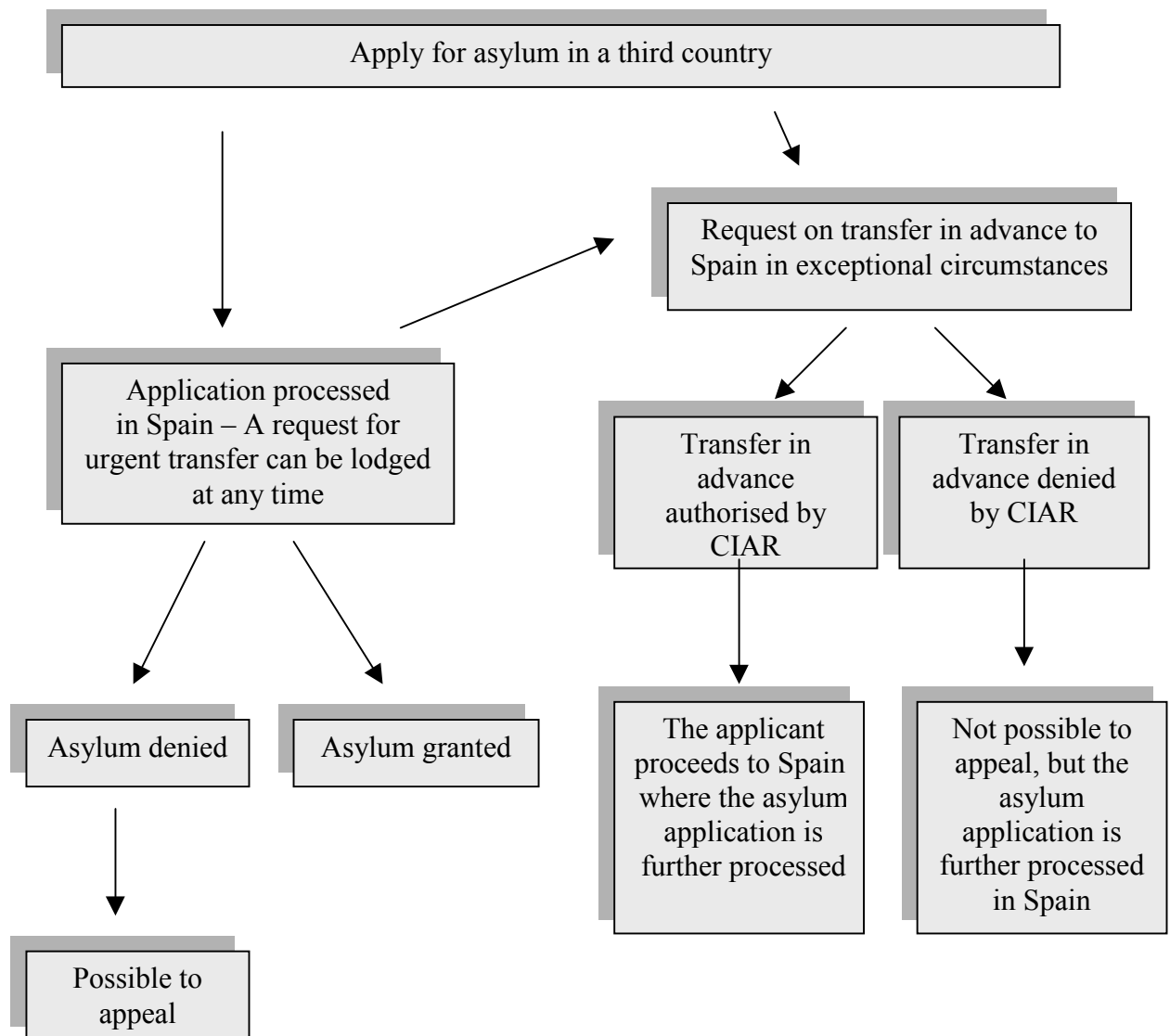
<sup>432</sup> Interviews with the OAR and UNHCR, 29 May 2002.

<sup>433</sup> Ibid.

explain the relatively low number of persons actually protected. While UNHCR considers its involvement to be a positive feature, the protraction of single cases also drains its resources.<sup>434</sup>

The fast-track option for applicants at risk is an interesting feature, which merits further study. The criteria (continued persecution and non-available local protection) appear to be legitimate, but this aspect of the model cannot be fully appreciated unless detailed information, including statistical data, is made available.

#### 6.1.5.16 *Procedural Diagram*



<sup>434</sup> See Noll and Fagerlund, *supra* note 6.

## 6.1.6 United Kingdom

### 6.1.6.1 Legal Regulation and Current Practices of Protected Entry Procedures

Under United Kingdom asylum and immigration legislation (the Immigration Rules) it is not possible to lodge a formal application for asylum abroad. The possibility of applying for entry clearance abroad with the purpose of seeking asylum once in the United Kingdom is not mentioned in the Immigration Rules, but is provided for under the Asylum Policy Instructions issued by the Immigration and Nationality Directorate of the Home Office.<sup>435</sup>

As the Asylum Policy Instructions are internal documents directed to the Home Office's caseworkers and not part of the legislation, the authorities consider the current Protected Entry Procedure to be an "informal programme".<sup>436</sup> The Asylum Policy Instructions, dating from June 2001, are currently under revision.

*Asylum Policy Instructions of June 2001*<sup>437</sup>  
*Chapter 2 Section 1*  
*Applications from abroad*

#### 1. Introduction

Applications from abroad are made by persons still present in a third country. The application from abroad is initiated when a British Diplomatic Post refers to the ICD [Integrated Casework Directorate] an application for asylum from outside the UK from a person who has not yet been recognised as a refugee by another country or by UNHCR. (...)

#### 1.1 Key points

Although there is no provision in the Immigration Rules for people who are overseas to be granted entry clearance to come to the UK as refugees, Entry Clearance Officers have discretion to accept, outside the Immigration Rules, an application for entry clearance for the UK where:

- A foreign national demonstrates a prima facie case that his/her circumstances meet the definition of the 1951 Convention;
- and s/he has close ties with the UK;
- and the UK is the most appropriate country of long term refuge.

All such accepted applications must be referred by the post abroad to the ICD for decision on whether to grant Entry Clearance as a refugee.

#### 2. Action at British diplomatic post

When making an application at a post abroad, the applicant will first be asked to complete a visa application form. The applicant will then be interviewed about the asylum claim. Where it is appropriate an applicant will normally be encouraged to approach the local authorities for asylum, or local representatives of the UNHCR.

Under the 1951 Convention, there is no obligation to consider an asylum application made overseas but if, exceptionally, the post accepts the application, the visa application form and the interview record will be forwarded to

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<sup>435</sup> The information included in this chapter is based on the content of the UK chapter of the report "Safe Avenues to Asylum ?", published by the Danish Centre for Human Rights and UNHCR in April 2002. The information has been completed and updated by means of a questionnaire sent to the Home Office's Immigration and Nationality Directorate and interviews were conducted with the Immigration and Nationality Directorate's Asylum Policy Unit, UNHCR Branch Office in the UK, the Immigration Law Practitioners' Association (ILPA) and an immigration lawyer in May 2002.

<sup>436</sup> Questionnaire response by the Asylum Policy Unit and interviews with the same unit, 16 May 2002.

<sup>437</sup> The Immigration and Nationality Directorate's *Asylum Policy Instructions* from June 2001 are available at [www.ind.homeoffice.gov.uk/default.asp?pageid=798](http://www.ind.homeoffice.gov.uk/default.asp?pageid=798) (accessed most recently on 2 September 2002).

the ICD for full consideration of the asylum claim. The applicant will be told that the Home Office in the UK will decide whether entry clearance should be granted.

### 3. Action in asylum directorate

#### 3.1 Considering the claim

The caseworkers must consider whether the applicant:

- i) satisfies the usual criteria for refugee status as set out in the 1951 Convention; and
- ii) has close ties with the UK; and
- iii) has established that the UK is the most appropriate country of refuge.

The applicant must have strong ties with the UK e.g. close family in the UK or periods spent here as a student. For the purposes of clarifying what constitutes close family the categories are:

- spouse
- Children (minors)
- Parents/grandparents over 65

#### Exceptional Circumstances

The following family members will only meet the close ties requirement in exceptional circumstances:

- parent/grandparent (in the singular) under 65
- family members aged 18 or over: son, daughter, sister, brother, uncle, aunt

No other categories of family relationship will meet the close ties requirement

The Asylum Policy Instructions on embassy applications are available on the Home Office's home page in accordance with the rules regarding access to government information. However, these instructions are not widely known and the authorities have no policy of actively promoting awareness about their existence and the possibility of applying for asylum from abroad. In practice, due to the very limited number of persons concerned (less than 10 cases each year, see Statistics below), the Protected Entry Procedure has very low priority for the authorities.<sup>438</sup>

#### **6.1.6.2 General Principles of the Procedure**

It is possible to apply for asylum at a British diplomatic or consular representation abroad, however only in a third country and not in the applicant's country of origin. The appropriate form is to file an application for entry clearance for the purpose of seeking asylum in the United Kingdom.

The representation's entry clearance officer will decide whether the asylum application fulfils the criteria or not. Should the entry clearance officer consider that the requirements are met, the case is forwarded to the Home Office in the United Kingdom for a decision on entry clearance.

Under the Asylum Policy Instructions of June 2001 mentioned above, the granting of an entry clearance for the purpose of seeking asylum once in the United Kingdom is subject to stringent conditions, including both the qualification as a refugee and close family or other type of ties to the United Kingdom.

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<sup>438</sup> Distinction has to be made between Protected Entry Procedure cases, dealt with in accordance with the Asylum Policy Instructions, and the so-called 'M15 cases', whereby a person is accepted and brought to the UK based on intelligence or security reasons. These cases, which are processed outside the scope of the asylum legislation and without involvement of the asylum authorities, are not considered in this study.

### 6.1.6.3 Access to the Representations

The United Kingdom authorities are not aware of specific situations where applicants may have difficulties entering the UK embassies or consulates in order to apply for a visa or to undergo an interview.<sup>439</sup> However, it seems that access to certain British representations has been made extremely difficult, if not impossible, for certain categories of applicants, especially those without the necessary documentation, in the aftermath of the 11 September events.<sup>440</sup>

### 6.1.6.4 Submission of the Application

Applications for entry clearance with the aim of seeking asylum once in the UK can only be lodged in third countries. The exclusion of claims lodged in the applicant's country of origin or in a country where she has her habitual residence is justified by the fact that these cases are considered to be outside the scope of the 1951 Geneva Convention.<sup>441</sup> Within this limit, applications can be lodged either at embassies or consulates. Applicants are requested to present themselves at the representation in order to lodge their application.

Since there is no formal procedure for submitting an asylum request at a British representation abroad, applications are often refused on the basis that there is no basis in the Immigration Rules allowing for entry clearance to be granted in order for the applicant to be able to request asylum when arriving in the UK.<sup>442</sup> Although there are no specific provisions on this issue in the Asylum Policy Instructions, UK representations may refer – and in practice often do – applicants to the local authorities and/or to UNHCR local office instead of accepting the application. Only if there is no local protection or no UNHCR office available, will the representation take the application for a visa under consideration.<sup>443</sup>

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<sup>439</sup> Interview with the Immigration and Nationality Directorate's Asylum Policy Unit, 16 May 2002.

<sup>440</sup> Access in the embassies in Kampala, Uganda, and Nairobi, Kenya, in particular, was made conditional on the person being able to present a valid identity document. In practice, this requirement made it impossible for most Somalis refugees to access the embassy premises. Following negotiations with UNHCR, persons holding a letter of referral from UNHCR were also given access. In April 2002, answering a parliamentary question concerning the access to the UK High Commission (embassy) in Kampala, the Secretary of State for Foreign and Commonwealth Affairs confirmed that only persons holding a valid national passport, a refugee document issued by the Ugandan authorities or a UNHCR laissez-passer were allowed access to the embassy. According to the same statement, "*many of the applicants affected [by the impossibility of accessing] are relatives seeking family reunion with refugees who have settled in the UK, and others*". The Secretary of State justified these restrictions with the security situation in Uganda, indicating "*I regret the need for this requirement but it is temporary, for the safety of our staff and members of the public and is necessary and proportionate in response to the perceived threat*", House of Commons Hansard Written Answers for 17 April 2002. By the end of May 2002, these restrictive measures were still valid. Interview with UNHCR, 16 May 2002, and with ILPA, 17 May 2002.

<sup>441</sup> Interview with the Asylum Policy Unit, 16 May 2002. It should be noted, however, that the opportunity of applying in the country of origin seems not to be completely excluded. In response to a parliamentary question regarding the possibility for a Chinese woman to apply for asylum at the British embassy in Beijing arguing that she may be forced to have an abortion under the Chinese one-child policy, the Minister of State Home Office, Ann Widdecombe, indicated in 1996: "however, where people present at embassies rather than on arrival in Britain, we would also consider ties with the UK and reasons for preferring it to other countries. I cannot give a blanket welcome to absolutely everyone who presents at an embassy with that particular case, but I can say that the merits of that case will have established themselves.", *The Asylum and Immigration Act 1996*, ILPA, September 1996, p. 46.

<sup>442</sup> Liebaut, *supra* note 306, p. 311.

<sup>443</sup> This was confirmed both by UNHCR and the Immigration and Nationality Directorate's Asylum Policy Unit during interviews held on 16 May 2002. According to the Asylum Policy Unit, the practice of referring applicants to UNHCR or the local authorities may explain the very low number of applications actually forwarded by the representations to the Home Office (estimated to be under 10 cases each year, see Statistics below).



As UK representations are not under the obligation of registering all persons approaching them with an asylum-related purpose, there are no statistics available as to the number of cases actually referred to the local authorities or UNHCR (see Statistics below).

#### **6.1.6.5 Registration and Initial Processing of the Application by the Representation**

If not directly referred to the local authorities or the UNHCR local office, the applicant will first be asked to fill out a visa application form. Later, upon convocation, she will be heard on her asylum request by the entry clearance officer located at the representation. The questions asked during this interview are at the entry clearance officer's discretion. Embassies usually arrange interpreters, if necessary.

According to the authorities, all entry clearance officers have to be UK citizens or Commonwealth citizens, if there is an agreement for this, but in any case, they cannot be nationals of the country where the representation is located. Entry clearance officers are normally aware of the existence of the Asylum Policy Instructions for embassy cases, but do not receive any in-depth training on asylum issues during their overall consular training. They have access to some training on interview techniques as well as training on admission criteria, although not specifically on asylum or protection-related issues.<sup>444</sup>

Based on the information included in the application form and following the interview, entry clearance officers have far-reaching discretion to reject the visa application without consulting the authorities in the UK or accept it and forward the case to the Home Office for a formal decision.<sup>445</sup> They have, however, no discretion to make a positive decision and must therefore forward to the Home Office any applications which they have accepted.

As stated in the Asylum Policy Instructions, entry clearance officers have discretion to accept an application and forward it to the Home Office when:

- firstly the applicant has demonstrated a *prima facie* case that she meets the definition of the 1951 Refugee Convention. Claims falling out the scope of the Geneva Convention but which could lead to the granting of subsidiary protection under the territorial procedure are not considered by the entry clearance officers.<sup>446</sup>
- secondly the applicant shows that she has close ties with the UK. In this regard, close family connections (such as children under 18 years of age, parents or grandparents over 65 years of age) and periods spent in the UK as a student, are considered to constitute 'close ties' with the UK. In exceptional circumstances, children not considered to be minors anymore or a parent or a grandparent under the age of 65 can be considered to meet the 'close tie' requirement as well. Other family members, such as sisters, brothers, aunts and uncles might also be granted entry clearance if exceptional circumstances are present.<sup>447</sup>

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<sup>444</sup> Interview with the Asylum Policy Unit, 16 May 2002.

<sup>445</sup> See above Asylum Policy Instructions, Section 1, Paragraph 1.1, Key point 1.1.1. This practice of 'pre-sifts' by the ECOs is commented in the *Report by the Independent Monitor (Immigration and Asylum Act 1999)*, Rabinder Singh, Joint Entry Clearance Unit, Foreign & Commonwealth Office, November 2001, p. 9-10, although this report does not deal specifically with asylum applications.

<sup>446</sup> This was confirmed by the Asylum Policy Unit in its questionnaire responses.

<sup>447</sup> See the Asylum Policy Instructions under Chapter 6.1.6.1 above.

- finally the UK must be considered to be the most appropriate country for the applicant to take refuge in.

All applications accepted by the representations must be forwarded to the Home Office for a decision on whether to grant an entry clearance as a refugee or not.

#### **6.1.6.6 *Transmission of the Case and Processing of the Application in the United Kingdom***

Applications for entry clearance forwarded by the representations abroad are referred to the Integrated Casework Directorate within the Home Office, which will decide whether the applicant should be granted entry clearance as a refugee.<sup>448</sup> In March 2002, the authorities indicated that their aim was to have all applications referred by the entry clearance officers processed within a period of four weeks.<sup>449</sup>

If the Directorate renders a positive decision on the visa application, the representation abroad is instructed to issue the applicant with the requested visa. For security reasons, this visa does not include any mention as to the reasons why it is granted.

Once an entry clearance has been granted and the applicant arrives in the United Kingdom, she will be granted indefinite leave to remain without further consideration of her claim. The immigration officer on arrival will simply check that there have been no changes in circumstances since the visa was issued.

#### **6.1.6.7 *Negative Decisions and Appeals***

It is rather uncertain whether a refusal by the entry clearance officer at the representation to forward the visa application to the Home Office can be appealed. It seems, however, that such an appeal has never been lodged making this possibility, if it exists, rather theoretical.<sup>450</sup>

Negative decisions on visa applications taken by the Home Office's Integrated Casework Directorate are notified by the embassy to the applicant in writing and in English. The decision includes information on appeal rights. In principle, these decisions can be both appealed under the Immigration Rules and subject to judicial review:

- Under the current Immigration rules, it is possible to file an appeal from abroad under Part IV, section 59(2) of the Immigration and Asylum Act 1999, which deals with refusals of entry clearance.<sup>451</sup> Accordingly, the appeal has to be lodged with the independent Immigration Appellate Authority, where the case will be heard by an adjudicator. If the adjudicator's decision is also negative, the case can be further appealed to the Immigration Appeals

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<sup>448</sup> Ibid.

<sup>449</sup> Letter of the Home Office's Immigration and Nationality Directorate to ILPA, dated 27 March 2002.

<sup>450</sup> Interview with the Asylum Policy Unit on 16 May 2002, with ILPA and an immigration lawyer on 17 May 2002.

<sup>451</sup> "A person who, on an application duly made, is refused a certificate of entitlement or an entry clearance may appeal to an adjudicator against the refusal".

Tribunal.<sup>452</sup> In practice, however, it seems that very few, if any, appeals are lodged under these provisions, which also therefore remain highly theoretical.<sup>453</sup>

The Nationality, Immigration and Asylum Bill submitted by the government in April 2002 proposes substantive changes in the provisions for appeals. If this proposal becomes law, it will no longer be possible to appeal against Home Office's or entry clearance decisions made outside the Immigration Rules, which includes those rendered on the basis of the Asylum Policy Instructions in embassy cases.<sup>454</sup> In view of the very limited use made of the current provisions, these changes, likely to become effective around Spring 2003, are not expected to have a large impact on the procedure.

- As with any other administrative decisions, negative decisions on visa applications can also be subject to judicial review. This includes a review by the High Court followed, if either side appeals, by further review by the Court of Appeal and then, in certain cases, by the House of Lords. Not being an appeal *stricto sensu*, the court does not review the decision on the substance, but only decides whether it was "reasonable". As such, judicial review cannot lead to a substantive decision by the court but only to the case being referred to the administrative organ for a new decision. Here again, very few requests for judicial review appear to be lodged regarding visa applications for asylum purposes.<sup>455</sup> The above-mentioned new rules for appeals will not affect the possibility of requesting judicial review of negative decisions.

#### **6.1.6.8 Legal Safeguards and Legal Assistance**

UK representations have no obligation to provide interpreters during the interviews with the applicant, although they generally arrange for this, if necessary. The decisions made by the Home Office are notified in writing to the applicant but only in English, and there are no provisions for translating these decisions into the applicant's own language.

Home Office's negative decisions include information on the appeal rights, but embassies are normally not involved in the practicalities of these appeals and do not provide any assistance to applicants wishing to lodge an appeal.<sup>456</sup>

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<sup>452</sup> Current provisions for appeals under the Immigration and Asylum Act 1999 can be read at <http://www.legislation.hmso.gov.uk/acts/acts1999/90033--d.htm#56>

<sup>453</sup> Neither the Asylum Policy Unit of the Immigration and Nationality Directorate or ILPA or the immigration lawyer met on 17 May 2002 were aware of a single appeal case processed under the appeals legislation rules.

<sup>454</sup> Clause 66(2)(d) of the 2001 Nationality, Immigration and Asylum Bill states that appeals will not be possible when the applicant "is seeking to enter or remain in the United Kingdom for a purpose other than one for which entry or remaining is permitted in accordance with immigration rules."

<sup>455</sup> The extremely limited use of judicial review is illustrated by the fact that only one case concerning an application lodged abroad has apparently been published so far. This decision concerned a group of Sri Lankan asylum seekers in transit in Oman, who had unsuccessfully tried to embark on a plane to the UK and subsequently applied for asylum at the British embassy. Their request for judicial review of the Home Office's negative decision was rejected, and the group was later returned to Sri Lanka by the Omani authorities, see *R v Secretary of State for the Home Department ex parte Robert Denzil Sriharan and Benet Marianayagam*, 24 February 1992. In two other cases, one of them concerning claims lodged at the UK embassy in Cyprus, the UK authorities conceded before any ruling was made.

<sup>456</sup> Interview with the Asylum Policy Unit on 16 May 2002.

#### **6.1.6.9 Applicants' Physical Safety during the Procedure**

According to the Home Office, the UK government has no responsibility for ensuring the safety of persons applying for asylum from abroad. Accordingly, an asylum seeker will not be protected by the representation while her application is being processed. Any applicant at risk would normally be referred to the UNHCR by the representation.

There is no specific or accelerated procedure for emergency cases. In principle, all cases forwarded to the Home Office should be examined within a processing time of four weeks. The authorities are not aware of any cases where the applicant has been subject to persecution whilst waiting for a decision on her visa application.<sup>457</sup>

#### **6.1.6.10 Statistics**

There are no official statistics documenting UK practices in the domain of Protected Entry Procedures. No information is available as to the number of persons who approach the UK representations abroad with the purpose of seeking asylum, since representations are not instructed to register all such cases. It is therefore not possible to know how many cases are directly referred to the local authorities or UNHCR or are rejected by the entry clearance officers following the interview.

The number of applications forwarded by the representations abroad to the Home Office is not known either, but it is estimated to be less than 10 per year. Out of these, the number of positive decisions on entry clearance by the Home Office – although not precisely known – is deemed to be very low.<sup>458</sup>

#### **6.1.6.11 Relations with Other Procedures**

The UK runs a mandate refugee programme providing for approximately 100 cases per year. This programme is conducted without formalised agreement with UNHCR, although discussions are taking place to formalise a quota system.

Due to the requirement of having close family (or other) ties with the UK, the Protected Entry Procedure is obviously linked with the family reunion procedure. Being included in the Immigration Rules, the latter provides though for clearer rules and more legal and procedural safeguards than the Entry Protected Procedure, which is only mentioned in the Asylum Policy Instructions. As a result, most lawyers are accustomed to advising their clients to apply under the family reunion procedure rather than for asylum. This may be one of the reasons for the low number of asylum applications submitted from abroad.<sup>459</sup>

#### **6.1.6.12 Evaluation of the UK Protected Entry Procedure**

The UK Protected Entry Procedure is characterised by a relatively low degree of formalisation, as it is not regulated by the Immigration Rules. The representation enjoys a fairly large discretion and

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<sup>457</sup> Ibid. Reference was though made to a case where the brother of an Iraqi scientist was killed in Amman after he had had contacts with the UK embassy in Jordan. Interview with UNHCR BO London, 16 May 2002.

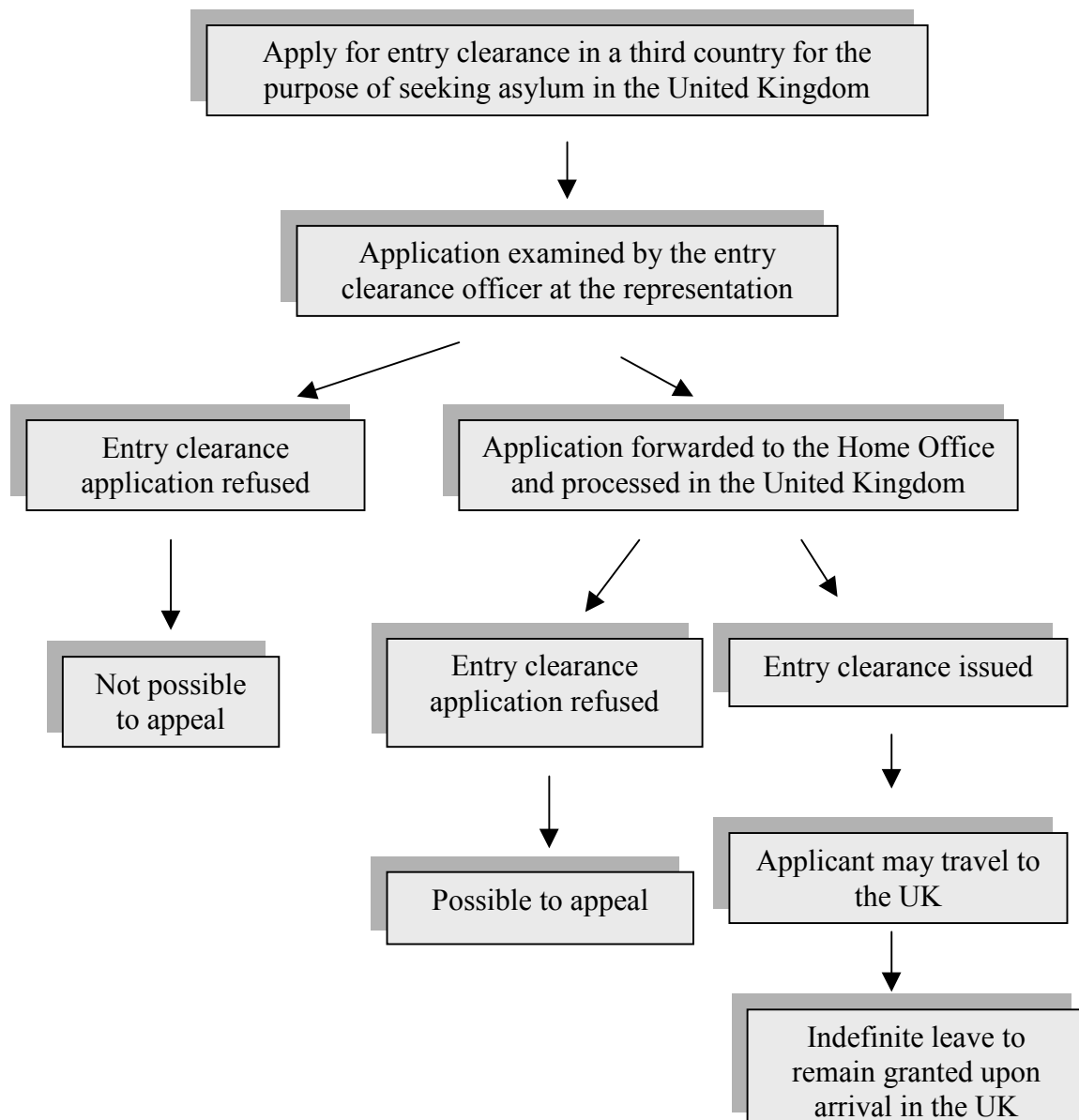
<sup>458</sup> Interview with the Asylum Policy Unit on 16 May 2002.

<sup>459</sup> Interview with ILPA and an immigration lawyer, 17 May 2002.

may reject applications without consulting the Home Office and without the applicant being able to appeal against such a refusal.

On the exclusionary side, it will be noted that the UK model caters for applicants in third countries only, and is limited to the Convention refugee category. The model features inter alia a close tie requirement, which is a further threshold to be passed by the applicant. On the inclusionary side, mention should be made of the possibility to appeal negative decisions made by the Home Office. The absence of statistics makes it difficult to evaluate practice in the UK, which appear to concern only an extremely limited number of persons.

#### 6.1.6.13 *Procedural Diagram*



## **6.2 Practice in States Not Operating a Formal Protected Entry Procedure**

### **6.2.1 Denmark**

#### **6.2.1.1 Legal Regulation and Current Practices of Protected Entry Procedure**

The possibility of submitting asylum applications at Danish consular and diplomatic representations abroad was introduced in the Danish asylum system by the Aliens Act No. 226 of 8 June 1983. The Protected Entry Procedure was later modified in 1992,<sup>460</sup> where a range of amendments was passed in order to increase the role of the representations in the processing of the applications. Eventually, the whole Protected Entry Procedure was abolished by Law No. 365 of 6 June 2002,<sup>461</sup> which brought considerable changes – most of them of a restrictive nature – to the existing Aliens Act. Since 1st July 2002, when the new amendments entered into force, it has no longer been possible to apply for asylum at Danish embassies and consulates.<sup>462</sup>

Although no longer functioning, the Danish Protected Entry Procedure has been included in this report because it did contain some interesting features, which differ from the procedures existing in other European countries.

The procedure's relevant legal provisions – of which Section 7(4) is the more important – are included in the Aliens Act:

#### *Section 7*

(1) Upon application, a residence permit will be issued to an alien if the alien falls within the provisions of the Convention relating to the Status of Refugees, 28 July 1951.

(2) Upon application, a residence permit will also be issued to an alien who does not fall within the provisions of the Convention relating to the Status of Refugees, 28 July 1951, but who, for reasons similar to those listed in the Convention or for other weighty reasons resulting in a well-founded fear of persecution or similar outrages, ought not to be required to return to his country of origin. An application as mentioned in the first sentence hereof is also considered to be an application for a residence permit under subsection (1).

...

(4) Subsections (1) and (2) apply correspondingly to an alien who is not in Denmark, if because of the alien's prolonged lawful stay in Denmark, of close relatives living in Denmark or of other similar attachment, Denmark must be deemed to be the country nearest to affording protection to that alien. The rule in the first sentence hereof does not apply to aliens staying in another EC country.

...

#### *Section 46 b*

(1) An application for a residence permit under section 7(4) will only be examined if the application contains information on the applicant's ties with Denmark.

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<sup>460</sup> Law No. 482 of 26 June 1992 amending the Aliens Act.

<sup>461</sup> Law No. 365 of 6 June 2002 amending the Aliens Act, Marriage Act and other Acts.

<sup>462</sup> This chapter is based on the content of the Danish chapter of the report "Safe Avenues for Asylum?" published by the Danish Centre for Human Rights and UNHCR in April 2002. The information was completed and updated through a questionnaire sent to the Ministry of Refugee, Immigration and Integration Affairs and by the Danish Refugee Council.

(2) The Danish diplomatic or consular representatives concerned shall see to it that the application satisfies the condition of subsection (1), and may refuse the application if this is not the case. A decision of refusal cannot be referred to another administrative authority.

### Section 53

(1) The Refugee Board comprises a chairman and a number of deputy chairmen and other members decided by the Minister of the Interior.

(2) When a case is tried before the Refugee Board, the Board consists of the chairman or one of his deputies and 4 other members, among these one member appointed by the Minister of the Interior, one member appointed after nomination by the Danish Refugee Council, one member appointed after nomination by the General Council of the Bar and Law Society, and one member appointed after nomination by the Minister of Foreign Affairs.

...

(4) Cases where the Danish Immigration Service has refused an application for asylum with reference to non-compliance with the conditions in section 7(4), can be considered by the chairman or one of his deputies alone.

...

### Section 53 a

...

(3) The Danish Immigration Service may, after having submitted the case before the Danish Refugee Council, resolve that the decision in a case, including a case concerning a residence permit pursuant to section 7(4), where the application must be considered manifestly unfounded, cannot be appealed to the Refugee Board.

...

### Section 56

The chairman of the Refugee Board or the person authorised by the chairman shall refer a case to be considered under section 53(2) or (4) to (6).

...

(4) The chairman of the Refugee Board or a person authorised by the chairman may refer a case to be considered under section 53(2) on the basis of written proceedings, if: -

...

(iii) the case concerns the issue of a residence permit under section 7(4), with reference to the conditions mentioned in section 7(1) or (2);

## 6.2.1.2 Earlier Experiences and Future Developments

The Protected Entry Procedure was introduced in 1983 as a rather inclusive model. Initially, Section 7(4) was intended to afford protection to persons submitting their application at a representation abroad provided that they fulfilled the requirements in Section 7(1) or 7(2)<sup>463</sup> and provided that Denmark would be considered as the first country of asylum in their case.<sup>464</sup> However, from the beginning, the close tie criteria of Section 7(4) – “*if because of the alien's prolonged lawful stay in Denmark, of close relatives living in Denmark or of other similar attachment, Denmark must be deemed to be the country nearest to affording protection to that alien*” – was interpreted by the Refugee Appeals Board in a restrictive way. In practice, only applicants who had close family members in Denmark were granted protection after submitting their application at a representation

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<sup>463</sup> Section 7(1) deals with Convention refugee status, while Section 7(2) provides for the granting of a *de facto* refugee status for other reasons similar to the one in the Refugee Convention. The *de facto* status was abolished in July 2002 and replaced by a new “protection status”.

<sup>464</sup> See Jens Vedsted-Hansen, *Retlige rammer og kriterier for afgørelsen af § 7, stk. 4-sager*, November 1989, and *Notat om vurderingstemaer i § 7, stk. 4-sager*, July 1992, regarding the relation between Section 7(3) and 7(4) of the Aliens Act, which both consists of the same two elements: connection with a country and need for protection (in Danish).

abroad.<sup>465</sup> As a result, the Danish Protected Entry acquired similar features to those of a family reunion procedure, although it still contained protection aspects. The latter, however, were given secondary role.

The procedure was amended in 1992 following dramatic raises in the numbers of applications lodged at Danish diplomatic representations abroad. From 1989 to 1990, the number of applications lodged at Danish representations indeed increased, with about 13.000 cases per year, reaching a total of 13.702 applications in 1990. Out of these, 12.564 claims were lodged by Afghans staying in Pakistan, due to a rumour amongst Afghan refugees that it was possible to obtain asylum in Denmark simply by applying at the embassy. However, the vast majority of these claims were rejected and only 30 Afghans were granted asylum on the basis of Section 7(4).<sup>466</sup>

The first amendment adopted in 1992, which led to the introduction of Section 46b in the Aliens Act, transferred partially the task of processing applications from the Immigration Service to the representations. According to this, the embassies were requested to verify whether asylum applications lodged abroad contained sufficient information on the applicant's connection to Denmark. If this was not the case, they had the authority to refuse the application without forwarding it to the Immigration Service in Denmark.

The second amendment, which was embodied in Section 53a(3) of the Aliens Act, made it possible to process applications submitted abroad under the manifestly unfounded procedure as is the case with in-country applications.

In May 2002, the new Danish government adopted a law amending many of the Aliens Act's provisions. Amongst other changes, the existing Protected Entry Procedure was fully abolished. This move was relatively unexpected, as this procedure had not been subject to public debate and, in practice, concerned a very limited number of persons (75 in 2001, 56 in 2000, see 6.2.1.12 below). Since 1 July 2002, when these changes entered into force, it has no longer been possible to apply for asylum at a Danish representation abroad.

### **6.2.1.3 General Principles of the Procedure**

- The Danish Protected Entry Procedure applied only in third countries and not in the country of persecution.
- The Danish model was not based only on protection considerations, but required also that the applicant had a close tie to Denmark. Emphasis was placed on this latter requirement to such an extent that the procedure acquired features similar to those of a family reunion procedure.

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<sup>465</sup> Although no statistical research have been made on this issue, the authorities indicate that the vast majority of the applicants actually referred to close family members in Denmark, while very few of them invoked non family-related reasons, such as a previous stay in Denmark or other types of links to Denmark. In this regard, the practice of the Appeals Board may have reflected the types of applications submitted to the Danish authorities, comments by the Ministry of Refugee, Immigration and Integration Affairs received on 16 September 2002.

<sup>466</sup> See Danish Immigration Service's 1992 Annual Report ("*Årsberetning 1992 – Direktoratet for Udlændinge*"), p. 24-27.



- As far as the protection need was concerned, the procedure was not merely restricted to cases falling under the Refugee Convention definition, but also included those fulfilling the criteria for *de facto* status.
- On the procedural side, the procedure was largely integrated into the general asylum system. Initially, all claims had to be examined by the Immigration Service as any in-country application. This left little room for discretion to the representations abroad. This was changed, however, in 1992, when the representations were given the task of screening the applications and to immediately rejecting – without the possibility of an appeal – those where the connection to Denmark was deemed insufficient.

#### **6.2.1.4 Submission of the Application**

The Danish procedure only allowed applications to be lodged at its representations in third countries, and not in the applicant's country of origin.<sup>467</sup> Both embassies and consulates served as locations where applications could be submitted. The applicant had to physically present herself at the representation to submit the request for asylum.

A person who approached the embassy in order to seek protection had to lodge an application for asylum, but no additional entry visa application was required.

#### **6.2.1.5 Registration and Initial Processing of the Applicant**

When approaching the Danish representation with a request for protection, the applicant was registered with a reference number. Then she was asked to fill in a standard application form, the purpose of which was to constitute the basis upon which the application for asylum was to be considered. The form used at embassies was almost identical with the one used for the territorial asylum procedure<sup>468</sup> and included questions on the applicant's identity, family situation, travel route, and reasons for fleeing. As a distinctive feature, the embassy form included specific questions on the applicant's situation in the third country as well as on her family members in Denmark and the nature of their relationship (nature of the family link, date of the most recent meetings, forms and regularity of contacts, financial support, dependency on the person in Denmark, etc.).

Normally, applicants were given the application form and asked to fill it in and bring it back to the representation a few days later. If needed, however, assistance was provided by the representation in filling in the form. The representation had no obligation to conduct a formal interview with the applicant, but an informal conversation usually took place upon delivery of the application form in order to check whether the relevant information had been included. Formal interviews could also be conducted at a later stage, at the request of the Immigration Service.

<sup>467</sup> The only other way of being admitted to Denmark as a refugee or on humanitarian grounds after having submitted the claim abroad was through the quota system. The quota system still continues unaffected after the 2002 amendments to the Aliens Act. The diplomatic or consular representations may always refer an applicant to the local UNHCR office in order for her to seek registration with the UNHCR. If the local UNHCR office reports the matter to the UNHCR Headquarters in Geneva, the latter may consider the merits of the case and possibly present it to the Danish authorities under the agreement concluded between Denmark and UNHCR concerning the resettlement of a yearly quota of refugees (500 persons) to Denmark.

<sup>468</sup> The asylum application form in Denmark is produced by the Immigration Service in approximately 20 different languages. With a few exceptions, it has to be filled by all asylum seekers. In addition, applicants – including those at embassies – have to fill in a standard application form for residence and/or work permit.

Staff assigned to Danish representations abroad, where they may have to deal with asylum matters, must receive specific training before deployment. In practice, ½ to 1 day of the formal training is dedicated to asylum matters.

#### **6.2.1.6 Processing of the Application by the Representation**

Applications lodged at Danish embassies and consulates were not sent directly to the Immigration Service for substantial examination, but had first to undergo an admissibility screening conducted by the representations.

According to Section 46b(2) of the Aliens Act, which was introduced in 1992, representations were required to verify whether the application satisfied the requirement of a close tie to Denmark. They had the authority to refuse a claim, if the applicant had not stated any such close ties, for example if she had only referred to a wish to live or to take an education in Denmark. Similarly, a claim could be immediately rejected by the representation, if the information about the close connection to Denmark was manifestly incorrect. This could be the case, for example, when a large number of applicants used the same person in Denmark as a reference, or when the name and address of the reference could be found in public circulation in the country where the application was lodged. However, if an applicant had previously been rejected once at the Danish border and expelled to a safe third country, this should be seen as a connection close enough in order for the Danish representation to forward the application to the Immigration Service.<sup>469</sup>

The representation had the obligation to ensure that the application contained meaningful information about the affiliation with Denmark, but it did not examine the case beyond that. If possible and necessary, the staff at the diplomatic or consular representation conducted an interview with the applicant. Such an interview was not conducted in order to assess whether the applicant met all requirements in the Danish legislation, but in order to establish or clarify the connection of the applicant with Denmark.

Based on these considerations, the representations took the initial decision on whether the application should be admitted and forwarded to the Immigration Service for substantial examination, or refused due to the absence of any or sufficient ties to Denmark. A refusal by the representation could only be based on the issue of the connection to Denmark, as it had no authority regarding the protection aspects of the claim.

#### **6.2.1.7 Processing of the Application by an Authority in Denmark**

All cases admitted by the representations were forwarded to the Danish Immigration Service, where the applicant was issued with a foreigner's number and registered in the Aliens File.<sup>470</sup> The Immigration Service, an autonomous body under the Ministry of Refugee, Immigration and Integration Affairs, is responsible for making first instance decisions in all asylum cases in

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<sup>469</sup> The Ministry of Foreign Affairs had issued instructions for the representations abroad, which included more detailed guidelines about the nature of the minimum connection required ("*Retningslinier*"–*Udtalelser i flygtningesager. Instruks for udenrigstjenesten – Flygtningesager*"). These are available at <http://www.um.dk> (in Danish only), accessed most recently on 13 September 2002. See also Noll and Fagerlund, *supra* note 6, p. 37.

<sup>470</sup> The Aliens File ("*Udlændingeregistret*") is a database of all foreigners who have a file with the Danish Immigration Service.

Denmark. As such, it had also the task of assessing and deciding upon applications submitted under the Protected Entry Procedure.

The Immigration Service processed the cases on the basis of the written information included in the file forwarded by the representations. The applicant's close family members (children, parents and siblings) living in Denmark were also asked to fill in a specific form and to provide information about their relationship to the applicant. Other references in Denmark were normally not asked to fill in such form. The Immigration Service could also decide that further information was needed from the applicant. In such a case, the representation was instructed to conduct an interview based on questions forwarded by the Immigration Service.

The applications submitted at Danish representations abroad were not prioritised in any way and were thus processed by the Immigration Service under the same conditions as in-country claims. Following amendments passed in 1992, they could also, depending on each case, be dealt with under the manifestly unfounded procedure, i.e. with shorter processing times and limited appeal rights (see below under sub-chapter 6.2.1.9).

When processing the claim, the Immigration Service first examined whether the requirement of a close tie to Denmark was fulfilled. The criteria applied were much stricter than those used by the representations abroad. Outside the close links required for normal family reunion (i.e. minor children of parents in Denmark or parents of minor children in Denmark), family links such as brother/sister or uncle/nephew had to be extremely strong to be deemed sufficient. In this process, the Immigration Service was looking at whether and for how long the applicant and her reference in Denmark had lived in the same household in the country of origin, whether they had fled together or not, whether they had frequent and regular communications (telephone, letters, visits), etc. Great importance was attached to any dependency link between the applicant and her reference, which could be demonstrated for example by the reference having regularly sent money to the applicant. Cases where the tie to Denmark was deemed insufficient were rejected without investigating the protection-related aspects of the claim.<sup>471</sup>

If the tie to Denmark was established and deemed sufficient, the Immigration Service then examined whether the applicant met the criteria to be granted refugee status in Denmark, either on the basis of the Geneva Convention (Section 7(1) of the Aliens Act) or under the Danish *de facto* regime (Section 7(2)).<sup>472</sup> Unless there were exceptional circumstances, the Danish authorities were only looking at the protection-related aspects in the applicant's country of origin and not in the third country.

Like in-country asylum seekers, applicants abroad were not entitled to free legal aid during the first instance procedure before the Immigration Service, but only to free counselling available from the Danish Refugee Council (DRC). In practice, the DRC could not provide such counselling to the applicants themselves, but was able, in some cases, to assist their referents in Denmark. Representations abroad were usually able to provide interpretation services to the applicants in the language of the country where they were located as well as in English.

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<sup>471</sup> The practice established by the Immigration Service not to examine the protection aspects of the claim when the link to Denmark was not deemed to be sufficient, was validated by the Danish Ombudsman in an opinion dated 28 April 1993.

<sup>472</sup> Supra note 463.

When the Immigration Service took a positive decision, the representation was instructed to issue an entry document to the applicant in order to facilitate her travel to Denmark. Depending on the circumstances, this could be in the form of a visa and/or a *laissez-passer*.

#### **6.2.1.8 Appeals against Decisions made by the Representation**

The decisions made by the representation to admit an application and to forward it to the Immigration Service or to refuse it were notified to the applicant either immediately during the conversation/personal interview or later in writing. The notification was made in the applicant's language if possible, otherwise in the language of the country where the representation was located, or in English.

There was no formal procedure for appealing against negative decisions by the representations based on the lack of connection with Denmark. However, as the representation always stated the reasons in its decision, the applicant could easily approach the representation again, and her claim would be forwarded to the Immigration Service, if she was able to demonstrate that she met the required conditions. Another way of challenging a rejection by the representation was to approach the Ministry of Foreign Affairs in Copenhagen, which would then consider the matter. There was, however, no special form or procedure in that regard.

#### **6.2.1.9 Appeals against Decisions made by Authorities in Denmark**

The Immigration Service's decision on the asylum claim was forwarded to the Danish representation, which then was responsible for notifying the applicant. This was done either in writing or orally. In the case of a negative decision the applicant was informed about the reasons of the rejection. If the decision was made in English or another main language, the applicant would receive a copy of the decision. If it was made in Danish, the representation was instructed to orally notify the applicant about the reasons for the decision. If the applicant insisted on a written decision within 14 days of receiving the notification, she would be given a written decision, including the reasons for the refusal.

It was, in principle, not possible to lodge an appeal with the Refugee Appeals Board against negative decisions made under the manifestly unfounded procedure. However, such decisions had to be forwarded to the Danish Refugee Council (DRC) and reviewed by one of its lawyers. The DRC examined the case on the basis of the written file received from the Immigration Service. No interview with the applicant was possible, but the DRC could, if necessary, contact the applicant's references in Denmark. If the DRC agreed with the Immigration Service's opinion, the decision became final. But if it disagreed, the DRC had the right to 'veto' the initial decision and the case was then automatically referred to the Refugee Appeals Board for a full appeal procedure.<sup>473</sup>

Negative decisions made under the normal determination procedure could be appealed to the Refugee Appeals Board. Unlike the in-country procedure, where negative decisions are automatically brought to the Appeals Board, applicants abroad had to lodge an appeal with the

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<sup>473</sup> The Danish Refugee Council's 'veto right' was introduced as a legal safeguard since the manifestly unfounded decisions cannot, in principle, be appealed to the Refugee Appeals Board. After the abolishment of the embassy procedure in 2002, this 'veto right' still applies to manifestly unfounded decisions made under the in-country procedure.

Board.<sup>474</sup> The representation had, however, an obligation to inform the applicant about the possibility of appealing the case, provided that the application had not been rejected as manifestly unfounded.

Until recently, the Refugee Appeals Board was composed of a professional judge, acting as chairman, and four board members nominated by the Ministry of Foreign Affairs, the Ministry of Interior, the Danish Refugee Council and the Danish Bar Association. From 1<sup>st</sup> July 2002, the number of members was reduced to three, as the Danish Refugee Council and the Ministry of Foreign Affairs are no longer part of the Board.<sup>475</sup>

If the appellant's connection to Denmark was obviously not sufficient, the Chairman of the Appeals Board had the possibility to decide on the case alone and on the basis of the file only. Otherwise, the decision was taken, as in the ordinary asylum procedure, by a full Board of five members following a hearing. The chairman had also the possibility of referring a case to a full Board without a hearing. In such a case, the decision was taken on the basis of written proceedings only. In all cases, the appellant was provided with a lawyer paid for by the Danish State. When a hearing took place, the applicant was represented by her lawyer. Occasionally, the Board could also decide to hear the applicant's references living in Denmark.<sup>476</sup> Decisions by the Refugee Appeals Board are final and cannot be further appealed.<sup>477</sup>

In practice, most cases that were appealed to the Refugee Appeals Board had been rejected by the Immigration Service due to the applicant's lack of sufficiently close connection to Denmark. When the Appeals Board disagreed with this, the initial decision was revoked and the case referred back to the Immigration Service for an assessment of the protection issue and a decision on whether refugee status should be granted or not. However, the Appeals Board could also decide upon the case without referring it back to the Immigration Service, if it was obvious that the applicant fulfilled the requirements to be granted protection in Denmark.

#### **6.2.1.10      *Transfer to Denmark***

Diplomatic or consular representations instructed by the authorities in Denmark to issue a visa or an entry document to an applicant following a positive decision under Protected Entry Procedure had no authority to refuse doing so. The representations usually helped applicants without passport or travel documents by issuing a *laissez-passer*, valid for six months.<sup>478</sup>

Practicalities of the departure to Denmark (airfares, booking, transit formalities if needed, reception in Denmark, etc.) were organised by the DRC, under an agreement with the Danish authorities, in

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<sup>474</sup> Section 53a(2) of the Aliens Act provides for an automatic appeal in cases where the Immigration Service takes a negative decision regarding an alien "*staying in Denmark*". *A contrario*, this does not apply to aliens outside Denmark.

<sup>475</sup> Law No. 365 of 6 June 2002 amending the Aliens Act, Marriage Act and other Acts.

<sup>476</sup> The details of the appeals procedure are outlined in Articles 56(4)(iii) and 53(4) of the Aliens Act.

<sup>477</sup> Until 1997, it was possible to file a complaint against the Appeal Board's decision with the Ombudsman. The latter did not look at the facts of the case but only at whether the administrative rules and principles had been applied adequately. The Ombudsman could not overrule a decision, but only issue an 'opinion', which usually was taken into consideration by the authorities. Several of such 'opinions' were issued regarding cases under Section 7(4) of the Aliens Law (see "Flygtningenævnets virksomhed, Formandskabets beretning, 1 January 1992 – 30 June 1995, p. 507). In 1997, a new Ombudsman Law severely restricted the possibility of involving this organ in asylum cases.

<sup>478</sup> The current relevant legal provisions are to be found in Chapter 3 of Decree No. 181 of 20 March on Foreigners' Access to the Country.

co-operation with IOM. All travel costs were paid by the Danish State. The staff of the representation was normally not involved in this.

#### **6.2.1.11 Applicants' Physical Safety during the Procedure**

As a rule, applicants had to wait in a third country until a decision has been made on their application, as there were no formal procedures allowing them to be transferred to Denmark earlier. There is no specific humanitarian visa regime allowing for immediate evacuation either.<sup>479</sup>

However, Danish diplomatic or consular representations may always refer an applicant to the local UNHCR office in order for her to seek registration with the UNHCR. If the local UNHCR office forwards the case to UNHCR Headquarters in Geneva, the latter may consider presenting a request to the Danish authorities for the admission of that person under the resettlement agreement between Denmark and UNHCR. This agreement provided for a quota of refugees to be accepted in Denmark each year. It is possible for the Danish authorities to process an urgent resettlement request submitted by UNHCR within a few days only.<sup>480</sup>

#### **6.2.1.12 Statistics**

While there are no statistics on how many applications were rejected at the Danish representations due to a lack of connection with Denmark, statistics on the numbers of applications accepted and forwarded by the representation, as well as positive and negative decisions by the Immigration Service and number of appeals and reversed decisions after appeals are very detailed. Table 7 below gives an overview of the available statistics in the Danish Protected Entry Procedure between 1997 and 2001.

The three largest nationality groups applying for asylum at Danish representations abroad were Afghans, Iraqis and Somalis. Between 1998 and 2002, the three Danish representations where most asylum applications have been lodged were in Islamabad (Pakistan), Tehran (Iran) and Nairobi (Kenya).

	1997	1998	1999	2000	2001
Number of cases admitted by the representations abroad and forwarded to the Immigration Service	477	380	562	2.658	1.933
Number of positive decisions by the Immigration Service*	54	34	33	56	75
Number of negative decisions by the Immigration Service	1.218	1.127	696	1.864	1.124

<sup>479</sup> Before the Protected Entry Procedure was introduced, it was anticipated that visas could be submitted to persons in immediate need of protection due to political persecution. It is unknown, however, whether visas have been issued due to such an urgent need, see Kim U. Kjær, *Den retlige regulering af modtagelsen af asylansøgere i en europæisk kontekst* (The Legal Regulation of the Reception of Asylum Seekers in a European Context), Jurist- og Økonomforbundets Forlag, Copenhagen 2001.

<sup>480</sup> The current quota is 500 persons per year. The Danish resettlement program has remained unchanged following the 2002 amendments to the Aliens Act.

	1997	1998	1999	2000	2001
Number of cases appealed to the Refugee Appeals Board	184	108	58	33	n.a.
Number of reversed decisions after appeal**	16	6	3	13	21

**Table 7 - Statistics Regarding the Protected Entry Procedure – Denmark**

\* includes both Convention and *de facto* status

\*\* includes cases where the Appeals Board found that the link to Denmark was sufficient, but referred the case back to the Immigration Service for a further decision.

In practice, the number of persons actually granted refugee or *de facto* status and allowed to come to Denmark after having applied from abroad was very limited (75 in 2001, 56 in 2000).

### **6.2.1.13 Financial costs**

It is difficult to calculate the costs of the Protected Entry Procedure, since it would involve ascribing a value to a range of services and material items and integrate these figures in the total amount of costs. However, the three tables below include calculations made by the Immigration Service as to the expenses linked to the Protected Entry Procedure. In order to facilitate comparisons, expenses met to process all asylum cases are also mentioned. Finally, a third table shows the costs linked to the reception system (accommodation, benefits, etc.). These costs do not relate to the Protected Entry Procedure, as applicants abroad do not receive any material or financial assistance from Denmark.

Table 8 shows the expenses of the Immigration Service with regard to cases examined under the Protected Entry Procedure (Section 7(4) of the Aliens Act)

<i>Expenses of the Immigration Service regarding Section 7(4) cases</i>					
(2002 price level)	1997	1998	1999	2000	2001
Section 7(4) - Total expenses (1.000 DKK)	1.346	916	891	1.880	2.078
Section 7(4) - Activities	754	605	578	1.811	1.080
Section 7(4) – Expenses per asylum seeker (DKK)	1.785	1.514	1.542	1.038	1.924

**Table 8 - Expenses for Protected Entry Procedure Cases – Denmark**

Table 9 shows the total expenses of the Immigration Service for processing asylum claims, including the processing of Protected Entry Procedure cases.

<i>Total expenses of the Immigration Service for processing asylum cases</i>					
(2002 price level)	1997	1998	1999	2000	2001
Processing of asylum claims (million DKK)	42.7	39.3	36.2	42.0	46.4

**Table 9 - Expenses for Processing all Asylum Claims – Denmark**

Table 10 shows the total expenses of the Danish reception system, including accommodation costs, maintenance costs of the accommodation facilities and social benefits per asylum seeker in Denmark and as a whole.

<i>Total expenses for the reception system</i>					
(2002 price level)	1997	1998	1999	2000	2001
Accommodation (1.000 DKK)	89.8	83.2	81.8	81.0	82.8
Maintenance of the accommodation system (1.000 DKK)	12.1	8.4	8.2	8.2	10.8
Single benefit payments (1.000 DKK)	23.0	23.4	22.5	26.2	26.2
<b>Total expenses per asylum seeker</b>	<b>124.9</b>	<b>115.0</b>	<b>112.5</b>	<b>115.4</b>	<b>119.8</b>
Number of accommodated asylum seekers	4.437	4.583	5.587	8.145	7.832
<b>Total expenses for the asylum procedure (million DKK)</b>	<b>554</b>	<b>527</b>	<b>629</b>	<b>940</b>	<b>935</b>

**Table 10 - Total Expenses for the Asylum Reception System - Denmark**

The above figures seem to clearly indicate that the overall costs borne by the Danish authorities for processing an asylum claim lodged abroad are drastically lower than those related to a claim submitted inside the territory. The difference appears to be mainly due to the absence of accommodation and accommodation-related costs when the applicant is abroad.<sup>481</sup>

#### **6.2.1.14 Evaluation of the Danish Model**

The Danish procedure, abolished in July 2002, was characterised by a relatively high degree of formalisation. It was based on law, and attempts had been made to interlink it with ordinary asylum procedures, including the special track for manifestly unfounded cases. In this context, the representations abroad had been given – initially – very little margin of discretion, since all cases had to be forwarded to the Immigration Service in Denmark.

This feature was however altered in 1992 when the Danish authorities, faced with a strong increase in the number of embassy applications, gave the representations the task of screening applications and rejecting – without possibility for an appeal – those lacking the necessary connection with Denmark.

Appreciating the inclusive dimension of the Danish procedure, an observer will notice that it could cover Convention refugees as well as *de facto* refugees, thus making very little difference between in-country and embassy cases as far as the protection aspects were concerned. Also, it has to be welcomed that an appeals system was available for cases forwarded by the representations.

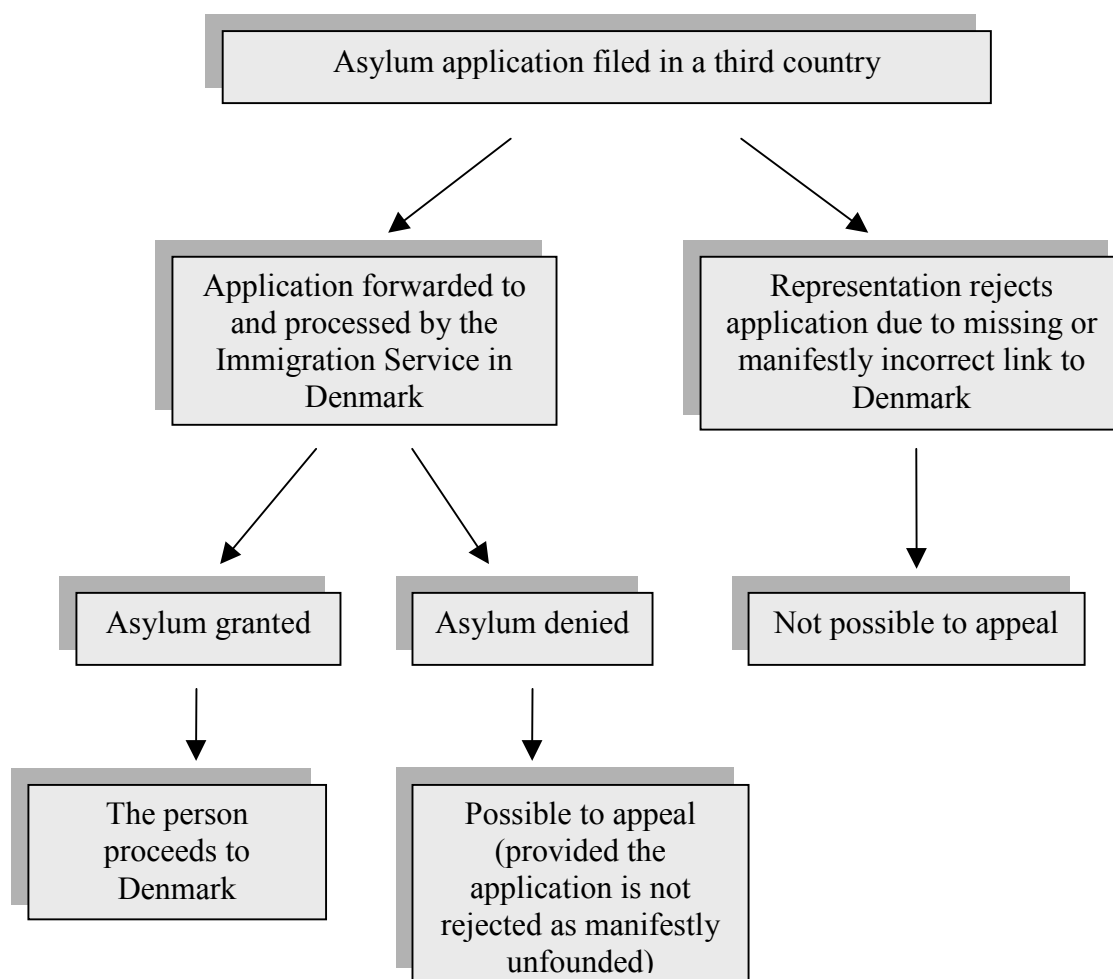
<sup>481</sup> The overall costs for processing a claim inside the territory (including both accommodation costs and the Immigration Service's expenses spent on in-country applications) in 2001 amounted to approximately 120.000 DKK compared to 1,924 DKK for an applicant abroad (authors' calculations based on the figures provided by the authorities). Although the statistics given by the authorities on embassy cases do not cover all expenses (costs incurred at embassies or transfer costs are, for example, not mentioned), there is a clear difference of costs, in the Danish case, depending on whether the application is submitted inside or outside the country.



There were a number of limitations, though. First, it will be noted that the Danish Protected Entry Procedure only extended to third countries. Second, the interpretation by the Refugee Appeals Board was very restrictive, in particular concerning the demand for a close connection to Denmark. In practice, only very close family connections led to asylum when the application was lodged at an embassy. As a result, the Danish model remained largely concerned with family reunification. Third, the applicant had to wait out the final decision on the territory of the state where the application was filed, which tilted the balance of risk-taking to her detriment.

In practical terms, mainly due to the requirement of strong family connection in Denmark, the Danish system was able to extend protection only to a very limited number of applicants.

#### **6.2.1.15 Procedure Diagram**



## 6.2.2 Other EU Member States and Norway

Presently, nine of the 15 EU Member States are not operating a formalised Protected Entry Procedure.<sup>482</sup> This group of states comprises Belgium, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Portugal and Sweden. To those states Denmark would need to be added, as it has recently abolished its formalised Protected Entry Procedure. As a detailed review of its practices was deemed useful for the purposes of this study, it has been dealt with in a separate chapter.<sup>483</sup> Given its existing cooperation with the EU, Norway has also been included in the study, and qualifies under this heading, as it does not operate a Protected Entry Procedure.

Although the named states do not have a formalised procedure for asylum applications submitted at embassies, a number of them do offer some kind of exceptional assistance to persons in immediate need of protection. Finland, Sweden and Greece are the only EU countries where the authorities claim not to offer any possibility of assistance in exceptional cases, neither in a formal nor in an informal way.

The Refugee Advice Centre, a Finnish NGO assisting refugees, responding to the questionnaire with regard to the Finnish procedure, was however aware of a few cases where persons in need of protection have been issued an entry visa by a Finnish representation, and upon arrival in *Finland* submitted an asylum application to the Finnish authorities. Due to the small number of such cases, the NGO was hesitant to give more detailed information.

Also the Swedish NGO, Caritas, responding to the questionnaire, claims that *Sweden* may assist, in individual cases and on an exceptional basis, persons in serious and urgent need of protection. In some cases high-profile persons have been issued with entry visas to Sweden. The Chilean crisis was pointed out as an illustrative example. In the 1970s, Swedish representations played a vital role in efforts to provide protection to Chileans fleeing persecutions after Salvador Allende's overthrow. Numerous Chileans were issued with entry visas to Sweden, and upon arrival granted asylum.

Even *Greece* seems to have exceptionally admitted persons in need of protection to its territory through Greek representations abroad. Two Kurdish aides of PKK leader Abdullah Öcalan, were assisted by the Greek embassy in Nairobi to reach Greece where they were offered asylum.<sup>484</sup>

Belgium, Germany, Ireland, Italy, Luxembourg, Portugal and Norway do offer protection to persons approaching their representations abroad in exceptional cases and on an informal basis. The practice of each of the seven countries is briefly presented below.

Although Belgian law clearly states that asylum applications only can be submitted at immigration offices inside Belgium, at the border (air- and seaports), and to the director of closed centres and/or prisons, persons in need of protection may find their way to *Belgium* through Belgian

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<sup>482</sup> The information included in this chapter is based on the answers received from EU Member States and Norway on the questionnaire sent within the framework of the feasibility study to the governments and NGOs working within these countries.

<sup>483</sup> See Chapter 6.2.1.

<sup>484</sup> CNN, *Greece offers asylum to Ocalan aides smuggled from Kenya*, February 26, 1999, available on <<http://www.cnn.com/WORLD/europe/9902/26/ocalan/>>, accessed on 27 August 2002. Furthermore 2 relatives of an Iraqi resident in Greece were assisted by the Hellenic Embassy in Turkey to enter Greece on humanitarian grounds [information received from the Greek Council for Refugees, 11 September 2002].

representations in exceptional cases. The officer at the representation may add a note to the official visa request submitted by a person who e.g. is known for her political activities. The representation does not have the authority to decide on such cases itself, but has to consult with the authorities in Belgium. A person admitted through this informal procedure will receive a positive answer on her visa request, and will be given information on the Belgian asylum procedure. The asylum application will be formally submitted once the person has arrived in Belgium.

Exceptionally, the diplomatic representations of *Germany* may assist persons in need of protection who approach them.<sup>485</sup> Protection can be granted to persons in specific individual cases where there is an unavoidable and serious threat to this person's life and limb, presumably based on political persecution.<sup>486</sup> An additional prerequisite is that the person in question has an obvious connection to Germany, e.g. she has made special contributions to the benefit of Germany, she has family members in Germany, or she has a specific interest in one of the Federal Länder or in the Federal Republic of Germany. Otherwise put, this discretionary mechanism contains a close link-criterion. In such exceptional cases, the representations do not themselves have any decision-making power. Rather, if it were to recommend admission for the person, it would give a comprehensive report and thoroughly state and evaluate all reasons in favour or against admission to Germany. In this context, it must also report on family members and the expected costs of the stay in Germany. The report should enable the Foreign Office to deal conclusively with the question of admission in co-operation with the competent authorities, i.e. the Federal Ministry of the Interior<sup>487</sup> or the Ministry of the Interior of a Federal Land<sup>488</sup>, whose approval is necessary for issuing a visa. As an effective asylum application can only be lodged within German territory, the temporary protection thus granted consists of issuing an entry visa to the applicant. Once the person concerned has arrived in Germany,<sup>489</sup> she is free to submit an asylum application to the German authorities.

*Ireland* maintains the discretion to assist, in exceptional cases and on an informal basis, persons who approach Irish representations seeking asylum. No legislative or administrative provisions exist, which would allow persons who are outside Ireland to be granted entry to Ireland for the purpose of seeking asylum. A decision to assist a person to travel to Ireland to seek asylum, would be at the discretion of the Department of Foreign Affairs and would be dependent on the assessment of the representation concerned, in consultation with the relevant Headquarters Sections of that Department. Likewise, the level and type of assistance would be at the discretion of the Department of Foreign Affairs.

Even though *Italy* does not provide for a possibility to apply for asylum at its representations abroad, the Italian representations may assist persons in need of protection who approach them, in exceptional, serious and urgent cases. The representations have some discretionary power to decide in such cases, but they always keep in touch with the national authorities in Italy. A person who approaches an Italian representation abroad and who is considered to be in need of urgent protection will be assisted by the representation in reaching Italy. When the person arrives at the Italian border, she may apply for asylum. Normally, representation staff do not engage in the practicalities of the departure, but in specific cases they might give some kind of support.

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<sup>485</sup> Formal instructions to representations by the Ministry are said to exist, but are not in the public domain. Authors' interview with Prof. Kay Hailbronner, 24 May 2002.

<sup>486</sup> The legal basis for such measures are Sections 30 and 33 of the Aliens Act.

<sup>487</sup> Under Section 30 of the Aliens Act.

<sup>488</sup> Under Section 33 of the Aliens Act.

<sup>489</sup> The person concerned will normally be given the necessary assistance for the journey to Germany by the representation abroad.

Worthy of note is the introduction of a provision on a Protected Entry Procedure in the Italian draft law on asylum proposed to the parliament during the legislative period, which ended in March 2001. According to this proposal, Italian diplomatic and consular representations abroad were to be authorised to receive asylum applications from persons in need of protection. The provision on a Protected Entry Procedure was, however, not included in the final version of the new Italian asylum law.<sup>490</sup>

Although the *Luxembourg* law on asylum procedures clearly states that applications for asylum must be presented 'at the border' or 'inside the country', there seems to be an opening for exceptional cases. If a representation is approached by a person asking for protection in Luxembourg, the representation will deal with the case on an individual basis and in full consultation with the competent national services. A decision to assist such a person would be at the discretion of the Department of Foreign Affairs.

Of all asylum applications submitted to Portuguese representations abroad, the great majority are sent to the representations by mail. On a case-by-case basis, it is possible for the representation to issue an entry visa, enabling the protection seeker to travel to *Portugal*. Portugal has had no experience of people entering its diplomatic representations asking for protection. If such a situation were to occur, the case would be analysed on an individual basis. On the basis of an opinion of the Aliens and Borders Service on the credibility of the case and the reasons invoked, it would be possible to issue an entry visa. This would facilitate access to the Portuguese asylum procedure for the applicant as soon as she arrives at the Portuguese border, or after entering Portuguese territory.

Furthermore, a number of countries offer the possibility of submitting an asylum claim at their representations abroad, as their national laws do not allow representations to reject such applications immediately. Sweden and Norway accept such applications, even though they are always rejected by the relevant refugee determination authority, as the applicant does not fulfil the requirement of being within the host country or at its borders. This however is bound to mislead applicants, who might believe that the formal possibility to apply for protection at embassies reflects a genuine chance to be granted protection. Under these circumstances, the authors believe that the formal possibility to apply for asylum at Swedish and Norwegian representations abroad should be abolished. It would spare the applicant from the waiting period and the disappointment of not being admitted, and save valuable time for staff at the representations and for determination authorities.

A decision by the Swedish Parliamentary Ombudsman (*Justitieombudsmannen*) lays down that Swedish representations abroad are obliged to accept asylum applications submitted at the representations and to forward them to the Swedish Migration Board.<sup>491</sup> Chapter 3 Section 7 of the Swedish Aliens Ordinance supports this decision, as it states that representations abroad are always obliged to accept requests for residence or work permit submitted by a person outside Swedish territory. The main rule is, however, that protection seekers have to be on Swedish territory in order

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<sup>490</sup> Senato – Disegno di legge 203 (testo presentato); available at <<http://www.parlamento.it/att/ddl/a0203p.htm>>, accessed on 23 July 2001; Rifugiati News, available at <<http://www.stranieriinitalia.it/rifugiati/ddl.html>>, accessed on 23 July 2001.

<sup>491</sup> Stf Justitieombudsmannen Leif Ekberg, *Anmälan mot Sveriges ambassad i Bonn/Berlin angående handläggning av ansökningar om asyl/uppehållstillstånd*, 2000-02-15, Dnr 3145-1999. See also Utrikesdepartementets Cirkulär till samtliga ambassader och karriärkonsulat samt handelskontoret i Taipei [Circular from the Foreign Ministry], *Handläggningen av ansökningar om asyl/uppehållstillstånd*, 2000-03-09, Nr. 16, R 191.

to be granted asylum, resulting in only negative decisions on applications submitted at representations. As a practical illustration of the misleading effects, this mesh of norms has led to 13.000 applications for protection-related visas being filed with the Swedish embassy in Islamabad during one year in 2000-01,<sup>492</sup> slowing down processing to a point where *bona fide* family reunification candidates will have to endure years of processing before a decision will be taken.

Even though it is possible to submit an asylum application at a Norwegian diplomatic representation abroad,<sup>493</sup> and even though this application will be forwarded to the Directorate of Immigration in Norway, the application will never be assessed on its merits. Rather, it will be rejected by the Directorate, as the Norwegian Immigration Act Section 17 requires that asylum applicants have to be either within Norwegian territory or at the Norwegian border in order to have a right to asylum in Norway. Currently it is being discussed whether the diplomatic representations abroad should be competent to formally reject asylum applications instead of forwarding them to the Directorate of Immigration.

It should be noted, however, that Norwegian diplomatic representations abroad may suggest resettlement of a person in need of protection. Normally this is done after a locally represented human rights organisations has identified persons in need of protection, and asked *Norway* to offer protection. The diplomatic representation will forward necessary documentation to the Directorate of Immigration for assessment. Refugees offered resettlement in Norway are normally persons staying in a third country; candidates still present in countries of origin are accepted only in exceptional cases.<sup>494</sup>

Based on this synopsis, it is possible to draw the conclusion that all EU states, as well as Norway, do offer at least a minimal possibility of providing protection through their representations abroad. Norway does so by allowing the representation to suggest resettlement for persons in need of protection. Although the Finnish, Swedish and Greek authorities officially deny that informal and exceptional assistance is available through their representations, NGO testimony and media reports indicates that such assistance is given in exceptional cases. The bottom line appears to be that all EU Member States as well as Norway and Switzerland are prepared to assist persons in need of protection reporting at their representations: a majority chooses to keep an informal and exceptional channel open, while a minority has opted for a formalised and predictable system.

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<sup>492</sup> FARR [Flyktinggruppernas och Asylkommittéernas Riksråd], *notis i tidsskriften Artikel 14 – Nätupplagan – Nummer 3/01*, 01-09-05, available at <<http://hem.passagen.se/asylum/arkiv.html>>. The Swedish Migration Board [Migrationsverket] has estimated the number of applications submitted by Afghani asylum seekers at the Swedish embassy in Islamabad to 10 – 15.000 between summer 2000 and May 2001. See *Migrationsverket, Nyheter* 2001-05-15, available on <[http://www.migrationsverket.se/inter\\_sivnews/article.html?id=3751&view=1](http://www.migrationsverket.se/inter_sivnews/article.html?id=3751&view=1)>, accessed on 30 June 2001.

<sup>493</sup> In 2001 the number of applications submitted abroad was 1.452. This can be compared with the 14.782 applications submitted in Norway.

<sup>494</sup> This possibility was used by the Norwegian government as a partial compensation, when the introduction of visa requirements for Colombian nationals blocked access to Norwegian territory for bona fide cases in 1999. Some NGOs operating in Colombia could refer cases to the Norwegian Immigration authorities, through the Norwegian Ministry of Foreign Affairs, with a request to allowing them entry on protection-related grounds. This arrangement is used very restrictively, and until now only five or six cases have found protection in Norway through this channel.

## **6.3 Practice in Three Non-EU Resettlement Countries**

### **6.3.1 Australia**

#### **6.3.1.1 Legal Regulation and Current Practices of the Australian Resettlement Programme**

With its isolated location, Australia has not experienced the same numbers of spontaneous asylum seekers as many of the Western European countries. Resettlement has therefore turned out to be the natural way of sharing the refugee burden, and it makes up the major part of Australia's Humanitarian Program. The other part caters for asylum seekers arriving spontaneously on Australian territory. Persons determined to be refugees might be resettled to Australia through the Refugee Program, which is one component of the offshore Humanitarian Program. Others, not falling under the refugee definition, but still in relative need of protection, may be resettled through the Special Humanitarian Program.<sup>495</sup>

Contemporary Australian refugee policy is strongly preoccupied with the augmenting number of spontaneous arrivals, in particular with the increasing number of asylum seekers arriving after secondary movements (although total numbers remain unimpressive compared to most other asylum countries in the North). The marked increase has led the Australian government to adopt targeted measures for controlling and dissuading spontaneous arrivals. One package of measures aims at discouraging spontaneously arriving protection seekers from entering Australia irregularly. In addition, spontaneous arrivals shall be dissuaded through a stark reduction of their benefits in comparison to resettlement cases.

The Australian policy for refugee protection is inspired by what could be described as a queue model. The government is attempting to discourage spontaneous protection seekers from entering Australia without a permit, i.e. using illegal means of migration.<sup>496</sup> The rather differentiated resettlement policy must be seen in this context – namely as an entry point to a queue system, which attempts to style resettlement as an exclusive way into the asylum procedure. This approach differs starkly from that taken by European countries, which regard Protected Entry Procedures as a complement to, and not a replacement for a system based on territorial applications for asylum. To be sure, the Australian resettlement procedure features single aspects that could be transferred into a future European Protected Entry Procedure. However, the Australian refugee policy as a whole, and the Pacific Solution in particular, contains problematic elements which have evoked wide-spread

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<sup>495</sup> The information included in this chapter is based on the content of the Australian chapter of the report “Safe Avenues to Asylum?”, published by the Danish Centre for Human Rights and UNHCR in April 2002. The information has been completed and updated by information available in articles and on official websites of the Australian government and relevant NGOs.

<sup>496</sup> One attempt to achieve this goal is the dissemination of information pamphlets by the Australian authorities in Indonesian hostels typically hosting transiting protection seekers on their way to Australia. This leaflet is illustrated with an octagonal stop sign and contains inter alia the following information in English, Arabic and Indonesian versions: “New Australian laws ensure that those attempting to enter Australia illegally by boat will never live in Australia. Illegal boat arrivals will have no right to apply for asylum under the Australian system.” The leaflet contains no information on the contents or effects of the prohibition of *refoulement* binding the Australian government. In the light of the actual practices under the Pacific Solution described below, the claim that illegal arrivals will never live in Australia is incorrect. Processing in the excised zones must be seen as part of “the Australian system”, which calls into question the veracity of the second sentence in the quote.

scepticism. As will be seen in the following, it would be technically inappropriate and legally problematic to import those into a European context.

General provisions relating to visas are available in the 1958 Migration Act. The 1994 Migration Regulations are, however, the primary body of legislation dealing with the offshore component of the Humanitarian Program. Apart from the Act and the Regulations, the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)<sup>497</sup> also provides advice to decision-makers, regarding the application of the main body of legislation to particular cases. This is generally referred to as policy advice. Such advice for the offshore Humanitarian Program is provided through the DIMIA Procedures Advice Manual (PAM3).

### **6.3.1.2 Earlier Experiences**

The Australian resettlement experience dates back to the 1930s, when 7.000 German Jews found a haven in Australia. After World War II Australia continued its practice of resettling refugees and people in humanitarian need. From the mid-1950s to the mid-1970s it was mostly persons escaping communist regimes in Eastern Europe who benefited from the Australian resettlement mechanism. As a consequence of the overthrow of the Allende Government in 1973, the Australian resettlement program was broadened, to include Chileans in need of protection. Beginning in the 1970s, persons fleeing persecution in the countries of Indo-China were also resettled to Australia, while resettlement from the Eastern European countries continued.<sup>498</sup>

In the early 1980s, case-by-case selection of refugees to be resettled in Australia was introduced at Australian diplomatic and consular representations abroad. Previous to this change, all selection of refugees had been made after UNHCR or IOM referrals only. In 1982, the Australian resettlement program was expanded, as the Special Humanitarian Program was set up to meet the needs of persons who did not meet the Convention definition of a refugee, but who were still in need of protection as they had experienced (or still were experiencing) substantial discrimination amounting to gross violations of human rights in their home country.<sup>499</sup> Generally this category has come to cover persons subject to human rights abuses, who do not fall under the international refugee definition, e.g. because they have not left their own country or they have been victims of gross discrimination rather than persecution. Also employees of Australian embassies who were experiencing difficulties have been resettled under this category.<sup>500</sup>

Since the end of World War II, close to 600.000 persons have been resettled under the Australian humanitarian programs. This constitutes 10 percent of all migrants arriving in Australia during this period.<sup>501</sup>

The following outline will give an overview of major caseloads resettled in Australia after World War II.<sup>502</sup>

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<sup>497</sup> The Australian Department for Immigration and Multicultural and Indigenous Affairs (DIMIA) was previously called the Department for Immigration and Multicultural Affairs (DIMA). This chapter contains referrals to both versions depending on whether the referred material was produced before or after the change of name.

<sup>498</sup> DIMA, *Refugee and Humanitarian Issues. Australia's Response*, October 2001, p. 11.

<sup>499</sup> Ibid.

<sup>500</sup> Glenn Nicholls, *Unsettling Admissions: Asylum Seekers in Australia*, Journal of Refugee Studies, Vol. 11, No. 1 1998, p. 68.

<sup>501</sup> DIMA, supra note 498, p. 11.

<sup>502</sup> Ibid.

- 170.000 Displaced Persons from Eastern Europe between 1947 and 1954,
- 14.000 White Russians from China between 1947 and 1985,
- 14.000 Hungarians after the 1956 uprising,
- Almost 6.000 Czechs after the Prague Spring of 1968,
- 18.000 Lebanese resettled after the 1975 Civil War,
- More than 155.000 Vietnamese since 1975,
- Some 38.000 from the countries of the former Yugoslavia since 1991,
- More than 1.600 from Sudan since 1996,
- More than 800 from Somalia since 1996, and
- More than 230 from Sierra Leone since 1999.

### 6.3.1.3 *Classes of Beneficiaries*

The Humanitarian Program consists of two components: the offshore component, which is open for offshore applicants in need of resettlement, and the onshore component catering for a possibility to apply for protection for those who have already entered Australia. The offshore component is divided into two categories, i.e. the Refugee Program and the Special Humanitarian Program. Applications falling under any of these two categories will be considered individually on the merits by officers working at DIMIA's overseas posts.<sup>503</sup>

Within the *Refugee Program*, persons staying outside their home country (or exceptionally still within their home country<sup>504</sup>), who are in need of resettlement due to persecution in their home country, are offered a possibility to apply for protection in Australia. While some refugees approach Australian representations abroad on their own initiative, most are referred by UNHCR, who makes a first assessment of the applicant and advises the Australian Government on her need for resettlement. Within the Refugee Program, three subsets exist. These are the Woman at Risk Program, the In-country Special Humanitarian Program and the Emergency Rescue Program.<sup>505</sup>

The *Woman at Risk Program* was established in July 1989, as a response to UNHCR priorities regarding the need for protection for refugee women. Women who

- are subject to persecution in their home country or registered as being 'of concern' to UNHCR, and
- live outside their home country and are without the protection of a male relative, and
- are in danger of victimisation, harassment or serious abuse because they are female

may be resettled in Australia under this category. It is required that the applicants under this subset whenever possible provide evidence that they have been registered as refugees with or are of concern to UNHCR. More than 3.800 persons have been accepted under the Woman at Risk category since its introduction. The planning figure for applicants accepted under this category has been maintained at 10.5% of the total allocation for the Refugee Program, i.e. 420 places each year. Women from the following countries have benefited from the Woman at Risk program: the former Yugoslavia, Afghanistan, Iraq, Sudan, Sierra Leone and Somalia.<sup>506</sup>

<sup>503</sup> Supra, at p. 13.

<sup>504</sup> See the outline for the In-country Special Humanitarian Program and the Emergency Rescue Program.

<sup>505</sup> DIMA, supra note 498, pp. 13-14.

<sup>506</sup> Supra, at p. 13; DIMIA, *Form 964i – Entry to Australia. Offshore Humanitarian Program – Seeking Asylum within Australia*, 2002, p. 1.



The *In-country Special Humanitarian Program* is a small program, comprising persons who are subject to persecution in their country of origin and who are still staying in that country. Only few places are available under this subset. Persons qualifying under this category are normally referred to an Australian representation by UNHCR or a major human rights organisation.<sup>507</sup>

The third subset, i.e. the *Emergency Rescue Program*, is catering for the need for protection of persons who are subject to persecution in their country of origin, and who are in urgent need of resettlement as their life or freedom is in immediate danger. Both persons in their country of origin and persons in a third country are admissible under this subset. Cases under the Emergency Rescue Program are approved by DIMIA in Canberra following a request for urgent assistance submitted by UNHCR via the UNHCR Regional Office in Canberra. Normally UNHCR referral is required to qualify under this subset.<sup>508</sup>

While the Refugee Program only admits persons who meet the criteria of the refugee definition (with a few minor exceptions), the *Special Humanitarian Program* has a broader scope and caters for the protection of persons who are subject to substantial discrimination amounting to gross violations of human rights in their country of origin and who are staying outside that country. Consequently, the program is open for persons who do not qualify as refugees, but who are still in need of resettlement for humanitarian reasons. An additional requirement in order to qualify under this program is that the applicant must be able to demonstrate some connection with Australia. Hence, the applicant must include a special form in her application (681 Refugee and Special Humanitarian Proposal) with a proposal from an Australian citizen, permanent resident or community organisation willing to support her resettlement application.<sup>509</sup> This form is available free from DIMIA offices.<sup>510</sup> The role of the proposers may include assistance with airfares, medical expenses and accommodation, as well as helping the applicant to gain access to the necessary services for successful settlement in Australia.<sup>511</sup> No subsets exist under the Special Humanitarian Program. However, one specific category that may benefit from this program is close family of refugees already staying in Australia.<sup>512</sup>

Previously a third program, the *Special Assistance Category*, existed. This program was, however, phased out in the 2000/2001-program year in order to focus the overall Humanitarian Program on people in the greatest need of resettlement. This category provided protection for people who did not fulfil the criteria for any of the other programs, but who were in a vulnerable situation and had close family in, or community links to, Australia.<sup>513</sup>

#### **6.3.1.4 Public Interest Criteria**

In addition to meeting the criteria for the Refugee Program or the Special Humanitarian Program, any person applying for resettlement in Australia must meet a number of public interest criteria in

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<sup>507</sup> DIMA, supra note 498, p. 14.

<sup>508</sup> Ibid.; Information by the UNHCR Regional Office in Canberra, received on 16 August 2001.

<sup>509</sup> DIMA, *Refugee and Humanitarian Issues – Australia's Response*, October 2000, p. 16.

<sup>510</sup> DIMA, supra note 506, p. 2.

<sup>511</sup> DIMA, supra note 498, p. 14.

<sup>512</sup> DIMA, supra, at pp. 15-16. Spouses may also consider applying for a regular migration spouse visa. Close family of applicants under the Refugee or Special Humanitarian Programs are eligible for consideration under the same program as the principal applicant.

<sup>513</sup> DIMA, supra note 509, p. 16.

order to be admitted to Australia. These criteria have been established in order to ensure that the resettlement program will not affect Australian residents in a negative manner. In particular health and character related criteria are assessed.<sup>514</sup>

Health requirements have to be met in order to protect Australian residents from health risks, such as tuberculosis. Any applicant qualifying for resettlement, who is 16 years of age or over, must therefore undergo a mandatory X-ray. Furthermore, pregnant women, unaccompanied minor children and other persons in special circumstances must undergo Hepatitis B testing, while HIV testing is required for all applicants who are 15 years or older.<sup>515</sup>

An additional aim of the health requirement is to maintain access to health resources for Australian residents. Consequently, an applicant who has a health problem amounting to a significant cost for the Australian community in the areas of health care and community services, may be refused a visa to, and resettlement in, Australia. A possibility of waiver exists for a person who has been found to have tuberculosis, but for whom the disease has been discounted. The officer at the overseas post who decides whether a waiver should be granted, will take into consideration any compelling circumstances speaking in favour of the applicant, and weigh these against, among other things, the expenses her condition will cause the Australian community and any disadvantages that it might cause Australian citizens and permanent residents in accessing health and community services.<sup>516</sup>

No named health conditions exist that automatically disqualifies a person from resettlement. However, persons to be resettled in Australia must be tuberculosis free. Persons who have signs of old treated tuberculosis will require follow-up in Australia to make certain that the infection has not reactivated.<sup>517</sup>

The character related criteria to be fulfilled by the applicant are the same as for most other visa applicants. These criteria have been set up in order to ensure that the applicant has a good character and does not represent a threat to the Australian community. The applicant must consequently satisfy a number of criteria relating to character, national security and Australia's foreign relations.<sup>518</sup> As part of the assessment the Australian Government conducts checks on all adult applicants' residence over the last ten years.<sup>519</sup>

#### **6.3.1.5 Submission and Processing of the Application**

A person in need of protection may approach any Australian diplomatic or consular representation with a request for resettlement under any of the outlined programs. All applications for resettlement submitted at Australian representations abroad are considered individually on the merits by officials at the overseas post.

All persons wishing to be resettled in Australia must complete form 842 *Application for a Permanent Visa on Refugee or Humanitarian Grounds*, which is available at all Australian representations abroad and at DIMIA offices in Australia. The applicant does not need to specify

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<sup>514</sup> Supra, at p. 18.

<sup>515</sup> Ibid.

<sup>516</sup> Ibid.

<sup>517</sup> Ibid.

<sup>518</sup> Supra, at p. 19.

<sup>519</sup> DIMA, *Form 964i – Refugee and Special Humanitarian Programs*, 2001, p. 2.

under which program she is applying, as her application will automatically be considered against both the Refugee Program and its subsets, and the Special Humanitarian Program. An applicant wishing to be considered under the latter must however include the special form 681 in her application, as explained above.<sup>520</sup> The application with supporting documentation (listed in the form) should be submitted at the closest representation. No fee is charged for application forms or for entering the application procedure. The official will examine the application, and either approve it or reject it. An interview of the applicant is not mandatory, but may be requested if deemed necessary for the decision.<sup>521</sup>

If an application is approved, a visa will be issued. The Australian Government normally pays the travel expenses and compulsory medical examination for applicants admitted under the Refugee Program, but not for those admitted under the Special Humanitarian Program, who have to pay their expenses themselves or be sponsored by their proposers in Australia.<sup>522</sup>

A negative decision on an application for resettlement cannot be appealed. Nor is an application eligible for review under the Migration Review Tribunal or Refugee Review Tribunal.<sup>523</sup> The latter is available only to those seeking asylum on Australian territory. Nothing, however, hinders repeat applications being made to the Australian representation overseas.

#### **6.3.1.6 The Pacific Solution**

The Pacific Solution is Australia's response to human smuggling and the increasing number of secondary movers arriving spontaneously in Australia, both underpinning the 2001 *Tampa* crisis. Briefly described, the Pacific Solution intends to scare potential asylum seekers off, in particular those asylum seekers arriving by boat with the help of human smugglers, and to reward those who do not attempt to reach Australia irregularly, but rather ask for resettlement to Australia in the first country of arrival they reach on their flight from persecution. Consequently, a person applying for resettlement from the first country of arrival will receive immediate permanent residence and complete settlement services, once she is approved for resettlement in Australia. A person who moves beyond the first country of arrival before requesting resettlement in Australia will have to wait 54 months for a permanent residence and for family reunion rights, and in such a case a permanent residence permit and family reunion rights will only be granted if the person is still deemed to be in need of protection. Finally, a person arriving unauthorized in Australia, who has passed other countries on the way, will never receive a permanent residence, but only successive temporary visas as long as protection is deemed necessary in her case. This discriminating visa regime aims at deterring secondary movements from, or the bypassing of, other countries that could have provided effective protection.<sup>524</sup>

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<sup>520</sup> See Chapter 6.3.1.3.

<sup>521</sup> DIMA, supra note 509, at p. 15; DIMIA, supra note 506, at p. 2.

<sup>522</sup> DIMA, supra note 498, at p. 13.

<sup>523</sup> DIMIA, supra note 506, at p. 2.

<sup>524</sup> *Principled observance of protection obligations and purposeful action to fight people smuggling and organised crime – Australia's commitment*, Australian position paper distributed during the June 2001 Global Consultations on access to procedures (on file with the authors), pp. 14-15 and 18. A refugee, who flees directly to Australia as the country of first asylum, will in the first hand have to wait for a period while the feasibility of repatriation is investigated. This could be arranged either by providing the refugee a safe haven visa or a temporary protection visa. In cases where repatriation is deemed not to be feasible, the applicant will be issued with a permanent residence visa and integrated into the Australian community.

Significant legislative changes were introduced as part of the Pacific Solution, in order to reinforce border control and manage unauthorized arrivals of asylum seekers. A number of Australian territories were excised from the Australian immigration boundaries, with the consequence that such arrivals are prevented from making a valid visa claim. In addition to Australian sea and resource installations, the territories declared as excised offshore places are Ashmore Reef, Cartier Islands, Cocos Island and Christmas Island.<sup>525</sup>

As Australia's obligations under the Refugee Convention still applies on the excised offshore places, all protection seekers arriving in such a place will have their claims for refugee status assessed, however not on mainland Australia. The assessment of the protection claim will be made against the criteria as described in the Refugee Convention, and no one will be subjected to *refoulement* during this assessment, nor after its completion if the person is found to fulfil the criteria for being a refugee. A review process is available for those being assessed at an excised offshore place.<sup>526</sup>

The new legislation also authorizes the removal of persons arriving at one of the excised offshore places, or intercepted in international waters, to a *declared country*. The Minister for Immigration and Multicultural and Indigenous Affairs may acknowledge as a declared country any country which can provide effective procedures for assessing asylum claims, which pending final determination can provide protection for the asylum seekers, which pending voluntary repatriation or resettlement in another country can provide protection to the asylum seeker, and which lives up to relevant human rights standards in providing that protection.<sup>527</sup> The concurrence of the country in question is naturally also needed in order to be able to acknowledge it as a declared country. Countries currently acknowledged as declared countries are Nauru and Papua New Guinea<sup>528</sup>

All persons removed to a declared country will undergo a refugee assessment procedure. In the absence of proper refugee determination structures in the declared country, the assessment will be conducted either by UNHCR or by the Australian authorities, i.e. DIMIA officials. In determining an applicant's claim for refugee status, the Australian authorities will conform with the standards and criteria outlined in the Refugee Convention. As the case is when processing is undertaken at an excised offshore place, the applicant has a right to review of an unfavourable decision by another DIMIA officer.<sup>529</sup>

Australia's capacity to remove asylum seekers to Nauru has its legal base in a Statement of Principles signed between the two states on 10 September 2001. Originally, Nauru entered into this agreement for humanitarian reasons in order to temporarily provide some relief for the asylum seekers trapped on the *M.V. Tampa*. The intention was that none of these asylum seekers would

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<sup>525</sup> Migration Amendment (Excision from Migration Zone) Act 2001[henceforth the Excision Act], Section 1. The Australian Government has proposed to extend the area of excised offshore places, to include the Coral Sea Islands Territory, all islands in the far north of Queensland, all islands forming part of the territory of The Northern Territory, and all Western Australian islands situated north of latitude 230 south (*New Regulation to Fight People Smugglers*, Minister for Immigration media release MPS 45/2002, 7 June 2002).

<sup>526</sup> DIMIA, *Introduction of New Legislation*, available on <<http://www.immi.gov.au/legislation/refugee/01.htm>>, accessed on 9 August 2002.

<sup>527</sup> Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 [henceforth the Excision Consequentials Act], Section 198A.

<sup>528</sup> DIMIA, *supra* note 526.

<sup>529</sup> *Ibid.*

remain in Nauru, but all would have left by May 2002.<sup>530</sup> By the end of May 2002, there were still some 700 asylum seekers waiting for a decision on Nauru.<sup>531</sup>

A Memorandum of Understanding was agreed upon and signed by the Australian and Papua New Guinean Governments on 11 October 2001, authorizing the removal of asylum seekers to, and the establishment of a processing centre on, Manus Island (located north of the mainland).<sup>532</sup> On Manus Island around 90% of the cases had been decided by the end of May 2002, and a majority of the applicants had received a positive outcome.<sup>533</sup> Papua New Guinea has expressed its wish that the arrangement with Australia should come to an end in October 2002.<sup>534</sup> By the end of August some 400 recognised refugees staying in the camps in Nauru and on Manus Island were still waiting for resettlement.<sup>535</sup>

The costs for establishing and maintaining the detention camps, where all asylum seekers are kept on Manus Island and in Nauru, and for processing applications, are met by Australia. IOM is responsible for the management and administration of the camps.<sup>536</sup> In Nauru both UNHCR and Australian officials are conducting refugee status determination<sup>537</sup>, while Australian officials alone conduct the processing in Papua New Guinea.<sup>538</sup>

The Pacific Solution brings with it a number of negative effects. The new visa regime introduced remarkably different residence visas for refugees depending on the way they chose – or indeed are forced – to take in order to reach Australia. This can be apprehended as a way to punish asylum seekers who make secondary movements with a worse status than those who ask for resettlement from the first safe country they enter. Such an approach disregards the fact that people fleeing from persecution seldom have exactly the same prospects for a safe waiting period during the processing of their resettlement request. It further does not recognise the despair and hopelessness experienced by people waiting for years in a refugee camp, which might drive them to seek a life in dignity through other means.

Describing parts of a country's territory as an excised offshore place, thus exempting them from normal immigration rules, raises intricate legal questions beyond the scope of this report. Of interest are, however, the consequences of combining the mechanism of excising Australian territories and that of removing asylum seekers entering them to declared countries.

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<sup>530</sup> Oxfam (Australia), *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, February 2002, p. 9.

<sup>531</sup> *Asylum Decisions Handed Down on Nauru*, Minister for Immigration media release MPS 41/2002, 30 May 2002. By the end of May 2002, 385 decisions had been made out of which more than half had been positive.

<sup>532</sup> Oxfam (Australia), supra note 530, at p. 10.

<sup>533</sup> *Asylum Decisions Handed Down on Manus and Christmas Island*, Minister for Immigration media release MPS 39/2002, 23 May 2002. Out of 305 decisions, 226 were positive.

<sup>534</sup> Amnesty International, *AUSTRALIA-PACIFIC Offending human dignity: the "Pacific Solution"*, August 2002, p.11.

<sup>535</sup> Supra, at p. 8.

<sup>536</sup> Oxfam (Australia), supra note 530, at pp. 9-10.

<sup>537</sup> UNHCR agreed to undertake the refugee status determination and resettlement processing on Nauru for the protection seekers from the *MV Tampa*, as it was a case of rescue at seas where burden-sharing principles applied. UNHCR furthermore agreed to process an additional group of asylum seekers and refugees who travelled to Nauru together with the *Tampa* group on board the Australian ship, the HMAS *Manoora*, due to the compelling humanitarian nature of the cases. Subsequently UNHCR advised that it was not in a position to undertake the refugee status determination of further groups shipped by Australia to Nauru and Papua New Guinea. Therefore the Australian Government alone is undertaking their assessment. UNHCR, *UNHCR Global Resettlement Needs, 2002*, Annual Tripartite Consultation on Resettlement, Geneva, 18-19 June 2002, p.43.

<sup>538</sup> UNHCR, supra.

With the implementation of the Pacific Solution, Australia is exporting its mandatory detention policy to the Pacific countries. This raises major concerns. Indeed, the Australian practice of detaining all asylum seekers have been widely criticized as contradicting international law and obligations under the Refugee Convention. To export this disputed detention policy to countries without the same resources and capacity as Australia may end in severe incidents and unnecessary hardship for the asylum seekers.<sup>539</sup>

What will happen to those asylum seekers determined to be refugees, and what will happen to those determined not to be refugees? The first category will have to wait for some country to approve them for resettlement. During this time they will remain in detention. Significant difficulties have been encountered in this respect, as only a limited number of countries have offered resettlement places. Ireland was first out to offer resettlement for 50 of the refugees being processed in Nauru and on Manus Island.<sup>540</sup> Sweden, Denmark and New Zealand have accepted some, and Australia has ended up taking a number of those determined to be refugees. Nonetheless, some 400 candidates are still waiting for resettlement. The issue at stake is, why states should give priority to refugees trapped in the Pacific solution instead of others who have waited for years in refugee camps in other parts of the world. Their cases are by no means more compelling. Hence, it cannot be taken for granted that other countries will feel empathy for Australia in this matter and offer their assistance.

In terms of its dissuasive effects, it must be noted that the smuggling option is still a rational choice under the Pacific Solution, as its worst outcome is still better than the risks to which refugees trapped in insecure host countries are exposed. Consider the example of an Afghan exposed to persecutory threats, which would be paradigmatic for the 2001 seaborne arrivals to Australia. Faced with the choice of seeking refuge in Iran or in being smuggled by boat to Australia, the latter option must be considered rational. The best-case outcomes are roughly comparable, while the worst-case outcomes diverge starkly. Both routes could eventually lead to Australia – the first via resettlement in fierce competition with other cases, the second either by a successful onshore landing, or, if the boat is intercepted, as a successful resettlement candidate accepted by Australia under the Pacific Solution to Australia. In the worst case, she would be exposed to *refoulement* by the Iranian government while her resettlement claim is processed by Australia. Accepting the smuggler's offer could, in the worst case, lead to interception and being trapped on Nauru or Papua New Guinea, but not to *refoulement*. Hence, the signal sent by the Pacific Solution must be considered an encouraging one by a rational refugee.

A further systemic shortcoming of the Pacific Solution is the insecurity of those asylum seekers not determined to be refugees. Neither UNHCR nor IOM engage in repatriating rejectees to their home countries against their will. While some have left voluntarily, it remains to be seen how many will refuse, and what the response of Australia will be. As the Australian government has promised that no asylum seekers will be left in Nauru or on Manus Island, they will most likely have to find a solution to this problem.

Yet another concern with the Pacific Solution is the degradation of procedural standards. Even though a large part of the processing is carried out by Australian immigration officials, this processing is being conducted in a foreign jurisdiction, and therefore does not have to follow higher

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<sup>539</sup> UNHCR, *supra* note 537, p. 16.

<sup>540</sup> *Supra*, at p. 6.

standards applicable on Australian soil. The asylum seekers are disadvantaged as neither Nauru nor Papua New Guinea can offer the full range of assistance, be it welfare or legal aid, to the asylum seekers.<sup>541</sup>

The Pacific Solution has turned out to be rather expensive. Substantial amounts were needed to cover expenses connected with establishing and maintaining detention camps, as well as processing asylum claims. Other costs to take into account cover transporting the asylum seekers, infrastructure and basic health services. In addition, both Nauru and Papua New Guinea have pledged money for different development programs in these countries. The Australian Government has revealed that sending asylum seekers for processing to other Pacific nations would cost up to \$500 million Australian dollars.<sup>542</sup> It may be validly asked whether these costs are in proportion to the relatively small number of refugees processed on these islands. Eventually a large number of these have ended up in Australia anyway, in what must appear as a costly detour to the taxpayer. In addition, it has been claimed that the financial inducements offered to Nauru have distorted the development assistance priorities of Australia in the South Pacific.<sup>543</sup>

All nations in the Pacific that Australia has considered as possible locations for detention camps have either not signed the Refugee Convention, or signed it with significant reservations. Nauru has not signed the Convention, nor has Palau and Kiribati, which have been suggested as potential locations for camps. Papua New Guinea has signed the Convention, but has placed reservations on it and does not accept obligations flowing from a number of significant articles.<sup>544</sup> Critics have raised the question whether this mere coincidence, or a planned strategy from the Australian side.<sup>545</sup>

The current arrangements put severe constraints on the Pacific islands involved. Neither Nauru nor Papua New Guinea has procedures and resources to deal with all issues that follow with the sudden increase of the population with some 1000 people or more. Not only is it asylum seekers that arrive, but also a number of security guards, Australian officials for determining cases, as well as UNHCR and IOM staff. Simple things such as water supply has shown to be a thorny issue in Nauru, as the camps apparently have priority over Nauruan households in regard to visits from the water truck. Furthermore, the limited health services available in Nauru are experiencing difficulties, as Nauru also has to provide health services to the asylum seekers.<sup>546</sup>

While small nations in the Pacific most likely are willing to contribute in helping out with the refugee issues, to a degree that does not put excessive constraints on their societies, the authors consider the Australian approach of swapping development aid for the acceptance of asylum seekers for processing as ethically untenable. It might be irresistible for less resourceful states, in particular when the long-term consequences have not been extensively pondered.

A further concern has been raised. As Australia is guarding its maritime borders increasingly strictly and turns away asylum seekers, smugglers might find it more meaningful to target the

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<sup>541</sup> Ibid.

<sup>542</sup> Supra, at p. 5.

<sup>543</sup> Ibid.

<sup>544</sup> These cover Article 17 on wage-earning employment, Article 21 on housing, Article 22 on public education, Article 26 on freedom of movement, Article 31 on refugees unlawfully in the country of refuge, Article 32 on expulsion, and Article 34 on naturalisation.

<sup>545</sup> Oxfam (Australia), supra note 530, pp. 6 and 10.

<sup>546</sup> Supra, at p. 9.

Pacific islands hosting Australian' processing centres directly.<sup>547</sup> The consequences of such a shift in smuggler routes can only be speculated on, but it is rather obvious that it would generate a heavy burden for these small Pacific nations.

The Pacific Solution actually replicates attempts by European states to shift responsibility to their neighbours. However, the major migration fault lines in Europe are land borders, and they divide countries with limited differences in wealth and legal safeguards.<sup>548</sup> The mechanisms used to reallocate responsibility in Europe cannot be freely transposed to a setting with maritime borders and with huge differentials amongst nations with regard to size, wealth and legal safeguards. This is precisely what Australia has done, thereby aggravating the inherent drawbacks of safe third country-arrangements. Furthermore, Australian practice in its excised zones equals the operation of an exclusive approach to externalised processing. We refer to Chapter 4.1.1 for a detailed analysis of the inadvisability of choosing such an approach.

### **6.3.1.7 Statistics**

Resettlement, with overseas processing, makes up the major part of Australia's Humanitarian Program. Each year more than 50.000 applications are filed under the Refugee and Humanitarian Programs. Only a limited number of these are approved for resettlement in Australia, and an even smaller number finally arrives in Australia.<sup>549</sup>

Each year, the size and composition of the Humanitarian Program is determined by the Australian Government. These decisions are based on information provided by the Minister for Immigration and Multicultural Affairs, who takes into consideration the views of the Australian community, Australia's ability to resettle refugees and people in humanitarian need, as well as the global resettlement needs as identified by UNHCR. The total number of places to be allocated is further divided by the government according to needs of each global region producing refugees.<sup>550</sup> Each year, however, a number of places remain not earmarked for specific regions, in order to be able to meet unforeseen resettlement needs that may arise in specific regions during the year.<sup>551</sup>

Any unused places from one program year may be carried over to the next program year for use in addition to the annual allocation for that year. Similarly, places for those who were granted visas but who never arrived in Australia may be reallocated for the subsequent program year. Furthermore, a sudden augmented need for resettlement places due to a humanitarian crisis allows the Minister to bring forward places from future programs, if the available places for the program year are not enough.<sup>552</sup> This allows for a greater flexibility for the government, in responding to emerging humanitarian crises. The roughly 15.000 places allocated for program year 1995-96 may serve as an illustrative example, as it consisted of 13.000 places from the original allocation and

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<sup>547</sup> Supra, at p. 22.

<sup>548</sup> It should be recalled that the so-called safe third country-regimes between Western European countries and their mostly Eastern neighbours presuppose a high degree of coherence amongst cooperating countries. Adherence to and implementation of the 1951 Refugee Convention and the ECHR are usually demanded, and courts monitor referral practices. In the present setting, an outright transfer of Australian practices to a European context would entail a litigation wave and, consequentially, the intervention of the courts.

<sup>549</sup> DIMIA, supra note 506, p. 2.

<sup>550</sup> Supra, at p. 1; DIMA, supra note 498, p. 14.

<sup>551</sup> DIMA, supra, at p. 17.

<sup>552</sup> Ibid.



around 2.000 places brought forward from the program year 1996-97, following an emergency request by UNHCR to assist in resettling refugees from former Yugoslavia.<sup>553</sup>

Another, more problematic element of flexibility in the Australian Humanitarian Program is the possibility of redistributing places from the offshore allocation to the onshore allocation, i.e. from the resettlement procedure to the asylum procedure, if additional places are needed in order to meet demands for visas in the onshore program.<sup>554</sup> This kind of flexibility is to the detriment of persons in need of resettlement, as the number of places available for them in one program year will depend on the number of spontaneous arrivals in Australia with a legitimate need for protection. On this basis, it may be considered rather unfair that the refugees resettled in Australia after refugee determination procedures in Nauru, Papua New Guinea or any of the excised areas will be counted within the offshore Humanitarian Program.<sup>555</sup>

Indeed, the Australian regime attempts to subjugate spontaneous arrivals to the quota logic of resettlement programmes. It builds on a plan economy of protection, built on counterfactual assumptions. It features an element of collective punishment: offshore applicants are punished for the sins of onshore applicants. This type of signal assumes refugees to be centrally steered actors – which they are not. The authors would find it more appropriate to uncouple the allocation of places between the offshore and onshore programs.

Program year 2001-02 may serve as an illustration of the categorical allocation of places and the regional granting of visas within the offshore component of the Humanitarian Program. For this year a total of 13.645 places were available within the Australian Humanitarian Program. 12.000 of these were newly allocated places, while the rest consisted of unused places carried over from the previous program year. The Refugee Program was allocated 4.000 places, while the rest were to be split between the Special Humanitarian Program and onshore applicants. Places unused in the onshore procedure will either be re-allocated to the Special Humanitarian Program or carried forward to the subsequent program year.<sup>556</sup>

Previously, the majority of refugees admitted under the offshore component of the Humanitarian Program were resettled from South-East Asia and Central America. During the past decade, the focus has been shifted to applicants from Europe (in particular from former Yugoslavia), the Middle East and South-West Asia, and Africa. A total number of 7.992 applicants were granted a visa under the offshore component in 2001-02. Of this number, 3.462 applicants were from Europe, 2.155 from the Middle East and South-West Asia region, 2.032 were from Africa and the rest, about 4% of the total number, were granted to applicants from other places than these three priority regions.<sup>557</sup>

Since the late 1970s the resettlement number has decreased from over 20.000 each year to around 10.000 places per year during the past decade.<sup>558</sup> Table 11 describes in numbers the resettlement places granted by the Australian authorities to persons in need of protection.<sup>559</sup>

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<sup>553</sup> Nicholls, *supra* note 500, p. 69.

<sup>554</sup> DIMA, *supra* note 498, p. 17.

<sup>555</sup> *Minister Announces Humanitarian Program Intake for 2002-03*, Minister for Immigration media release MPS 31/2002, 7 May 2002.

<sup>556</sup> DIMA, *supra* note 498, p. 15.

<sup>557</sup> *Supra*, at pp. 15-16.

<sup>558</sup> Nicholls, *supra* note 500, p. 69.

	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
<b>Refugee</b>	4.643	3.334	4.010	3.988	3.802	3.997	4.160
<b>SHP</b>	3.499	2.583	4.636	4.348	3.051	3.116	4.258
<b>SAC</b>	6.910	3.735	1.821	1.190	649	879	40
<b>Resettlement admissions (total)</b>	15.052	9.652	10.467	9.526	7.502	7.992	8.458
<b>Onshore protection visa grants</b>	-	-	-	1.834	2.458	5.577	3.885
<b>Humanitarian Program (total)</b>	-	-	-	11.360	9.960	13.569	12.343

**Table 11 – Resettlement Places Granted within the Offshore Component of the Australian Humanitarian Program, 1995-2002, Onshore Protection Visas Granted and Total Number of Admissions within the Australian Humanitarian Program, 1998-2002**

Table 12 offers an overview of the total number of arrivals within the offshore component of the Humanitarian Program. The numbers do not correspond to those in Table 11, as not all applicants admitted for resettlement actually arrive in Australia. There may be several reasons for this discrepancy. Some applicants might simply not be able to leave for reasons that could be persecution-related. Others might have found protection somewhere else in the meantime.

	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00
<b>Refugee</b>	4.006	4.060	3.372	3.553	3.269	3.429
<b>SHP</b>	3.774	3.617	2.120	3.033	4.614	3.022
<b>SAC</b>	5.852	6.147	4.394	2.193	907	816
<b>Total</b>	<b>13.632</b>	<b>13.824</b>	<b>9.886</b>	<b>8.779</b>	<b>8.790</b>	<b>7.267</b>

**Table 12 – Number of Actual Arrivals to Australia within the Offshore Component of the Humanitarian Program, 1994-2000**

### **6.3.1.8 Evaluation of the Australian Procedure**

The Australian offshore Humanitarian Program shares a core element with Protected Entry Procedures, namely the possibility of approaching an embassy with a request for protection. However, other elements, such as the quota restriction, provide for important differences.

The division into categories might serve as an inspiring source when considering a harmonised European Protected Entry Procedure. A positive feature of the Australian division of beneficiaries into different categories is that the main category, i.e. the Refugee Program, for which sponsors are not needed, embraces persons who are still within their country of origin. Sponsorship has been

<sup>559</sup> Both tables can be found in DIMA, *Australian Immigration Statistics*, available on <<http://www.immi.gov.au/statistics/refugee.htm>>, accessed on 3 July 2001 and 6 March 2002. In the table *Refugee* comprises applicants admitted under the Refugee Program, including its three subclasses: Woman at Risk, In-Country Special Humanitarian Program and Emergency Rescue. SHP stands for *Special Humanitarian Program*. *Special Assistance Category* (SAC) includes people not falling under the two other categories, mainly people aiming for family reunification.

added as an element in the second program, i.e. the Special Humanitarian Program, allowing the Australian community to get involved in the resettlement program. It is encouraging to note that the sponsorship element has not entailed an undue fluctuation in the availability of places: the numbers of accepted applicants have been on the same level as for the Refugee Program.

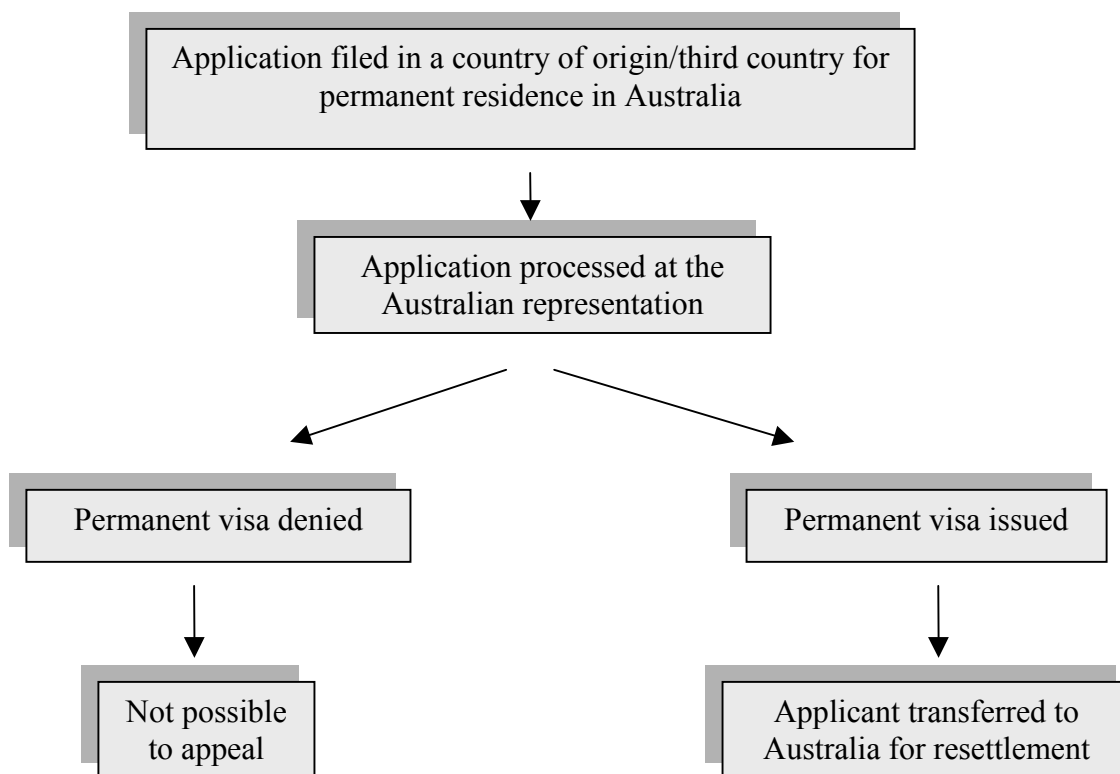
The generosity of the government in providing financial assistance to facilitate the journey to Australia and to pay for the medical examination, for those falling under the Refugee Program, must be considered as a positive facet of the Australian program. On the other hand, the possibility of handing in a repeat application cannot cover the need for a review process, which today is missing in the offshore component of the Humanitarian Program.

A negative aspect of the program is linked to the ceiling set by the Government for each program year. Despite its temporal flexibility (unused places may be carried over, emergency places may be used ahead of schedule), it must be considered a major drawback that the number of spontaneously arriving asylum seekers directly diminishes the numbers admitted for resettlement.

The Australian refugee policy has been strongly affected by the *Tampa* crisis, and the Pacific Solution created in its aftermath. Importing features from the Pacific Solution to a harmonised European Protected Entry Procedure cannot be recommended. There are no financial or organisational benefits from such an arrangement. The impact on human smuggling might be only marginal, as it has been shown from the determination procedures in both Nauru and Papua New Guinea, that more than half of the applicants were in fact genuine refugees. Furthermore, in spite of Australian assurances to the contrary, the smuggled caseload is securing better outcomes than those playing by the rules. In the worst case, the only impact will be that smugglers will bring refugees directly to the islands where refugee determination is taking place. This would indeed impact on the Pacific islands' ability to respond to such a development and their willingness to cooperate with Australia, as resources would become even more strained.

The inconsistencies, the functional failure and the legal precariousness of the Pacific Solution beg the question why Australia insists on it. Why does the Australian government accept considerable risks by removing asylum seekers to determination procedures in countries which are not signatories to the Refugee Convention or which have placed significant reservations to it? This might be an important question for debate when considering establishing processing centres outside the EU.

### 6.3.1.9 Procedural Diagram



## 6.3.2 Canada

### 6.3.2.1 Legal Regulation and Current Practices of the Canadian Resettlement Programme

Being a traditional resettlement country, Canada offers good comparative material for our study. Resettlement applications may be submitted at Canadian diplomatic and consular representations in third countries and in a few listed countries of origin. Processing of resettlement applications abroad is an important part of Canada's overall refugee program.<sup>560</sup>

The Canadian procedure for processing resettlement applications at representations abroad dates back at least to the Hungarian crisis of 1956. Resettlement was, however, not codified until the Immigration Act of 1976. The applicable law is the new Immigration and Refugee Protection Act 2001<sup>561</sup> and the Immigration and Refugee Protection Regulations.

The Immigration and Refugee Protection Act provides that persons may be granted resettlement in Canada either as Convention Refugees Abroad, or as members of the Country of Asylum Class or Source Country Class. In order to be admitted under one of these classes, the applicant needs to

<sup>560</sup> The information included in the present chapter is based on the content of the chapter on Canada of the report "Safe Avenues to Asylum?", published by the Danish Centre for Human Rights and UNHCR in April 2002 and on consecutive studies. Members of the research team visited the Canadian embassy in Vienna on 4 June 2002, and were oriented on its role in resettlement.

<sup>561</sup> The Immigration and Refugee Protection Act 2001 came into effect on 28 June 2002.

fulfil a number of requirements qualifying her under the specific class, as well as some general admissibility criteria.

### **6.3.2.2 Earlier Experiences and Future Developments**

Canada first started its resettlement practice after World War II by resettling displaced persons from Europe. It was based on political-humanitarian considerations, as there was no legal foundation for resettlement at that point in time. During the Hungarian crisis in 1956 and after the outflows from Czechoslovakia in 1968, the Canadian policy of resettling displaced persons continued.<sup>562</sup>

In 1972-73, the first larger group of non-European beneficiaries was resettled, when Canada received more than 7.000 persons risking eviction from Uganda under Idi Amin's rule. This was the first time the Canadian practice had taken the character of an in-country programme, as the beneficiaries had not left Uganda, and hence did not fulfil the criterion of being outside their country of origin. People in need of protection were resettled from Chile in 1973, following the overthrow of Salvador Allende.<sup>563</sup>

Traditionally, the mechanism for assisting refugees has been the immigration programme. Therefore, the standard solution is to give a permanent residence permit to an admitted applicant. Temporarily limited permits have only been issued in urgent cases, where processing has not been completed before the person's arrival in Canada. After completion, a permanent residence permit was normally issued.<sup>564</sup>

The Indochinese refugee crisis of 1979-80 had an important impact on the formation of Canadian resettlement practices. In that context, the sponsorship mechanism was first introduced. Sponsorship implies that an organisation or a group of five or more Canadians commit themselves to provide reception and integration resources (including housing for one year), while the Canadian state still provides language training.<sup>565</sup>

There has been a political debate in Canada on whether the number of spontaneous arrivals should impact on the resettlement target.<sup>566</sup> No such connection has yet been established between resettlement and spontaneous arrivals. This could change if there were to be a dramatic increase of spontaneous arrivals.

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<sup>562</sup> Canadian Council for Refugees, *A hundred years of Immigration to Canada: A chronology focusing on refugees and discrimination*, available on <<http://www.web.net/~ccr/history.html>>, accessed on 16 September 2002.

<sup>563</sup> Ibid.

<sup>564</sup> Ibid.

<sup>565</sup> Canadian Council for Refugees, *The Resettlement of Indochinese Refugees in Canada: Looking Back after Twenty Years*, available <<http://www.web.net/~ccr/20thann.html>>, accessed on 16 September 2002.

<sup>566</sup> This can be compared with the Australian procedure, where a high number of spontaneous arrivals automatically reduces the number of admitted resettlement applicants, as there is a common ceiling for these two groups.

### 6.3.2.3 General Principles of the Procedure

Persons in need of protection are resettled in Canada under three different categories (classes). The applicant needs to fulfil the criteria in either one of the Convention Refugees Abroad Class, Country of Asylum Class or Source Country Class in order to be eligible for resettlement.<sup>567</sup>

To qualify as a *Convention Refugee Abroad* the applicant must:

- (a) have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, *and*
  - ☐ be outside her country of nationality and unable or, by reason of that fear, unwilling to obtain the protection of that country, *or*
  - ☐ not having a country of nationality, be outside her country of former habitual residence and unable, or by reason of that fear, unwilling to return to that country, *and*
- (b) have not ceased to be a refugee, *and*
- (c) there must be no reasonable prospect, within a reasonable period of time, of a durable solution.

To qualify as a member of the *Country of Asylum Class* the applicant must:

- (a) be outside Canada and outside her country of nationality or habitual residence, *and*
  - ☐ have received a private sponsorship for herself and her family members, *or*
  - ☐ be able to establish, to a visa officer's satisfaction, that she has sufficient financial resources to provide for the lodging, care and maintenance and resettlement in Canada of herself and her dependents, *and*
- (b) have been, and continue to be seriously and personally affected by civil or armed conflict or a massive violation of human rights in her country of nationality or habitual residence, *and*
- (c) there must be no reasonable prospect, within a reasonable period of time, of a durable solution.

The Country of Asylum Class is Canada's response to the resettlement needs of people in refugee-like situations who do not qualify as Convention refugees.

To qualify as a member of the *Source Country Class* the applicant must:

- (a) be a national or habitual resident of a country listed as a source country on the Schedule of Countries, *and*
- (b) be living in that country at the time she applies for protection, and the country must still be considered a source country by Canada when the application is approved (visa issued), *and*
- (c) be seriously and personally affected by civil or armed conflict in her country, *and*
- (d) be, or have been,
  - ☐ detained or imprisoned in that country, *or*
  - ☐ subjected to some other recurring form of punishment (e.g. jail, house arrest, constraints on normal activities) as a direct result of acts which, if committed in

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<sup>567</sup> The outline of the different classes is based on Ministry of Citizenship and Immigration Canada [henceforth CIC], *Application for permanent residence in Canada – Convention Refugees Abroad and Humanitarian-Protected Persons Abroad*. IMM 6000E (06-2002), 2002, Ottawa [henceforth the Application Guidelines].

- Canada, would be considered legitimate expression of free thought or legitimate exercise of civil rights pertaining to dissent or trade union activity, *or*
- (e) meet the Convention refugee definition with the exception that she is residing in her country of nationality or habitual residence, *and*
  - (f) there must be no reasonable prospect, within a reasonable period of time, of a durable solution.

Through the Source Country Class the protection and resettlement needs of people who are residing in their country of nationality or habitual residence are addressed.

The countries whose nationals are admissible under the Source Country Class are listed in Schedule 2 of the Immigration and Refugee Protection Regulations. Normally, the Schedule is reviewed on an annual basis and amended after consultation with a number of Citizenship and Immigration Canada's partners, such as NGOs and UNHCR. The countries enlisted in the current schedule, which is valid from 29 June 2001 until 31 December 2002, are Colombia, Democratic Republic of the Congo, El Salvador, Guatemala, Sierra Leone, and Sudan.<sup>568</sup>

The following aspects affect the decision whether a country should be listed as a Source Country:<sup>569</sup>

- the situation in the country,
- processing can be conducted reasonably safely,
- the Ministry of Foreign Affairs agrees on the inclusion of the country on the list (bilateral relations have to be taken into consideration), and
- it must be a country where a Canadian officer works or travels on routine visits.

The only possibility for a person in need of protection who is still in her country of origin, which is not listed as a Source Country, to be admitted to Canada is through a visa or Minister's Permit issued on an exceptional basis after a decision by the Minister of Citizenship and Immigration.<sup>570</sup>

#### **6.3.2.4 Submission of the Application**

A person in need of protection may after referral from UNHCR or a sponsor submit a resettlement application to the closest Canadian diplomatic or consular representation. The applications will only be processed by a limited number of designated visa processing posts.<sup>571</sup> The applicant does not have to specify under which class she is applying, i.e. Refugee Convention Abroad, Country of Asylum Class or Source Country Class, as the processing post automatically will assess whether the application is eligible under any of these classes.

The old Immigration Act allowed persons in need of protection to apply for resettlement if they were referred to the Canadian representation by UNHCR or another agency, if they were named by sponsors in Canada or if they inquired at the representation directly on their own initiative. The new Immigration and Refugee Protection Act makes a referral from a referral agency or a sponsor

<sup>568</sup> CIC, *Chapter OP5. Refugees – Protected Persons*, in CIC, *Immigration Manual: Overseas Processing*, 2002, Ottawa, Section 6.43.

<sup>569</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

<sup>570</sup> *Coderre tables Annual Report on Minister's Permits*, Citizenship and Immigration Canada News Release 2002-13.

<sup>571</sup> Appendix B of the Application Guidelines contains the list of addresses for these visa offices, *supra* note 567. The offices in Africa and the Middle East are located in Ivory Coast, Ghana, Egypt, Syria, Kenya and South Africa. The offices in the Americas are in Columbia, Cuba and Guatemala. European offices are in Turkey, UK, Russia, Italy and Austria and Asian offices are in Thailand, India, Pakistan and Singapore.

necessary in order for a resettlement application to be accepted and processed. Currently the only referral agency is UNHCR, but the Minister of Citizenship and Immigration may enter into an agreement with any other organization, which then may act as a referral agency.

Direct access to visa offices for individual resettlement applicants will not be accepted any more, save for in exceptional circumstances. Such exceptional circumstances may occur only in geographic areas which the Minister has designated as areas where direct access for applicants is justified. Only areas where there are no referral organizations, where there are insufficient referrals, or where global situations justify direct access will be designated by the Minister.<sup>572</sup> In such areas an applicant may approach a Canadian representation directly, without being referred by a referral agency or a sponsor. Currently, residents from DR Congo, Sudan, El Salvador, Guatemala, Colombia and Sierra Leone have direct access to the Canadian representations serving those countries.<sup>573</sup>

#### **6.3.2.5 Processing of the Application by the Processing Post**

Applications are assessed and decided upon by a visa officer at the dedicated processing post. The officer has received prior training by Citizenship and Immigration Canada for this task. She is obliged to act fairly and be reasonable, and to follow the Immigration and Refugee Protection Act and its Regulations in her assessment and decision-making. It is the responsibility of the visa officer to assess whether an applicant qualifies as a Convention Refugee Abroad or as a member of the Country of Asylum Class or the Source Country Class.<sup>574</sup>

At the initial stage a clerk will screen the application, in order to make sure that the paperwork has been completed and that the application is not entirely frivolous. All complete and apparently *bona fide* applications are handed over to the visa officer. If she, based on the paper work, considers that the person is eligible for resettlement either as a Convention Refugee Abroad or under the Country of Asylum Class or the Source Country Class, she will normally decide to proceed to interview the applicant. An interview is however not necessary for approving a resettlement application. A visa officer from the visa processing post will travel to the country where the applicant is staying in order to conduct the interview. Normally the interview takes place at a Canadian representation in that country. The visa officer may refuse applications on paper.<sup>575</sup>

If an interview is conducted, the visa officer will determine in the interview whether the person qualifies for resettlement. The interviewing visa officer shall keep detailed notes of the interview. She shall include a conclusion with a summary of the decision and a clear statement on how the applicant meets or does not meet the definition of a Convention Refugee Abroad or a member of the Country of Asylum or Source Country Class.<sup>576</sup>

The visa officer may seek guidance in the Immigration Manual *Overseas Processing* 5.<sup>577</sup> It gives an outline of Canada's refugee policy, defines basic terms and provides guidelines for processing

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<sup>572</sup> Immigration and Refugee Protection Regulations, Section 150.

<sup>573</sup> CIC, *The Canadian Refugee System*, available on <<http://www.cic.gc.ca/english/refugees/resettle-5.html>>, accessed on 17 September 2002.

<sup>574</sup> CIC, *supra* note 568, Section 13.

<sup>575</sup> CIC, *supra* note 568, Section 10; Source: Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

<sup>576</sup> CIC, *supra* note 568, Section 16.3.

<sup>577</sup> CIC, *supra* note 568.



applications for resettlement as Convention Refugee Abroad and as members of the Country of Asylum or Source Country Class.

#### **6.3.2.6 Admissibility**

There is a distinction to be made between eligibility, which is about meeting the protection-related criteria set up by the Canadian system, and admissibility, which is about meeting immigration-related criteria of the system. In order to qualify for resettlement in Canada, the applicant must meet both the eligibility criteria outlined above, and the admissibility criteria, meaning that the applicant must pass medical, security and criminality checks. If an applicant is deemed eligible after the interview has taken place, admissibility screening will be conducted.

An applicant with serious medical conditions might not be admitted for resettlement. The medical examination is normally conducted by a designated local medical practitioner. If the applicant has a communicable disease that is a danger to public health or public safety, such as tuberculosis, she will not pass the admissibility control, with the result that she is denied admission to Canada. The visa officer may, however, consider issuing a temporary permit even though the applicant has a communicable disease, if strong humanitarian and compassionate reasons justify it. Another option would be to give medical treatment to the applicant, and make a new assessment after some time has passed.<sup>578</sup>

The ability of the applicant to resettle successfully in Canada shall also be assessed. Consequently, the visa officer shall consider whether the applicant has relatives or sponsors in the community in Canada where she intends to settle, her ability to speak or learn to speak English or French, her potential for employment based on her education, skills and work experience, and her resourcefulness and other similar characteristics that may help the applicant to adapt to life in Canada.<sup>579</sup>

A final criterion that may restrict the admission of applicants to resettlement in Canada relates to sponsorship. Members of the Country of Asylum class consist of self-funded or privately sponsored applicants only, while persons resettled as Convention Refugees Abroad or as members of the Source Country Class may be sponsored either by the government or by sponsorship agreement holders<sup>580</sup>, community sponsors<sup>581</sup> or groups of five or more private persons.<sup>582</sup> The target for year 2002 for government-sponsored admissions is 7.500. For these persons, no financial requirements are set up, as the federal government provides financial support for one year after arrival. There is in principle no numerical restriction to the admission of privately sponsored cases, as financial commitment on the part of the sponsor(s) is required. The working target for these admissions during year 2002 is however in the range of 2.900 to 4.200.<sup>583</sup>

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<sup>578</sup> Supra, at Sections 14.1 and 18.2.

<sup>579</sup> Supra, at Section 13.3.

<sup>580</sup> Sponsorship agreement holders are organizations and groups in Canada that have signed sponsorship agreements with a view to facilitate the sponsorship process. These are essentially pre-approved sponsors. Either they may sponsor refugees themselves or they may authorize their constituent groups to sponsor refugees.

<sup>581</sup> Community sponsorship is open to organizations, associations and corporations with sufficient finances, who can provide adequate settlement assistance to refugees. Community sponsors must be located in the community where the refugee will live.

<sup>582</sup> CIC, *Fact Sheet No. 12 – Refugee and Humanitarian Resettlement Program*, 2002.

<sup>583</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001 and 4 March 2002.

If there is a strong protection need, a balancing between the protection need and the demands of the admissibility criteria can be done. E.g. if one family member is inadmissible, but the remaining family admissible, and there is a serious protection problem, the Minister can give leave to grant admission to the family.<sup>584</sup>

### **6.3.2.7 Negative Decisions by the Visa Officer and Appeals**

If a person is not considered to be eligible for resettlement to Canada, the visa officer recommends a rejection. A rejection always needs a countersignature by a senior officer at the post, while positive decisions need no countersignature.<sup>585</sup>

The Immigration and Refugee Protection Act does in general not provide for a right to appeal decisions of visa officers overseas.<sup>586</sup> A person applying for resettlement may however seek judicial review before the Federal Court of Canada (Trial Division) if the visa officer rejects her application.<sup>587</sup>

Judicial review is not an appeal on the merits of the case, but is rather a process for ensuring that any decision “made under the *Immigration and Refugee Protection Act* comply with the *Charter of Rights and Freedoms* and the principle of fairness and non-discrimination”.<sup>588</sup> Thus, the assessment made by the Federal Court will merely consider points of law.

Leave is required in order for the Federal Court to consider the case. The application for leave and review has to be submitted within 60 days after the applicant was notified of the decision of the visa officer.<sup>589</sup> Leave will only be granted if a judge of the Federal Court is convinced that a serious issue is at stake. The applicant has to be represented by a lawyer before the Court, and this is something she has to organise herself. If the Court denies the leave application, no further possibility to appeal exists. It is neither possible to appeal a rejected application for leave.<sup>590</sup>

If the Federal Court admits the application for leave, the Trial Division of the Court will consider the case. Decisions by the Trial Division on full judicial review applications may be appealed to the Federal Court of Appeal, provided that “a serious question of general importance” is at issue. A decision by the Federal Court of Appeal can be further appealed to the Supreme Court of Canada. Leave to appeal must be granted in order for the Supreme Court to consider the case.<sup>591</sup>

The possibility to have an application reviewed by the Federal Court of Canada remains largely theoretical for refugees seeking resettlement, since they would have to hire legal counsel in Canada to bring the case. Although rejected applications for entry to Canada as independent immigrants commonly lead to such appeals, they are fairly unknown in refugee resettlement cases.<sup>592</sup>

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<sup>584</sup> CIC, *Chapter Enforcement 2 / Overseas Processing 18: Refugees – Protected Persons*, 2002, Sections 11 and 13.

<sup>585</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

<sup>586</sup> Sponsors of applications under the Family Class, which is not considered in this report, are however granted a right of appeal.

<sup>587</sup> CIC, *supra* note 568, Section 27.4.

<sup>588</sup> CIC, *Chapter Overseas Processing 22: Judicial Review*, 2002, Ottawa, Section 2.

<sup>589</sup> This deadline may be extended by the Court.

<sup>590</sup> CIC, *supra* note 588, Sections 5.2 - 5.6 and 7.

<sup>591</sup> *Supra*, at Sections 5.6 and 5.7.

<sup>592</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

It is always possible to submit a second or further application. Evidence of significant change must, however, be provided in order to effectuate a change of the decision.<sup>593</sup> Applicants whose cases have been refused often write to the visa officer, the Refugee Branch at the Ministry of Citizenship and Immigration, to the Minister of Citizenship and Immigration and to UNHCR requesting review of the refusal decision. However, it should be underscored that this option does not constitute an appeal in the proper sense<sup>594</sup>

#### **6.3.2.8 Transfer to Canada**

If the applicant is eligible as a Convention Refugee Abroad or as a member of either the Country of Asylum or Source Country Class, and fulfils the admissibility criteria, she will be granted an entry visa to Canada. IOM arranges the transport. The applicant may be granted a loan by the Canadian government, depending on her need and ability to repay, covering e.g. transport and medical examination costs.<sup>595</sup>

The Immigration Manual *Overseas Processing 5* states that in circumstances involving a need for urgent protection, where the Immigration Program Manager is satisfied about the quality of the request and the applicant's credibility or admissibility, the Manager may waive the interview. Such urgent cases are normally referred by UNHCR under the Urgent Protection Program.<sup>596</sup>

If the application process cannot be completed abroad, e.g. because medical assessment of the applicant cannot be finished, the applicant may be transferred in advance to Canada, provided that her case is considered to be urgent. The applicant will then be transferred to Canada on a temporary residence permit, and the processing of her case will be completed after arrival in Canada. The visa officer in charge of examining the application will take the decision whether the applicant should be transferred in advance to Canada. A decision on the applicant's eligibility as a Convention Refugee Abroad, or member of the Source Country or Country of Asylum Class will always be made prior to transfer. Consequently, the processing carried out once the applicant has arrived in Canada will only relate to the applicant's admissibility.<sup>597</sup> In many cases, however, departure will depend on obtaining an exit permit, and this may hinder the applicant from benefiting from the Canadian resettlement program.

#### **6.3.2.9 Applicants' Physical Safety during the Procedure**

There is no formal arrangement to protect or shelter an applicant at the Canadian representation abroad while her application is being processed. Nevertheless, the Canadian authorities may establish contact with non-governmental organisations, and sometimes even with the government, which will take measures to protect the applicant during the processing of her application. As useful as they may be, these measures are of course not necessarily water-tight safeguards.<sup>598</sup>

While the Canadian authorities are not in a position to give examples of government agents physically hindering access to their representations abroad, it is clear that this does happen.

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<sup>593</sup> Application Guidelines, supra note 567, p. 9.

<sup>594</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

<sup>595</sup> CIC, supra note 573.

<sup>596</sup> For more information, please consult CIC, supra note 568, Section 23.

<sup>597</sup> CIC, supra note 568, Sections 23.2 and 23.17.

<sup>598</sup> Information by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

Government agents of the country where the representation is located may well impede access of persons in need of protection to the Canadian representations, if not openly, then through other forms of harassment or intimidation. In deciding on which countries should be on the Source Country list, the Canadian government considers whether access to the representation is possible and reasonably safe, for the applicant as well as for Canadian interests.<sup>599</sup>

#### **6.3.2.10 Statistics and Costs of the Procedure**

For this year, 2002, the Canadian government has set a total resettlement target of 7,500 admissions. To this, one has to add sponsored cases, for which no absolute ceiling is set, but a target on between 2,900 and 4,200. This target is split up by the Ministry of Citizenship and Immigration among processing offices. Furthermore, a target has been set for in-country refugee status claimants of between 10,500 and 15,600, which indicates that ‘spontaneous’ arrivals still represent the greatest part of the total number of persons admitted residence permit in Canada on refugee or humanitarian grounds.<sup>600</sup>

Table 13 below shows the actual number of applicants that arrived in Canada within the Source Country Class and the Country of Asylum Class or as Convention Refugees Abroad during the period 1997 - 2001. A comparative row has been included with the numbers of spontaneous asylum seekers that have been approved. This gives an indication of the relatively high numbers of people in need of protection that arrive in Canada after resettlement procedures. The number of spontaneous arrivals is slightly higher than the number of resettled refugees though.

	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
<b>Source Country Class</b>	242	797	1,341	1,521	1,443
<b>Country of Asylum Class</b>	26	148	907	1,464	2,035
<b>Convention Refugees Abroad</b>	10,101	8,700	7,401	7,298	7,396
<b>Total resettlement admissions</b>	10,369	9,645	9,649	10,283	10,874
<b>Total asylum approvals</b>	10,623	10,179	11,792	12,978	-

Table 13 – Number of Applicants Resettled in Canada under the Three Different Categories, 1997 – 2001, and Number of In-country Refugee Status Claimants Approved, 1997 – 2000.<sup>601</sup>

#### **6.3.2.11 Evaluation of the Canadian Procedure**

The Canadian model for resettlement is highly formalised and elaborate. Detailed rules govern the assessment and decision-making, and the system operates under rather clear-cut delimitations. In contrast to the Australian system, Canada attempts to put applications filed abroad and on its territory on the same footing. The training of decision-makers abroad and the organisation of specific processing centres are further elements pointing to a high degree of normative steering of the system.

<sup>599</sup> Ibid.

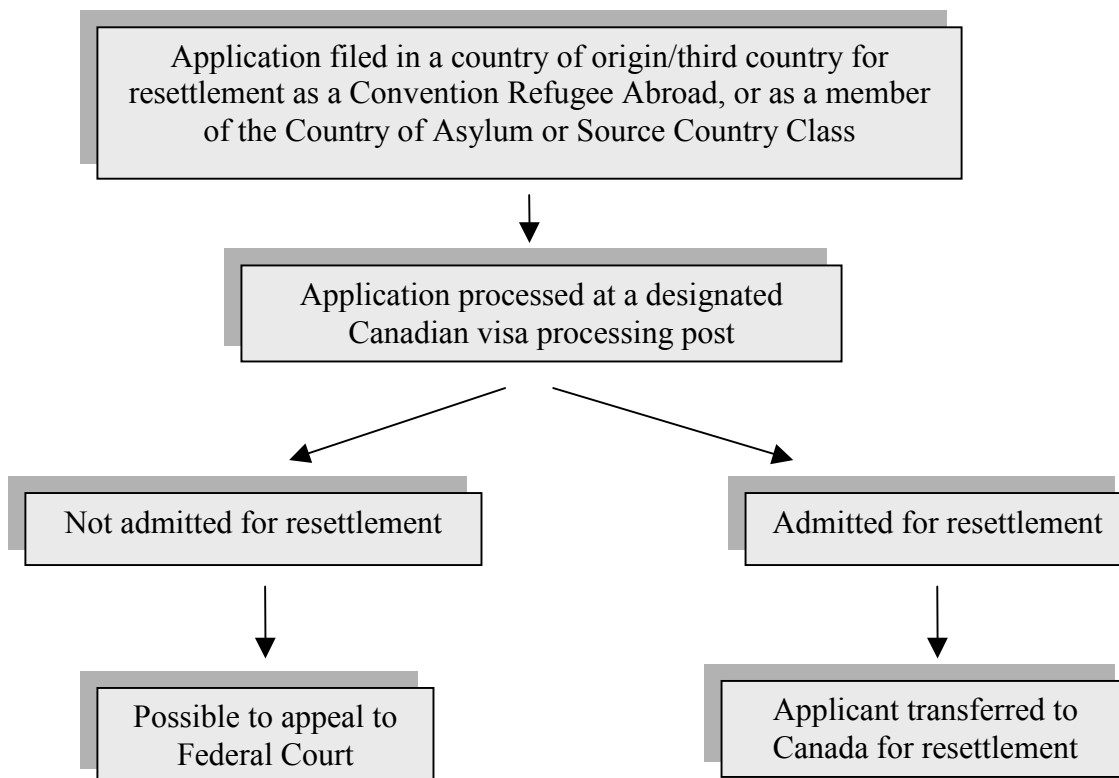
<sup>600</sup> CIC, *Part III - Report on Plans and Priorities. 2002-2003 Estimates*, 2002, p. 16.

<sup>601</sup> Information by the UNHCR Branch Office in Ottawa, received on 15 October 2001 and 4 March 2002; CIC, *Annual Immigration Plans 1999-2002*, available on <<http://www.cic.gc.ca/english/pub/index-2.html#statistics>>, accessed on 17 September 2002.

Notably, access from countries of origin is limited to a number of enumerated countries, and the criteria for this selection feature both protection-related and pragmatic elements. On the inclusionary side, one might wish to note the fast-track procedures for urgent cases, where an applicant is partly assessed after arrival in Canada, as well as the multi-level appeals procedure. In terms of accessibility, the system operates with embassies as primary access points, but appears to move towards greater involvement of pre-screening agencies.

The sponsoring feature of the Canadian model allows Canadian citizens to be involved in the Resettlement Programme. This blends a public good approach with market elements. The procedure also enables Canada to cooperate with UNHCR in providing durable solutions to refugees. The Canadian society at large, government officials and politicians support this resettlement procedure for people in need of protection. However, there is a flip side of the coin to be taken into account: generally, media and the public consider resettled refugees to be ‘real’ refugees, as contrasted with spontaneously arriving asylum seekers who are often seen as ‘bogus’.

### 6.3.2.12 *Procedural Diagram*



## 6.3.3 United States of America

### 6.3.3.1 *Legal Regulation and Current Practices of the US Resettlement Programme*

The United States operates the world's largest resettlement programme. Historically, this programme is rooted in the activities of assistance organisations set up by groups of US citizens who wished to facilitate the immigration of families and kin to the ‘New World’. After World War II, the US Congress enacted legislation regulating the access of refugees from overseas to US

territory. This legislation formed the base for the development of the US resettlement programme, which still relies on the interaction and joint funding of private organisations and the public administration.<sup>602</sup>

The US does not operate Protected Entry Procedures. Its resettlement programme should not be compared outright to Protected Entry Procedures. However, the US provides an example of how humanitarian concerns, domestic and foreign policy concerns as well as immigration considerations can be interwoven in the facilitation of territorial access. The technical solutions chosen might inspire European legislators when they develop Protected Entry Procedures. Therefore, US practices will be presented at some length in this study, with an emphasis on the role played by embassies.

Since 1975, the US has resettled 2.4 million refugees, with 77 % being either Indochinese or citizens of the former Soviet Union, reflecting the importance of foreign policy considerations in the selection of target groups.<sup>603</sup> Since the enactment of the Refugee Act of 1980, which standardised resettlement services for all resettlement cases admitted to the US, annual admission figures have ranged from 61.000 in 1983 to a high of 207.000 in 1980. The average number admitted annually since 1980 is 98.000. This number cannot be compared outright with admission under European resettlement programmes or Protected Entry Procedures, as the US operates with markedly lower requirements of protection need for some groups. Even if such cases are withdrawn, the scale of the US contribution to refugee resettlement remains impressive in quantitative terms.

To understand how the US Resettlement Programme (USRP) works, it is critical to discern between three stages:

- referral,
- adjudication, and, in case of a positive decision,
- integration into US society.

Referral implies that a specific case is suggested for resettlement in the US. Normally refugees do not approach the US embassies themselves with the resettlement request. Applications directly submitted by an applicant are only accepted at embassies in countries where no other entity, such as a voluntary agency<sup>604</sup>, IOM or UNHCR, has been designated to refer refugees to INS under the USRP. As the USRP has not been designed to identify and process single individuals, the US relies in practice to a great extent on UNHCR for individual resettlement referrals. Only a minority of referrals are made by US representations. The voluntary agency or UNHCR will refer a case to INS, if they believe that the case will have a chance of success. A pre-screening with a preliminary interview of the applicant will be conducted by the voluntary agency. If the application has prospects of success, the agency will prepare the case for submission, and an interview will be scheduled with INS.

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<sup>602</sup> The information included in this chapter is based on the content of the US chapter of the report “Safe Avenues to Asylum?”, published by the Danish Centre for Human Rights and UNHCR in April 2002. The information has been completed and updated by means of an interview at the US embassy in Vienna with an acting officer in charge of the US Immigration, the American Consul General and US Refugee Coordinator at the embassy, and the Director of the Hebrew Immigrant Aide Society, on 4 June 2002.

<sup>603</sup> Office of Refugee Resettlement, *U.S. Resettlement Programme – An Overview*, Washington, 18 July 2002, p. 1.

<sup>604</sup> Such a voluntary agency may be a locally represented NGO.

Adjudication of referred cases takes place at certain dedicated Immigration and Naturalization Service (INS) Offices abroad.<sup>605</sup> INS takes an authoritative and final decision on whether or not a referred case will be resettled.

Admitted cases will be integrated into US society through programmes operated by the Department of State and the Office for the Resettlement of Refugees. In integration, great emphasis is put on the role of private actors as Mutual Assistance Organisations and other NGOs, and the refugee's self-reliance at a comparably early stage. The labour market is seen as the major integration device.

The relevant provisions for the US resettlement programme are available in the Immigration and Nationality Act, Section 101(a)(42)(B) and 207(e), as well as in Section 207 of the Refugee Act. The latter concerns overseas processing of resettlement applications.

The terrorist attacks of 11 September 2001 substantially affected the admission of refugees under the USRP. Refugee admissions were formally suspended at the end of September and were not re-authorised until 21 November 2001. In practice, admissions were put on hold for almost three months. Even after this period, the more stringent security checks and concerns about the safety of US government personnel have slowed the resettlement procedure down. An immediate effect of the terrorist attacks was the very strict identity and security checks put into force, affecting both new applicants as well as those who had already passed all checks, and were only waiting for transfer to the US.<sup>606</sup>

The major reason for the suspension of the USRP during autumn 2001 was probably the thorough security review carried out at the time. The three main concerns under scrutiny were: the safety of INS officers working abroad, the security of the public in the US in regard to those applicants screened and admitted under the USRP, and the risk of misrepresentation or fraud by persons trying to enter the US through the USRP.<sup>607</sup>

Currently, a process aiming at the acceleration and harmonisation of practices at the various embassies through standardized work sheets and through a comparison of randomly selected cases has been initiated.<sup>608</sup> At the time of writing, a joint computer database Worldwide Refugee Application System (WRAPS), is being launched, allowing referring agencies and governmental actors to access standardised case information online.

### **6.3.3.2 General Principles of the Procedure**

Comparisons between US and European practices are often hampered by terminological misunderstandings. According to US terminology, a difference is made between asylum seekers and refugees applying for resettlement. The former are persons who are physically present at US territory or who have arrived in the US. The latter are persons who submit their resettlement application while still outside the US. In particular the benefits offered to these two groups differ.

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<sup>605</sup> These offices are the district offices in Mexico City, Rome and Bangkok, and the sub-offices in New Delhi, Islamabad, Accra, Nairobi, Moscow, Vienna, Athens and Frankfurt. The Rome office with its sub-offices accounts for 95% of refugee processing cases – the office covers more than 130 countries, mainly in Europe and Africa.

<sup>606</sup> Kathleen Newland, *Refugee Resettlement in the United States post-September 11*, paper presented at the Immigration Law and Policy Seminar in Chicago, 12 April 2002.

<sup>607</sup> Ibid.

<sup>608</sup> Interview at the US embassy in Vienna, 4 June 2002.

Asylum seekers have access only to a severely limited range of benefits, while resettled refugees enjoy the full range of benefits.

Within the framework of the resettlement programme, it is possible to approach an embassy with a request for resettlement, provided that neither a voluntary agency nor the UNHCR has been given the sole right to refer applications to INS in the country where the representation is located. Under the priority system that has been established by the Department of State (Priority 1 – Priority 5, see for further explanation below), any nationality may be referred by an embassy under Priority 1 of the USRP.<sup>609</sup>

Before the case reaches the INS, it has passed a pre-screening phase conducted by the referring agency. This pre-screening is an important explanation for the high recognition rates by INS, as the Service never receives cases obviously not qualifying - those are screened out by the voluntary agencies.

### **6.3.3.3 Classes of Beneficiaries**

All candidates for resettlement under the USRP must fulfil the criteria of the refugee definition. For certain groups (e.g. citizens of the Former Soviet Union), evidentiary requirements have been relaxed, and a strong emphasis is put on past persecution. In addition, the candidate's case must relate to the categories of an elaborate priority system. This system provides a mechanism for deciding which cases deserve more urgent processing than others. In practice it is used to set the order for the INS interview.<sup>610</sup>

The priority system is based on a structure which was introduced in 1994. In theory it consists of five priority categories, while in practice applicants are currently referred under three categories only. Originally Priority 1 was designed to cater for especially urgent cases. In practice, however, it has turned out to include a broad range of categories and definitions.<sup>611</sup> Presently it covers all cases that have been identified by UNHCR or by a US embassy where the applicant is considered to be in immediate danger: “persons facing compelling security concerns in countries of first asylum; persons in need of legal protection because of the danger of *refoulement*; those in danger due to threats of armed attack where they are located; persons who have experienced recent persecution because of political, religious, or human rights activities (prisoners of conscience); women-at-risk; victims of torture or violence; physically or mentally disabled persons; persons in urgent need of medical treatment not available in the first asylum country; and persons for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution”.<sup>612</sup> Priority 1 cases are very rare and usually not successful. It consists mainly of family-related cases, as it is normally families that refer the cases into the system.<sup>613</sup>

Priority 2 consists of groups of special concern. Certain groups of persons have been identified by the State Department to have a special need for protection. For the year 2001, one example of such

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<sup>609</sup> Department of State, *Proposed Refugee Admissions for Fiscal Year 2001: Report to the Congress*, p.21.

<sup>610</sup> Ibid.

<sup>611</sup> Bill Frelick, *Rethinking U.S. Refugee Admissions: Quantity and Quality*, excerpt from U.S. Committee for Refugees, *World Refugee Survey 2002*.

<sup>612</sup> Department of State, *supra* note 609, pp. 21-22.

<sup>613</sup> Interview at the US embassy in Vienna, 4 June 2002.



a group was members of Iranian religious minorities.<sup>614</sup> Normally, these applicants have to be outside their country of origin, except for cases in Cuba<sup>615</sup>, the Former Soviet Union and Vietnam. Currently, Somali Bantus are being considered for Priority 2.

Family related cases, i.e. applicants that have been separated from immediate family members who have legal residence in the United States, are placed under Priority 3. Priority 4 was intended for more distant relatives and Priority 5 for even more distant relatives. These categories fall outside the scope of this report.<sup>616</sup>

The priority system cannot be understood merely by resorting to protection needs. Also, one has to consider the foreign policy interests of the US government, the pressure exerted by ethnic groups in US domestic policy and the role of immigration in US society. Hence, the USRP should not be judged merely on the basis of protection imperatives.

#### **6.3.3.4 Access to the Representations**

Different from Protected Entry Procedures, embassies play a subordinate role in accessing the US resettlement programme. With UNHCR, IOM and voluntary agencies providing the major inroad into the process of selection, the access to embassies is of critical importance only for a minor group.

For this group, however, access to the premises of an US embassy can turn out to be problematic. First, it requires courage to approach the representation, given that the local authorities might register every move one is making. Furthermore, a passport or some other form of identification is normally required in order to enter the premises of the representation.<sup>617</sup> The Department of State has issued instructions to the embassies on how to handle so-called walk-ins. While every embassy possesses these instructions, not every embassy has experience with the asylum dimension. This is particularly relevant for small embassies that never have received a resettlement request.<sup>618</sup>

The placement of INS processing offices is dictated by security concerns. Therefore, offices are located at a certain distance from the region generating refugees, explaining *inter alia* why many African applications are processed in Rome.<sup>619</sup> Geographical distance generally prolongs processing, and the US system is known to be unresponsive to very urgent cases.

In cases where an applicant cannot be brought to the INS office at one of the dedicated locations for an interview, INS officers travel to the applicant in order to conduct the interview locally. This is called a 'circuit ride'. When a pile of cases has been identified in a given country, an INS officer goes on a circuit ride. In principle, a ride can be motivated by the existence of only one application. At times, it may take months after preparations for the case have been completed before a circuit ride is carried out.<sup>620</sup> Staff at the Vienna INS office seldom performs such rides.<sup>621</sup>

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<sup>614</sup> Department of State, *supra* note 609, p. 22. Other specific groups have been singled out from Africa, Bosnia, Burma, Cuba, Former Soviet Union and Vietnam.

<sup>615</sup> In Cuba, pre-screening is done by a consular officer, as no voluntary agency is present there.

<sup>616</sup> Frelick, *supra* note 611.

<sup>617</sup> This is a problem recurring at e.g. British representations. See Chapter 6.1.6.3.

<sup>618</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>619</sup> *Ibid.*

<sup>620</sup> Newland, *supra* note 606.

<sup>621</sup> Interview at the US embassy in Vienna, 4 June 2002.

The INS sub-office in Vienna offers a good illustration of how practicalities have been agreed between the US and the country where the INS office is located. The Vienna INS office is cooperating with the Austrian authorities in a special arrangement to legally bring religious minorities from Iran to Austria for processing by the INS. The process begins in the US, where family members of the applicant contact a voluntary agency in order to bring the case to their attention. The voluntary agency checks whether the person actually belongs to the religious group as alleged, by asking the religious group to certify that the beneficiary is a member of the group.<sup>622</sup> After this has been established, INS performs a first security check. Then the voluntary agency prepares a file, and requests the Austrian Federal Ministry of the Interior to issue an Austrian visa. The Austrian authorities perform their own security check of the applicant, before instructing the Austrian embassy in Tehran to issue a D-visa, valid for 6 months (which can be prolonged after arrival) to the applicant. Thereafter the applicant can leave Iran for Vienna.<sup>623</sup> In Vienna, fingerprints are taken by the voluntary agency involved, and a second INS security check is carried out. Next, the applicant is interviewed by the voluntary agency, and, in successful cases, an INS interview is scheduled. Accommodation in Vienna (including food, lodging and medical supply) must be provided for by a sponsor, normally the applicant's family.<sup>624</sup>

Why would Iranian refugees take the detour via Austria? The reason is that it would be dangerous to apply in other Muslim countries in the neighbourhood of Iran<sup>625</sup>, and Turkey is overburdened by asylum applicants. In Vienna, there are resources to deal with cases. Since 2001, INS only accepts applicants who arrive in Vienna in an orderly manner, meaning that no spontaneous arrivals at the embassy are accepted.<sup>626</sup>

In the case of in-country processing, impediments to seeking asylum attributable to the country in which the representation is situated might be encountered. The authorities in that country may limit the access to the resettlement procedure for certain persons, and they may hinder persons from leaving the country even if they have been approved for resettlement in the US. In order to avoid intervention of this kind from the local authorities, the US has approached the authorities in the countries where they wish to do in-country processing, for bilateral agreements in this regard.<sup>627</sup> A graphic example of difficulties that may arise is from the early 1990s, when a number of Haitians, out of fear of government identification and ensuing reprisals, did not dare to approach the US representation and apply for resettlement.

The referral agencies involved in the USRP, not only make the burden easier on INS, but also contribute to a more accessible procedure for applicants. While rigid security regimes might be imposed on American embassies, hindering access for many applicants, such arrangements are rare for the agencies conducting the pre-screening task. As the applicant in the first phase will approach the agency, she will access the USRP without having to present e.g. identity documents, which she might not have in her possession, and she will avoid possible security risks that she may be exposed to by approaching an American embassy.<sup>628</sup>

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<sup>622</sup> Self-policing of the group is thought to prevent abuse.

<sup>623</sup> The Iranian authorities are presumed to know about this practice.

<sup>624</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>625</sup> This evaluation of regional security is in stark contrast to the application of 'protection elsewhere'-arguments to turn down applications under the Austrian Protected Entry Procedures. See Chapter 6.1.1.5 above.

<sup>626</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>627</sup> Ibid.

<sup>628</sup> Ibid.

### **6.3.3.5 Submission of the Application**

A person in need of protection may approach a US diplomatic or consular representation in a country where such a representation is situated. If a voluntary agency has been assigned to do pre-screening and referral, the applicant will be asked to report to this agency. It is entirely within the discretionary power of the voluntary agency (or representation, if a dedicated voluntary agency is not present in the country) to decide whether the person should be referred to INS for a resettlement interview. If a person approaches a US representation in a country where UNHCR is present, the officer at the representation would most likely advise the person to approach UNHCR instead.

According to US refugee legislation, persons who are still within their country of origin may apply for resettlement in the US, provided that they are located in certain designated countries of origin. These countries are decided through a presidential directive. Currently, Cuba, countries of the former Soviet Union, and Vietnam have been designated.<sup>629</sup> Candidates applying in one of these countries must fall within a pre-decided category. By way of example, in Cuba, the procedure has been restricted to applications by former political prisoners. In-country processing generates a large number of refugee admissions to the US. In 1997, more than 50% of the refugees authorised for resettlement in the US were admitted through this procedure.<sup>630</sup> This illustrates the important role of policy considerations in formulating priorities under the USRP.

The in-country processing procedure does not give representations a discretionary power to refuse forwarding applications for assessment to INS if the applicant satisfies the basic application criteria, such as being a former political prisoner if applying at the US representation in Havana, Cuba.<sup>631</sup> It does, however, fall within the discretion of the officer at the representation to decide whether the applicant fulfils the basic application criteria.

### **6.3.3.6 Initial Processing of the Application**

An applicant is always asked whether she filed an application with embassies of other potential host countries, but no checks are carried out to verify the response. Nor does any collaboration with other embassies take place in this regard. If a person admits that an application is pending with another embassy, the outcome in that procedure is waited for, and the case put on hold by the INS.<sup>632</sup>

Normally, voluntary agencies assist INS by conducting pre-screening interviews and by preparing cases to be submitted to INS. All the necessary documents will be collected and a preliminary assessment of the case will take place. The voluntary agency will schedule an interview with INS if the case has prospects of success. In Vienna, the voluntary agency pre-screening resettlement applications is the Hebrew Immigrant Aid Society.<sup>633</sup> In the in-country processing procedure, applicants normally submit their application for resettlement by mailing completed preliminary questionnaires to the appropriate processing entity.

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<sup>629</sup> As of 14 January 2002.

<sup>630</sup> IGC, *Report on Asylum Procedures. Overview of Policies and Practices in IGC Participating States*, 1997, p. 374.

<sup>631</sup> In Cuba the US is represented by the US Interests Section of the Embassy of Switzerland, Havana, Cuba.

<sup>632</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>633</sup> Ibid.

### 6.3.3.7 Adjudication of the Application by INS

All decisions on resettlement applications submitted abroad are taken by INS on a case-by case basis. The INS officer who conducts the refugee interview will decide whether or not the applicant will be admitted to the US for resettlement. The decision of the INS officer will not be reviewed by anyone else. If the officer finds that the applicant fulfils the criteria for resettlement in the US and consequently approves the application, the Department of State may not refuse to issue an entry visa for the applicant.

The purpose of the interview is to clarify the applicant's request for resettlement. Through this interview, the INS officer will try to establish whether the applicant has suffered past persecution, or has a well-founded fear of future persecution, on the basis of political opinion, religion, nationality, race, or membership in a particular social group. If the documents submitted appear not to be authentic, the INS does in some cases reject applications without holding an interview.

All applicants must meet the definition of refugee, as set out in US law. In addition to fulfilling the eligibility criteria, i.e. falling under the refugee definition, an applicant shall also fulfil a number of admissibility criteria in order to be approved for resettlement in the US. The admissibility criteria are identical with those applying to ordinary immigrants. The applicant must show that she does not have a criminal history, that she is free from serious contagious diseases of public health significance such as tuberculosis, and that she is not affiliated with certain political movements (e.g. a Nazi organisation).<sup>634</sup> The medical check is normally carried out by IOM and the security check by the FBI. Both are conducted before the applicant travels to the US. If the admissibility criteria are not fulfilled, the applicant will not be approved for resettlement to the US.

The terrorist attacks of 11 September 2001 resulted in new security procedures, inter alia comprising a more thorough process of name verification and a more extensive scrutiny of certain populations, groups within those populations, or both. The latter concerns in particular Middle Eastern, Turkish, Central Asian and Muslim men aged between 16 and 55, but also the religious minorities in Iran that are processed at the US representation in Vienna. For such persons, new 'security advisory opinions' are required. The advisory opinions results from checks carried out by FBI, CIA and other intelligence agency sources. They aim at identifying persons who are considered suspicious due to e.g. certain travel patterns.<sup>635</sup>

Legal assistance is not provided for, but the voluntary agency will assist in preparing the application for submission to INS. There are, however, no impediments for the applicant to organise legal aid on her own.<sup>636</sup>

Before 11 September 2001, the processing time of a resettlement application, from registration with a voluntary agency to the entry into the US, was 2 months. Now it takes 3 to 5 months. In cases where the most intense security screening is performed, processing can take more than 6 months.<sup>637</sup>

A rejected resettlement application is not subject to appeal, nor to review. It is, however, possible to approach the adjudicating INS officer with a request for reconsideration of the decision. The

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<sup>634</sup> See Immigration and Nationality Act, Section 212(a).

<sup>635</sup> Newland, *supra* note 606.

<sup>636</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>637</sup> Department of State, *Fact Sheet: U.S. Refugee Admission and Resettlement Program*, May 30, 2002.

voluntary agency may assist in improving the resettlement application in order to submit it for reconsideration, but it does not take the side of the applicant, as a lawyer or an NGO would do. The voluntary agency's task is to provide the open door to the system.<sup>638</sup>

#### **6.3.3.8 Transfer to the United States**

The USRP foresees a very complex procedure, involving a number of entities. It is a mix of a federal-state-local collaboration, as well as a public-private collaboration. Once a refugee has passed the whole resettlement procedure, she will have been involved with four different federal agencies (INS, FBI, the Bureau of Population, Refugees and Migration, and the Office of Refugee Resettlement), two international organisations (UNHCR and IOM), two voluntary agencies (one pre-screening agency and one concerned with integration in the US) and a Congressional Committee.

Due to the validity of the entry visa issued to an approved resettlement applicant, she has to arrive in the US within one year.<sup>639</sup> The journey is normally organised by IOM, which will also provide for a loan for transportation for those refugees who cannot afford the journey themselves.<sup>640</sup>

Before the admitted applicant travels to the US, her case will be forwarded to the Allocation Group in New York. The Allocation Group will refer the case to one of the nine US voluntary agencies conducting resettlement work domestically, which then will take responsibility for resettling the applicant in the US. The State Department allocates a small 'reception and placement grant' for each refugee that the voluntary agencies resettle. In Spring 2002 this grant was determined to be \$800 per refugee. An affiliate of the voluntary agency will be engaged to sponsor the refugee and organise her reception in the place where she will be living.<sup>641</sup>

During the first year after arrival in the US, the applicant will be assisted through state funding. Thereafter the applicant is expected to survive on her own. The goal is that 95% of employable persons should be employed within 6 months after arrival – a goal which is usually met. Voluntary agencies will assist refugees resettled in the US with labour market integration.<sup>642</sup>

An applicant will not be transferred to the US before her application has been decided upon by the INS, even if she is in immediate need of protection. The US contribution to the evacuation of Kosovars in 1999 represents an exception, where the INS interview was completed abroad, but the assessment of admissibility, i.e. health and security screening, was completed after arrival in the US.

Furthermore, persons in immediate need of protection, who are not already determined to be refugees, may be brought to the US under "humanitarian parole". This is an exceptional form of relief, used extremely sparingly, for which no procedure has been established neither as part of US resettlement, nor for in-country processing.

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<sup>638</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>639</sup> Ibid.

<sup>640</sup> Newland, *supra* note 606.

<sup>641</sup> Ibid.

<sup>642</sup> Interview at the US embassy in Vienna, 4 June 2002.

The applicant will not be protected by the US representation or by the INS while her application is being processed. Physical protection as such is considered to be the responsibility of the first country of asylum or UNHCR, as long as the applicant has not been transferred to the territory of the US.

### 6.3.3.9 Statistics

Each year, the President, in consultation with the Congress, determines the number of refugees that will be admitted to the US during the coming fiscal year. For fiscal year 2002, admission of up to 70.000 refugees to the United States was decided to be justified by humanitarian concerns or otherwise in the national interest. This number was to be allocated among refugees of special humanitarian concern to the United States in accordance with the regional allocations set out in Table 14.<sup>643</sup>

Region	Admissions for 2002
Africa	22.000
Eastern Europe	9.000
Latin America	3.000
East Asia	4.000
Former Soviet Union	17.000
Near East / South Asia	15.000

**Table 14 - Regional Admissions to the US for 2002**

Some 5.000 places are allocated for non-funded applicants each year. This number is an unallocated reserve, i.e. not earmarked for a particular region, but saved in order to meet unexpected needs that may arise during the year. These places may be used only upon notification to the United States Congress and provided that necessary funding can be identified with existing appropriations of the Department of State and Health and Human Services.<sup>644</sup>

Not all allocated places are used during the year. One reason is that logistics might not always support the processing of a great numbers of applicants. In order to avoid strategic behaviour of applicants,<sup>645</sup> the US does not inform actively about its resettlement programme.<sup>646</sup>

Table 15 shows the ceiling for admissions and the total number of refugees admitted to the United States during each year of the period 1992-2001. It also includes two comparative columns with the total number of asylum applications submitted in the United States and the number of approved

<sup>643</sup> US Committee for Refugees, *Regional Refugee Ceilings and Admissions to the United States, FY 1989-2002*, available on <[http://www.refugees.org/downloads/rr01\\_v12ceilings.pdf](http://www.refugees.org/downloads/rr01_v12ceilings.pdf)>, accessed on 20 August 2002.

<sup>644</sup> Department of State, *supra* note 609, p. 3.

<sup>645</sup> The approval rates from the INS office in Frankfurt may serve as a visualising example in regard to strategic behaviour of resettlement applicants. The Frankfurt office dealt mainly with Bosnians, in order to burden-share with Germany. In the beginning of the period 1997 – 2000, approval rates were 90-95 percent. At the end of this period they had decreased to 80-85 percent. The explanation provided by U.S. authorities is that knowledge of the U.S. program had been disseminated informally within the target group, resulting in a larger number of non-qualified applications. Interview at the US embassy in Vienna, 4 June 2002.

<sup>646</sup> Interview at the US embassy in Vienna, 4 June 2002. One commentator has demanded proper and transparent public-information campaigns directed at potential beneficiaries. Frelick, *supra* note 611, p. 36.

asylum applications.<sup>647</sup> The latter gives an indication of the importance of the USRP. The largest part of people in need of protection arrives through this programme, while only a minor part is approved after spontaneously arriving in the United States. The comparison also shows that as refugee admissions have gone down, asylum approvals have simultaneously gone up. This could indicate a connection between the decrease in admitted refugees and increase in asylum approvals.<sup>648</sup>

<b>Fiscal Year</b>	<b>Ceiling</b>	<b>Refugee admissions</b>	<b>Asylum applications</b>	<b>Asylum approvals</b>
<b>1992</b>	142.000	131.294	103.964	3.919
<b>1993</b>	132.000	119.231	144.166	5.012
<b>1994</b>	121.000	112.682	146.468	8.131
<b>1995</b>	112.000	99.490	154.464	12.454
<b>1996</b>	90.000	75.693	128.190	13.532
<b>1997</b>	78.000	70.085	91.381	10.509
<b>1998</b>	83.000	76.554	57.786	10.364
<b>1999</b>	91.000	85.006	42.530	13.510
<b>2000</b>	90.000	72.515	49.462	16.810
<b>2001</b>	80.000	68.426	66.356	20.651
<b>2002</b>	70.000	≈ 25.000	no information	no information

**Table 15 – Ceilings, Actual Admissions to the US, Asylum Applications Made in the US and Asylum Approvals, 1992-2002**

Almost 90 percent of the admissions to the US completed in 1992 originated from countries of the former Soviet Union, Indochina, and Cuba. Still, these countries and regions make up more than a third of all refugee admissions to the US each year, despite the decrease in the total number of admitted refugees, and the more diverse appearance of the USRP today. In 2000, refugees from more than 60 countries were resettled in the US.<sup>649</sup>

Compared to 1992, the number of actual admissions in 2001 has more than halved. The reasons for this decrease is to be found in structural obstacles that INS often is faced with in its refugee determination, the decline of the regional resettlement programs with roots in the Cold War, and difficulties in defining new groups for resettlement.<sup>650</sup>

A constant gap between the number of refugees allowed under the agreed ceiling and the number of refugees actually admitted has resulted in a repeated decline in the ceilings for resettlement. Since the middle of the 1990s, a pattern has emerged, through which the actual number of admissions has been mirrored in the ceiling decided for the following year. This decrease has led to around 7-16 percent of the admitted numbers have being cut each year, resulting in a cumulative shortfall of

<sup>647</sup> US Committee for Refugees, *supra* note 643; Immigration and Naturalization Service, *1996 Statistical Yearbook of the Immigration and Naturalization Service*, Washington DC 1996; Immigration and Naturalization Service, *Fiscal Year End Statistical Reports 1998-2001*, available on <<http://www.ins.usdoj.gov>>, visited on 2 September 2002.

<sup>648</sup> As a comparison the attention may be drawn to the Australian resettlement program, where the numbers of applicants admitted within the territorial asylum procedure directly affects the number of applicants admitted under the resettlement program. The reason is that the two procedures have a common ceiling for admissions, and therefore are interrelated. See Chapter 6.3.1.7.

<sup>649</sup> Newland, *supra* note 606.

<sup>650</sup> *Ibid.*

admissions with more than 100.000 places in total since the middle of the 1990s. As unused resettlement places one year may not be transferred to the next year, those places will be permanently lost.<sup>651</sup>

Acceptance rate for applicants interviewed by INS abroad is normally above 70%.<sup>652</sup> This may vary slightly according to the number of cases and the nationality of the applicants. Approximately 5% of the rejected applications are referred for reconsideration to the INS officer, and of these about 10% of the applicants have their decisions reversed. The high acceptance rate is most likely an effect of the pre-screening mechanism, where only applicants with prospects of success will be referred to INS for an interview.

Table 16 reproduces the statistics for Refugee-Status applications for the years 1995 – 2000.<sup>653</sup>

Year	Applications pending beginning of year	Applications filed during year	Applications approved during year	Applications denied during year	Applications otherwise closed during year	Applications pending end of year
1995	12.471	143.223	78.936	32.412	34.251	10.095
1996	10.095	155.868	74.491	26.317	59.589	5.566
1997	5.566	122.741	77.600	22.725	17.270	10.712
1998	10.712	124.777	73.198	31.001	6.768	24.522
1999	24.522	111.576	85.592	19.094	6.358	25.054
2000	25.042	91.854	66.546	21.010	10.482	18.858

**Table 16 - Applications for Refugee Status in the US, 1995-2000**

Should approval rates go down, this might reflect a problem with the quality of pre-screening. However, where refugee resettlement programmes last longer, fraud rates usually increase. Therefore, programmes have a short life-span.<sup>654</sup>

11 September 2001 has strongly affected the numbers of admitted refugees under the USRP. 781 refugees were admitted to the US during the first quarter of fiscal year 2002. This is a major decline in numbers compared with the more than 14.000 admitted during the same period the previous year. It is doubtful whether the number of actual admissions will even come close to the ceiling of 70.000 set for 2002. Only 13.777 refugees had been admitted by May 31, 2002, compared to 41.721 at the same time during fiscal year 2001.<sup>655</sup> With two months remaining of fiscal year 2002, only some 20.000 refugees had been admitted by the end of July.<sup>656</sup>

<sup>651</sup> Ibid.

<sup>652</sup> This percentage can be calculated by using data provided in Table 16 below.

<sup>653</sup> Immigration and Naturalization Service, *2000 Statistical Yearbook of the Immigration and Naturalization Service*, 2000, Washington DC.

<sup>654</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>655</sup> U.S. Committee for Refugees: *2002: Lowest Refugee Admissions in Two Decades?*, Refugee Reports Vol. 23, No. 4, May 2002.

<sup>656</sup> U.S. Committee for Refugees, *IRSA/USCR Launch FY 2003 Refugee Admissions Advocacy, Call for "National Refugee Advocacy" Day of Action on August 20*, available at <<http://www.refugees.org/news/crisis/resettlement/index.htm>>, accessed on 20 August 2002.



Finally, the INS office in Vienna will serve as an example of the number of applications processed at one single INS office. The Vienna office deals with applicants from 12 countries, from the Baltics to Greece. In 1999, 6,000 applications were processed in Vienna, most of them Iranians, some Iraqis and some Bosnians. In 2000, the number was 5,000, and in 2001, the number was 1,500. The Vienna office deals mostly with Priority 2 cases, as UNHCR does not refer cases to Vienna from any other Priorities.<sup>657</sup>

### 6.3.3.10 Evaluation of the US Procedure

It has to be appreciated that a resettlement scheme is not fully comparable to a Protected Entry Procedure in all respects. In US resettlement policy, numerical ceilings, regional allocations and the pitching of the priority system are central features. By contrast, Protected Entry Procedures by definition possess no ceilings, and definitions of beneficiaries are more geared to merely reproducing the refugee definition, perhaps adding a close-tie requirement. In general, the US resettlement scheme clearly represents what could be called a “plan economy of protection”, albeit with important individual contributions (the role of private sponsors, or religious communities certifying beneficiaries). This should be kept in mind when crafting comparisons.

The US resettlement program is a highly formalised part of the overall protection system. In mere quantitative terms, its resettlement contingent is impressive. Unlike European host states, resettlement plays a central role in US refugee policies. Parallel to other non-European resettlement countries, the degree of differentiation in the USRP is high, which is also expressed in the specific targeting of certain countries (e.g. Cuba) and even certain groups within those (e.g. former political prisoners). Whether this differentiation always corresponds to the primacy of protection needs can be challenged. A adjustment of the priority structure strictly along the magnitude of humanitarian concern has been proposed,<sup>658</sup> which is presented along with existing priorities in Table 17. The present authors believe that the current priority system is opaque and prioritises foreign and domestic policy concerns over needs. On the other hand, with all its drawbacks, the priority system remains more predictable than the highly discretionary practices found with some European states operating Protected Entry Procedures.

	Existing Priorities	Proposed Priorities
<b>Priority 1</b>	<p>Persons referred by UNHCR or a US embassy, who</p> <ul style="list-style-type: none"> <li>- are in danger of <i>refoulement</i></li> <li>- are in danger due to threats of armed attack</li> <li>- have experienced persecution because of political, religious, or human rights activities</li> <li>- are categorised as women-at-risk</li> <li>- are victims of torture or violence</li> <li>- are physically or mentally disabled</li> <li>- are in urgent need of medical attention not available in the first-asylum country</li> <li>- are persons for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution</li> </ul>	<p>The most urgent refugee protection cases in countries of first asylum, including:</p> <ul style="list-style-type: none"> <li>- refugees facing compelling security concerns in countries of first asylum</li> <li>- refugees in need of legal protection because of danger of <i>refoulement</i></li> <li>- refugees in danger of armed attack in their immediate location</li> <li>- refugees in urgent need of medical attention not available in the first-asylum country</li> </ul>

<sup>657</sup> Interview at the US embassy in Vienna, 4 June 2002.

<sup>658</sup> Frelick, *supra* note 611, pp. 28-37.

	Existing Priorities	Proposed Priorities
<b>Priority 2</b>	Persons belonging to US State Department-identified refugee groups within specific nationalities. E.g. members of Iranian religious minorities	Refugees whose persecution or fear of persecution is based on actual or imputed association with the US government or US nongovernmental entities
<b>Priority 3</b>	<ul style="list-style-type: none"> <li>- Spouses, unmarried children of any age, and parents of persons lawfully admitted to the US as permanent resident aliens, refugees, asylum seekers, conditional residents, and certain parolees</li> <li>- Unmarried children (at least 21 years of age) of US citizens</li> <li>- Parents of US citizens who are under 21 years of age</li> </ul>	Refugee “women-at-risk” who are susceptible to exploitation and abuse, including women who are highly vulnerable in countries of first asylum
<b>Priority 4</b>	Grandparents, grandchildren, married sons and daughters, and siblings of US citizens and persons lawfully admitted to the US as permanent resident aliens, refugees, asylum seekers, conditional residents, and certain parolees (Not available for any nationality in FY 2002.)	Physically or mentally disabled refugees and refugee survivors of torture or violence
<b>Priority 5</b>	Uncles, aunts, nieces, nephews, and first cousins of US citizens and persons lawfully admitted to the US as permanent resident aliens, refugees, asylum seekers, conditional residents, and certain parolees (Not available for any nationality in FY 2002.)	Persons belonging to US State Department-identified refugee groups within specific nationalities
<b>Priority 6</b>		<ul style="list-style-type: none"> <li>- Refugee spouses, unmarried refugee children of any age, and refugee parents of persons lawfully admitted to the US as permanent resident aliens, refugees, asylum seekers, conditional residents, and certain parolees</li> <li>- Unmarried children (at least 21 years of age) of US citizens</li> <li>- Parents of US citizens who are under 21 years of age</li> </ul>
<b>Priority 7</b>		Long-stayer refugees for whom voluntary repatriation or local integration are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution

**Table 17 – Existing and Proposed Priorities for the US Resettlement Programme**

Assessing the accessibility of the system leaves the observer with contradicting impressions. In a sense, the US procedure attempts to move processing closer to the applicant, with a network of processing entities with qualified staff covering various regions of origin. This form of outreach is better organised than its equivalent in European Protected Entry Procedures, where problems with under-trained and overburdened staff have surfaced. However, the USRP is not omnipresent, and security concerns have exacerbated a withdrawal from regions of origin. This can be only partly compensated by the system of circuit rides, where INS officers travel to countries where no INS office is located in order to interview applicants.

It will be noted that the goal of the US system is not to have persons applying directly at embassies. Rather, the aim is that voluntary agencies should do a pre-screening of cases, and thereby relieve

the embassy from a part of the selection process. The pre-screening conducted by the voluntary agency will ease the burden on the INS offices, while at the same time providing the applicant with some basic assistance in making the resettlement application. Pre-screening has, as emphasised above, contributed to the high admission statistics for US resettlement. The voluntary agency conducting the pre-screening can be considered as the first filtering mechanism encountered by the resettlement applicant.

There is no equivalent role for NGOs in European Protected Entry Procedures, and one should encourage a further exploration of the possibility to them as pre-screeners in a systematic fashion, or to develop cooperation with UNHCR to cover those functions.

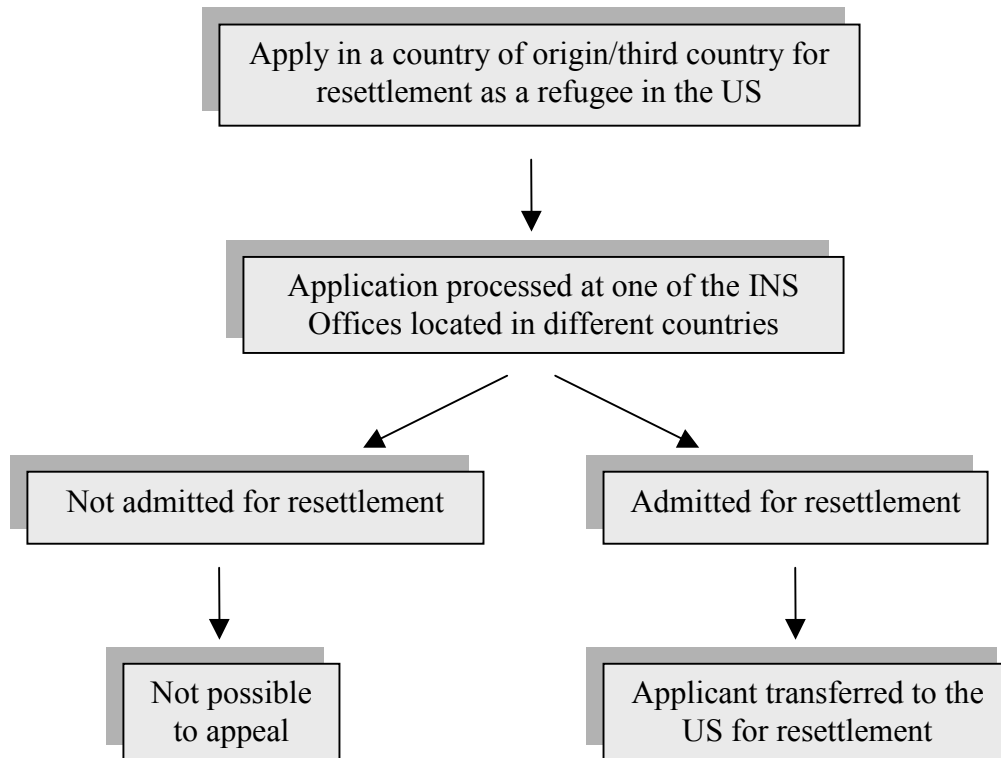
No appeal or reconsideration tool is available in case the applicant does not pass the first filter. The screening agencies are endowed with considerable discretionary power, and *ex post* corrections to erroneous screening are absent. While free legal aid is not on offer for resettlement applicants, the assistance of the voluntary agency can at least to a certain degree compensate for rudimentary counselling needs (e.g. with the preparation of complete applications). It is not possible to appeal the outcome of INS determination either. The effects are aggravated by the fact that the determination procedure is the responsibility of one determination officer alone.

A positive aspect of the USRP is the holistic perspective it is based upon, stretching from selection to integration. To Europeans, it should be particularly striking that a high percentage of resettled refugees participate in the work force already half a year after arrival. The number, 95% of employable persons, shows that the US system, based on voluntary agency involvement, and subsidised by the government, has succeeded better with integrating the resettled refugees into the labour market.

A bottleneck with regard to the applications from Iranians belonging to a religious minority in Iran is the need for a family member in the US who can alert a voluntary agency of the case, and the requirement that the religious community acknowledges the applicant as being a member of it. While the extension of the system to involve civil society has to be welcomed, one should be aware that an important power is thus delegated to the community in question.

Information policies remain a problematic aspect of the USRP. Officials complain that the quality of applications deteriorates, once a certain programme has become widely known among members of a target group. Hence, no information on programmes is spread. In essence, the US model relies on the capability of pre-screening entities to “search out” persons in need.

#### 6.3.3.11 *Procedural Diagram*



## **7 The Development Potential of External Processing in Europe**

This chapter begins by offering a comparative overview of practices in those European states operating formalized Protected Entry Procedures. Subsequently, the question is addressed what role such procedures could play in the architecture of European asylum and migration law. At the end of the chapter, a number of blueprints for future action are drawn up.

### ***7.1 Comparative Overview and Critical Analysis of Existing Solutions***

To facilitate comparison on a number of selected features, Table 18 offers an overview of choices European states have made when modelling Protected Entry Procedures, while Table 19 reflects available statistical data. As the complexity of resettlement schemes is hard to present in a user-friendly table, Australia, Canada and the US are not featured in the two tables. It has not always been possible to gather information in a fully comparable format, but indicative data have been included to convey a broader impression. As only Denmark offered more detailed calculations on costs, it was considered superfluous to include this item in the overview. Generally, the tables should not be used without referring to Chapter 6, explaining country practices in detail.

#### **7.1.1 Information Policies**

With regard to information policies, the difference between resettlement countries and countries offering Protected Entry Procedures is quite striking. Resettlement countries systematically provide information on categories of beneficiaries and procedures on the Internet or via print media. Dissemination of information also takes place in third countries (Australian information campaigns in Indonesia). Countries operating Protected Entry Procedures behave differently. If information is made available at all, it is often difficult to access and understand (publication of pertinent legislation or instructions to caseworkers). Their systems are usually little known among potential beneficiaries and, at times, even among embassy staff. Protected Entry Procedures lack a quota limitation, and countries might seek to compensate for this through very restrictive information policies. The data gathered suggest that this practice should be reconsidered, as it makes little sense to invest in procedures which remain virtually unknown.

#### **7.1.2 The Nexus between Accessibility and the Formality of Procedures**

The empirical data collected suggest that the number of access points and the degree of formality of the system are interrelated. The larger the representation network of a country is, the less formalised its practices are. France and the United Kingdom operate highly informal systems, while maintaining large networks of diplomatic representations where cases can be filed. Austria opted for a formalized system, but its access points are much more scarce than in the French or the British system (see Annex 1). By contrast, Australia, Canada and the US possess large networks and run highly formalised systems, but restrict the total number of cases through other filters. Ultimately, resettlement countries can always fall back on the limitative effects of their quotas. Better

Country	Degree of formalization	Application from		Classes of Beneficiaries	“Close ties” required	“Protection elsewhere”- referrals	Decision-making power	Major filter elements	Urgent transfer	Appeals
		Country of Origin	Third Country							
<i>Austria</i>	High	Formally possible, rejection likely	Yes	Convention refugees only	No	Iran and Pakistan considered safe for Afghans	Territorial asylum authority only	Questionnaire procedure, limited depth of scrutiny, restrictive practice	No	No
<i>Denmark (abolished in 2002)</i>	High	No	Yes	Convention and de-facto refugees	Yes	No specific data	Pre-screening on close ties by representations, territorial asylum authority takes material decision	Restrictive practice, high demands on closeness of ties	No	Yes
<i>France</i>	Low	Yes	Yes	Convention refugees, beneficiaries of “territorial asylum”	No	No specific data	Representation, Ministry of Foreign Affairs and territorial asylum authority	Discretion in decision-taking, housing requirement	Yes	Yes
<i>Netherlands</i>	High	No (save for exceptional cases)	Yes	Convention refugees only	No	Primacy of protection in safe third countries, or through UNHCR or UNDP offices	Representations have a very limited discretion, material decisions taken by territorial authorities	Referral to protection elsewhere	Yes	Yes
<i>Spain</i>	High	No	Yes	Convention refugees only	No	No specific data	Territorial asylum authority in cooperation with an inter-ministerial body	Long processing delays (12-13 months in first instance). Uneven practice at embassies	Yes	Yes, both on transfer and on visa decision
<i>Switzerland</i>	High	Yes	Yes	Convention refugees, no SP cases. TP could be activated. Exceptionally, other persons at risk	Yes	Asylum can be denied to persons who reasonably can be expected to seek access to another country	Territorial asylum authority only	Restrictive practice	Yes	Yes

Country	Degree of formalization	Application from		Classes of Beneficiaries	“Close ties” required	“Protection elsewhere”-referrals	Decision-making power	Major filter elements	Urgent transfer	Appeals
		Country of Origin	Third Country							
United Kingdom	Low	No	Yes	Convention refugees only	Yes	UK must be “the most appropriate country of long term refuge”	Representation and territorial asylum authority	Double discretion in decision-taking, restrictive practice, procedure virtually unknown, access to representations	No, save for judicial review	No

**Table 18 - Protected Entry Procedures in Seven European States Practicing Protected Entry Procedures: Key Features**

Country	Statistical indications
Austria	Fragmentary statistics. Before 2001, the number of yearly applications never exceeded 353 cases. In 2001, 5.622 applications were filed, of which 124 were allowed entry on grounds related to family unity.
Denmark (abolished in 2002)	Detailed statistics. Of 1933 applications in 2001, 75 succeeded in first instance, and 21 succeeded in second instance. Cost calculations are available to a limited extent.
France	No statistics. The vast majority of protection visas are granted by French representations abroad, some 120-150 applications are referred to the MFA yearly.
Netherlands	Statistics exist. The number of applications never exceeded 397 in the past four years. Under 10 positive decisions/year, 1-2 actual transfers/year.
Spain	Fragmentary statistics. After subtracting family reunification cases, some 20 applications are estimated to remain among the claims filed with Spanish representations in 2001.
Switzerland	Detailed statistics. Of 757 applicants at representations in 2001, 130 received a positive decision, 54 entered Switzerland, and 38 were granted asylum after admission. Better “recognition rates” than in ordinary procedures: 1/6 of all applicants allowed entry.
United Kingdom	Estimates only. Less than 10 applications per year forwarded to the UK Home Office. The number of positive decisions is unknown.

**Table 19 –Seven European States Practicing Protected Entry Procedures: Statistical Indications**

possibilities for physical access appear to trigger a preference for greater discretion by the state running the representation network.

### **7.1.3 Definition of Beneficiaries, Choice of Countries, “Protection Elsewhere” and Close Ties**

In all scrutinised countries operating a formalized Protected Entry Procedure, the delimitation of beneficiaries gravitates towards the Convention refugee definition. In Austria, the Netherlands, Spain and the UK the Convention refugee category is indeed the only one on offer. Other countries add further categories (de facto refugees added by Denmark; or beneficiaries of territorial asylum added by France) or have prepared for the activation of Protected Entry Procedures for TP beneficiaries (Switzerland). In certain countries, subsidiary protection is confined to removal procedures, which blocks its availability in the context of Protected Entry Procedures (e.g. Spain and Switzerland). A number of countries appear to offer entry visas to persons in urgent need of protection, who do not fulfil the technical requirements of the categories on offer. This practice is very exceptional and highly discretionary.

All countries accept applications from third countries, but important limitations flow from referrals to ‘protection elsewhere’. The Netherlands only accepts applications from persons who cannot receive protection in the third country where they are present. If UNHCR or UNDP is represented in that country, protection is deemed to be available. In its Protected Entry Procedure, Austria regards Iran and Pakistan as safe for Afghans, while the safety of Austria’s neighbours has been denied by Austrian courts. Other countries turn the tables and look into the question if the destination state is the most appropriate country of refuge (Switzerland and the UK).

Austria, France and Switzerland accept applications filed at representations in the country of origin (or habitual residence). In Austria, such applications seem to have slight prospects of success, while such applications seem to be an important component in Swiss practices. The Netherlands generally does not accept such applications, save for very exceptional cases. Interestingly, Australia, Canada and the US cater for resettlement applications filed in countries of origin under carefully circumscribed circumstances. By way of example, Canada identifies countries of origin by resorting both to Canada’s own security concerns and the protection needs of would-be applicants.

Some countries, such as the UK, add a requirement of close ties to the criteria in the refugee definition (or other relevant categories), which can create strong exclusionary effects. Denmark’s practice was so focussed on the closeness of ties that it mutated to a pure family reunification mechanism in practice. While Austria formally does not require close ties, its practices suggest that only such persons adducing family linkages are being granted an entry permit. The existence of ties to Switzerland is an element to be considered in decision taking under the Swiss procedure, but it is not an absolute requirement.

### **7.1.4 Procedures**

Interestingly, most states operating Protected Entry Procedures actually sever the grant of an entry permit from the formal determination of refugee status. Austria, France, Switzerland and the UK are cases in point. In all named countries, the asylum procedure formally starts once a beneficiary of



Protected Entry Procedures has entered the territory. Protection-related assessments at earlier stages are solely means to respond to the question whether or not an entry visa should be granted.

The Netherlands has chosen an analogous approach, but the grant of asylum seems to be merely a matter of formality. By contrast, the considerations under Protected Entry Procedures have no impact whatsoever on the separate determination procedure conducted after the applicant has entered Austria and filed her asylum application there.

Spain and Denmark are to be found on the other side of the spectrum. Due to the complete integration of Protected Entry Procedures into the ordinary asylum determination procedure, a full assessment is made, and asylum can be granted while the applicant is abroad. However, the Spanish procedure also foresees decision taking on urgent transfers, which adds a new element compared to its territorial procedures. Before abolishment, Denmark also operated a system fully integrated with its asylum procedures, and capable of making a full determination within the framework of Protected Entry Procedures.

The distribution of competencies between representations and territorial authorities also reveal important differences. Embassies possess a considerable margin of discretion in those countries operating informal systems (France, UK). Those countries operating formal systems usually concentrate decision-making powers with territorial authorities – be it the ordinary asylum determination bodies, or ministries. Denmark provided an interesting intermediary solution, allowing its embassies to perform a pre-screening of close ties, while the determination protection needs and a thorough scrutiny of close ties was carried out by the territorial asylum determination authorities. The majority of countries allow appeals, but the efficiency of appeal rights can be doubted, as legal assistance and legal aid is usually unobtainable. The possibility of obtaining a transfer in urgent cases can be found with four of the seven countries discussed here. Countries seem to converge in that they offer little or no protection or assistance to applicants as long as they are abroad. Where assistance is offered, this is usually at the discretion of the representation.

### **7.1.5 Major Filter Elements**

The material indicates that states generally rely on different mixes of filter elements. The superficiality of assessment in the Austrian questionnaire procedure works systematically against applicants, and is aggravated by the qualification of sub-standard protection options as safe (Iran and Pakistan are seen as safe countries for Afghan refugees). The rather inclusively formulated Danish legislation was quickly narrowed down in practice, allowing access only to cases with strong family ties to persons already granted protection in Denmark. France as well as the UK can rely on the wide margins of discretion in their system as the main filter element. To a lesser degree, Switzerland does the same. The Netherlands seem to limit their actual protection offer by referring to protection elsewhere. Spain deflates the usefulness of its procedures through excessively long processing (12-13 months elapse before a decision is taken in first instance). Finally, it must be reiterated that general ignorance of the procedure is a filter element common to all states scrutinised here.

### **7.1.6 Statistics and Costs**

The lack of statistical data concerning applications, outcomes and costs is striking. In general, our questions on nationalities of applicants at large, numbers of cases and nationalities applying at major representations as well as the outcome of procedures (decisions taken at each level) remained unanswered. Of the European countries included in the study, only Denmark, the Netherlands and Switzerland were capable of providing useful data. In other states, there was no statistical separation between protection-related entry permits and entry permits based on grounds of family unity, or statistics were simply unavailable. Only the Swiss data allowed for a comparison with the territorial system, which revealed that Swiss Protected Entry Procedures were better at identifying cases in need of protection than territorial procedures.

With the exception of Denmark, governments and authorities were not in a position to indicate costs related to the operation of Protected Entry Procedures. Ironically, the Danish statistics were compiled at a time where the government prepared for the abolishment of Protected Entry Procedures, while the data indicated that they are generally much cheaper than their territorial counterpart. Switzerland provided data on the organisation of work and the manpower needed to process claims. The absence of economic data represents a serious problem, and hampers an informed discussion on how to develop protection systems in the EU.

Existing data reveals that the number of yearly applications is generally rather low, ranging in the hundreds. In exceptional cases, as experienced by Denmark and Austria, rumours may cause dramatic increases over a short period, often limited to certain nationalities and representations. Two conclusions can be drawn from this, if seen against the backdrop of filtering techniques described in the country chapters. First, the numbers suggest that states are capable of controlling caseloads, although Protected Entry Procedures are not limited by quota. As long as no radical changes in the area of information policies are effectuated, it is improbable that Protected Entry Procedures would substantially boost the quantity of protection seekers in EU. Second, the related conclusion may be drawn that Protected Entry Procedures will not revolutionise the fate of protection seekers faced with difficulties of accessing the EU. As long as the volumes processed are limited, Protected Entry Procedures should be seen as a qualitative, and not a quantitative response to protection needs. On the other hand, if information dissemination is radically improved, the number of protection seekers employing Protected Entry Procedures could very well rise in a more visible manner, adding a quantitative dimension to its practice.

### **7.1.7 Conclusion: Inclusiveness and Formalization**

In Chapter 4.3, we introduced an analytical grid allowing to group country practices along the parameters of inclusiveness and formalization. In Table 20, a tentative categorisation of seven European countries practicing Protected Entry Procedures is attempted. Our categorisation is relative, and not absolute. When Switzerland is described as formal and inclusive, this does not necessarily imply the absence of any discretionary margin, or an extremely liberal protection practice. To be sure, Switzerland is formal and inclusive only in comparison to other countries.

A further caveat is in order. As the availability of empirical data varied among states, categorizations must be seen as provisional. French representations have seemingly embarked on

protection-sensitive visa practices at embassy level. This is hard to corroborate in the absence of statistics, but existing indicators cannot be ignored. In the UK, representations also enjoy a wide discretion, but we have not been given any indications that this discretion is employed to further protection-related objectives. A closer scrutiny of UK practices could theoretically reveal that outcomes are rather close to the French ones, ultimately impacting on categorisation of the UK in our grid.

For those actors interested in the further development of Protected Entry Procedures, Swiss practices are perhaps those most worthy of a close study. This is confirmed by the statistical data, suggesting that Swiss procedures manage to filter out a high proportion of strong cases. In spite of its lack of transparency, the French example offers inspiration for a gradual sensitisation of entry control to the needs of protection seekers. The procedures operated by Austria, Denmark, the Netherlands, Spain and the UK all hold interesting elements, which could provide building blocks for future systems. This notwithstanding, the outcomes produced by them are not convincing, and major reforms appear to be needed to rebuild the confidence of potential beneficiaries.

	<b>Exclusive</b>	<b>Inclusive</b>
<b>Informal</b>	UK	France
<b>Formal</b>	Austria, Denmark, the Netherlands, Spain	Switzerland

**Table 20 - Categorisation of Seven European Countries Operating Protected Entry Procedures**

## **7.2 Future Scenarios for Processing Asylum Claims Outside the EU**

This section explores the role that Protected Entry Procedures could play in modelling a comprehensive EU response to enhancing the global system for refugee protection. Subsequently, five proposals for specific solutions within the EU will be presented. Two of them trace the contours of community legislation harmonising Protected Entry Procedures. In crafting these proposals, inspiration has been drawn partly from state practices, and partly from the evolving asylum and migration *acquis*.

### **7.2.1 Local Integration, Resettlement, Protected Entry Procedures and the Principle of Subsidiarity**

Protected Entry Procedures are but one limited practice in a complex environment, where various states' refugee, asylum and migration policies interact with each other. Arguably, these policies are not always consistent with each other, and an enhanced cooperation in this field could optimise their performance – to the advantage of both protection seekers and states. When considering the continued or even extended implementation of Protected Entry Procedures, it should be clarified how those fit together with other protection practices. In particular, Protected Entry Procedures must not weaken the efforts to secure and enhance the quality of protection in first countries of asylum. Protected Entry Procedures should also be crafted in a manner respectful to practices of

resettlement. The issue at stake is how to interlink the three named protection practices – local integration in a first country of asylum, resettlement and Protected Entry Procedures – in a meaningful and synergetic manner.<sup>659</sup>

In the search for answers, the principle of subsidiarity may offer guidance.<sup>660</sup> Subsidiarity thinking is based on the assumption that the single human being is not self-sufficient. This lack of autarky creates a need for collective structures to provide assistance: family, clan, local community, state, or even the international community. But the individual must not be absorbed in these structures, and her dignity prohibits that she be assisted, where she can assist herself. This reflection triggers a preference for the lowest organizational level that can provide the necessary assistance. Hence, subsidiarity is indeed a double principle. Firstly, it prescribes assistance where there is a need for it and, secondly, it proscribes the usurpation of competence in assistance.<sup>661</sup> Assistance turns into a pretext for the agglomeration of power, where a higher-ranking societal extension performs tasks that could be performed by lower ranking societal extensions or the single human being herself. This proscription has become notorious by its—contextually adapted—insertion into Article 5 TEC and the reference to it in Article 2 of the Treaty on European Union.

Transposed to our context, subsidiarity means that the individual shall not be assisted where she can assist herself, and, where assistance is required, it should be delivered at the lowest organisational level possible. This implies, first, that local integration in first countries of asylum should not be disrupted by insisting on extraregional solutions, as long as the level of protection responds to the individual's needs. Second, where first countries of asylum indeed do not respond to such needs at an individual level, extraregional solutions as Protected Entry Procedures and resettlement should be considered for the person in question.

Third, in selecting such solutions, the individual should not be discouraged from using her own initiative and skills, and she should be allowed to make use of non-state structures as families, religious communities and diasporas. Therefore, fourth, the individual should be allowed to actively engage in seeking a protection solution, to the extent this can be reconciled with states' legitimate needs to control their protection engagement. Extraregional arrangements differ in the way they accommodate individual initiative. Protected Entry Procedures are to a large extent self-selecting: an individual with close ties to the preferred destination state approaches its embassy on her own initiative. Here, the protection seeker herself may contribute to finding an optimum solution, which makes a central planning agency largely superfluous. UNHCR-mediated resettlement ranges on the opposite side of the spectrum, where the influence of a central planning agency is dominant, and the individual has very limited possibilities to choose a solution in a specific country. To wit, subsidiarity does not imply that central planning is bad, and self-selecting solutions are good. On the contrary: centralised and institutionalised selection is good, where self-selection simply cannot provide an adequate level of protection. Hence, self-selecting solutions as Protected Entry Procedures and those forms of resettlement procedures which allow applicants to contribute to outcomes should be given prevalence over centralised and institutionalised selection processes (as

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<sup>659</sup> The present attempt to relate three practices to each other is but one aspect of a more comprehensive debate on durable solutions, which aim at the integration of a refugee into society.

<sup>660</sup> For an introduction to the concept of subsidiarity, see O. Höffe, *Subsidiarität als staatsphilosophisches Prinzip*, in K. W. Nörr and T. Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa*, 1997, J.C.B. Mohr, Tübingen, pp.56-59.

<sup>661</sup> This specification finds support in Höffe, *supra*, at pp. 53–5 and P. Koslowski, *Subsidiarität als Prinzip der Koordination der Gesellschaft*, in K. W. Nörr and T. Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa*, 1997, J.C.B. Mohr, Tübingen, pp. 40-41.

UNHCR). The benefit is a double one: the individual's initiative is respected, and institutional resources are used in a cost-efficient manner.

These considerations can be condensed into the following sequence of solutions:

1. The first preference is local integration in first countries of asylum. Where this does not cater for a specific protection need, the next option will be taken into account:
2. Protected Entry Procedures or self-selecting forms of resettlement are the second preference. This allows the individual to personally engage in the search for an optimal protection solution. Where this option is unavailable or does not cater for a specific protection need, the next option will be taken into account:
3. The third preference is resettlement as a multilateral mechanism, mediated through international or regional organisations, or both.

This sequence begs some further explanations. To start with, it is imperative that first countries of asylum discharge their protection obligations towards arriving refugees. In designing responses, care must be taken not to undermine these obligations. This notwithstanding, the capacities of many first countries of asylum need to be strengthened, and Member States could make a critical contribution in that area. It is unlikely and not necessarily desirable that resettlement and Protected Entry Procedures will offer solutions to large numbers of refugees. As currently practised, both are characterised by making a qualitative rather than a quantitative contribution. As noted elsewhere, resettlement must be “smart” and “create additional leverage with other countries”<sup>662</sup>. The same goes for Protected Entry Procedures. But where protection in the region of origin is too weak, the pressure on the elitist extraregional solutions will become overwhelming. This will entice extraregional states to restrict their engagement (e.g. by closing down reception programmes, or access points as embassies), further exacerbating the mismatch between demand and offer. Already today, states feel uncomfortable with larger numbers of protection seekers turning to their embassies, which are often not equipped to process a high volume of cases.

In other words, the elitist solutions of resettlement and Protected Entry Procedures are only legitimate to the degree they complement a basic protection offer in first countries of asylum. In the absence of such an offer, elitist solutions will quickly prove untenable in ethical and practical terms. Ethically, it is hard to defend that only a limited number among equally needy persons would actually be protected, and practically, any agent offering protection would soon find the pressure of need overwhelming in relation to the relatively few cases that can pass the various filters used in resettlement and Protected Entry Procedures.

What, then, is the specific utility of resettlement and Protected Entry Procedures respectively? Ideally, Protected Entry Procedures should cater for protection seekers who

- a) are not adequately protected in the first country of asylum; and
- b) are capable and willing to actively seek out protection opportunities, e.g. in a system of embassy asylum; and
- c) possess relevant ties to destination states.

Resettlement, on the other hand, could then be fine-tuned as a subsidiary solution for those persons who do not fulfil the two last criteria b) and c).

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<sup>662</sup> Frelick, *supra* note 611, at p. 28.

This brings up the question of responsibility for the operation of the three-pronged scheme described above. Clearly, the primary responsibility for providing protection lies with the home state of the person now seeking protection from other states. Beyond that, one may safely state that an important responsibility to secure *non-refoulement* lies with the territorial state in which the protection seeker is present. As earlier analysed, third states can also bear a limited legal responsibility for securing human rights to persons under their jurisdiction, which may become relevant when applications for protection are filed e.g. with an embassy. Where first states of asylum do not meet their responsibilities due to either resource constraints or disregard for legal obligations or both, this can cause a rippling of further destabilisation and forced migration ultimately affecting more remote states in the North. Therefore, ensuring that the system works in a rudimentarily predictable fashion is also in the long-term interest of EU Member States.

Hence, a comprehensive approach would imply that EU Member States offer three different, but interlinked types of contributions to benefit each level of the three-pronged system:

1. Assistance to regional first countries of asylum to handle larger quantities of protection seekers in full compliance with international norms.
2. Protected Entry Procedures offered by a single Member State, catering for individuals whose needs cannot be met by the first country of asylum due to qualitative limitations in its protection offer, and who possess specific links to that Member State.
3. A resettlement quota offered by EU Member States through a central agency, e.g. UNHCR. This quota would be used to cater for protection needs which cannot be met either in the first country of asylum or through self-selecting extraregional solutions. The quota would be exclusively protection-oriented, and thus free of utilitarian considerations benefiting Member States.

This system would combine simplicity with clarity.

One could imagine, though, that some Member States might prefer a greater degree of flexibility. Rather than introducing a Protected Entry Procedure without quota limitations right away, such Member States may instead favour a unilateral resettlement scheme limited by a quota. Unilateral resettlement schemes would range between Protected Entry Procedures and multilateral, agency-selected resettlement schemes. Making allowance for flexibility, the system would be extended to consist of four prongs, subsidiary in relation to each other:

1. Assistance to regional first countries of asylum to handle larger quantities of protection seekers in full compliance with international norms.
2. Protected Entry Procedures offered by a single Member State.
3. A resettlement quota offered by a single Member State.
4. A resettlement quota offered by EU Member States through a central agency, e.g. UNHCR.

Both the three-pronged and the four-pronged version of the system raise the question of burden sharing. Ideally, each Member State would contribute to all prongs in a manner adding up to an equitable sum total. Unfortunately, the history of EU burden sharing in the asylum field has shown how difficult it is to achieve an equitable distribution of risks within the framework of a predictably operating protection system. This strikes against the feasibility of any grand scheme – be it a jointly operated regional processing centre distributing refugees over the Union, or be it a fiscal burden

sharing system of sufficient size to impact domestic discourses. Therefore, the realist option will perhaps be to craft a system allowing a certain degree of unilateralism in the choices of means, as long as it synergises with other Member State contributions to achieve a common end. An expanded investment into Protected Entry Procedures along the lines sketched up above would comply with this condition.

### 7.2.2 Five Proposals

A variety of approaches to integrating the externalised processing of asylum claims into the *acquis* present themselves. In the present context, choices are limited by two considerations. First, the status quo of divergent practices is undesirable, not only because it sends a confusing multitude of signals to protection seekers and first countries of asylum. More importantly, the normative dynamics of harmonisation will discourage states to continue with unilateral practices which are not factored into the CEAS. This would mean a downgrading and gradual disappearance of Protected Entry Procedures, which, in turn, implies exacerbation of the problem of territorial access. Hence, it appears advisable to develop unilateral practices towards greater cohesion within the framework of the CEAS.

If the minimalist solution of maintaining status quo is undesirable, so is the maximalist solution of EU-operated processing centres in the region of crisis, providing for a unified central procedure and dispersal of qualifying applicants among Member States along a fixed distributive key, and representing the only avenue to protection in the EU.<sup>663</sup> Political support among Member States for such a demanding solution appears unrealistic, at least within the foreseeable future. On the legal side, the problem of allocating state responsibility for actions or omissions of a EU processing centre would be hard to solve. In practical terms, the fact that such centres risk attracting vast numbers of applicants, the unclear responsibility for dealing with the rejected caseload, and the likely unwillingness of countries in the crisis region to host them provide further reasons for caution. Taken together, these are compelling reasons not to pursue the maximalist approach further.

Instead, the five proposals set out in detail below attempt to make use of existing practices and infrastructures to the extent possible, rather than crafting wholly new norms and isolated institutions. They are inspired by the structure and language of the *acquis* as it stands today, as well as the relevant draft instruments tabled by the European Commission and presently under negotiation.

The first, second and third proposals sketch different developmental strategies which Member States could pursue. While the first proposal seeks to enrich existing visa policies with a protection dimension, allowing for a cautious step-by-step approach, the second proposal focuses on the potential contributions to be made by the civil sector, suggesting shared responsibilities in the areas of selection, funding and integration. The third proposal, in turn, attempts to offer a platform for the regional presence of the EU, integrating different dimensions of migration (determination procedures, protection solutions, labour migration and return, as well as assistance to the region of origin) in a single tool allowing the EU to “speak with one voice”.

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<sup>663</sup> For an argument on the legal and practical problems, see Chapter 4.1.1 *infra*. On the distribution of risks in this context, see text accompanying note 222 *infra*.

By contrast to the first three proposals, the fourth and fifth proposal are legal by nature, and attempt to depict two different levels of European integration in the field of Protected Entry Procedures. They are developed at greater length to mirror how complex the detailed modelling of Protected Entry Procedures will be in practice.

The fourth proposal aims at the Union-wide dissemination of best practices, while largely retaining a unilateral focus. It has been given the form of a directive. The fifth proposal is more ambitious: it seeks to regulate the allocation of responsibility to process applications for protection visas among Member States. It has been cast in the form of a Regulation. Once adopted, it would piggyback onto the first proposal, precisely as the Dublin Convention has piggybacked on domestic asylum procedures in Member States. If Member States wish to engage only in a limited degree of harmonisation, they could consider adopting the Directive alone. If Member States wish to move forward towards a highly integrated and multilateral system of granting protection visas, they could choose to adopt both the Directive and the Regulation in one and the same negotiation process.

### **7.2.2.1 Legal Basis**

While the first three proposals dwell on strategic developments rather than sketching detailed legal instruments, it has been considered superfluous to supplement a detailed analysis of their legal base, which, after all, would depend greatly on the precise solutions chosen. In this context, it should be recalled that pertinent EC competencies allow for the developments sketched up here, stretching from the harmonisation of visa policies to burden sharing in the field of international protection.

The Directive suggested in the fourth proposal would be based on article 62 (2) b) ii) TEC to the extent it relates to the grant of visas, on article 63 (1) d) to the extent it relates to asylum procedures on the territory of Member States (which covers the involvement of territorial authorities) and on article 63 (2) (a) TEC to the extent it relates to other categories than refugees in the sense of the 1951 Refugee Convention.

The Regulation suggested in the fifth proposal would be based on article 63 (2) (b) TEC, as it promotes the balance of Member States' efforts to receive refugees and displaced persons. In addition, it is suggested that article 63 (1) (a) would offer an appropriate legal basis. As this article has been interpreted to cover the allocation of asylum applications made at Member States' border crossing points<sup>664</sup>, it appears possible to construe the phrase "applications ... submitted in a Member State" in article 63 (1) (a) to refer to the jurisdictional, and not merely the territorial extension of a Member State. Hence, it would cover applications filed at diplomatic representations as well.

The first phase in developing the CEAS will have been concluded, before Protected Entry Procedures might enter the legislative agenda of the Commission and Council. Hence, any

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<sup>664</sup> The Dublin Successor Regulation is based on art. 63 (1) (a) TEC. Interestingly, its definition of what constitutes an asylum application shifts from the phrase "in a Member State" to the phrase "to a Member State", which suggests that the criterion is a jurisdictional rather than territorial one. Its art. 2 (a) reads as follows: "'asylum application' means the request for protection which is submitted by a third-country national to a Member State and which can be regarded as having been submitted on the grounds that the third-country national is a refugee within the meaning of Article 1(A) of the Geneva Convention." Article 4 (5) and (6) DSR refers explicitly to applications filed with a Member State from the territory of another Member State. However, there are no indications whatsoever that the Dublin Successor Regulation purports to allocate responsibility for applications filed with a Member State by a person present on the territory of a third state.



instrument adopted in the second phase would be subject to qualified majority voting according to Article 67 (5) TEC.

### **7.2.2.2 Proposal 1 – Flexible Use of the Visa Regime**

Practice within the EU has shown that the existing visa regime could be used to enhance refugee protection. In a number of Member States, arrivals in possession of a valid visa seek asylum. This may be the result of a conscious policy of restraint by the Member State in question, where the control objectives of the visa regime are balanced against refugee protection objectives. France has exercised great caution not to cut off the access of certain groups of Algerian nationality to its territory, although a number of group members actually sought asylum after having entered French territory. Between 80 and 90 percent of the approximately 25.000 Algerians who sought asylum in France during 2001 held a visa issued by French representations in Algeria.<sup>665</sup> Sweden provides another example of a balanced approach vis-à-vis Algerian nationals. While the instructions issued by the Swedish Migration Board to Swedish representations otherwise advocate attentiveness towards potential “defectors” (i.e. persons who might seek asylum rather than returning home), a liberal attitude is recommended for certain segments in the Algerian elites. For “prominent politicians or journalists, who risk to be exposed to threats or violence in their professional activity and who wish to ‘take a rest’ outside Algeria for a limited duration, there is no impediment for granting a visa”.<sup>666</sup> Without doubt, the list of examples is not confined to France and Sweden. Other actors operating informal or exceptional systems – as the UK and Germany – open up access in a way very similar to French and Swedish practice. However, the informality of protection-inspired exceptions to a strict visa regime makes outcomes difficult to track and evaluate.

This notwithstanding, practices by Member States indicate that a protection-minded usage of the visa regime is fully conceivable, and that the accessibility of Member States to persons in need of international protection can be enhanced without costly new institutions and instruments. At earlier opportunities, UNHCR has expressed its support for such a development.<sup>667</sup> Hence, the first proposal recommends *a systematic usage of Member States’ discretion for the benefit of protection objectives*. This would, nonetheless, presuppose a number of steps.

First, as the quoted examples of country practices indicate, a clear message on the availability of a “protection discretion” in the grant of visas by caseworkers should be sent out by an authoritative source in Member States, preferably the competent ministry or another centrally placed authority. This message could make clear that the usual considerations of the risk of illegal immigration

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<sup>665</sup> See supra note 295.

<sup>666</sup> Statens Invandrarverk (former Swedish Immigration Board, renamed since to Swedish Migration Board), Region mitt, Visumenheten, Information angående viseringsärenden [*Information relating to visa cases*], 21 October 1999 and 12 November 1999, Doc. No. SIV 19-99-4115, Praxisinformation Algeriet [*Information on practice vis-à-vis Algeria*]. The instructions on Algeria shall not be taken as representative for Swedish visa practice at large, however.

<sup>667</sup> “UNHCR would recommend that in implementing their visa policies States should give due humanitarian considerations to the particular situation in which persons who have to flee from persecution in their country of origin find themselves. Such persons will very often have serious difficulties in meeting visa prerequisites such as the possession of a valid national passport, monetary sums to cover the costs of their stay abroad and their return travel, or family ties in the country of intended destination. Whether, therefore, a person establishes to a reasonable degree that his or her continued stay in the country of origin would expose him or her to a risk of persecution or ill-treatment, this should cause States to be flexible on their visa requirements in a spirit of justice and understanding. It is likewise in the case of a person in an intermediate country where, in the absence of or with limited resettlement opportunities – the inability to leave that country would, for relevant refugee protection reasons, endanger his or her life or freedom there, or put him or her at risk of *refoulement* to his or her country of origin.” UNHCR, supra note 54, para. 17.

should be complemented by considerations of protection. It could usefully take the form of guidelines, which offer a methodological framework for decision-making, without eradicating discretion altogether.

The choice of beneficiaries would be at the discretion of each Member State issuing guidelines, with due regard to obligations under international law. For illustrative purposes, the following five categories could be named as examples of groups raising protection considerations:

- Refugees facing compelling security concerns in third countries;
- Refugees in need of legal protection because of imminent danger of *refoulement*;
- Refugees in danger of armed attack in their immediate location;
- Refugees in urgent need of medical attention not available in third countries; and
- Persons present in their country of origin or habitual residence and at risk of persecution.

When considering a visa request, caseworkers should content themselves with a rudimentary assessment of protection needs rather than attempting to replicate a fully-fledged determination procedure. The simplicity of the suggested approach would not preclude contact being made with territorial asylum authorities, UNHCR or NGOs in single, more complex cases.

Second, Member States should seek to reach political agreement amongst themselves confirming that the grant of short-term entry visas based on protection considerations are a proper use of the visa regime. An enhanced Dublin mechanism in conjunction with the gradual improvement of fingerprint exchange through Eurodac will inhibit single Member States from merely providing entry without taking responsibility for protection or return.

On a supranational level, the EU Council, which has substituted itself for the Schengen Executive Committee, could endorse such an understanding in an implementing decision further developing the EU visa policies.<sup>668</sup> As the visa *acquis* has hitherto not made reference to any form of protection discretion, without, however, ruling out the possibility of its exercise<sup>669</sup>, such a signal by the Council would confirm the legitimacy of a balanced approach, drawing inter alia on the spirit of the Tampere Conclusions.

Third, the training of visa caseworkers should include modules on protection considerations, to be undertaken when processing visa claims from countries from which refugees originate or from individuals whose application reflects a protection need. The training element is perhaps the most decisive step in the suggested approach. The culture of visa processing has hitherto identified persecution and other threats to applicants' human rights as elements suggesting the denial rather than the grant of a visa. This perception will not be changed overnight, and the introduction of new language in official guidelines is not enough to effectuate change. Therefore, states such as France and Switzerland have started to train representation staff in issues of asylum and protection.

These three steps represent a relatively low threshold when developing a rudimentary Protected Entry Procedure. Such a procedure would be integrated into the present visa regime, but allow single Member States to determine its features and outcomes. It represents an informal system, whose degree of inclusiveness depends on the day-to-day practices of states and caseworkers. Its benefits and drawbacks must be assessed with these features in mind.

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<sup>668</sup> See Council of the European Union, Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications, OJ L 116/2, preamble, para. 8.

<sup>669</sup> See Chapter 3.3.2.1 above.

A clear benefit of the proposed system is that it will be comparably cheap. Neither a new institution, nor new legislation on domestic, supranational or international level is required. Pertinent guidelines can be issued within existing domestic framework for the steering of visa practices. As a visible manifestation of political will, the next appropriate Council instrument developing the EU visa *acquis* could carry a reference to the emerging new practice. Sensibly used, the system will allow Member States to comply with their legal obligations under human rights instruments, such as the ECHR. It can be linked up to future developments in EU visa policies, e.g. the creation of common administrative structures such as joint visa posts.<sup>670</sup> As it is discretion-based rather than rights-based, Member States retain a considerable steering prerogative, and may expand and restrict protection-related intakes according to their political preferences. In their information policies, Member States can choose not to profile the protection dimension of the visa regime, and thus rely on an informal filtering effect. Both features imply a low degree of transparency and predictability, a price to be paid by applicants as well as electorates in Member States.

The primary disadvantage of the first proposal is its comparably passive approach. Member States would merely await the emanation of protection needs in “ordinary” visa applications without encouraging their submission in any way. The façade of exclusively control-oriented visa policies would be upheld, although no longer reflective of the reality of practices, thereby providing an additional and informal filter element. Taken together, the Union’s accessibility to *bona fide* protection seekers would be enhanced, but the smuggling market would presumably not suffer to a greater degree from the introduction of a more flexible visa regime.

At any rate, the first proposal could serve an important pioneer function in the gradual transgression from the fragmented array of current practices to a more formal and predictable framework within the future CEAS. It starts out from a unilateralist premise, but can be easily extended into the multilateral domain, at least in the medium term. Such “politics of taking small steps” would allow Member States to retain control at each stage of the procedure’s development.

#### ***Benefits of Proposal 1***

1. Comparatively cheap: no new institutions or comprehensive legislation needed
2. Low transitional costs: existing visa infrastructures can be used
3. Suitable for a gradual transition towards a more protection-minded access policy
4. Compatible with the present visa *acquis* and prospects for its future development
5. Member States retain discretion, and hence a large degree of flexibility in operating this approach

#### ***Drawbacks of Proposal 1***

1. Passive approach, protection impact hinges largely on energetic protection seekers
2. Low impact on smuggling, as long as no or little information is disseminated on this option
3. Requires a new way of thinking from decision-makers, and hence comprehensive training efforts
4. Discretion may lead to unpredictability and low transparency for both protection seekers and electorates

<sup>670</sup> See European Commission, *supra* note 52, pp. 12-3.

### **7.2.2.3 Proposal 2 – Introduction of a Sponsorship Model**

The second proposal is geared at a greater involvement of civil society in the issue of access to protection. It draws inspiration mainly from Canadian as well as from US practices, and attempts to transpose them to a European context, characterised by the absence of quotas and the fight against the smuggling sector. In one specific area, the Canadian system has done away with the numerical limitation otherwise so typical for resettlement schemes: private sponsorship by a group of five or more Canadians can bring in additional protection seekers. US practices suggest that the involvement of NGOs should be seriously considered throughout the whole process, from the facilitation of access to integration into host society. In the European context, Norway has gathered experience with licensing NGOs in the country of origin to relate cases meriting protection and thus an entry visa to its authorities.

Under the second proposal, NGO's would function as access points, pre-screening agencies, co-sponsors and integration facilitators. Member States would reserve the right to select beneficiaries, if only by the formal confirmation of the recommendation given by the NGO, grant a visa to successful cases and assume an overall supervisory role. The proposal represents a challenge to both states and the civil sector, as neither has tested cooperation in such sensitive matters to the extent at stake here.<sup>671</sup> The actual grant of entry permits ultimately hinges on the availability of funding. The suggested system wishes to make this nexus transparent in an open-ended scheme, without, for that matter, 'privatising' the grant of protection. Member States would finance the activities of NGOs related to the system, as well as its own activities, thus providing a basic infrastructure. Reasonably, assigning certain tasks to NGOs will prove to be cheaper than delegating them to diplomatic representations or territorial authorities. However, there is a measure of co-financing between Member State and civil society, and the system also allows the self-sponsoring of applicants.

Eligible protection seekers are only admitted to the extent that places are created under a co-sponsoring scheme funded by civil society and the Member State in question.

- First, a place in the system is created, if private sponsors in the Member State guarantee travel costs as well as care and maintenance for a period of two years. These costs should be standardized according to a statistical average. Typically, NGOs could campaign for and administer sponsorships.
- Second, for each eligible person privately sponsored, the Member State in question will admit a second eligible person, for whom it will assume public sponsorship (i.e. drawing on the state budget). Hence, the Member State actually doubles the number of places directly funded by the civil sector.
- Third, for each pair of places created according to the above formula, one self-sponsored place is created. Self-sponsorship implies that sufficiently affluent protection seekers pay their own travel costs, as well as care and maintenance costs for a two-year period.

It is imperative that self-sponsors cannot 'buy their way' into a host society, without clear indications that civil society is prepared for integration. Under the suggested formula, one 'affluent' eligible protection seeker is admitted only after two 'destitute' eligible protection seekers have been admitted. It must be underscored that self-sponsoring does not affect the assessment of personal protection need – all protection seekers need to meet the same criteria, regardless of their financial

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<sup>671</sup> Cooperation between states and refugee NGOs exists in a number of areas, covering determination, integration and return. Perhaps most noted is the "Danish model", by which the Danish Refugee Council has been accorded veto powers in the determination of territorially filed asylum claims which are channelled into an accelerated procedure.

capacities. Totally ruling out self-sponsoring due to its inherent distributive dilemmas is ethically and economically indefensible. From the perspective of subsidiarity, it would be wrong not to let people use their own funds, thus denying them self-help.

In a first step, a Member State would designate suitable NGOs with whom they intend to cooperate. Such NGOs should be represented in relevant regions of origin, either directly, or through partnership with a local NGO. Member States must insist, though, that the cooperation between the regional and territorial NGO entity is dense, robust and reliable. The regional entity will be mainly responsible for providing an access point and to pre-screen cases, while the territorial NGO shall secure sponsorships, assume integrative tasks and bear the overall responsibility for the NGO cooperation. Designated NGOs will receive a license to fundraise and to pre-screen. Should a cooperating NGO abuse its powers under the scheme, the Member State could withdraw its licence, which should be an effective deterrent.

An applicant would turn to the regionally represented NGO, either in a country of origin or in a third country. That NGO would seek to assess whether or not the applicant would meet eligibility criteria set out by the Member State, performing similar functions as voluntary agencies in the US resettlement scheme. Again, the five groups named in the context of the first proposal could be a source of inspiration when designing pertinent definitions. Alternatively, a more demanding framework, as set out in the fourth proposal below, could be used. It would be up to the NGO to determine how proactive or reactive they wish to be in identifying potential beneficiaries. It could conduct active information policies on their protection offer, or limit itself to a form of tacit diplomacy, identifying cases discreetly through its network of contacts. Once an applicant is screened in, i.e. assessed to be eligible, the case is transmitted to the ordinary first instance asylum authority on the territory of the Member State, which confirms or rejects the assessment of the pre-screening NGO. Confirmation equals the grant of an entry permit. A rejection may be appealed, and the NGO will then mutate from an impartial decision-maker to a defender of its positive pre-screening decision. This would guarantee the applicant a certain measure of legal aid, which is otherwise difficult to obtain outside the territory of the potential host state.

Although the system is open-ended, the sponsoring scheme might not afford enough places to accommodate all applicants during demand peaks. To anticipate such situations, a priority system could be conceived, which is co-administered by the designated NGOs and the territorial asylum authority. Priorities could be agreed on at regular meetings, and inform the pre-screening practices of NGOs. Those would only forward cases to territorial authorities which can be reasonably expected to come in under one of the agreed priorities, and thus be guaranteed a place. The creation and administration of places must, in other words, always remain a shared responsibility between state and civil society.

Once a protection seeker has received an entry visa, the regionally represented NGO assists with preparations for the journey. In non-urgent cases, it could also brief the beneficiary on the society awaiting her to facilitate a smooth start. Upon arrival in the host Member State, the beneficiary would be welcomed by the territorial NGO, which would provide information and integration services, and attempt to facilitate an early entry into the host society and its labour market. This element of the proposal is also inspired by US resettlement, which boasts a comparatively successful labour market integration.

Essentially, the second proposal can be operated unilaterally by Member States. Without doubt, its impact would be greater if the whole EU embarked on a harmonised sponsorship scheme. The scheme could still be managed by each Member State for itself, but the consciousness that fiscal and integrative solidarity is shared by all other European citizens and denizens should boost the morale of the European civil sector at large. The second proposal requires a form of framework legislation. In principle, it can be adopted at the domestic level, but a certain degree of harmonisation would certainly be desirable. A guiding instrument by the Council, e.g. a directive, could be conceived.

The prime benefit of the suggested scheme is that it forges a broad partnership between civil society and Member States on the issue of access to territory. Different from a centrally planned resettlement programme with fixed ceilings, it continuously recreates protection capacities by making the link between admission and integration transparent to beneficiaries and stakeholders alike. Delegating central tasks to NGOs should prove to be advantageous. In the information segment, NGOs might be more successful than states in convincing protection seekers that legal approaches are to be preferred over disorderly migration. NGOs might also be able to cater for groups of protection seekers who find it difficult or impossible to approach an embassy for a variety of reasons. Experience has shown that NGOs can work more cost-efficiently than state bureaucracies. The proposal also provides for sensible work-sharing between NGOs and state administrations, and offers a reasonable response to the problem of effective appeals from abroad. It could qualify as a ‘comprehensive’ approach, as it covers all stages of the migratory process, and puts much emphasis on integration from the day of arrival. States can choose to operate it unilaterally or multilaterally. There would be transactional costs for creating the system and starting it up, but the operational costs would be calculable and systemically limited through the nexus with funding by the civil sector. Finally, from a theoretical perspective, the second proposal is true to the principle of subsidiarity.

Among its drawbacks, one should be aware that the suggested scheme potentially exposes the protection issue to market forces. If NGOs manage to convince the public that it should co-fund places, all is very well. If they fail, persons in need of protection will simply not be admitted. This entails problems not at least with regard to cases where Member States are obliged to protect under human rights instruments. Furthermore, regionally represented NGOs are more easily subjected to pressures by the countries hosting them, and are much weaker protectors than a diplomatic representation. States also need to monitor the performance of NGOs in regular intervals, so as to guarantee that the system is not abused or subjected to corruption.<sup>672</sup> Although the system has good prospects for competing with the smuggling offer, a shortage of places could harm this capacity. At the end of the day, the success of NGOs in attracting sponsorships will be decisive for success.

#### ***Benefits of Proposal 2***

1. Forges a strong partnership between state and civil society in creating protection capacities
2. Makes the political and economic dimensions of protection visible
3. Transposes best practices from Canada and the US to Protected Entry Procedures in the EU
4. NGOs may be perceived as more neutral access points compared to diplomatic representations

<sup>672</sup> Cases of corruption within state-administered visa bureaucracies have been reported, so there is no principled difference between state bureaucracies and the civil sector.

6. Cheaper to operate than a bureaucratic system: NGOs are usually more cost-efficient than state bureaucracies, and private funding is systematically involved
7. Integration-friendly, as the protection seeker meets civil society representatives at the very start of the process
8. Offers effective legal aid at the appeal stage
9. NGOs can actively seek out persons in need of protection who would be unable to present themselves to an embassy
10. Can be operated unilaterally or multilaterally

#### ***Drawbacks of Proposal 2***

1. Exposes the grant of protection to political fluctuations in civil society and market forces
2. Can be perceived as a step towards the commodification of protection
3. NGOs are less resistant to pressure by third states than governments, and possess weaker protective capabilities
4. NGOs are not directly obliged to implement international human rights law
5. Certain transitional costs for framework legislation, creation of an NGO infrastructure and training
6. System needs constant monitoring in order to prevent corruption and abuse
7. Impact on smuggling depends on the number of places actually created and the capability of the system to create a direct rapport with potential migrants

#### **7.2.2.4 Proposal 3 – Towards an EU Regional Task Force and EU Regional Nodes**

The third proposal is geared towards the double purpose of strengthening regional protection capacities while offering solutions to those whose needs cannot be accommodated regionally. It draws inspiration mainly from the emergence of common administrative structures within EU immigration policies and the comprehensive approaches which Member States seek to develop within the framework of the HLWG. A further source of inspiration is the three-pronged approach to the development of different referral systems for protection seekers, economic migrants and specific groups as trafficked persons, currently pioneered by the international community in Albania.<sup>673</sup>

The core of the third proposal is the creation of a joint regional presence of the EU, providing expertise to local authorities where needed, and operating a referral system, matching different needs with appropriate solutions. If EU presence were established temporarily in a crisis situation, it would be proper to speak of a EU Regional Task Force. If EU presence is to be established more permanently, it might be appropriate to relate to the institution as a EU Regional Node. Both represent multilateral solutions, and allow Member States to speak with one voice. In a nutshell, the third proposal offers a multilateral platform, which can support a varying material and operational content.

The EU regional presence would allow for the establishment of a differentiated referral system, catering for migration and protection alike. To that effect, it would be staffed with persons well acquainted with the immigration and asylum policies of the EU and its Member States.

<sup>673</sup> See Johannes van der Klaauw, *Building Partnerships with Countries of Origin and Transit*, in Clothilde Marinho, *Asylum, Immigration and Schengen Post-Amsterdam: A First Assessment*, Maastricht 2001, p. 32, note 19.

- *Information dissemination*: The EU presence would deliver accurate and authoritative information to potential migrants and local authorities on the immigration and asylum options on offer in the EU.
- *Processing*: The EU presence could, where needed and requested, assist local authorities in carrying out refugee determination. Hence, eligible persons could be identified and the search for solutions could begin, while rejected cases could be shifted over to return programmes<sup>674</sup>.
- *Resettlement and Protected Entry Procedures*: In the framework of processing, the EU presence could identify the cases which should be lifted out from the region and protected within the EU. Such cases could have special protection needs which cannot be catered for regionally, or possess close ties to a Member State. Finally, additional cases could be taken over by the EU within the framework of a burden sharing arrangement with countries in the region.
- *Procuring information for asylum determination*: The EU presence could also engage in the procurement of information on countries of origin to serve territorial determination procedures in Member States.

In many of these activities, a close cooperation with UNHCR could be mutually beneficial.

With regard to beneficiaries who shall be allowed entry to a Member State, the EU presence could either cooperate with its most proximate diplomatic representation, or assume the function of a joint visa post for all Member States. Adding the latter function would enhance the capability of speaking with one voice and processing cases swiftly, but the idea of joint visa posts is not fully operational yet, as important practical and financial questions remain unsolved.<sup>675</sup>

At any rate, the high degree of centralisation inherent in the proposal would force Member States to agree on some form of allocation procedure for cases to be protected within the Union. Various approaches are conceivable. One would be to embark on resettlement according to a predetermined quota. Another, more in line with the general objectives of Protected Entry Procedures, would be to allocate responsibility through a permanent distribution committee, which could work in a more flexible manner, taking the closeness of ties to single Member States into account. The distribution committee could be centrally placed in the EU, while the EU task forces and nodes would refer its cases to it. At the very least, the distribution committee needs the political backing of Member States, preferably manifested in an EC instrument.

Among the benefits of the present approach, the advantage of a one-stop source for asylum and labour immigration to the EU is perhaps the most visible one. It should give the EU Task Force or the EU Node a comparative advantage over information and assistance provided through the representations of the Fifteen. There is a good chance that such a regional presence would become well known amongst potential users, and it would simultaneously offset various forms of ‘solution shopping’ and strategic behaviour amongst applicants. In the protection segment, strategic behaviour will be countered by the fact that applicants will not know exactly where they will be protected – in the region, or in the EU (or, if UNHCR-mediated resettlement is linked to the system, elsewhere outside the region). The EU presence would also provide a good groundwork for burden sharing – both between the EU and regional host states, and among Member States themselves. The

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<sup>674</sup> The Commission has proposed financial support by the EU to return programmes in transit countries as part of a package of pre-frontier measures to fight against illegal immigration. European Commission, *supra* note 52, p. 16.

<sup>675</sup> *Supra*, at p. 13.



problem of an unequal distribution of diplomatic representations would be addressed.<sup>676</sup> Finally, the proposal would also contribute to the development of the regional protection and migration infrastructure.

The suggested solution also entails disadvantages of its own. Indeed, it demands comprehensive preparations and is quite the opposite of a quick fix. Implementing the proposal will not be cheap, and the difficulties of establishing joint visa posts reflect the challenges inherent in creating joint institutions in the immigration and asylum field. Its flexible approach to burden-sharing could result in a situation where Member States are unwilling to assume a sufficient degree of responsibility, thus leaving needy cases without protection. If political agreement is not sufficiently far-reaching, the solution risks becoming a shell without real content. As with all solutions of a predominantly multilateral nature, the present proposal raises intricate problems of state responsibility. Finally, the relative unpredictability of outcomes might entice some would-be migrants to resort to human smugglers after all.

#### ***Benefits of Proposal 3***

1. One-stop system catering for immigration as well as protection, adaptable to shifting protection contexts
2. Allows the EU to “speak with one voice” and partially avert strategic behavior with applicants
3. Economy of scale in the medium to long term
4. Could function as a joint visa post in the future
5. Gives the EU significant weight when competing with human smugglers on the information market
6. Addresses the problem of unequal distribution of diplomatic representations

#### ***Drawbacks of Proposal 3***

1. Important transitional costs
2. Presupposes a robust agreement on sharing costs and responsibilities
3. Risks becoming a shell without real content in the absence of sufficient political will
4. State responsibility under international law unclear
5. If outcomes are too unpredictable, protection seekers will resort to smugglers after all

#### **7.2.2.5 Proposal 4 – Gradual Harmonisation Through a Directive Based on Best Practices**

The fourth proposal differs from the earlier ones in that it takes a legal-technical approach. It is based on the introduction of a rudimentary form of Protected Entry Procedures in all Member States participating in the cooperation under Title IV TEC. It is assumed that Member States wish to retain a certain degree of control at all stages of Protected Entry Procedures, while approximating their practices to each other. It is inspired by the logic of the first phase in building the CEAS, which aims at the dissemination of minimum standards to be respected by all Member States in their unilateral practices. The adequate form for bringing about this level of harmonisation would be a directive.<sup>677</sup>

<sup>676</sup> See Annex I, comparing the Austrian, French and UK representational networks.

<sup>677</sup> “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Art. 249 TEC.

This proposal does not foresee that Member States should represent each other through their embassies or consulates. Hence, it would not be possible to approach the representation of one Member State to apply for an entry visa to another Member State. Under the fourth proposal, a Member State's Protected Entry Procedures can only be accessed at the representation of that Member State. This is an important filter compared to the fifth proposal, and limits the outreach of the system towards protection seekers. The rationale behind this choice is to keep the system simple and cheap in operational terms, by minimising the degree of multilateral consultations in decision-making.

The entry visas granted to successful applicants will be territorially confined short-term visas rather than Schengen visas. This is in line with the limited degree of integration at which the fourth proposal aims. Although there is a common minimum standard of due process, decisions on access are made with a considerable degree of national discretion. As the proposal retains a unilateral focus, questions of dispersal of applicants are not addressed. Given this discretion, it is reasonable to limit the assumption of responsibility for a given protection seeker to the Member State granting a visa. The limitation of a visa's geographical validity to the territory of the granting Member State is a clear expression of that aim, and is in harmony with articles 5 (2), 15 and 16 SC. By consequence, Member States granting a national visa within the framework of Protected Entry Procedures must inform other Member States accordingly.

#### ***7.2.2.5.1 Outline of the Proposed Directive***

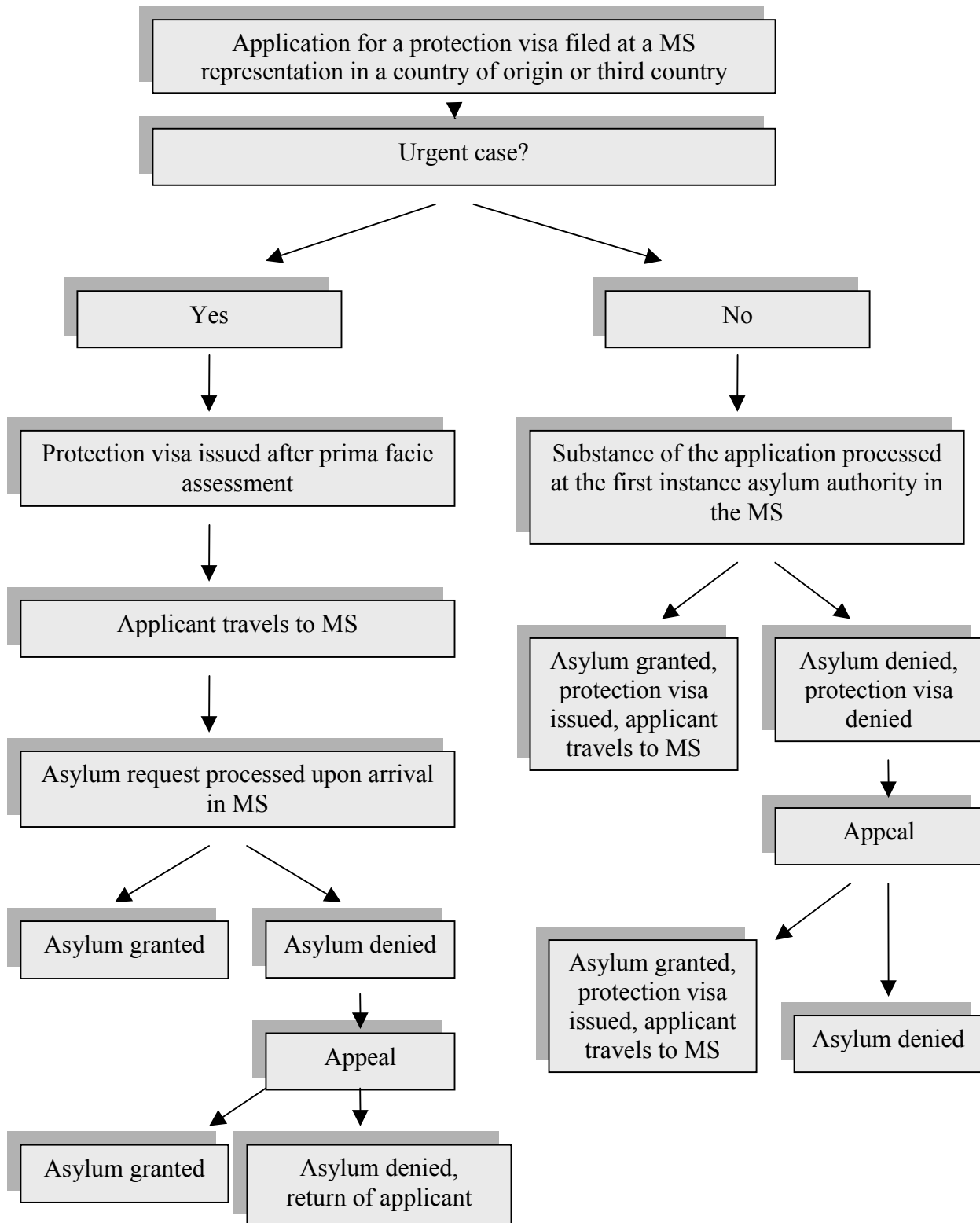
The Directive suggested here (henceforth referred to as the Protection Visa Directive, abbreviated PVD) features the following characteristics:

- It is sensitive to the urgency and imminence of risks invoked by the protection seeker and offers a fast-track procedure with an accelerated transfer for urgent cases.
- It offers a two-pronged determination procedure, split up into an eligibility test and a test on the adequacy of protection in the state from which a protection visa is sought.
- In line with existing obligations under the ECHR, an obligation to grant a protection visa is only foreseen for applicants under an imminent and acute threat to life, liberty or security in a third country. Obligations vis-à-vis other applicants are weaker and leave Member States with discretionary margins.
- It integrates applications for protection visas as far as possible into the ordinary asylum procedures carried out by Member States' territorial asylum authorities. Territorial authorities play a pivotal role in material determination, and diplomatic representations function largely as mere receptors and mediators of protection claims.
- It respects Member States' margin of discretion and does not introduce complex institutional arrangements among them.

The Directive should address four core areas:

- Scope and definitions
- Basic principles and guarantees
- Qualification for protection visas
- Processing of applications for protection visas, including appeals procedures

A graphic representation of the procedure to be followed is featured in Figure 4 below. In the following sub-sections, the core elements of the proposed Directive will be described and commented.



**Figure 4 – Procedure under the Protection Visa Directive**

#### **7.2.2.5.2 *Scope and Definitions***

The purpose of the Directive would be to establish minimum standards for the grant of protection visas by Member States to persons in need of international protection. ‘Protection visa’ will be a core term of the instrument, and it could be defined as “a visa granted on humanitarian grounds under Article 5 (2) of the Schengen Convention and restricted to the territory of the Member State granting it”. The linkage to the Schengen Convention is necessary to integrate the Directive with the existing visa *acquis*. ‘Humanitarian grounds’ remain undefined in the Schengen Convention, but it is contextually clear that the grant of visas to alleviate threats to the applicant’s human rights are covered by the term. There is no need for a more detailed definition, as the delimitation of the Directive’s protective scope will single out a group of beneficiaries.

Already at this stage, the limited ambition of the instrument emerges. A protection visa will be granted as a ‘national visa’, i.e. it will be limited to the territory of the Member State granting it. This flows logically from the considerable margin of domestic discretion enjoyed by Member States under the Directive and the present state of play in harmonising asylum and immigration within the EU. At a later stage of harmonisation, it could be considered whether intra-communitarian freedom of movement could be granted to successful applicants for a protection visa.

It should also be laid down in the Directive’s text that it applies to all persons filing a claim for a protection visa at a Member State’s representation until their entry into the territory of that Member State. After that point in time, the Asylum Procedure Directive (APD) shall apply. This choice reflects the conviction that Protected Entry Procedures should be integrated into ordinary asylum procedures to the maximum extent possible. The erection of double processing tracks should be avoided for the sake of coherence and efficiency. Also, the message should be sent to protection seekers that a successful application for a protection visa will give them all the advantages of territorial applications without the considerable dangers of human smuggling or other forms of illegal entry.

#### **7.2.2.5.3 *Basic Principles and Guarantees***

The Directive should also contain basic principles and guarantees from which applicants for protection visas may benefit. The choices made here should reflect the difference between territorial asylum procedures and Protected Entry Procedures. First of all, the issue of access to diplomatic representations is a problem of much greater weight than access to relevant authorities for asylum applicants present on the territory. Second, diplomatic representations cannot be expected to replicate the resources available in the territorial asylum procedure – therefore, one must reasonably accept a lower level of guarantees than in the territorial context. Pegging demands too high risks disqualifying smaller and representations as access points, which would run counter to the basic idea of enhanced and evenly distributed geographical accessibility of protection. Third, it has to be appreciated that both international and domestic law is generally less demanding when it comes to the protection of individual rights in the extraterritorial exercise of state jurisdiction. Finally, consideration should be given to the fact that time is a more precious resource in Protected Entry Procedures than in territorial asylum procedures. Thus, unduly complex rules might protract procedures and thereby augment the applicant’s risk exposure.

The basic principle should be that all diplomatic representations of a Member States can be accessed to file an application, and that Member States are obliged to keep their premises

accessible. In practice, physical access can constitute a considerable threshold for applicants, and it is important that Member States actively seek to lower this threshold. This obligation would comprise appropriate instructions to locally hired guards and, where necessary and to the extent possible, a constructive dialogue with the authorities of the host state on the behaviour of its police or other staff guarding the streets around the embassy. Alternatively, Member States could use NGOs as access points, which would then forward the case to the diplomatic representation.

Another practical problem is the uneven dissemination of information to embassy staff. Therefore, Member States should oblige themselves to ensure that all diplomatic representations have instructions for dealing with applications for a protection visa. Specific training requirements for the various staff categories likely to come in contact with applicants or applications should be prescribed. Finally, a general norm should be included to the effect that representations are equipped with adequate resources to carry out their tasks.

For identification purposes and to enhance swift access to relevant information, it is reasonable to demand that an applicant files her application personally. This requirement can be derogated from in cases where security risks or impediments beyond the control of the applicant would make it unduly harsh to demand personal presence. Such derogations are at the discretion of the diplomatic representation.

As a rule, applicants shall be given the opportunity of a personal interview before a decision is taken. In urgent cases, this rule can be derogated from where it is manifest that a protection visa will be granted. This can be relevant in cases where the representation already possesses a sufficient degree of information on the applicant (who could, e.g., be a dissident, or an easily identifiable member of a persecuted group). Where another visit to the representation would mean a substantial augmentation of risk for the applicant, representation staff could seek to conduct an interview at the same time as the application is filed. Alternatively, the representation can refrain from conducting a personal interview at a later stage, and use other appropriate channels of communication instead (telephone or other, trustworthy intermediary etc.).

A pivotal issue in the communication between applicant and representation is the choice of language. Putting the onus of adapting to a common language entirely on the representation and stipulating a right to interpretation appears unrealistic, especially as representations would also, and perhaps primarily, receive applicants from neighbouring countries. It must be recognized that this is disadvantageous to applicants without linguistic skills and without a network that can provide such skills. A balance could be struck by pegging the standard for written communication to a language that the applicant is *likely* to understand and formulating the obligation to provide interpretation in weak and malleable terms.

Finally, rules on confidentiality as well as on the involvement of UNHCR in Protected Entry Procedures should also be included under this heading.

#### **7.2.2.5.4 *Qualification for a Protection Visa***

An intelligible and legitimate delimitation of the personal scope of Protected Entry Procedures is a central element for their smooth functioning. It is suggested that this delimitation be composed of two criteria, namely the establishment of a basic protection need with the applicant (here termed 'eligibility'), and the adequacy of allocating protection responsibility to the state from which a

protection visa is sought. If, and only if, both criteria are satisfied in third country applications, a protection visa will be granted by the Member State from which it is sought.

The first element can be dealt with in a relatively straightforward manner. If the logic of offering alternatives to human smuggling is taken seriously, protection categories in Protected Entry Procedure schemes should replicate those categories utilised in the territorial context to the extent they are based on international obligations. This puts the definition of refugees and of beneficiaries of subsidiary protection into the limelight. Use should be made of the current efforts within the EU to harmonise the application of the refugee definition and the categorisation of persons benefiting from other forms of international protection.

However, a given Member State cannot reasonably grant protection visas to *any* applicant fulfilling the relevant criteria for international protection. In contrast to resettlement, Protected Entry Procedures imply an open-ended commitment, the size of which is ultimately to be governed by the definition of beneficiaries. Therefore, an additional filter criterion is suggested. This is in line with the practice of states currently operating Protected Entry Procedure schemes. These schemes typically feature requirements of close ties, assumptions of safety in countries from which applications are made, procedural hurdles or the withholding of information about the existence of Protected Entry Procedures to limit the number of cases ultimately allowed entry. A EU Directive could usefully translate these divergent practices into a single set of transparent and predictably operating criteria, supportive of protection structures in first countries of asylum as well as the institution of resettlement. This set should answer the question why it is most adequate that a given Member State assumes responsibility for the protection of an applicant.

Protected Entry Procedures should also cover applications filed with Member States' representations *in the country of origin or habitual residence*. Member States need a considerable degree of discretion when dealing with in-country applications. Therefore, the fulfilment of the eligibility requirements under the first step, and the assessment of absent protection alternatives under the second step will not automatically lead to the grant of a protection visa – there is still a residual discretion resting with the Member State from which the visa is sought. However, it should be observed that obligations to grant access, e.g. by means of a protection visa, may flow from Member States' human rights obligations.

A gradation of access obligations could be useful. While Member States 'shall' grant a protection visa to applicants approaching third country representations and fulfilling the criteria of eligibility and adequacy, they 'shall favourably consider' doing so with regard to an applicant approaching a Member State representation in her country of origin. In the latter case, the adequacy test can be skipped, as there are no apparent alternative protection providers in such circumstances.

#### ***7.2.2.5.4.1 The First Step – Qualification for International Protection – Alternative 1***

The first step could usefully draw on the current EU efforts to harmonise the conditions for qualification for refugee status and other forms of international protection, or attempt to craft a formula on the basis of ECHR obligations alone. The first alternative requires that an applicant for a protection visa qualify for international protection as defined in the [Draft] Qualification Directive (DQD). It is easier to integrate into the emerging CEAS, and exploits the existing expertise of decision-makers with regard to article 1.A.(2) of the Refugee Convention.

This alternative could be worded as follows:

- (1) Member States shall consider the following categories of applicants as eligible for a protection visa:
  - (a) an applicant who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country of origin or habitual residence;
  - (b) an applicant who does not qualify under sub-paragraph (a) of this article, who has a well-founded fear of suffering serious and unjustified harm set out in article 15 (a) to (c) of the [Draft] Qualification Directive, and who is unable or, owing to such fear, unwilling to avail himself or herself of the protection of his or her country of origin or habitual residence.
- (2) Member States shall ensure that an applicant is denied a protection visa, if he or she fulfils the criteria for exclusion under article 1.F of the Refugee Convention or exemption from the prohibition of *refoulement* under article 33 (2) of the Refugee Convention.
- (3) In assessing an application for a protection visa, the provisions of the [Draft] Qualification Directive apply to the extent they have a bearing on applications filed at Member States' representations.

Paragraph (1) is inspired by the DQD. In order to accommodate applications for protection visas in countries of origin, the requirement of being outside one's country of origin or habitual residence have been deleted. Paragraph (2) shall ensure that a person who fulfils the criteria specified in article 1.F and article 33 (2) of the Refugee Convention is denied access to Member States' territory. It is reasonable to assume that positive obligations under the ECHR do not go so far as to oblige a Member State to allow access to such persons. This provision would safeguard the integrity of international protection as well as the legitimate security needs of Member States. Given that the layer of positive obligations under the ECHR to allow entry on protection-related grounds is rather thin, it can be reasonably ruled out that admission obligations exist vis-à-vis a person qualifying under paragraph (2) but excludable under paragraph (3). Finally, paragraph (4) reminds decision-makers that the norms of the DQD must be applied *mutatis mutandis*, keeping in mind that the extraterritorial situation of the applicant must not be used per se to disqualify her. Also, certain norms may be simply irrelevant for Protected Entry Procedures, such as those on cessation.

#### **7.2.2.5.4.2 The First Step – Qualification for International Protection – Alternative 2**

It is conceivable that the EC legislator would favour a text which focussed on the obligations flowing from the ECHR, as its wording reflects the existence of extraterritorial protection obligations in an unambiguous manner. In this case, it might be more adequate to craft a provision using relevant elements from the DQD as well as from the language of the relevant case law of the ECtHR. The second alternative could be phrased as follows:

A Member State shall consider an applicant to be eligible for a protection visa where there are substantial grounds for believing that the denial of such a visa would subject him or her to a violation of a human right, sufficiently severe to engage that Member State's international obligations. When assessing the extent of the obligation to secure that right,

recourse shall be taken, in each case, to the severity of the risked violation and the probability of its materialisation.

Due to its rather technical nature, it is reasonable to expect that this alternative would require more training and information efforts than the first one.

#### ***7.2.2.5.4.3 The Second Step – Adequacy of Allocating Protection Responsibility to the Member State from which a Protection Visa is Sought***

In addition, it must be clear that protection is indeed most adequately provided in the Member State from which a protection visa is sought. This step should allow decision-makers to focus more closely on the specific protection needs of the applicant, and match them with the protection resources in the Member States from which a permission to enter is sought. It has to be appreciated that this step imposes a set of additional requirements beyond those already contained in the first step. Three aspects are relevant – the availability of adequate protection in the third country, the urgency of protection needs and the existence of relevant links to the country from which protection is sought.

First, it has to be assessed whether or not an adequate level of protection is available to the individual applicant in the third country where she is present. The adequacy of protection has to be understood in an individualised sense. By way of example, it is irrelevant that the general level of refugee reception is satisfactory in a specific third country, if it cannot protect from persecution by the secret service of the refugee's home country. In such cases, it could be adequate to reallocate the responsibility for protection to a country outside the region, and thus beyond the likely range of operation of persecutors. Another example would be a lack of protection capabilities for disabled, traumatised or socially ostracised persons, where a reallocation of protection responsibility could also be meaningful. Once it has been assessed that protection in the third country is inadequate, a second consideration becomes relevant. This is the need to take into account how urgent and acute the applicant's protection need is, and, in some cases, consider why the country from which entry is sought is comparatively better situated to grant protection.

This is the suggested formulation, with the adequacy test being contained in paragraphs (2) to (4):

- (1) A protection visa shall be granted to an applicant who is under an imminent and acute threat to life, liberty or security in the third country.
- (2) A protection visa should be granted to an applicant who cannot receive adequate protection in the third country where he or she is present and who possesses substantial relevant links to the Member State from which entry is sought.
- (3) A protection visa may be denied to an applicant who applies for it at a Member State's representation in a third country where he or she is present, provided that an adequate level of international protection is assured to the applicant in that country. In considering the adequacy of such protection, Member States shall take into account the nature and extent of the harm feared by the applicant, the legal and practical protection afforded to the applicant at present and in the foreseeable future.
- (4) A protection visa may be denied to an applicant who applies for it at a Member State's representation in a third country, and who possesses stronger relevant links to another country, provided that the other country is legally and practically accessible to the applicant



without a substantial aggravation of risks, and adequate protection will be afforded to the applicant upon entry.

Urgency of protection needs and relevancy of links are interrelated. In cases of extreme urgency, this interrelation makes all considerations on the relevancy of links superfluous. In other words, no additional requirements should inhibit a positive decision in such cases, which is clearly expressed in the first paragraph above. Conversely, the less urgent a case is, the more reasonable it is to require that substantial and relevant links exist between applicant and the country from which entry is sought. The term “relevant” aims at discarding linkages of a purely voluntary nature (e.g. political sympathies with the present government in the country where entry is sought), while the term “substantial” signals a minimum threshold of intensity.

Once an assessment of substantial and relevant links is entered into, the following non-exhaustive list of elements can be considered:

- Existence of substantial family or community linkages (ethnic or religious group)
- Existence of a substantial relationship between applicant and Member State due to the applicant’s earlier migratory record (legal presence in the country from which entry is sought for work or study purposes)
- Existence of substantial linguistic and cultural linkages

At any rate, the Directive should make clear that it does not regulate the right to enter a country within the framework of the right to respect for family life.

These elements can be cumulated, but there is no requirement that each element must be catered for in a specific case. Quite clearly, each of these linkage elements features a dimension of depth to be taken into account. Certainly, shorter stays in the country of destination have less significance than longer ones. Also, the exclusivity of linkages should be considered: is a certain linkage element also relevant with regard to other countries? Seen in isolation, the applicant’s capability of speaking French ties her equally to all Francophone countries. Are there any additional linkages suggesting that an allocation to one specific country is particularly adequate? At large, exclusivity of linkages suggests that it is adequate to allocate responsibility to the country to which they are attached.

Conversely, as reflected in the fourth paragraph, where stronger links exist to another country, the applicant can be denied a protection visa, as long as that country is accessible to the applicant in legal and practical terms, entry into it can be sought without a substantial aggravation of risks and protection is indeed available there.<sup>678</sup>

*Accessibility:* Factors to be considered are inter alia the existence of visa requirements for the nationality of the claimant imposed by that other country, the length of processing, the likelihood of obtaining an entry visa and other legal or practical inhibitions (denial of exit where the destination is that other country, additional travel costs etc). Furthermore, an applicant can under no circumstances be referred to another country, where this referral would imply the use of human smugglers or illegal entry.

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<sup>678</sup> This formulation of the norm is inspired by EXCOM Conclusion No 15 (XXX) of 1979.

*Protection:* With regard to the question of whether or not another country could offer protection, the following criteria could offer guidance to decision-makers:

- admission to safety
- *non-refoulement*
- physical security
- non-discrimination in the enjoyment of civil, economic and social rights
- access to a durable solution

To the extent that these criteria relate to stipulations in international law, only states which have adhered to pertinent instruments of treaty law should be considered sufficiently safe. By way of example, a state must have assumed *non-refoulement* obligations under international law, that is, under the 1951 Refugee Convention and under CAT. In line with the elaborations of the safe third country-notion in authoritative case law, formal adherence must be reflected in practical implementation.<sup>679</sup>

Clearly, the adequacy of protection with regard to the applicant's needs has to be taken into account, and an individualised assessment needs to be carried out. Referral to protection in another country should only take place in situations where there is an obvious choice between two roughly comparable protection alternatives, and protection in the other country would rationally appear to be more adequate.

#### **7.2.2.5.5 Processing of Applications for Protection Visas**

In framing procedural aspects of Protected Entry Procedure schemes, Member States actually determine the risk distribution between them and the protection seeker. Extended waiting periods augment the risks to which an applicant is exposed. Beyond a certain limit, a protection seeker will consider human smuggling as an alternative to the outcome of Protected Entry Procedures, as it offers an immediate way out of a situation which is perceived to be untenable. On the other hand, if states were to grant entry visas to a large group of applicants at a premature stage of assessment, this would reproduce problems experienced in systems based on territorial applications – namely the return of rejected protection seekers. A fair balance has to be struck between expediency and quality.

This balance will look different depending on the imminence and acuteness of risks. Therefore, the procedural framework could usefully distinguish between urgent and non-urgent cases. Urgent cases are cases where the applicant is exposed to an imminent and acute risk to his or her life, liberty or security, which can be averted by leaving the country where he or she is present.<sup>680</sup> Cases not fulfilling these requirements are classified as non-urgent cases.

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<sup>679</sup> Such criteria have been put forward e.g. by the Austrian and German Supreme Courts when addressing the application of safe third country-clauses in domestic legislation.

<sup>680</sup> As source of reference for developing the criterion of urgency, UNHCR resettlement guidelines can be usefully referred to. "As an instrument of international protection, resettlement is in the first instance a guarantee for the physical security of refugees. Resettlement may offer the only means to preserve human rights and to guarantee protection when refugees are faced with threats which seriously jeopardize their continued stay in a country of refuge, in particular:

- (a) threat of *refoulement*,
- (b) threat of expulsion to a country from where a refugee may be refouled or where his life or freedom would be threatened,
- (c) threat to physical security,

In urgent cases, the Member State from which entry is sought, grants a protection visa on the basis of a *prima facie* assessment of the claim, and the applicant travels to the Member State, where the case is fully assessed in the framework of the ordinary asylum procedure. In non-urgent cases, the applicant will only be granted a protection visa if a positive decision has been taken after a full assessment of the application. A negative decision can be appealed in both the urgent and the non-urgent procedure, as stipulated in Chapter V. In both cases, the rules of the territorial asylum system will be followed.

There should not be an individual right to have one's case processed as a matter of urgency, and neither should a decision on handling a case in the non-urgent procedure be subject to appeal. However, at any stage of the proceedings, the applicant can inform the representation that the imminence and urgency of risks have increased. Where this brings the case above the required threshold of urgency, it can be re-routed from the non-urgent to the urgent procedure by the representation after consultation with the territorial asylum authority. In the extraterritorial context, the preconditions for swift and effective appeals to, e.g. administrative courts are simply lacking. The temporal advantage gained by re-routing to the urgent procedure would presumably be lost by the delays created through an appeal to e.g. administrative courts. Nonetheless, there is a risk that the practice of representations develops in an incoherent manner, or that the routing decision is used as a filter to limit the number of positive decisions over time. Therefore, it is of utmost importance that the territorial asylum authority closely tracks the practice of representations in this regard. It could also be considered to ask UNHCR, possibly in cooperation with a group of NGOs to perform monitoring at regular intervals.

With regard to the distribution of roles, the diplomatic representation will function as a receptor for a visa application, which is passed on in an expedient manner to the ordinary first instance determining authority for asylum claims, and as a service organ for the latter authority in assessing the claim and communicating the outcome. Representation staff will be obliged to pass on all applications to that authority without any independent competence to turn down applications. In urgent cases, however, and provided that staff of the determining authority cannot be reached within a reasonable timeframe, representation staff may take a positive decision and grant a protection visa after a *prima facie* assessment of the case. In situations where a representation experiences larger case-loads, or particularly complicated cases, it could be considered dispatching a task force from the first instance authority to the representation in order to speed up processing and conduct personal hearing, omitting the intermediary role of representation staff.

How is the system to deal with repeat applications? The present proposal draws on two assumptions. First, the scrutiny of persecution and violation risks taking place in Protected Entry Procedures is of a sufficiently high quality to create a basis for decision-making in situations where the applicant has filed a new application. Second, keeping in mind the rationale of discouraging illegal migration, a "no" received at the front end of the system should send a serious, and, as a rule, final message on admissibility on protection-related grounds. In itself, territorial contact should not improve the situation of the applicant significantly, e.g. by giving her an unimpaired second chance to apply for protection. However, the decreased depth of scrutiny in the accelerated procedure must be limited to the qualification for international protection, i.e. the first step in the assessment of

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(d) threat of arbitrary detention."

Executive Committee of the High Commissioner's Programme, *Resettlement: an instrument of protection and a durable solution*, 28 May 1996, UN Doc. No. EC/46/SC/CRP.32, para. 9

whether the applicant falls under the personal scope of the Directive. Keeping in mind that circumstances may change in reality, it appears reasonable to limit the temporal application of the norm on repeat applications to a period of 12 months from the communication of the first application's final decision.

Conversely, where applicants have been rejected on grounds relating to the second step (e.g. safety in a first country of asylum or missing relevant links), a new application must be given full scrutiny.

This leads to the following suggestion:

Where the applicant has been denied a protection visa by a Member State representation on grounds that he or she does not qualify for international protection, and files

- a new application for a protection visa with that representation, or,
- a new application for a protection visa with another representation of that Member State, or,
- a new application for a protection visa with a representation of another Member State, or,
- an application for asylum or subsidiary protection at the border or on the territory of a Member State,

within a period of 12 month after the denial has been communicated to the applicant, this application may be dealt with as a repeat application in an accelerated procedure. Where relevant new facts with respect to the applicant's particular circumstances or the situation in his or her country of origin have been raised, such applications shall be dealt with in the regular procedure.

Under the present heading, it should be reaffirmed that the validity of protection visas is limited to the territory of the Member State granting it and that Member States shall inform each other on their grant. In order to keep the system simple, cooperation between Member States is kept to a minimum level. In accordance with earlier practices, the information exchange between liaison officers of Member States' consulates could be extended to cover regular exchanges on applications for protection visas, with full respect for the protection of sensitive personal data. Where multiple pending applications are detected, the applicant should be asked to indicate one Member State for purposes of processing. Until she has done so, none of the multiple applications will be processed. This principle can be deviated from in cases of urgency.

As earlier mentioned, appeals procedures under the proposed Directive should link up directly with the EC norms governing territorial asylum applications. A time limit of seven days for processing could be set to serve the interests of applicants, who usually find themselves in a more risk-exposed situation than asylum applicants on the territory of Member States.

#### **7.2.2.5.6 *Benefits and Drawbacks***

When considering the advantages of, as well as the investments needed for, this proposal, its ambition to deliver a comparatively higher degree of EU-wide harmonisation must be kept in mind. Compared to Proposals 1 to 3, its reach is much wider. Some Member States would have to introduce Protected Entry Procedures to comply with it, others would need to modify existing procedures. This notwithstanding, the present proposal will integrate smoothly into the normative landscape created by the first phase of the Common European Asylum System, and seeks to exploit

existing infrastructures in Member States as far as possible. Adopting a legally binding instrument holds advantages in the area of predictability and the provision of individual safeguards. On the other hand, Member States' discretion is obviously limited, once the Directive has entered into force.

Proposal 4 offers detailed solutions to a number of pertinent problems in the area of extraterritorial processing. It draws on the experience already gathered by leading Member States, as well as other European states. By way of example, the issue of repeat applications is addressed, the system is responsive to the urgency of claims, and eligibility questions are severed from those relating to a final allocation of a person to one specific Member State.

But the proposal also features limitations. As Member States do not represent each other in decision-making, visas issued under the suggested system are territorially limited to the issuing Member State. There are non-trivial transitory costs – legislation has to be adopted, infrastructures have to be geared towards the grant of protection visas, and training programmes have to be executed. However, the Swiss example illustrates that these obstacles can be overcome.

#### ***Benefits of Proposal 4***

1. Provides minimum standards for Protected Entry Procedures informed by the best practices of European states
2. Once the first phase of CEAS is in place, the present proposal would fit in well into its normative framework
3. Avoids complex supranational arrangements
4. Integrates Protected Entry Procedures with the infrastructure for territorial asylum applications
5. Honours legal obligations under the ECHR in a predictable manner
6. Sensitive to urgent cases (fast-tracking option)
7. Severs questions of eligibility for protection from questions of allocation to a Member State
8. Addresses technical problems as repeat applications

#### ***Drawbacks of Proposal 4***

1. Important transitory costs: legislation, infrastructural adaptation, training programmes
2. Discretion of Member States is limited, once the Directive enters into force
3. Limited to territorially confined short-term visas
4. No mutual representation of Member States

### **7.2.2.6 Proposal 5 – Towards a Schengen Asylum Visa**

The Directive sketched in the fourth proposal would establish the basic framework for the harmonised grant of protection visas throughout the Union. However, it would not purport to deliver a comprehensive answer on which of the Member States should be responsible for processing a claim. This issue is addressed by the present proposal for a regulation establishing criteria and mechanisms for determining the Member State responsible for examining an application for a protection visa lodged at a diplomatic representation of a Member State. Such a regulation would bring advantages both to Member States and to protection seekers. For Member States, the suggested systematic information exchange secures a further elimination of multiple applications

and introduces a rudimentary mechanism of responsibility sharing. As the reader will note, this feature replicates the function of the Dublin Convention (and its successor Regulation) in the area of protection visas. For protection seekers, the network of access points is widened, as Member States are enabled to represent each other through their representations. This copies an element originally implemented through the Schengen visa *acquis* into the seeking of protection visas.

The price to be paid is the considerable complexity of the system. In line with the choice made when formulating the proposal on a PVD, the Regulation distinguishes between urgent and non-urgent cases. Whereas urgent cases entail a simplified procedure, where family reunification criteria already familiar from the Dublin successor Regulation are resorted to, non-urgent cases are processed by assessing “substantial relevant links” to Member States (to be explained in detail below). This assessment can be rather demanding. All in all, procedures under the proposed Regulation are significantly more complex than under the proposed Directive, and so are the demands on *bona fide* cooperation among Member States. Nonetheless, it should be recalled that regional processing centres would require even more complex procedures, and the erection of a wholly new infrastructure. The Regulation largely draws on an infrastructure which is merely an extension of the existing *acquis* (Schengen, Dublin and Eurodac).

There are some residual questions which the present proposal does not address. Not all Member States have chosen to engage in the Schengen cooperation, which begs the question to what extent they wish to adopt a joint mechanism allocating responsibility for the processing of applications for protection visas. In addition, the role of Iceland and Norway in the suggested framework needs to be considered. Also, experience has shown that mutual representation under the Schengen *acquis* is not wholly unproblematic, with some Member States insisting on the conclusion of bilateral agreements before Member States’ representations assume such tasks. These divergences of opinion reflect a dimension of burden sharing, which would need to be tackled in the context of the Regulation proposed here.

#### **7.2.2.6.1 Outline of the Regulation**

The Regulation suggested here features the following characteristics:

- It contains criteria and mechanisms for identifying the Member State which should engage in processing a claim, and in providing protection to a successful applicant.
- It represents a multilateral extension of the predominantly unilateral system introduced in the PVD and can piggyback onto the latter.
- It would subject Protected Entry Procedures to a system of responsibility allocation largely parallel to the Dublin regime, including its Eurodac components.
- It opens up the possibility of using the representation mechanism, foreseen in the Schengen Common Consular Instructions, in the processing of protection visas.
- It inhibits multiple applications more effectively than the PVD alone, as it provides for information collection with a global outreach.
- It is sensitive to the urgency of individual claims and contains a simplified fast track for urgent cases.

The Regulation should address four core areas:

- Subject matter and definitions

- General principle
- Procedure for identifying the Member State responsible for processing an application (featuring a section each on urgent and non-urgent cases respectively)
- Administrative cooperation

A graphic representation of the procedure to be followed is featured in Figure 5 below. In the following sub-sections, its content will be outlined.

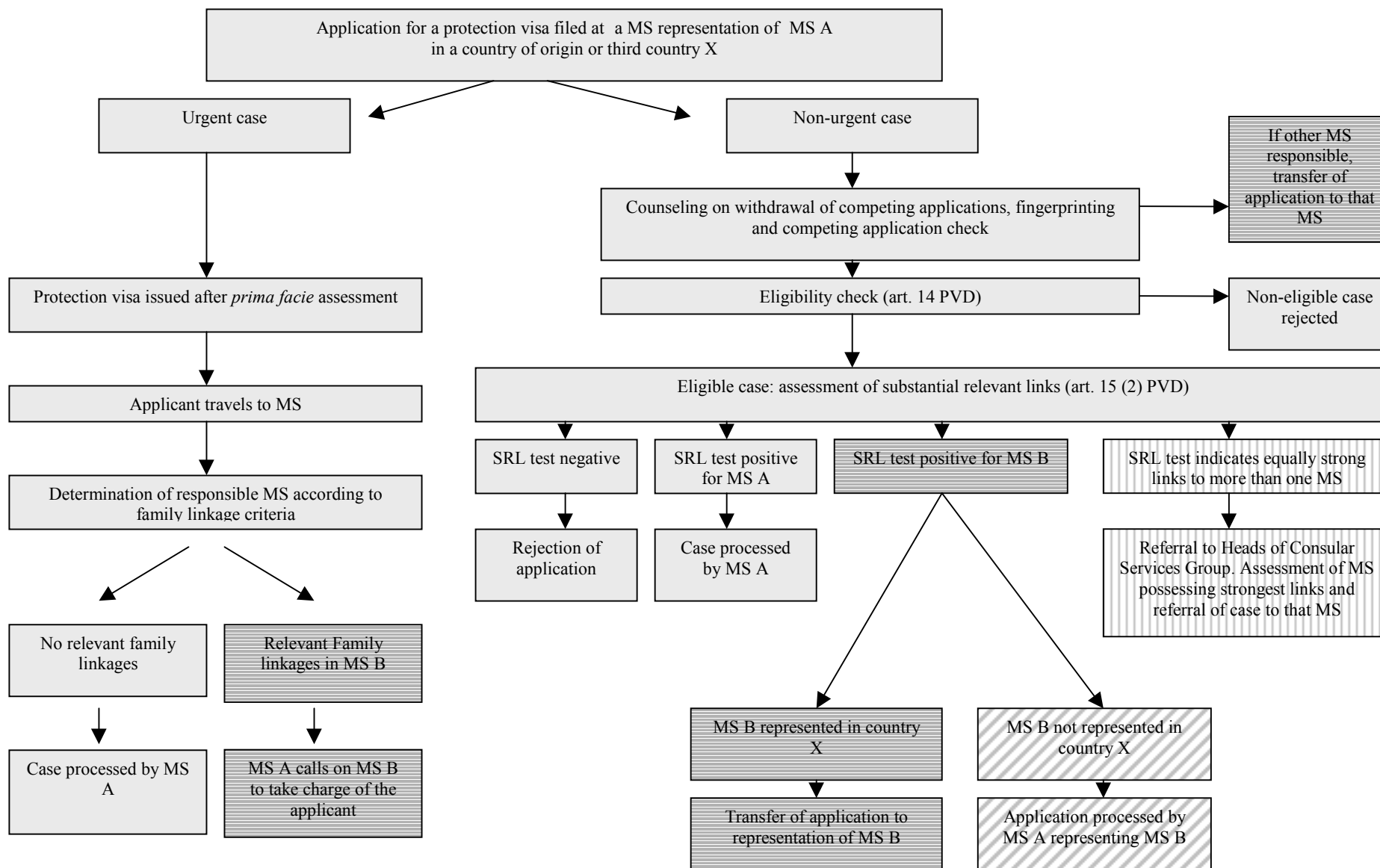
#### ***7.2.2.6.2 Subject Matter and Definitions***

The purpose of the Regulation would be to stipulate the criteria and mechanisms for determining the Member State responsible for examining an application for a protection visa lodged at a diplomatic representation of a Member State. A core concept is that of a ‘competing application’, which could be defined as “an application for a protection visa filed with a diplomatic representation of a Member State which relies on the same reasons as an earlier application for a protection visa filed with another Member State’s diplomatic representation.”

It should also be made clear that the Regulation applies to all applicants for asylum at a diplomatic representation of a Member State until the eventual entry into the territory of that state. Upon entry, the procedure is regulated by the APD.

#### ***7.2.2.6.3 General Principle***

A general principle should be laid down in the Regulation, stating that a single Member State shall examine an application for a protection visa in substance. This principle would be inspired by the Dublin Convention and its draft successor Regulation. Furthermore, it should be made clear that applications at diplomatic representations are examined in accordance with the Directive suggested as the fourth proposal. This would ensure that the Regulation merely piggybacks onto the Directive, without altering the content of the latter.



**Figure 5 – Procedure under the Regulation**

Abbreviations: PVD = Protection Visa Directive  
SRL = Substantive Relevant Links





#### **7.2.2.6.4 Procedure for Identifying the Member State Responsible for Processing an Application**

This part of the Regulation should be split into two sub-sections, one setting out the procedure to be followed in urgent cases, the other stipulating norms for the processing of non-urgent cases. This separation is in line with the approach taken in the PVD. The underlying idea is that an optimal allocation solution cannot be pursued in urgent cases for want of time. Optimal allocation simply takes longer, and the time needed is simply not available when the threats against the applicant are imminent and acute.

The *urgent procedure* discards the issue of allocation before entry into the territory of a Member State. After the entry of eligible cases on the territory of a Member State, a check is made whether the family reunification criteria featured in articles 6 to 8 of the Dublin Successor Regulation can be applied. Where one of these criteria is found to be relevant, the relevant norms of the Dublin Successor Regulation shall be applied, which will eventually lead to the taking over of the applicant by another Member State.

The urgent procedure also foresees fingerprinting to allow registration and matching in Eurodac. If the applicant is unable to present herself, as access to the representation is inhibited by circumstances beyond her control or would imply an unacceptable risk to her security, this rule may be derogated from, and fingerprinting carried out at later stage (e.g. “as soon as practically possible”).

By contrast, *non-urgent cases* allow more time for an optimal match between applicant and Member State. Also, the problem of multiple applications can be more comprehensively addressed in such cases.

Three steps are foreseen. First, the applicant is informed of the principle that only one Member State will process her application in substance and given the opportunity to withdraw any competing applications. At this stage, the applicant should be given a full picture of the substantive relevant link test. This allows for rational behaviour in selecting the Member State vis-à-vis which she ultimately will entertain her application, and to withdraw any competing applications. Ultimately, it is good economy to allow the applicant to contribute to selection of the ‘right’ Member State. If she makes an objectively correct choice, this saves work for the relevant determining authority, which can confine itself to confirming that choice, rather than correcting it. Also, it expresses the belief that individual initiative is an important contribution to the smooth functioning of protection systems.

Second, a comparison of fingerprints and their matching in Eurodac will identify whether any competing applications exist. This exercise would also let information on earlier applications and their outcome emerge, which will be useful for material processing of the claim. Again, if the applicant is unable to present herself, as access to the representation is inhibited by circumstances beyond her control or would imply an unacceptable risk to her security, this rule may be derogated from, and fingerprinting shall be carried out at later stage (again, the formulation “as soon as practically possible” could be used). Where the taking of fingerprints is not possible, established channels of local consular cooperation shall be used to identify the existence of competing applications.

Where checks have revealed that competing applications exist, the Member State in which an application first was filed in the state where the applicant is currently present shall be responsible for the further processing of the application. Other Member States shall be informed, and the processing of competing applications discontinued.

Third, an assessment of eligibility is entered into. It should be noted that this assessment presupposes unified union-wide criteria for determination of beneficiaries of international protection in the EU, as the Member State carrying out the eligibility test is not necessarily the one providing protection. As shall be seen later, the applicant may still be transferred to another Member State under the test of substantive relevant links. The latter test is entered into, once an applicant is deemed eligible. Its purpose is to identify the Member State has to be regarded as the most adequate protection provider. This test may result in four outcomes:

1. There are no substantive relevant links to any Member State, or there are stronger substantive relevant links to an accessible third state: *the application is rejected*.
2. There are substantive relevant links to the Member State currently processing the case, or, where substantive relevant links exist to more than one Member State, the links to the Member State currently processing the case are strongest: *the case is further processed by the same Member State*.
3. There are substantive relevant links to another Member State than the one currently processing the case, or, where substantive relevant links exist to more than one Member State, the links to a Member State other than the one currently processing the case are strongest: *the case is further processed by that other Member State*.
4. There are equally strong substantive relevant links to two or more Member States: *the case is referred to a group consisting of the Heads of Consular Services, who determine which Member State shall be deemed responsible for further processing*.

Where a transfer of a case to another Member State is necessary (outcome 3 and, possibly, outcome 4), the diplomatic representation of that Member State is engaged. Where no such representation exists in the country where the case has been hitherto processed, the representation of the Member State first seized with the case will represent the responsible Member State in further proceedings. Practically, this implies that the representing country contacts the determining authorities of the represented country. Chapter 1.2. of the Schengen Common Consular Instructions are applied to such cases.

#### **7.2.2.6.5 Administrative Cooperation**

A provision on the exchange of information among Member States for the purpose of implementing the Regulation should be included. It could replicate relevant provisions of the Dublin Successor Regulation and the Eurodac Regulation. As in the PVD, a specific provision should address the necessity of allocating sufficient resources to authorities implementing the proposed Regulation.

#### **7.2.2.6.6 Benefits and Drawbacks**

The present proposal is the most ambitious one of all four. It presupposes the adoption of an instrument as suggested in Proposal 4, but goes much further in integrating Member States' practices. Importantly, it adapts the lessons learned in the application of the Dublin Convention and

its *acquis* to the operation of Protected Entry Procedures. This would allow Member States to clarify state responsibility for a protection claim in a clearly described procedure with predictable outcomes. Multiple applications are eliminated to a higher degree than under other proposals, and the EU would indeed respond with “one voice” to protection demands. Still, sensitivity to urgent cases is retained, and the bindingness of rules also replicates the interests of the protection seeker.

Another central benefit is the extension of access points where protection can be sought, which is a product of Member States’ mutual representation at their diplomatic representations (in line with a potential of the Schengen *acquis*). Member States should also consider the systematic information exchange under the proposed Regulation, which allows them to build up a comprehensive database depicting the moves of protection seekers.

The price to be paid is a complex system. Its introduction will neither be cheap, nor quick. The presently existing “variable geometry” of integration (with some Member States not cooperating in the Schengen area) could also raise questions about the adequacy of the Regulation. A comparatively higher degree of cost-sharing is required to make the proposal work in practice, and Member States have little discretion left once the Regulation is adopted.

#### ***Benefits of Proposal 5***

1. Resolves issues of state responsibility for cases in Protected Entry Procedures on the basis of lessons learned in the implementation of the Dublin *acquis*
2. Piggybacks onto Proposal 4
3. Offers a maximum network of access points, as Member States represent each other
4. Systematic information exchange among Member States, linking up to the Eurodac database
5. Sensitive to urgent protection needs
6. The legal character of a resolution ensures a maximum degree of predictability

#### ***Drawbacks of Proposal 5***

1. The emerging system of decision-making is very complex
2. High transitional costs
3. Member States not part of the Schengen area are left outside the system
4. A high degree of cost sharing is needed
5. Member States have little discretion left, once the Regulation has entered into force

## 8 Conclusions

“[W]e must make it easier for genuine refugees to access the protection regimes of Europe and other Western States, for example by making their journeys less hazardous”.

Former UK Home Secretary Jack Straw (2001)<sup>681</sup>

1. With the development towards comprehensive and more sophisticated border control regimes, the problem of protection seekers' access to EU territory has increasingly come into focus. Disorderly movement is presently the main avenue to safety in the EU, and human smugglers act as important facilitators. Single European states have sought ways out of this dilemma, and pioneered techniques of reaching out to protection seekers. One of them is the operation of Protected Entry Procedures from the platform of diplomatic representations. Such Procedures undermine the market of the human smugglers and establish a dialogue with would-be migrants at the earliest conceivable stage of the migration continuum. Their pivotal element is a redistribution of risks between protection seeker and potential host state, while eliminating the risks of human smuggling. For select groups, Protected Entry Procedures could indeed deliver more protection for the Euro, and dissuade disorderly movement.
2. Presently, one third of the fifteen EU Member States practise Protected Entry Procedures on a formalised basis (Austria, France, the Netherlands, Spain and the UK). Denmark belonged to this group until June 2002, when its Protected Entry Procedure was abolished. Six Member States allow access in exceptional cases and in an informal fashion (Belgium, Germany, Ireland, Italy, Luxembourg, Portugal). The remaining Member States (Greece, Finland and Sweden) as well as Norway declare that they do not to facilitate access, while empirical evidence suggests that they have done so on specific occasions.
3. Legal obligations under human rights instruments as the ECHR suggest that states may find themselves obliged to allow access to their territories in exceptional situations. Where such access is denied, claimants may rely on the right to a remedy. These are further reasons supporting the conception and operation of formalized Protected Entry Procedures, which offer a framework for handling such exceptional claims. Such Procedures would be coherent with the *acquis* as it stands today. Furthermore, there is a Community competence for developing a joint normative framework.
4. On a theoretical level, Protected Entry Procedures combine the liberal paradigm and the open-endedness of conventional asylum systems building on spontaneous arrivals with the egalitarian protection objectives and the manageability of resettlement schemes. The practice of European states and of the three non-European resettlement countries included in the study indicates that a differentiated battery of filter elements is available, which allows for sophisticated modelling and steering of Protected Entry Procedures. Presently, their quantitative contribution to the total delivery of protection in Europe is minor, if we choose to compare with disorderly arrival systems. However, this has to be ascribed to the cautiousness of states in the field of information policies as well as inadequacies in the design of their Protected Entry Procedures, rather than to the viability of the concept as such.

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<sup>681</sup> Supra note 42.

5. Already today, Switzerland provides an example of what a serious attempt to design and operate Protected Entry Procedures might look like. Switzerland is an important recipient of disorderly arrivals, and assisted a major share of Bosnian refugees seeking protection in Western Europe. It has maintained and developed its Protected Entry Procedures in spite of peak demands in the segment of disorderly arrivals. The Swiss example proves that Protected Entry Procedures can be managed both qualitatively and quantitatively, and that fears of massively boosted caseloads are unfounded. Without pretensions of perfection, its system offers a number of features and safeguards worthy of emulation in a wider European context. Swiss Protected Entry Procedures attract and identify significantly more 'genuine refugees' than the ordinary territorial procedures, and should therewith correspond to former UK Home Secretary Jack Straw's programmatic demands at the 2000 Lisbon Conference.

6. The present diversity and incoherence of Member States' Protected Entry Procedures diminishes their actual impact. There is a strong case for a harmonisation, which will most likely result in an exponential boost of their protection capabilities, as well as their competitive edge vis-à-vis the smuggling sector. In particular, common and harmonised information policies should have good prospects of establishing Protected Entry Procedures as an persuasive alternative to irregular entry, and the only way out for those who cannot receive adequate protection in the region, while sending strong signals of dissuasion to non-qualifying cases. Harmonisation should pick up on existing practices and mould them step-by-step into the *acquis*. Against the backdrop of our findings, Protected Entry Procedures presently constitute the most adequate response to the challenge of reconciling migration control objectives with the obligation of protecting refugees.

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### ***Information Providers***

#### *Australia*

UNHCR Regional Office in Canberra

#### *Austria*

Caritas Österreich

Federal Asylum Office

- Iris Habish
- Christian Schmid

Federal Ministry of the Interior

- Hilbert Karl

UNHCR Branch Office in Vienna

- Karola Paul
- Christoph Pinter

#### *Belgium*

Ministry of the Interior

OverlegCentrum voor Integratie van Vluchtelingen

#### *Canada*

UNHCR Branch Office in Ottawa



### Denmark

Danish Refugee Council  
Ministry of Refugee, Immigration and Integration Affairs  
Refugee Appeals Board

### France

Amnesty International (Service Réfugiés)

- Patrick Delouvin

French Office for the Protection of Refugees and Stateless Persons (OFPRA)

- Michel Raimbaud

Ministry of Foreign Affairs

- Alexander Garcia
- Jean Wiet

UNHCR Branch Office in Paris

- Xavier Creach
- Marie-Noëlle Thirode

### Finland

Ministry of the Interior  
Refugee Advice Centre

### Germany

Federal Ministry of the Interior  
ProAsyl

### Greece

Greek Council for Refugees  
Ministry of Interior, Public Administration and Decentralization

### Ireland

Department of Justice, Equality and Law Reform  
Irish Refugee Council

### Italy

Italian Refugee Council  
Ministry of the Interior

### Luxembourg

Caritas  
Ministry of Justice

### The Netherlands

Dutch Immigration Lawyer

- Arie van Driel

Dutch Refugee Council

- Stefan Kok

Immigration and Naturalisation Service, Department of Justice

- Mark Kiela

Immigration Policy Department, Department of Justice

- Ira M.C. van Bommel - van der Zaal
- Ministry of Foreign Affairs
- Michiel W. van Campen

UNHCR Branch Office in The Hague

- Linda Goldschmeding
- Hanne-Meike Grol

### Norway

Ministry of Local Government and Regional Development

The Norwegian Organisation for Asylum Seekers

### Portugal

Asylum and Refugee Department, Ministry of the Interior

Portuguese Refugee Council

### Spain

Spanish Commission for Refugee Assistance

- Javier Carneros Entrena
- Jon Zabala Otegui

Office for Asylum and Refuge, Ministry of Interior

- Julián Prieto Hergueta

UNHCR Branch Office in Spain

- Carlos Boggio
- Marta Garcia
- Roberto Quintero

### Sweden

Caritas

Ministry for Foreign Affairs

### Switzerland

Federal Office for Refugees, Federal Department of Justice and Police

- Lorentz Glauser
- Matthias Keusch

Swiss Refugee Council

UNHCR Liaison Office for Switzerland and Liechtenstein

### United Kingdom

Home Office

- Heaven Crawley
- Ailish King-Fisher
- Lynn Smart
- Ian Walsh

Immigration Law Practitioners' Association

- Suzan Rowlands

Tooks Count Chambers, London

- Judith Farbey (barrister)

UNHCR Branch Office in London

- Michael Kingsley-Nyinah
- Christian F. Mahr
- Kate Pooler

#### United States of America

Hebrew Immigrant Aide Society

- John-Martin Winter

Immigration and Naturalization Service

- Leonard P. Forth

US Embassy in Vienna

- James D. Pettit

#### Other Sources

European Commission

- Friso Roscam Abbing
- Stefano Vincenzi

European Council on Refugees and Exiles

- Gil Loescher

Inter-Governmental Consultations (Secretariat)

- Mike Bisi
- Gerry van Kessel

International Centre for Migration Policy Development

- Lukas Gehrke
- Ann-Charlotte Nygård
- Martijn Pluim
- Oliver Seiffarth

International Organization for Migration

- Frank Laczko

United Nations High Commissioner for Refugees

- Damtew Dessalenge
- Jean-Francois Durieux

#### Participants at the Expert Seminar 5-6 August 2002 in Copenhagen

Dietrun Günther, UNHCR RO Stockholm

Louise Holck, Danish Refugee Council

George Joseph, Caritas Sweden

Kim U. Kjær, Danish Centre for Human Rights

Friso Roscam-Abbing, European Commission

Areti Sianni, ECRE London

Jens Vedsted-Hansen, Aarhus University

#### External Reference Group for the Study

Paul Levine, Uppsala University

Eiko Thielemann, London School of Economics & Political Science

Jens Vedsted-Hansen, Aarhus University

*Internal Reference Group for the Study*

Eva Ersbøll, Danish Centre for Human Rights

Isi Foighel, Danish Centre for Human Rights

Louise Holck, Danish Refugee Council

Morten Kjærum, Danish Centre for Human Rights

Eva Maria Lassen, Danish Centre for Human Rights

Hans-Otto Sano, Danish Centre for Human Rights

# Annexes

## Annex 1 – Austria, France and the UK: Comparison of Representation Networks

### *Africa*

EM = Embassy, HC = High Commission

	Austria	France	UK
Algeria	EM	EM	EM
Angola	–	EM	EM
Benin	–	EM	–
Botswana	–	EM	HC
Burkina Faso	–	EM	–
Burundi	–	EM	–
Cameroon	–	EM	HC
Cape Verde	–	EM	–
Central African Republic	–	EM	–
Chad	–	EM	–
Comoros	–	EM	–
Congo	–	EM	–
Congo, Democratic Republic of the	–	EM	EM
Cote d'Ivoire	EM	EM	EM
Djibouti	–	EM	–
Egypt	EM	EM	EM
Equatorial Guinea	–	EM	–
Eritrea	–	EM	–
Ethiopia	EM	EM	EM
Gabon	–	EM	–
Gambia	–	–	HC
Ghana	–	EM	HC
Guinea	–	EM	–
Guinea-Bissau	–	EM	–
Kenya	EM	EM	HC
Lesotho	–	–	HC
Liberia	–	–	–
Libya	EM	EM	EM
Madagascar	–	EM	EM
Malawi	–	–	HC
Mali	–	EM	EM
Mauritania	–	EM	–
Mauritius	–	EM	HC
Morocco	EM	EM	EM
Mozambique	–	EM	HC
Namibia	–	EM	HC
Niger	–	EM	–
Nigeria	EM	EM	HC
Rwanda	–	EM	EM
Sao Tome and Principe	–	–	–
Senegal	EM	EM	EM

	Austria	France	UK
Seychelles	–	EM	HC
Sierra Leone	–	–	HC
Somalia	–	–	–
South Africa	EM	EM	HC
Sudan	–	EM	EM
Swaziland	–	–	HC
Tanzania	–	EM	HC
Togo	–	EM	–
Tunisia	EM	EM	EM
Uganda	–	EM	HC
Zambia	–	EM	HC
Zimbabwe	EM	EM	HC

### *Asia*

EM = Embassy, HC = High Commission

	Austria	France	UK
Afghanistan	–	EM	–
Armenia	EM	EM	EM
Azerbaijan	–	EM	EM
Bahrain	–	EM	EM
Bangladesh	–	EM	HC
Bhutan	–	–	–
Brunei	–	EM	HC
Burma (Myanmar)	–	EM	EM
Cambodia	–	EM	EM
China	EM	EM	EM
Cyprus	–	EM	HC
East Timor	–	–	EM
India	EM	EM	HC
Indonesia	EM	EM	EM
Iran	EM	EM	EM
Iraq	–	EM	–
Israel	EM	EM	EM
Japan	EM	EM	EM
Jordan	EM	EM	EM
Kazakhstan	–	EM	EM
Korea (north)	–	–	EM
Korea (south)	EM	EM	EM
Kuwait	EM	EM	EM
Kyrgyzstan	–	–	–
Laos	–	EM	EM
Lebanon	EM	EM	EM
Malaysia	EM	EM	HC
Maldives	–	–	–
Mongolia	–	EM	EM
Nepal	–	EM	EM

	Austria	France	UK
Oman	EM	EM	EM
Pakistan	EM	EM	HC
Philippines	EM	EM	EM
Qatar	–	EM	EM
Russian Federation	EM	EM	EM
Saudi Arabia	EM	EM	EM
Singapore	–	EM	HC
Sri Lanka	–	EM	HC
Syria	EM	EM	EM
Taiwan	Pakistan	EM	–
Tajikistan	–	–	EM
Thailand	EM	EM	EM
Turkey	EM	EM	EM
Turkmenistan	–	EM	EM
United Arab Emirates	EM	EM	EM
1Uzbekistan	–	EM	EM
Vietnam	EM	EM	EM
Yemen	–	EM	EM

### *Oceania*

EM = Embassy, HC = High Commission

	Austria	France	UK
Australia	EM	EM	HC
Fiji	–	EM	HC
Kiribati	–	–	–
Marshall Islands	–	–	–
Micronesia	–	–	–
Nauru	–	–	–
New Zealand	–	EM	HC
Palau	–	–	–
Papua New Guinea	–	EM	HC
Samoa	–	–	–
Solomon Islands	–	–	HC
Tonga	–	–	HC
Tuvalu	–	–	–
Vanuatu	–	EM	HC

## *The Americas*

EM = Embassy, HC = High Commission

	Austria	France	UK
Antigua and Barbuda	–	–	–
Argentina	EM	EM	EM
Bahamas	–	–	HC
Barbados	–	–	HC
Belize	–	–	HC
Bolivia	–	EM	EM
Brazil	EM	EM	EM
Canada	EM	EM	HC
Chile	EM	EM	EM
Colombia	EM	EM	EM
Costa Rica	–	EM	EM
Cuba	EM	EM	EM
Dominica	–	–	HC
Dominican Rep.	–	EM	EM
Ecuador	–	EM	EM
El Salvador	–	EM	EM
Grenada	–	–	HC
Guatemala	EM	EM	EM
Guyana	–	–	HC
Haiti	–	EM	–
Honduras	–	EM	EM
Jamaica	–	EM	HC
Mexico	EM	EM	EM
Nicaragua	–	EM	EM
Panama	–	EM	EM
Paraguay	–	EM	EM
Peru	EM	EM	EM
St. Kitts & Nevis	–	–	–
St. Lucia	–	EM	HC
St. Vincent & the Grenadines	–	–	–
Suriname	–	EM	–
1Trinidad & Tobago	–	EM	HC
Uruguay	–	EM	EM
USA	EM	EM	EM
Venezuela	EM	EM	EM



## Europe

EM = Embassy, HC = High Commission

	Austria	France	UK
Albania	EM	EM	EM
Andorra	–	EM	–
Austria	–	EM	EM
Belarus	–	EM	EM
Belgium	EM	EM	EM
Bosnia-Herzegovina	EM	EM	EM
Bulgaria	EM	EM	EM
Croatia	EM	EM	EM
Czech Republic	EM	EM	EM
Denmark	EM	EM	EM
Estonia	EM	EM	EM
Finland	EM	EM	EM
France	EM	–	EM
Georgia	–	EM	EM
Germany	EM	EM	EM
Greece	EM	EM	EM
Hungary	EM	EM	EM
Iceland	–	EM	EM
Ireland	EM	EM	EM
Italy	EM	EM	EM
Latvia	EM	EM	EM
Liechtenstein	–	–	–
Lithuania	EM	EM	EM
Luxembourg	EM	EM	EM
Macedonia	EM	EM	EM
Malta	–	EM	HC
Moldova	–	EM	EM
Monaco	–	–	–
Netherlands	EM	EM	EM
Norway	EM	EM	EM
Poland	EM	EM	EM
Portugal	EM	EM	EM
Romania	EM	EM	EM
San Marino	–	–	–
<sup>1</sup> Slovakia	EM	EM	EM
Slovenia	EM	EM	EM
Spain	EM	EM	EM
Sweden	EM	EM	EM
Switzerland	EM	EM	EM
Ukraine	EM	EM	EM
United Kingdom	EM	EM	–
Vatican City	–	EM	EM
Yugoslavia	EM	EM	EM

### *Statistics*

	<b>Africa</b>	<b>Asia</b>	<b>Oceania</b>	<b>Americas</b>	<b>Europe</b>	<b>World</b>
<b>Number of states/entities</b>	<b>53</b>	<b>48</b>	<b>14</b>	<b>35</b>	<b>43</b>	<b>193</b>
Number of <i>French</i> embassies	45	41	5	26	39	156
Number of <i>UK</i> embassies or HC	33	42	7	30	38	150
Number of <i>Austrian</i> embassies	12	22	1	11	32	78

Data on embassies and representations has been collated from official websites of the three states scrutinized.<sup>682</sup> Additional information was provided by the French and UK embassies in Copenhagen, Denmark.

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<sup>682</sup> The authors are indebted to Mr. Alex K. Tonnesen for his assistance.

## **Annex II – Sample Questionnaire (State)**

### **Introductory Remarks**

Throughout the study, the term “Externalised Processing” will be employed as overarching concept for arrangements allowing a non-national

- to approach the potential host state outside its territory with a claim for asylum or other forms of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Six Member States practice Externalised Processing on a regular basis, while others use it as an exceptional tool. While Externalised Processing is limited to applications filed in third countries in some states, other states also receive protection claims at their diplomatic representations in the country of origin of the applicant.

Externalised Processing is composed of two elements:

- the decision on the grant of an entry visa
- the decision on the merits of the claim for international protection.

These two elements can be combined in different ways. Among states practising Externalised Processing some grant entry visas before the completion of an examination on the merits of the protection claim. Others do not foresee such initial visa decisions, and the protection seeker has to wait in the country where the application was submitted for the full duration of the material examination.

### **Structure**

The questionnaire has been organised according to the following structure:

- I - Legal Regulation and Current Practices of Externalised Processing
- II - Earlier Experiences and Future Developments
- III - Submission of the Application
- IV - General Principles of the Procedure
- V - Registration and Initial Processing of the Application
- VI - Processing of the Application by the Representations
- VII - Processing of the Application by an Authority in Your Country
- VIII - Appeals against Decisions made by the Representation
- IX - Appeals against Decisions made by Authorities in Your Country
- X - Applicants' Physical Safety during the Procedure
- XI - Transfer to Your Country
- XII - Staff at the Representations
- XIII - UNHCR and NGO Involvement
- XIV - Case Law
- XV - Statistics
- XVI - Relations with other Procedures
- XVII - Benefits and Drawbacks
- XVIII - Financial Costs
- XIX - Exceptional and Informal Intervention

## **I – Legal Regulation and Current Practices of Externalised Processing**

1. Is it possible on a *formalised* basis to lodge an asylum application at your diplomatic or consular representations abroad?
2. Is it possible on a *formalised* basis to lodge a request for an entry visa at your diplomatic or consular representations, on the understanding that such a visa would allow the applicant to enter your country to await the final decision on his/her asylum application (hereafter referred to as “humanitarian visa”)?

3. Please answer this question if you responded with “Yes” to Question 1 or 2. Otherwise, proceed to question 6.

In case it is possible to lodge an asylum application and/or a request for a “humanitarian visa” at your diplomatic or consular representations abroad, are the relevant provisions laid down in a law and/or in administrative regulations?

If yes, please specify which law and articles and/or which administrative regulations. If possible, please send a copy of the relevant text(s), preferably in English, French or German, otherwise in the national language.

If no, please specify where the authorisation then can be found. Please also include an excerpt of this authorisation:

4. Please specify when and through which law/regulation this procedure was initially introduced.

5. Parallel to the formal procedure, does your country assist persons *informally* in emergency situations, i.e. in cases of great urgency *outside* the framework of formal procedures? If yes, please explain and exemplify:

## **II – Earlier Experiences and Future Developments**

6. Has your country previously operated a formal externalised processing scheme now abolished? If yes, please specify when and through which law and legal provision this procedure was introduced and abolished, and briefly describe its content. Please specify the main reasons why this formal procedure was abolished:

7. Have amendments within the last 10 years changed the procedure for asylum applications lodged at representations abroad? If yes, please provide information on the main elements of these amendments together with the legal and/or political arguments leading to them:

8. Is there a discussion in your country with a view to change current law/practice on Externalised Processing?

If yes, please specify what elements are prone to change and what the position taken of the your Government is (if possible include relevant background material, as legislative drafts):

9. Would your Government be interested in cooperating with other EU Member States on a harmonised Externalised Processing scheme?

If yes, please clarify under what conditions your country might be interested:

If no, please explain why:

10. Would your Government be interested in cooperating on the creation of joint EU processing centres in regions of origins, featuring determination of claims, entry clearance and allocation to specific Member States? If yes, please clarify under what conditions your country might be interested, and what time-frame you envisage for the creation of such centres:

### **III – Submission of the Application**

*Please answer the following questions if you responded with "Yes" to Question 1 or 2. Otherwise, proceed to Question 76.*

11. Is it possible to apply for asylum and/or a "humanitarian visa" at diplomatic or consular representations both in countries of origin of the applicant *and* in third countries?

- ☐ A) Country of origin of the applicant only
- ☐ B) Third country only
- ☐ C) Country of origin of the applicant AND third country

*12. Please answer only if you chose alternative C in Question 11:*

Are applications filed in the applicant's country of origin treated differently than applications filed in a third country? If yes, please explain:

13. Is it possible to lodge the application at *any* diplomatic or consular representation (or is this possibility restricted to listed countries, or countries where international organisations as UNHCR or UNDP are not represented)? If no, please specify to which representations this possibility is restricted and on what grounds this restriction was introduced:

14. Is it possible to lodge the application at *both* embassies *and* consulates? If no, please specify:

15. Apart from filing a claim at diplomatic and consular representations, is there another way of submitting an application for asylum to your country from abroad? If yes, please explain and indicate name and number of applicable law and legal provision:

16. Is it mandatory that an applicant *physically* presents herself/himself at the representation to submit the request for asylum and/or "humanitarian visa" (considering that accessing the representation's premises may be difficult or dangerous for the applicant)? If no, please specify what other possibilities the applicant has to lodge her/his application:

17. When a person contacts the embassy or consulate in order to seek protection, does he/she have to lodge an application for asylum, an application for an entry visa or both at the same time? Please specify and indicate name and number of applicable law and legal provision:

#### **IV – General Principles of the Procedure**

18. Is the formalised procedure restricted to claims falling under the refugee definition of the Geneva Convention, or does it also apply to claims based on humanitarian or other grounds? Please explain and indicate name and number of applicable law and legal provision:

19. Do applications for asylum and/or a “humanitarian visa” lodged at diplomatic or consular representations follow the same procedure as those lodged inside your country? Please outline the procedure that will be followed and indicate name and number of applicable law and legal provisions:

20. Is UNHCR informed and/or involved in any manner in the processing of the asylum application by the diplomatic representation? If yes, please describe:

21. Are the local authorities (of the third country) informed and/or involved in any manner in the processing of the asylum application lodged at a diplomatic or consular representation? If yes, please specify:

#### **V – Registration and Initial Processing of the Application**

22. Please describe the initial phases of the procedure:

- a. How is the applicant registered (note for the file, database entry, other)? Please explain:
- b. Does the applicant have to fill out a written asylum application?
- c. If yes, is there an application form available in all diplomatic representations?
- d. If yes, is it different from the form for applications made inside your country?

If yes, please explain how it differs and if possible attach one sample of the application form to this questionnaire:

- e. Does the representation staff conduct an interview?

Yes                      No                      In some cases

If you chose the latter alternative, please specify in which cases an interview will be conducted:

- f. Is there a standard formula for questions to be asked? Please specify:
- g. How is the interview recorded? Please explain:
- h. Who is evaluating the interview? Please specify:
- i. Is the asylum interview made at the representation transmitted to the processing authorities in written form, on a sound- or videocassette or otherwise? Please specify:

- j. Please describe other matters of the initial phase of the procedure that might be of interest for this study:

## **VI – Processing of the Application by the Representations**

23. Is the diplomatic or consular representation empowered to make a formal decision on the application for asylum and/or a “humanitarian visa” without consulting the national asylum authorities?

If yes, does this apply both to negative and positive decisions? Please specify:

If yes, is this competence of the representation exercised on its discretion, or is it subjected to regulation? Please specify:

24. If this competence is regulated, please enumerate the criteria which the representation has to take into account when exercising its competence and indicate name and number of applicable law and legal provision (manifestly unfoundedness of applications, lack of connections with your country, etc.):

25. If this competence is discretionary, is the actual practice of representations uniform?

If yes, would you describe the usage of this discretion as restrictive or expansive with a view to granting protection? Please specify:

## **VII – Processing of the Application by an Authority in Your Country**

26. If the diplomatic or consular representation is *not (or not in all cases)* empowered to make formal decisions, which institution in your country is responsible for deciding on the application? Please specify and indicate name and number of applicable law and legal provision:

27. Is the same institution responsible for examining the application for asylum and for deciding on issuing a visa? If your answer is “no”, please specify and indicate name and number of applicable law and legal provision:

28. What is the procedure for examining *applications for asylum* lodged from abroad?

- a. Are there additional criteria to be taken into consideration (personal connection with your country, etc.)? If yes, please specify and indicate name and number of applicable law and legal provision:
- b. Do manifestly unfounded procedures apply to these applications? If yes, please indicate name and number of applicable law and legal provision:
- c. Are these applications prioritised in any way? If yes, please specify:
- d. Please describe any other procedural matters of relevance:

29. What is the procedure for examining *applications for a humanitarian visa*?

- a. Do additional requirements – e.g. the existence of an invitation letter from a family member, relative or sponsor in your country, passing of a medical examination, etc. – apply? If yes, please specify and indicate name and number of applicable law and legal provision:
- b. Are these applications prioritised in any way? If yes, please specify:
- c. Please describe any other procedural matters of relevance:

30. Is any form for legal counselling or representation available under this procedure? If yes, please specify (are NGOs involved, who bears the costs etc.) and indicate name and number of applicable law and legal provision:

31. Is any form of interpretation available in case the applicant does not understand and/or speak the language at the representation? Please specify and indicate name and number of applicable law and legal provision (are NGOs involved, who bears the costs etc.):

#### **VIII – Appeals against Decisions made by the Representation**

32. How are the decisions made by the representation notified to the applicant? In writing? In the applicant's own language? Please specify and indicate name and number of applicable law and legal provision:

33. Is it possible to appeal against negative decisions made by the representation?

- a. Please indicate name and number of applicable law and legal provision:
- b. If yes, does the decision notified to the applicant include information on appeal rights?

34. What authority will consider the appeal? Please specify and indicate name and number of applicable law and legal provision:

35. What is the appeal procedure? Please describe and indicate name and number of applicable law and legal provision:

36. Is any form for legal counselling or representation available under this procedure? Please specify and indicate name and number of applicable law and legal provision (are NGOs involved, who bears the costs etc.):

37. Is any form of interpretation available in case the applicant does not understand and/or speak the language at the representation? Please specify and indicate name and number of applicable law and legal provision (are NGOs involved, who bears the costs etc.):



## **IX – Appeals against Decisions made by Authorities in Your Country**

38. How are the decisions made by the national authorities notified to the applicant? In writing? In the applicant's own language? Please specify and indicate name and number of applicable law and legal provision:

39. Is it possible to appeal negative decision concerning asylum and/or a “humanitarian visa” made by the national authorities?

a. Please indicate name and number of applicable law and legal provision:

b. If yes, does the decision notified to the applicant include information on appeal rights?

40. What authority will consider the appeal? Please specify and indicate name and number of applicable law and legal provision:

41. Is the procedure applied for appeals distinct depending on whether it is a decision on asylum or a decision on visa issuance? If yes, please describe the difference(s):

42. What is the appeal procedure? Please describe and indicate name and number of applicable law and legal provision:

43. Is any form for legal counselling or representation available under this procedure? If yes, please specify and indicate name and number of applicable law and legal provision (are NGOs involved, who bears the costs etc.):

44. Is any form of interpretation available in case the applicant does not understand and/or speak the language at the representation? If yes, please specify and indicate name and number of applicable law and legal provision (are NGOs involved, who bears the costs etc.):

## **X – Applicants' Physical Safety during the Procedure**

45. Are you aware of particular impediments hindering applicants to access your representation in specific countries, such as

a. formal or informal screening by the guards of the representation which may prevent applicants from entering the premises? If yes, please specify:

b. agents of the local government physically hindering access to the representation for persons in need of protection? If yes, please specify:

c. monitoring and surveillance by agents of the local government of persons who have contacted the representation? If yes, please specify:

d. any other examples? Please specify:

46. When such problems occur, do the representations have instructions or an established practice of taking measures in order to facilitate access to their premises? If yes, please specify:

47. Are you aware of specific cases where the representation has taken such measures? If yes, please specify:

48. Are you aware of specific cases where the representation has not taken such measures, making it impossible for the applicant to physically access the building? If yes, please specify:

49. If urgently needed, can applicants receive some form of protection while their application is being processed and they are awaiting the initial decision on entry visa for entering your country? If yes, please specify:

50. If urgently needed, can applicants be transferred to your country before the processing authority has reached a decision on the application?

If yes, please specify who is responsible for taking such decision, and according to which criteria this is usually made (e.g. what is considered to be a sufficient risk to allow such a transfer). Please also indicate name and number of applicable law and legal provision:

51. Provided that there is a possibility for transfer before a decision on the asylum application has been made, can a negative decision on transfer in advance be appealed? If yes, please describe the appeal procedure and indicate name and number of applicable law and legal provision:

52. Are you aware of cases where the applicant was refused an early transfer and thereafter became a victim of persecution awaiting the outcome of the procedure? Please specify, if possible, date, nationality, number of persons concerned, country of persecution, etc.:

## **XI – Transfer to Your Country**

53. Can the diplomatic or consular representation refuse issuing a visa to an asylum seeker although requested by the processing authority in your country to do so?

If yes, is it possible to appeal such a decision?

If yes, please specify the law provisions and procedure to be followed:

54. What kind of visa is normally issued to applicants whose application for asylum and/or a “humanitarian visa” is accepted? Is this a special category of visa? Please specify and indicate name and number of applicable law and legal provision:

55. Does the staff of the representation usually engage in the practicalities of departure? If yes, please specify:

- a. Does the staff of the representation ensure that the person is able to take his/her plane and leave the country? If yes, please specify:
- b. Does the staff of the representation provide financial support for travel costs? If yes, please specify:

- c. Does the staff of the representation issue a travel document if the person has no passport and cannot obtain one? If yes, please specify:
- d. Please specify any other measures taken by the staff of the representation in order to secure the departure of the applicant:

56. Are you aware of cases where applicants – despite being accepted in your country and granted visa – were not able to travel due to lack of funds, lack of documentation, etc.? If possible, describe relevant cases:

57. Are you aware of any cases where an asylum seeker, for whom a visa to your country has been issued, was physically hindered by the local authorities to leave the country? If possible, describe relevant cases:

## **XII – Staff at the Representations**

58. Are national personnel of the representations also dealing with asylum matters?

59. Is there an *obligation* to have staff trained in asylum matters in all or in certain diplomatic representation? If yes, please specify and indicate name and number of applicable law and legal provision:

60. Does the staff dealing with asylum requests normally receive some form of training in asylum matters? If yes, how many days/weeks does the training comprise, and who conducts the training?

61. Does the staff dealing with asylum requests normally receive some form of training in interviewing technique? If yes, how many days/weeks does the training comprise, and who conducts the training?

## **XIII – UNHCR and NGO Involvement**

62. Do UNHCR and/or NGOs have any possibility of alerting the authorities of your country on particular cases deserving urgent intervention? If yes, please describe how contacts are normally made:

63. Is UNHCR or any NGO(s) involved in the decision-making process regarding asylum applications lodged abroad? If yes, please describe and indicate name and number of applicable law and legal provision

## **XIV – Case Law**

64. Are you aware of any case law concerning asylum applications lodged at a diplomatic or consular representation?

If yes, please attach the relevant case/s to your answers to this questionnaire. While we prefer an English version, feel free to attach the case/s in your official language, if an English version is not available. However, we would appreciate a short summary in English if the case is only available in your official language and that language is not English, German or French.

## XV – Statistics

65. Please indicate the statistical numbers for the years 1996 through 2001.

Please fill in the table, and feel free to include additional statistics that might be of interest in the empty rows. If more convenient, you may attach the statistics separately.

	1996	1997	1998	1999	2000	2001
<b>Number of asylum applications filed at a representation abroad</b>						
<b>Number of positive first decisions by the representations abroad</b>						
<b>Number of applications rejected by the representation</b>						
<b>Number of applications sent onwards to the processing authorities in your country</b>						
<b>Number of appeals due to the rejection by the representation of the application</b>						
<b>Number of applicants transferred to your country before the processing authorities had reached a decision on the asylum request</b>						
<b>Number of applicants granted asylum, when the application was filed abroad</b>						
<b>Number of applicants denied asylum, when the application was filed abroad</b>						
<b>Number of appeals after denial of asylum by the processing authorities</b>						
<b>Number of reversed decisions after appeal</b>						
<b>Number of approved applicants that actually arrived in your country</b>						

66. What is the average processing time from the filing of an asylum request at your representation to the communication of the decision? Please specify:

67. What are the three largest nationality groups applying for asylum at your representations?

68. From 1998 onwards, please specify for the three representations were most asylum applications were lodged the following information:

1. Place where the representation is located:

	1998	1999	2000	2001
Number of asylum applications filed at the representation				
Positive decisions				
Negative decisions				
Otherwise closed applications				
Appeals filed at the representation				
Number of applicants, receiving a positive decision, that entered your country				

2. Place where the representation is located:

	1998	1999	2000	2001
Number of asylum applications filed at the representation				
Positive decisions				
Negative decisions				
Otherwise closed applications				
Appeals filed at the representation				
Number of applicants, receiving a positive decision, that entered your country				

3. Place where the representation is located:

	1998	1999	2000	2001
Number of asylum applications filed at the representation				
Positive decisions				
Negative decisions				
Otherwise closed applications				
Appeals filed at the representation				
Number of applicants, receiving a positive decision, that entered your country				

69. Additional comments on statistical issues:

## **XVI – Relations with other Procedures**

70. If your country runs a resettlement programme, is the externalised processing procedure in any way linked to this programme? If yes, please specify:

71. Has the introduction of the possibility to submit an asylum application at representations abroad had any impact on the total number of asylum application received by your authorities each year? If yes, please specify:

## **XVII – Benefits and Drawbacks**

72. What are the benefits and/or the drawbacks of the procedure for externalised processing in force in your country?

73. Do you have any indications in regard to the extent that the procedure is actually known to persons who are in need of protection? Please explain:

### **XVIII – Financial Costs**

74. Can you indicate or estimate the specific financial costs related to Externalised Processing?

If yes, please specify, where possible, total cost per year and cost per applicant for the last five years:

If no, please name the indicators we should research to assess the financial costs of the procedure:

75. Can you indicate or estimate the specific financial costs related to your asylum system in general? Please specify, where possible, total cost/year and cost per applicant for the last five years, and add separate statistics, if appropriate:

### **XIX – Exceptional and Informal Intervention**

*This section is to be answered only by states not operating any formal externalised processing scheme.*

76. What is the attitude of a diplomatic or consular representation of your country when approached by a person who seeks protection in your country? Is the person simply informed that it is not possible to apply for asylum, or is the case referred, for example, to the local UNHCR office (if any)? Please describe:

77. May your representations abroad assist, in exceptional cases and on an informal basis, persons in need of protection who approach them?

If yes, in which type of cases does this competence for exceptional and informal intervention apply (serious and urgent protection cases irrespective of other criteria, persons with personal or cultural connections with your country, specific nationalities of origin, specific categories of applicants, “well-known” persons, etc.). Please specify:

78. Do the representations abroad have discretionary power to decide on such cases or do they have to consult the national authorities? Please describe:

79. What is usually the method used for assisting these persons? Are they issued with a visa in order to reach the territory of your country and have their application processed there, or is their asylum application processed (partially or totally) before they are allowed to come to your country? Please describe:

80. Does the staff of the representation engage in the practicalities of the departure (ensuring that the person is able to take his/her plane and leave the country, providing financial support for travel costs, issuance of travel document if the person has no passport and cannot obtain one, etc.)? Please specify:

## **Annex III – Sample Questionnaire (NGO)**

### **Introductory remarks**

Throughout the questionnaire, the term “Externalised Processing” will be employed as overarching concept for arrangements allowing a non-national:

- to approach the potential host state outside its territory with a claim for asylum or other forms of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Six Member States practice Externalised Processing on a regular basis, while others use it as an exceptional tool. While Externalised Processing is limited to third countries in some states, other states also receive protection claims at their diplomatic representations in countries of origin.

Externalised Processing is composed of two elements:

- the decision on the grant of an entry visa
- the decision on the merits of the claim for international protection.

These two elements can be combined in different ways. Some Member States grant entry visas before the completion of an examination on the merits of the protection claim. Others do not foresee such initial visa decisions, and the protection seeker has to wait in the country where the application was submitted for the full duration of the material examination.

### **Instructions for use**

Attached to the questionnaire, you will find an excerpt of a Preliminary Study on Positive Interception written by the Danish Centre for Human Rights (DCHR) for UNHCR in 2001-02 (hereafter the Preliminary Study), describing your country’s practice regarding Externalised Processing. This description is based on the general background information collected by the DCHR and information provided by UNHCR. Neither your country’s government nor NGOs have been officially consulted for the Preliminary Study.

Many of the questions in the questionnaire have already been addressed in the Preliminary Study. Nevertheless, we would like you to answer them as well. If you fully agree with the information given in the Study, you may simply refer to it. You may also wish to comment or rectify some points, add new elements, refer to your own experience, etc. In any case, feel free to confirm, comment, criticise or complete the information provided in the Study.

We have also included numerous questions that were not addressed in the Preliminary Study. We would like you to look at them with particular care. Amongst these, we are particularly interested in knowing more about NGO involvement in Externalised Processing procedures – “alerting” role, legal counselling and assistance, participation in the procedure, lobbying activities, etc. – and in any information you may have from your experience in dealing with such cases.

Some technical questions can probably only be answered by civil servants who are familiar with procedures at diplomatic representations. A similar questionnaire is also sent to your country’s government. If you do not have the information requested – and cannot obtain it without consulting the authorities – please mention this and leave the question unanswered.

We are very keen to look at the issue of Externalised Processing also from the NGO community's perspective. You are welcome to contact other organisations or private persons, such as lawyers or academics, in order to collect information on specific issues. If you do so, please let us know who has been consulted. You may also find useful to contact refugees who have been accepted in your country following Externalised Processing. They may indeed have first-hand experience and practical information to share with you.

Thank you for your assistance



## **I– Legal regulations**

1. Is it possible on a *formalised* basis to lodge an asylum application at your country's diplomatic or consular representations abroad?
2. Is it possible on a *formalised* basis to lodge at diplomatic or consular representations a request for an entry visa in order to travel to your country where the actual asylum application will be submitted (hereafter “humanitarian visa”)?
3. If yes, are the relevant provisions included in a law and/or in administrative regulations? Please specify which law and articles and/or which administrative regulations. If possible, please send a copy of the relevant text(s), preferably in English, French or German, otherwise in the national language.
4. How long has this procedure existed? Please specify when and through which law/regulation it was initially introduced
5. If these provisions are included in administrative regulations or administrative guidelines, are these regulations/guidelines available to the external actors (NGOs, lawyers, public)?

## **II– Submission of the application – General rules**

6. Is it possible to apply for asylum and/or “humanitarian visa” at diplomatic or consular representations both in countries of origin *and* in third countries. If not, please specify.
7. Is it possible to lodge the application at *any* diplomatic or consular representation, or are there limitations (only in certain specified countries, only when there are no UNHCR or UNDP representations in the country, etc.)? Please specify
8. Is it possible to lodge the application at *both* embassies *and* consulates?
9. Beside diplomatic and consular representations, is there another way of submitting an application for asylum to your country from abroad?
10. When a person contacts the embassy or consulate in order to seek protection, does he/she have to lodge an application for asylum, an application for an entry visa or both at the same time?

## **III– Submission of the application – Physical access to the representation**

11. Is it mandatory that the applicant him/herself *physically* present him/herself to the representation to submit the request for asylum and/or “humanitarian visa” (accessing the representation's premises may be impossible or dangerous for the applicant)?
12. Are you aware of particular problems for accessing the representation of your country in specific countries, such as
  - formal or informal screening by the guards of the representation which may prevent applicants from entering the premises

- agents of the local government physically hindering access to the representation for persons in need of protection
- monitoring and surveillance by agents of the local government of persons who have contacted the representation
- any other examples.

13. When such problems occur, does the representations have instructions or an established practice of taking measures in order to facilitate access to their premises?

14. Are you aware of specific cases where the representation has taken such measures?

15. Are you aware of specific cases where the representation has not taken such measures, making it impossible for the applicant to physically access the building?

#### **IV– General principles of the procedure**

16. Is the formalised procedure restricted to claims falling under the refugee definition of the Geneva Convention or does it also apply to claims based on humanitarian or other reasons? Please explain.

17. Do applications for asylum and/or “humanitarian visa” lodged at diplomatic or consular representations follow the same procedure as those lodged inside the country? If no, please outline the procedure that will be followed.

18. Is UNHCR informed and/or involved in any manner in the processing of the asylum application by the diplomatic representation? If yes, please describe

19. Are the local authorities (of the third country) informed and/or involved in any manner in the processing of the asylum application lodged at a diplomatic or consular representation? If yes, please describe

#### **V– Registration and initial processing of the application**

20. Please describe the initial phases of the procedure:

- how is the applicant registered?
- does the applicant have to fill a written asylum application?
- if yes, is there an application form available at all diplomatic representations? If yes, is it different from the form for applications made inside the country?
- does the staff of the representation conduct an interview? In all cases?
- is there a standard formula for questions to be asked?

- how is the interview recorded?
- who is evaluating the interview?
- is the asylum interview made at the representation transmitted to the processing authorities in written form, on a sound- or videocassette or otherwise? Please specify
- etc.

21. How do you evaluate, according to your experience, the quality of the initial processing conducted by the representations, in particular the initial interview?

#### **VI– Processing of the application by the representations**

22. Is the diplomatic or consular representation empowered to make a formal decision on the application for asylum and/or “humanitarian visa” without consulting the national asylum authorities?

23. If yes, does this apply both to negative and positive decisions?

24. If yes, is this competence of the representation exercised on its discretion, or is it subjected to regulation?

25. If this competence is regulated, what are the criteria which the representation has to take into account when exercising its competence (manifestly unfounded applications, lack of connections with the country of asylum, etc.) this may happen

26. If this competence is discretionary, what is, according to your experience, the practice usually followed by representations?

#### **VII– Processing of the application by an authority in your country**

27. If the diplomatic or consular representation is *not (or not in all cases)* empowered to make formal decisions, which in-country institution is responsible for deciding on the application?

28. Is the same in-country authority responsible for examining the application for asylum and for deciding on issuing a visa? If not, please specify

29. What is the procedure for examining *applications for asylum* lodged from abroad?

- are there additional criteria to be taken into consideration (personal connection with the country, etc.)
- do manifestly unfounded procedures apply to these applications?
- are these applications prioritised in any way?

– etc. Please describe any other procedural matters of relevance

30. What is the procedure for examining *applications for humanitarian visa*?

- do additional requirements – e.g. invitation letter from a family member, relative or sponsor in your country, medical examination, etc. – apply.
- are these applications prioritised in any way?
- etc. Please describe any other procedural matters of relevance

31. Is any form for legal counselling or representation available under this procedure? Are NGOs involved? Please specify

32. Is any form of interpretation available in case the applicant does not understand and/or speak the language of the representation

### **VIII– Appeals against decisions made by the representation**

33. How are the decisions made by the representation notified to the applicant? In writing? In the applicant’s own language? Please specify

34. Is it possible to appeal against negative decisions made by the representation?

35. If yes, does the decision notified to the applicant include information on appeal rights?

36. Which authority will consider the appeal?

37. What is the appeal procedure? Please describe

38. Is any form for legal counselling or representation available under this procedure? Are NGOs involved? Please specify

39. Do you consider that this appeal procedure provides a real prospect of having the case re-examined, or is this rather a purely formal exercise? What is your experience with such appeal cases?

### **IX– Appeals against decisions made by an authority in your country**

40. How are the decisions made by the national authorities notified to the applicant? In writing? In the applicant’s own language? Please specify

41. Is it possible to appeal against negative decisions concerning asylum and/or “humanitarian visa” made by the national authorities?

42. If yes, does the decision notified to the applicant include information on appeal rights?

43. Which authority will consider the appeal?

44. What is the appeal procedure? Please specify and describe if the procedure is distinct depending on whether it is a decision on asylum or a decision on visa issuance.

45. Is any form for legal counselling or representation available under this procedure? Are NGOs involved? Please specify

46. Do you consider that this appeal procedure provides a real prospect of having the case re-examined, or is this rather a purely formal exercise? What is your experience with such appeal cases?

#### **X– Applicants’ physical safety during the procedure**

47. If urgently needed, can applicants receive some form for protection while their application is being processed and they are awaiting the initial decision on entry visa for entering your country? If yes, please specify

48. If urgently needed, can applicants be transferred to your country before the processing authority has reached a decision on the application?

49. If this is the case, please specify who is responsible for taking such decision, and according to which criteria this is usually made (what is usually considered to be a sufficient risk to allow such a transfer)?

50. Do you have any information on the practice regarding early transfers? Are you aware of cases where early transfer was decided following intervention by NGOs? Please specify

51. Are you aware of cases where the applicant was refused an early transfer and thereafter became of persecution awaiting the outcome of the procedure? Please specify, if possible, date, nationality, number of persons concerned, country of persecution, etc.

#### **XI–Transfer to your country**

52. Can the diplomatic or consular representation refuse issuing a visa to an asylum seeker although requested by the processing authority in your country to do so?

53. If yes, is it possible to appeal such a decision? If yes, please specify the procedure to be followed

54. What kind of visa is normally issued to applicants whose application for asylum and/or “humanitarian visa” is accepted? Is this a special category of visa?

55. Does the staff of the representation usually engage in the practicalities of departure:

- ensuring that the person is able to take his/her plane and leave the country
- providing financial support for travel costs

- issuing a travel document if the person has no passport and cannot obtain one
- other measures

56. Are you aware of cases where applicants – despite being accepted in your country and granted visa – were not able to travel due to lack of funds, lack of documentation, etc. If possible, describe some cases

57. Are you aware of cases where an applicant, for whom a visa to your country had been issued, was physically hindered by the local authorities to leave the country? If possible, describe some cases

## **XII– Staff at the representations**

58. Are national personnel of the representations also dealing with asylum matters?

59. Is there an obligation to have staff trained in asylum matters in all or in certain diplomatic representation?

60. If not, does the personnel dealing with asylum requests normally receive some form of training in asylum law and/or interviewing technique?

61. Do you believe that the staff dealing with asylum applications at representations abroad is generally sufficiently aware of the issues involved and qualified to deal with them?

## **XIII – NGO involvement**

62. Do NGOs have any possibility of alerting the authorities of your country on particular cases deserving urgent intervention? If yes, please describe how contacts are normally made

63. Do the authorities of your country normally consider seriously and investigate urgently cases that are presented or supported by NGOs?

64. Are you aware of cases where your country has accepted to process asylum applications lodged abroad or has issued a “humanitarian visa” to a person in need of protection *following NGO intervention*. If yes, please specify, if possible, date, nationality, number of persons concerned in each case, involvement of NGOs (and/or media), procedure used by the authorities, etc.

65. Are you aware of cases where your country has refused to process asylum applications lodged abroad or to issue a “humanitarian visa” to a person in need of protection *despite NGO intervention*. If yes, please specify, date, nationality, number of persons concerned in each case, involvement of NGOs (and/or media) as well as, if known, the faith of the person concerned.

66. Does your NGO, or any other NGOs, provide legal counselling, legal aid or legal representation in cases where the applicant is abroad. Please specify.

67. Is your NGO, or any other NGOs, involved in the decision making process regarding asylum applications lodged abroad? Please describe

68. Is your NGO, or any other NGOs, involved in the reception of applicants whose applications lodged abroad have been accepted. Please describe your activities.

69. Additional comments on the relations NGOs-authorities:

#### **XIV– Case law**

70. Are you aware of any case law concerning asylum applications lodged at a diplomatic or consular representation?

71. If yes, please attach the relevant case/s to your answers to this questionnaire. The case/s may be attached in your official language, if an English version is not available. However, we would appreciate a short summary in English if the case is only available in your official language and that language is not English, French or German.

#### **XV– Statistics**

Your government has been asked to provide following statistics for 1996–2000:

- No. of persons who have applied for asylum at the diplomatic and consular representations
- No. of applications refused by the representation due to a lack of connections with your country
- No. of appeals lodged against a rejection by the representation of the application (if appeals are possible)
- No. of applications referred to the processing authorities
- No. of applicants transferred to your country before a decision was made on the asylum request
- No. of applicants granted asylum under this procedure
- Average processing time from the filing of an asylum request at the representation abroad to the communication of the decision
- Three largest nationality groups applying for asylum at representations abroad

#### **XVI– Relations with other procedures**

72. If your country runs a resettlement programme, is the procedure for asylum applications lodged abroad in any way linked to this programme? Please specify

73. According to you, is there a relationship (statistical impact, qualitative impact, etc.) between the applications made abroad under the externalised processing procedure and the spontaneous requests made on the territory of your country? If yes, please specify

74. According to you, is there a relationship between the applications made abroad under the externalised processing procedure and the procedure for family reunion? If yes, please specify

75. Do you think that your government “uses” the externalised processing procedure as an argument against spontaneous applicants (the “good” asylum seekers being those staying abroad and applying to the representations?)

## **XVII– Benefits, drawbacks and current discussions**

76. What are, according to your experience, the benefits and/or the drawbacks of the procedure for externalised processing in force in your country?

77. Do you consider that this procedure is sufficiently known by persons who are in need of protection?

78. Do you consider that this procedure offers a fair and real alternative to applying inside the territory of your country (which, in most cases, requires illegal travel)?

79. Have amendments within the last 10 years changed the procedure for asylum applications lodged at representations abroad? If yes, please specify the political and legal background of these amendments

Is there currently a discussion regarding possible changes to the existing law/practice in this field?  
If yes, please specify what the discussion exactly concerns and what is the position taken of the NGO community