

Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones

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Working Paper

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A revised version will be forthcoming in the European Journal of Migration and Law, Volume 5, Issue 3, 2003.

Abstract:

Since February 2003, plans by the UK government to deport asylum seekers arriving in the UK to "Regional Processing Areas" and "Transit Processing Centres" have gradually leaked to the public. While the former are located in the source region of the refugee crisis, and purport to be a contribution to strengthening reception capacities there, the latter are closer to the external borders of the EU, and represent a deterrent for unwanted migration, including that of asylum seekers. Essentially, the UK, Denmark and other supportive governments intend to geographically circumvent the individual rights flowing from the prohibition of refoulement in international law, and replace them with resettlement at the discretion of states.

The present article seeks to demonstrate that the named governments are intentionally and proactively creating a permanent state of exception in the international refugee regime, in which legal and factual protection of certain classes of individuals is gradually done away with. Against the backdrop of Australian experiences, it is to be expected that the UK proposal will cost more than traditional asylum procedures on the territory of destination states, while offering less protection. This, in turn, exposes those groups of asylum seekers returned from a European asylum state to a Transit Processing Centre or Regional Protection Area to discriminatory treatment in violation of international law, concurrently raising issues under the prohibitions of collective expulsion. Furthermore, the massive use of detention in the absence of clear-cut guarantees on the availability of durable solutions or a repatriation alternative is likely to produce violations of specific human rights norms. From a practical perspective, the proposals are unworkable and ultimately unable to achieve their stated objectives.

From a theoretical perspective, the initiative marks a shift towards the paradigm of the exceptional, where law and violence are no longer separated. Against the backdrop of totalitarian population policies in the early decades of the last century, European legislators should be slow to revert to the model of the camp, which remains the space that is opened when the state of exception is realized normally.

A. Introduction

Since February 2003, plans by the UK government to deport asylum seekers arriving in the UK to "Regional Processing Areas" (RPAs)¹ and "Transit Processing Centres" (TPCs) have gradually leaked to the public. Both concepts formed part of a larger reform framework, and must be seen against the backdrop of Prime Minister Tony Blair's promise to halve the number of asylum applications filed in the UK under a one-year period. Some months earlier, Denmark had started to promote a European revival of the debate on "protection in the region", and the UK government let itself be inspired by its Scandinavian colleagues. From the outset, it sought support by other states and international organisations. During Spring 2003, the Dutch, Danish and UK governments held a number of informal meetings to develop the concepts, while the UK also initiated broader discussions *inter alia* in the EU Council of Ministers and the IGC. Keen not to be marginalized in the new discourse, UNHCR swiftly reacted by tabling its own proposal, becoming known as "the three prongs".

As the UK appears to be pushing for a pilot project, the legal and theoretical ramifications of the suggested concepts should be clarified at the earliest stage possible.² However, it must be emphasised that the proposals presented by the UK and seconded mainly by Denmark remain moving targets for analysis, as the political debate within the EU and beyond still is in a formative phase.

In its essence, the matured version of the UK proposal deploys two concepts – "Regional Protection Zones" and "Transit Processing Centres". While the former are located in the source region of the refugee crisis, and purport to be a contribution to strengthening reception capacities there, the latter are closer to the external borders of the EU, and represent a deterrent for unwanted migration, including that of protection seekers. In the long run, the UK proposal could represent a serious challenge to the institution of asylum as we know it.

The present article seeks to demonstrate that the UK, Denmark and other supporters are intentionally and proactively creating a state of the exceptional in the international refugee regime, in which legal and factual protection of certain classes of individuals are gradually done away with. In section B, we shall briefly present the debate unfolding in the wake of the UK initiative in Spring 2003. In Section C, we shall illustrate how the UK and its supporters have consistently shunned broader and transparent forays for discussing the proposals, and ignored the lessons of precedents. In Section D, core elements of the proposals will be presented, drawing extensively on documents not yet publicly available. In Section E, legal as well as practical issues raised by the possible launch of such Centres shall be analysed. As the UK proposal aims at a radical change of the international asylum system, concluding Section F will discuss it as an intended and permanent state of exception, drawing on the work of the Italian philosopher Giorgio Agamben. In that context, it is recommended that the reformist states test their proposals against the slippery slope of population policies developed in the 20th century's early decades.

¹ As will emerge below, the concept "Protection Zone" (PZ) has been used interchangeably with "Regional Protection Area".

² For a contribution from an international relations perspective, see Gil Loescher and James Milner, "The Missing Link: the Need for Comprehensive Engagement in Regions of Refugee Origin", 79 *International Affairs* pp. 583-617 (2003).

B. The Debate on “New Approaches” in Spring 2003

Against the backdrop of an intensifying domestic debate in the UK on the increasing number of asylum seekers, UK Prime Minister Tony Blair promised to cut applications down to half of the 2002 numbers under 2003. To reach this goal, reforming both the domestic and the international asylum system was envisaged. Apparently, the UK labour government drew inspiration from its liberal-conservative Danish colleagues. The Danish government had pursued the topic of “reception in the region” since its advent to power in 2001³, and apparently promoted discussions on interception policies along the lines of the US programme deterring Haitian protection seekers and the Australian attempts to launch a “Pacific solution” to avert arrivals by boat.⁴ On a by-line, it must be conceded that the performance of Denmark was diplomatically masterful. If it is correctly grasped that its government was the initiator of the debate in the *huis clos* of the Presidency, it was smart enough to let the UK go public and ride out the storm of civic criticism.⁵

The UK reform agenda was gradually developed during spring 2003, and reached the public mostly through piecemeal press reporting or NGO reactions to leaking information. Given the fundamental changes envisaged, the lack of transparency is striking: governmental actors and international organisations involved in the debate chose not to share core documents with the public.⁶

As of today, the UK Proposals do not represent a coherent and monolithic bloc of reform suggestions, but rather a moving target, in which a set of ideas resurfaces time and again in slightly different forms and with varying levels of sophistication. So far, the debate has developed along the following lines:

1. In February 2003, a UK Cabinet Office and Home Office policy paper bearing the title “A New Vision for Refugees” was leaked to *The Guardian*, the British daily, and thereafter circulated informally in the NGO sector.⁷ This draft was obviously not intended for wider perusal. It retained editing remarks and some parts of it were unfinished. Nonetheless, it allows insights into the thinking behind the UK initiative, and reveals continuities and change in its development. The key concept of this 28-page draft was the creation of so-called “safe havens”.

³ For the Danish presidency of the EU in the second half of 2002, Danish minister Bertel Haarder designated “reception in the region” to be one of the priorities in the area of migration and asylum policies.

⁴ See Claus Blok Thomsen, “Europas nye vision for flygtninge” [“Europe’s New Vision for Refugees”], *Politiken*, 4 May 2003, explaining how the Danish government floated the idea of exclusive regional processing during the Danish EU presidency in the second half of 2002. In particular, the Danish Minister Bertel Haarder was said to have circulated a report on the US interception programme, drafted by his Ministry, on 20 December 2002.

⁵ Hence, the Danish government avoided to be shamed as the architect of yet another restrictionist initiative targeting refugees in Europe, and little did the world note that Pia Kjærsgaard, the leader of the nationalist Danish People’s Party, characterized Transit Processing Centres as a “superb idea” and announced that her party would push for earmarked allocations in the 2004 Danish state budget. Jesper Thobo-Carlsen and Flemming Pedersen, “S støtter indsats mod asyl-strømme” [Social Democrats support action against asylum flows], *Berlingske Tidende*, 26 April 2003.

⁶ This motivates the numerous quotes in the present article.

⁷ UK Home Office, *A New Vision for Refugees. Final Report. Draft*, 5 February 2003 [hereinafter the February 2003 Draft]. On file with the author.

2. In early March 2003, a UK Cabinet Office and Home Office paper on a “New Vision for Refugees” came into informal circulation.⁸ No longer a draft, it had expanded on the core idea of its predecessor. Significantly, the term “safe haven” had been swapped for “Regional Protection Areas”. This 31-page document is so far the most comprehensive exegesis of the reform plans.
3. On 10 March 2003, Prime Minister Tony Blair wrote to the EU Presidency and asked to put a discussion on “better management of the asylum process globally” on the agenda of the 2003 European Council in Brussels on 23 March 2003. Attached to this letter was a 6-page document proposing a system for improved regional management of asylum and protection as well as the creation of transit processing centres in countries close to the external borders of the EU.⁹ At the Brussels European Council, the European Commission was asked “to explore these ideas further, in particular with UNHCR, and to report through the Council to the European Council meeting in June 2003”.¹⁰ The UK presented the same document to the IGC Full Round on 2-4 April 2003 in the form of a “Discussion Paper”. By this time, it had become clear that Denmark and the Netherlands publicly supported the UK in the pursuit of its reform policy.
4. On 17 March 2003, UN High Commissioner for Refugees Ruud Lubbers made an attempt to take the lead in the evolving debate by presenting a “three-prong model” to a meeting in London, hosted by the UK government and attended *inter alia* by a Danish delegation. The three prongs encompassed solutions in the region, improved domestic asylum procedures and the processing of manifestly unfounded cases in EU-operated closed reception centres within EU borders.
5. On 28 March 2003, Lubbers offered an elaborated version of the UNHCR model to an informal meeting of the EU Justice and Home Affairs Council in Veria, Greece.¹¹ The graphs and explanatory notes for the three prongs were leaked to the press. At the same meeting, the range of dissent among Member States became very clear. According to Agence Europe, German Interior Minister Otto Schily displayed scepticism and believed the Transit Processing Centres not to be feasible. The Netherlands, Italy and Spain marked their support for the UK proposals.¹² It was agreed that the UK and its partners would produce a worked up set of proposals for the June European Council in Thessaloniki, Greece.
6. On 7 April 2003, the UK elaborated its “ideas for processing in the region and off-shore processing” at the 6th meeting of the EU Immigration and Asylum Committee in Brussels, followed by a UNHCR presentation of its three-prong model. At this meeting, Member State delegations raised a number of concerns regarding the legality and feasibility of the UK proposals.

⁸ This document is hereinafter quoted as the “Vision Paper”. In the version received by the author, the title page had been removed. Hence, no precise reference can be given. On file with the author.

⁹ Letter of 10 March 2003 by Prime Minister Tony Blair to His Excellency Costas Simitis, with attached document “New International Approaches to Asylum Processing and Protection”, available at Statewatch’ Internet site, <<http://www.statewatch.org/news/2003/apr/10safe.htm>> [hereinafter the Discussion Paper].

¹⁰ European Council, *Presidency Conclusions. Brussels European Council*, 20 and 21 March 2003, para 61.

¹¹ UNHCR, *Lubbers Offers New Approaches on Asylum-Migration Issue*, Press release, 28 March 2003.

¹² Agence Europe, *Bulletin Quotidien Europe*, 28. March 2003.

7. On 23 April 2003, Denmark hosted the third informal meeting of the so-called mini-IGC which was exclusively dedicated to what was termed “new approaches”. Apart from Denmark, the Netherlands, the UK, the EU Commission, IGC and IOM participated together with UNHCR. This meeting resulted in a memorandum drafted by the Danish Ministry of Refugee, Immigration and Integration Affairs, establishing the state of the art in the discussion so far, and setting out a number of legal, practical and financial issues.¹³
8. A month later, on 23 May 2003, Denmark hosted an IGC workshop discussing the range of elements which need to be provided in Regional Protection Zones.
9. By the end of May 2003, UK Prime Minister Tony Blair’s representative to the Convention on the Future of Europe proposed to the Convent on the Future of Europe to alter Article 11 of the Draft Constitutional Treaty.¹⁴ If adopted, the proposed alteration would gear the Common European Asylum System towards processing and protecting in the region of origin rather than within the Union, thus introducing a paradigm shift in EU asylum and migration policies.¹⁵
10. On 3 June 2003, the European Commission responded to the invitation by the Brussels European Council and presented a Communication to the Council and the European Parliament under the title “Towards more accessible, equitable and managed asylum systems”.¹⁶ While paying lip service to the timeliness of the UK proposal, the Commission set out a number of “basic premises of a new approach to the international protection regime”. The Communication points out that the UK proposals disrespect a number of them, most prominently the complementarity of new approaches to the existing territorial reception and processing of protection seekers. Rather than following the line of thought suggested by the UK and its supporters, Member States should consider the introduction of Protected Entry Procedures¹⁷ and

¹³ Ministry of Refugee, Immigration and Integration Affairs, *Protection in the Region/Transit Processing Centres. Legal, Practical and Financial Issues*, 24 April 2003 [hereinafter the Danish Memorandum]. On file with the author.

¹⁴ Convention for the Future of Europe, Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, Suggestion for amendment of Article 11, Submitted by Peter Hain, with the support of Lord Tomlinson, available at <http://european-convention.eu.int/Docs/Treaty/pdf/3111/11Hain.pdf> (accessed on 29 May 2003).

¹⁵ Three of the six suggested objectives of EU legislation are directly related to the UK Vision Paper:

- providing protection in the region of origin of nationals of third country in need of international protection where practicable;
- facilitating the resettlement in the Union where appropriate of persons found to be in need of international protection; and
- facilitating processing of asylum applications in countries of transit and ensuring that applicants for asylum lodge their applications in the first safe country they reach.

¹⁶ European Commission, *Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM(2003) 315 final.

¹⁷ Protected Entry Procedures are operated from the platform of diplomatic representations, and allow 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. See Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, *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*, European Commission 2003, available at: http://europa.eu.int/comm/justice_home/doc_centre/asylum/common/asylumstudy_dchr_2002_en.pdf.

resettlement schemes.¹⁸ All in all, the Commission had more radically dissociated itself from the UK proposals than UNHCR.

11. On 5-6 June, the EU Justice and Home Affairs Council examined the UK proposals together with the Commission Communication of 28 May 2003. At the occasion, the Swedish Minister for Migration vividly dissociated himself from plans to erect TPCs and expressed astonishment that “the High Commissioner himself supports these ideas”.¹⁹ Yet, German Minister Otto Schily had apparently changed his mind and supported the proposals.²⁰

This leaves the observer with three positions. First out is the UK “vision”, backed by the Danish and Dutch²¹ governments: its centrepiece is the launch of a Transit Processing Centre as a pilot project within the near future. Second, there is Ruud Lubbers attempt to wriggle his Office out of Tony Blair’s ambivalent embrace by offering the three prongs of compromise and evasion.²² This model gives in to the UK by accepting closed processing camps and the listing of safe countries of origin, but distances itself from the UK project by moving the camps back into EU territories. Third, there is the European Commission, which defends the Common European Asylum System against the political dynamics of the UK proposals and pushes forward with the idea of Protected Entry Procedures and enhanced resettlement schemes.

Although the UNHCR position and the agenda of the Commission would merit a detailed analysis in their own right, this article shall exclusively focus on the core elements of the UK proposals. There are several reasons motivating this choice. First, states are the masters of international law, and a proposal launched and supported by states is closer to impacting reality than suggestions of international organisations. Second, the UK proposals signal the most radical break with the international refugee regime as we know it. It is no exaggeration to state that it could very well mean the end of the 1951 Refugee Convention²³. Third, the UK has made clear that it is prepared to pursue its reform agenda on its own, or in cooperation

¹⁸ The Commission asked the European Parliament, Council and European Council to endorse the pursuit of legislative instruments on an EU resettlement scheme, on Protected Entry Procedures and on a legal basis for financing new approaches to asylum systems in third countries. European Commission, *supra* note 16, p. 22. A “Study on The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure” is currently being carried out by the Migration Policy Institute, Washington D.C, on behalf of the European Commission.

¹⁹ See Svenska Dagbladet, “Jan O Karlsson kritiserar EU-förslag om asylläger” [Jan O Karlsson criticises the EU proposal of asylum camps], 6 June 2003.

²⁰ Annette Marcher and Claus Blok Thomsen, “EU-forslag: Indespær flygtninge” [EU-proposal: Lock Up Refugees], *Politiken*, 6 June 2003, p. 2.

²¹ The Dutch government appears to be more cautious in its support than the Danish one. For the Dutch government’s perspective, see the Letter on Protection in the Region by the Minister of Foreign Affairs, the minister of Aliens Affairs and Integration and the Minister of Development Cooperation to the Chairperson of the Second State Chamber, 28 May 2003. Available at <http://www.minbuza.nl/20030528-124603-A> (accessed on 5 May 2003).

²² The UK moves have put UNHCR in a very delicate position. After all, the Office depends on annual funding by states. Its operations are severely hampered by economic constraints, and cooperation with the UK must seem fiscally attractive at the very least. This notwithstanding, there are legal constraints: UNHCR’s mandate assigns it to protect refugees, and to supervise the compliance of states with the legal framework set out in the 1951 Convention.

²³ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 [hereinafter 1951 Refugee Convention, abbreviated GC]. In the following, reference to the 1951 Refugee Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267.

with a few likeminded states.²⁴ While it would prefer its fellow Member States to walk along with it, and to increase the clout of any pilot project scheme to be devised, this seems to be no precondition for moving forward. After all, the fiscal resources of the EU are limited²⁵, and so is the competence of the European Communities in this area.²⁶ Although the UK has proposed a new set of competences, tilting the work of the EU towards reception in the region of origin²⁷, the fate of this proposal remains unclear.

The dissent amongst Member States and the misgivings of the Commission are, however, no guarantee that the UK vision will remain a figment of imagination. Should it be implemented unilaterally, or in a smaller group comprising Denmark and probably one or two other states, the practice of deflecting protection seekers to Transit Processing Centres risks to proliferate in domestic legislations over time. A lesson to revert to is how the concept of “safe third countries” made its way from the Danish law into that of other states, and is now about to transform into a binding norm of a EU Directive.²⁸

C. “New Approaches” and Earlier Precedents – From Tragedy to Farce?

By timing their reform proposals in early 2003, the UK government and its followers were, perhaps deliberately so, back-peddalling earlier and sustained efforts by UNHCR and EU institutions respectively to discuss and reform the international and European refugee regime.²⁹ It is surprising that the UK proposals could be advanced fourteen months after the conclusion of the so-called Global Consultations, a multiannual discussion of the global refugee protection system, ending with an unequivocal endorsement of the 1951 Refugee Convention. This outcome was supported *inter alia* by the UK, the Netherlands and Denmark. Nevertheless, all three countries chose to reopen the debate in 2003, casting doubt on the sincerity of their earlier commitment.

²⁴ “[W]e may want to select the more likely European enthusiasts and work with a coalition of say 5 partners” states the UK Vision Paper on p. 27. Australia, however, is perceived as a somewhat problematic partner: “If we choose to work with only Australia we may want to consider how a close liaison between Australia and UK immigration policy [sic!] would be viewed.” Ibid.

²⁵ The appropriate budget line in the Community budget is B7 667, envisaged to finance programmes and projects in the framework of a partnership with the countries and regions of origin and transit in relation to migration and asylum. If the legal basis for the programme is adopted, an amount of EUR 30 million has been proposed for 2004. For 2005-2008, the amount is expected to be higher. E-mail communication of 14 May 2003 by Mr. Christian Meunier, European Commission, to Ms. Aleksandra Popovic, Faculty of Law, Lund University.

²⁶ Given that the proposals appear to aim at a replacement of parts of the ordinary asylum systems in Member States by arrangements for exclusive extraterritorial processing, it is hard to bring them in under the specific competencies of Article 63 TEC, given that those are predominantly aiming at the development of minimum standards.

²⁷ See text accompanying note 14 above.

²⁸ The Danish legislature introduced the precursor to the modern concept of safe third countries in 1986. During the 1990s, the concept proliferated in domestic legislations in Europe, and found its way into the soft law of the then European Community. At the time of writing, it is about to enter the domain of hard law. See Commission Of the European Communities, *Amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Brussels, 18.6.2002, COM(2002) 326 final, arts. 27-8 and Annex I.

²⁹ The UK Vision Paper sees an opportunity to appropriate the “Forum” and the “Convention Plus”-process, both launched by UNHCR, for its own needs. [T]he concepts of the Forum and Convention-plus are currently ill-defined and even within UNHCR the way forward is unclear. The UK, and if we can marshal other states and the EU, are therefore in a good position to set the agenda [sic!].” UK Vision Paper, p. 8.

At the EU level, the conclusions of the 1999 Tampere European Council had put the development of common policies for “those whose circumstances lead them justifiably to seek access to the territory of the European Union”³⁰ on the agenda, with a number of Commission Communication addressing the problem of access to territory³¹, and promoting a debate amongst Member States, EU institutions and civil society³².

The language of “new approaches” employed by the UK and Denmark wrongly implies that the proposals draw on original ideas which have neither been debated nor tested earlier. Rather, refugee lawyers and electorates are served old wine in new caskets. “Transit Processing Centres” have been invented, implemented and evaluated before. Already back in 1986, Denmark proposed a draft resolution in the UN General Assembly, which suggested the establishment of regional United Nations processing centres administering resettlement.³³ 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.”³⁴ The draft failed to attract necessary support from other states, and the pursuit of the idea was abandoned.

In 1993, the Netherlands put the topic of reception in the region of origin on the 1994 agenda of the IGC.³⁵ 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.³⁶

While multilateral initiatives have regularly failed, “Transit Processing Centres” have been used unilaterally by resettlement countries as the US and Australia. Different from EU Member States, both countries have traditionally relied on resettlement for a significant proportion of their refugee intake. When the number of so-called “spontaneous arrivals” rose, this created fears regarding the sustainability of the system as a whole. The US reacted to the outflows from Haiti and Cuba by letting the US Coast Guard and the US Navy interdict refugees coming by boat or on man-made rafts, redirect those with a “credible fear” of persecution first to a Navy hospital ship “The USNS Comfort” moored in Kingston harbour in Jamaica, and eventually to the US Naval Base on Guantanamo, Cuba to process their claims there. It has to be appreciated that the Haiti interdiction programme was coupled to a military intervention in the refugee-producing country, and the Cuban programme pivoted around

³⁰ European Council, Presidency Conclusions, Tampere European Council. 15/16 October 1999 [hereinafter Tampere Conclusions], Conclusion 3.

³¹ 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; 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.

³² For a comprehensive discussion from a civil sector perspective, see ECRE and USCR, *Responding to the asylum and access challenge: an agenda for comprehensive engagement in protracted refugee situations*, April 2003.

³³ 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.

³⁴ Ibid.

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

³⁶ 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].

rather unique agreement, by which the Cuban government obliged itself to inhibit disorderly departures by refugees while tolerating resettlement of Cuban refugees. A contemporary example is the “Pacific solution” implemented by Australia, and brought home to the European audience through the MS Tampa incident of August 2001.³⁷ Essentially, it replicates the Australian idea in that boat arrivals are systematically removed outside Australian jurisdiction to third countries (Nauru and Papua New Guinea), where their claims are processed under preclusion of ordinary judicial control.³⁸ Successful candidates are eligible for resettlement to Australia. In spite of severe criticism, Australia has implemented its model since 2001 and promotes it internationally.

The Spring 2003 debate reveals that the “Pacific solution” constituted a source of inspiration for the British and Danish governments. On the 23 April meeting of the mini-IGC mentioned above³⁹, the Australian model as well as the Haiti and Cuban interdiction programmes implemented by the US were discussed. To an outside observer, it is somewhat surprising that the extensive analysis of the interdiction programmes in the 1994-5 IGC studies appear to have been forgotten.

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 idea of exclusive regional processing is voiced.⁴⁰ The 1995 follow-up-report by the IGC offhandedly rejects the idea, drawing on consultations with 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.⁴¹

A thorough reading of the 1995 IGC report shows that both the Haitian and Cuban programmes are covered in it. The 1995 report suggests that the Haiti programme indeed must be regarded as exceptional, given that the US concurrently intervened into the country with the backing of a UN Security Council mandate.⁴² The Cuban interdiction programme was considered a failure, and the US closed down the safe havens in Guantanamo Bay and

³⁷ See, e.g., Human Rights Watch, *‘By Invitation Only’: Australian Asylum Policy*, New York, December 2002.

³⁸ The gradual abolishment of court control was a project pursued before the Pacific Solution was launched. See Mary E. Crock, “Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions”, 24 *Melb. U. L. Rev.* 190.

³⁹ See text accompanying note 13 above.

⁴⁰ The UK proposals promote a form of exclusive regional processing, at least for certain groups, implying that they can no longer rely on the traditional mode of seeking asylum on the territory of the UK.

⁴¹ IGC, *Reception in the Region of Origin. Draft Follow-Up to the 1994 Working Paper*, Geneva, August 1995 [hereinafter IGC 1995], p. 7.

⁴² IGC 1995, pp. 26-28.

Panama less than a year from the inception of the programme in August 1994. “Regarding costs, the US found both schemes to be very expensive”, the 1995 Report states.⁴³

In this line-up of debates and practices, the UK initiative is the most recent attempt to subjugate the movement of asylum seekers to a grand design of migrational plan economy. There is some irony to the fact that exclusive reception in the region is again discussed at the IGC, whose earlier conclusions are forgotten or ignored.

The unawareness of existing analysis, the selective approach to precedents and the avoidance a broad and transparent debate reflects a desire to skip the burden of connecting to earlier arguments and problematic experiences. Such a strategy subscribes to power, not to knowledge. It prefers the gesture of decision to the ratio of discourse. Behind the UK proposals and the Danish Memorandum, the contours of the sovereign ruler become visible – a ruler who is determining a set of norms governing a state of the exceptional. Such norms are not necessarily legal ones. If the ongoing Australian experience can be validly described as a sustained tragedy, the UK and Denmark seem all set to launch a farcical repetition.

D. Core Content of the Proposals

1. The February 2003 Draft

In a blunt and edgy fashion, the February 2003 Draft documents early stages of the reform agenda pursued within the UK Cabinet Office and Home Office. As it was leaked in an unfinished state, it must be used with caution. Some of the Draft’s elements have been further developed in later documents; others were toned down or discarded altogether. We limit our presentation of the Draft to the core ideas, to then move on to later documents, which reflect governmental will-formation in a more authoritative manner.

The February 2003 Draft sets out with a background analysis of the inequitable distribution of protection resources under the current asylum system, highlighting that much of the expenditure on asylum procedures in the North could be better spent on refugee protection in the South. According to the Draft, the “Global Vision” leading to a more just protection system would be composed of two elements:

- intervention, including by military means, into countries producing refugees, to stop the flow of refugees and to enable returns⁴⁴; and
- creation of a “global network of safe havens”, both near or even within refugee-producing countries, and closer to or within the EU.⁴⁵

In addition, the Draft suggests

- an amendment of the 1951 Refugee Convention to allow for the return to safe havens and the introduction of an exclusion practice under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁶

⁴³ IGC 1995, p. 27.

⁴⁴ February 2003 Draft, pp. 9-10.

⁴⁵ February 2003 Draft, pp. 10-11, p. 25.

The ultimate goal pursued through the “Global Vision” presented in the February 2003 Draft would be “protection but not migration”.⁴⁷

The first element raises complex legal issues regarding the use of force, which are named, but not elaborated in the document. Suffice it to note that the UK attempts to promote its doctrine on “humanitarian intervention” correspond well to the intent to prevent flight through the use of force as stated in the February 2003 Draft. Instead, our focus will be on the second element, which is elaborated at length in the document.

The core idea of the safe haven is its exclusive role as an access point to the refugee protection system.

“Any asylum seeker would be able to go direct to one of the havens and, most importantly, if they ask for asylum from a particular State, this State has the right to send them to a haven and protection will be provided for them there. Therefore, any asylum seeker that arrives in the UK (or elsewhere) would be immediately turned around to the safe haven. This decision could be challenged only by judicial review.”⁴⁸

At this stage of development, safe havens were conceived primarily as places for granting a temporarily limited form of protection, and not as processing centres.⁴⁹ “However, in the short term, perhaps for the first 6 months, temporary protection could be provided to all without determination of status.”⁵⁰ Thereafter, a “UNHCR type body” would process cases, with the option of an administrative review “perhaps by a senior board on the papers only”.⁵¹ If the claim is founded, a place in the safe haven is secure, until the refugee can return home or a state has offered resettlement on a discretionary basis.

Significantly, the language of “safe havens” did not recur in later documents. Probably, the drafters were reminded of the Srebrenica massacre, which took place in the Bosnian war after UN troops failed to protect the inhabitants of a UN-declared “safe haven”.⁵² Indeed, the memory of Srebrenica was strikingly absent in the evolving debate.

As mentioned, the February 2003 Draft concerns itself with the legality of safe havens, and points out that acceptance by the Courts is elementary for the smooth functioning of the system.

“We would wish to be in a position where safe havens could be listed as safe third countries. This would not mean that no one could challenge being sent to [a] safe haven, but it would mean that such challenges could be limited to judicial review only... [I]n the long term, to reinforce that safe havens are the

⁴⁶ February 2003 Draft, p. 16. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 [hereinafter ECHR].

⁴⁷ February 2003 Draft, p. 8.

⁴⁸ February 2003 Draft, p. 10.

⁴⁹ When dwelling on safe havens in and near Europe, the February 2003 Draft states that those “would be different to the concept of off-territory processing centres. This is because they are primarily places of protection.” February 2003 Draft, p. 11 and pp. 25-6.

⁵⁰ February 2003 Draft, p. 11.

⁵¹ February 2003 Draft, p. 12.

⁵² I am indebted to Christoph Bierwirth, UNHCR Geneva, for drawing my attention to this analogy.

appropriate protection place for refugees, it may be wise to state this in a revised version of the Geneva Convention. Although, strictly speaking, there is no breach of the Geneva Convention, stating this categorically would only assist the interpretation.”⁵³

Frank formulations of this kind do not recur in later documents.⁵⁴ It can be speculated whether this part of the project was abandoned for good, or merely considered to be too sensitive to pursue presently.

2. The Vision Paper

With a polished terminology, a tidier structure and a more appealing language, the Vision Paper was the most elaborate statement of the UK position during Spring 2003. It presents a “global vision that meets both our international obligations and is responsive to domestic political and economic concerns” and qualifies the suggested strategy as “pro-refugee but anti-asylum”.⁵⁵ The current protection system is failing, it argues, because

- support for refugees is inequitably distributed between the North and the South,
- the system requires illegal migration and favours human smuggling,
- between half and three quarters of those claiming asylum do not meet the criteria of full refugees, whereas there are 12 million genuine refugees in the world according to UNHCR, and
- the difficulties in removing rejected asylum seekers undermine public confidence in the system and make it more attractive to “economic migrants”.⁵⁶

The emphasis on North-South inequalities is rarely found with Northern governments discussing refugee protection. Without passing any judgment on whether its source is genuine concern or not, we should point out that the third argument on unfounded claims is inconclusive, and the objective to redistribute to protection in the South unrealistic in a system built on force rather than the trust of potential migrants. The drafters state openly that “the proposed vision is not designed to be a cost savings exercise” and flag for the likeliness that it requires an injection of additional funding in the short term. In the long term as well, one should add, given the visions reliance on force and repression, which will inevitably trigger evasion strategies by would-be migrants.

To wit, asylum systems deal not only with the grant of protection to aliens, but also with defending the boundaries of a state community. The latter task is not for free. Decoupling the control of this boundary from the asylum system will lead to costs moving elsewhere in the system, as long as the migration pressure in the world is at large as it is.⁵⁷ The idea that a change in the protection system could limit inward migration to qualified cases only is about as realistic as projections of a tax system operating without any incidents of error or fraud. Therefore, the implied suggestion that money can be saved in the UK asylum system and

⁵³ February 2003 Draft, p. 16.

⁵⁴ The Vision Paper states explicitly on p. 2 that a change of the 1951 Refugee Convention or the ECHR is not needed.

⁵⁵ Vision Paper, p. 1.

⁵⁶ Vision Paper, p. 1 and pp. 6-7.

⁵⁷ The Vision Paper’s emphasis on intervention into root causes of flight is analytically correct, yet unrealistic, given the resistance against any doctrine of humanitarian intervention in the East and the South.

transferred to the 12 million “genuine” refugees elsewhere is without substance, unless it is made clear how a net reduction of boundary defence costs can be effectuated.

To remedy the failure of the current system, the Vision Paper proposed a “Protection Package” consisting of four elements.⁵⁸

1. The creation of Regional Protection Areas to achieve an improved protection in the region. UNHCR would be responsible to provide “protection and humanitarian support” to refugees, and standards must be to Art. 3 ECHR levels, implying safety from related threats within the Area, and removal to such threats.
2. The return of spontaneous arrivals in the UK or cooperating countries to a RPA, which would discourage “economic immigrants using asylum applications as a migration route into third countries” and should bring down numbers of applications in the UK, provided that RPAs have a sufficient geographical coverage.
3. The international recognition of the need to intervene to reduce flows of genuine refugees and enable refugees to return home, with options ranging from assistance to source countries to military intervention.
4. An assumption that the main way in which refugees would move to a third country would be through RPAs, where managed resettlement schemes would add limited options for onward movement. “Although not all refugees would be accepted for resettlement, this would enable countries who currently accept asylum seekers to share the refugee burden but in a managed way”. Refugees who would not gain a resettlement place would be given assistance to integrate locally in their region of origin.

The paper sets out three “main risks” to the protection package, consisting of a) the impossibility to provide a sufficient level of protection in the RPAs to convince the courts in Europe that the return of spontaneous arrivals to them is legal, b) the unwillingness of countries in the source regions to host RPAs and c) an inadequate sharing of fiscal and resettlement burdens between the co-operating states.⁵⁹

In addition, a working strategy is sketched up. The location for pilot RPAs has to be identified, and Northern partner countries for their operation and financing need to be sought. The paper emphasises that consideration must be given on how to approach UNHCR, and states that pilots could be part of UNHCRs development of “Convention-plus” initiatives, which could give the UK the scope “for moulding the organisation more as we wish it to be”.⁶⁰ Finally, once partners and UNHCR are on board, host states for the erection of RPAs need to be contacted.

The strategy is bound to achieve

- an agreement between the Northern partners on how to share the financing and resettlement burden;

⁵⁸ Vision Paper, p. 3.

⁵⁹ Vision Paper, p. 7.

⁶⁰ Ibid.

- an agreement between the partners, the host state and UNHCR, setting out the details of the package;
- an intervention action plan;
- UNHCR endorsement of the RPAs; and
- amendments to domestic legislation allowing for removals there.⁶¹

Once these are in place, the pilot projects could start to operate. The emphasis on UNHCR endorsement reflects that the UK government accords it a critical role in convincing the courts to accept removals as legal. It should be underscored that UNHCR cannot absolve any state from its responsibilities under the 1951 Refugee Convention, and any UNHCR endorsement of extraterritorial arrangements is but one element in an independent assessment of legal issues to be effectuated by the relevant domestic authorities, and, where applicable, the ECtHR or the CAT Committee.

3. The Discussion Paper and Following Developments

The UK contributions to the debates in the IGC Full Round, the European Council and the EU Committee on Immigration and Asylum introduced an important distinction between RPAs in the region of origin, and Transit Processing Centres closes to the external borders of the EU. By doing so, the migration control element was emphasised more strongly than in earlier documents.

The Discussion Paper sets out two “complementary elements”, namely measures to improve regional management of migration flows, and processing centres on transit routes to Europe.

The management element is said to comprise four elements in its own right:

- prevention of conditions causing population movements;
- better protection in source regions;
- an increase of permanent resettlement quotas; and
- raising awareness and acceptance of state responsibility to accept returns.

When discussing standards for protection in the region, the paper contents itself with reiterating the obligation of non-refoulement and suggesting that “refugees must be able to count on receiving physical protection and shelter that complies with accepted international standards”. Furthermore, “[p]rotection on the basis of Article 3 of the ECHR – freedom from inhuman or degrading treatment – plays a crucial role.”⁶² Status determination could exclusively be allocated to UNHCR, and durable solutions would consist of resettlement in Europe, local integration, “where practical”, and repatriation.

The functioning of “Transit Processing Centres” is dealt with at some length. With the exception of certain categories such as disabled persons or minors, spontaneous arrivals would be transferred to TPCs located outside the EU, where their claims would be assessed. IOM would manage the TPC, screening would be provided by UNHCR, and financing shared amongst participating states, with the assistance of the European Commission. Recognised refugees would be resettled in Europe on a burden-sharing basis, while failed claimants

⁶¹ Vision Paper, p. 8

⁶² Discussion Paper, p. 5.

“could not remain in the TPC”.⁶³ The majority of failed claimants would be returned to the home countries, perhaps with the assistance of new readmission agreements. Cases which cannot be returned due to lacking safety in their home country “might be given temporary status in the EU”⁶⁴, until the safety situation has improved. The Discussion Paper raises the question whether TPCs should also be receiving “illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so”.⁶⁵ The main function of TPCs is said to be a deterrent against abuse of the asylum system.

At the meeting of the EU Committee on Immigration and Asylum on 7 April 2003, the UK delegation added another important element by merging RPAs and TPCs into one and the same model for migration control and refugee protection. Claimants who fail in the procedure in TPCs could also be returned to RPAs, while “humanitarian removals” could go in the opposite direction, being transferred from RPAs to TPCs. It is held that the UK delegation also shared a number of “challenges” in the realisation of its vision, *inter alia* the prevention of the targeted caseloads simply displacing into illegal immigration.

4. The Danish Memorandum

By the end of April 2004, the Danish Memorandum documented the outcome of informal discussions between the Danish, Dutch and UK governments. It reflected a move from overarching issues to operational questions, preparing the ground for the planning of pilot projects. The Memorandum introduces a further terminology change, discarding the use of “Regional Protection Area” and introducing the concept of “Protection Zone”. It is defined as a “zone in a country in the region close to a specific country of origin offering effective protection to refugees and displaced persons”.⁶⁶ The term “Transit Processing Centre” is maintained, and defined as “a closed reception centre processing asylum applications. It would be located outside the destination state”.⁶⁷

The three avantgarde states agreed that all practical arrangements must be in place before any returns are effectuated, and that a time frame for the conclusion of necessary agreements and other preparations would be necessary. The need to consider the compatibility of pilot projects with the Dublin Convention and the concept of Safe Third Country was underscored.

The Memorandum then reflects on the screening process to which spontaneous arrivals in destination states are subjected.⁶⁸ Screening aims at the identification of three groups:

- persons to be returned to Protection Zone countries,
- persons to be processed in TPCs, and
- persons to be processed in ordinary asylum procedures in the destination country.

According to the Memorandum, screening will merely deal with the issue where material processing will take place or where effective protection will be provided for eligible cases. It

⁶³ Discussion Paper, p. 8.

⁶⁴ Discussion Paper, p. 8. If the anticipated deterrent effect is achieved, no “illegal immigrant” should maintain an intention to lodge an asylum claim in Western Europe. There is some beauty to the circularity of this suggestion. Either there is no deterrent effect, or no target group as described in the quote.

⁶⁵ Discussion Paper, p. 8.

⁶⁶ Danish Memorandum, p. 1.

⁶⁷ *Ibid.*

⁶⁸ Danish Memorandum, p. 2.

would be based on objective criteria such as nationality, undocumented arrival or possible place of application. Screening should be very fast: “[i]deally, if appeal in the screening procedure is necessary, it should not have a suspensive effect. The relevant part of the Memorandum also states that it should be explored “whether lack of cooperation or identification on the part of the asylum seeker could in itself make [a claim] eligible for transfer to a Transit Processing Centre”.⁶⁹

In the remainder of the Memorandum, Protection Zones and TPCs are addressed in a section of their own, with a brief analysis of legal, practical and financial issues for each of the two concepts. Some considerations apply to both concepts, and are presented jointly in the following.

a. Protection Zones

Given that the objective of Protection Zones is to provide “effective protection”, the Memorandum sets out that it should comprise as a minimum “a non-refoulement guarantee, physical protection and an appropriate level of social protection”.⁷⁰ The Memorandum refers to the EU Directive on Asylum Procedures, Annex 1, and paragraph 15 of the Summary Conclusions of the Lisbon Expert Roundtable of 9 and 10 December 2002, yet it also points out the importance of agreeing on a level “that can be implemented in practice”.⁷¹

Strikingly, determination procedures are not seen as an absolute necessity:

Whether or not refugee status determination would be needed and upon which legal basis (Geneva Convention, OAU Convention, Cartagena Declaration) depends on the individual situation and the request of the Protection Zone country during negotiations of a binding Protection Zone agreement. It is considered that in several situations it would not be necessary to do refugee status determination when effective protection is provided.⁷²

In case where determination is considered necessary, “the prima facie group determination concept should be applied”.⁷³ With regard to the personal scope of protection, the Memorandum states that persons in need of subsidiary protection should be included.

The exact meaning of these statements is not obvious to the reader. First of all, the applicability of international instruments is governed by their texts, and not by any subsequent agreement by a sub-group of contracting parties. To wit, formal procedures for amendment of or withdrawal from the relevant treaties must be applied. Furthermore, it seems that the three avantgarde states imagine *en bloc* inclusion of certain groups. But do they foresee, by the same token, *en bloc* rejections as well? If so, based on which criteria and in what kind of process? How is such a process to conform to the relevant Conventions? On the other hand, including any person under protection arrangements would bring Protection Zones to host cases regardless of protection need, and potentially lead to the stockpiling of inhabitants in the Zone.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Danish Memorandum, p. 3.

⁷³ Ibid.

The Memorandum then goes on to underscore that resettlement programmes are seen as necessary for implementing a Protection Zone, and discusses criteria and mechanisms for resettlement. Thus, it becomes clear that some degree of individual determination must have been imagined by the three states. The Memorandum recommends participating states to consider that “for pilot projects ... those granted refugee status should be resettled in the destination State”.⁷⁴ This would presuppose some form of individual procedure, one would think. The Memorandum appears to confirm that:

Who to resettle out of a specific caseload must be decided on the basis of selection criteria developed in close cooperation with UNHCR and with due consideration to the characteristics of the individual refugee situation. Such criteria are likely to include vulnerability and long stay. It was proposed that a third category could be based on lottery selection.⁷⁵

If refugees are to be resettled, they must be identified in the crowd. If all inhabitants of a Zone would be determined as refugees, this would make all eligible for resettlement, and the whole idea of the Protection Zone would come to naught. If none were to be resettled, all would need to be treated in accordance with 1951 Refugee Convention standards. Will any host state agree to such demands? Will any participating state have the fiscal muscle and political will to bring either standards or resettlement numbers up to that level? Group determination and a lottery mechanism go well together, but the Memorandum suggests lottery selection only as one of three selection categories. The logic behind this part of the Memorandum is indeed hard to grasp. Perhaps, its drafters felt the same, as they added the following paragraph:

The availability of local integration and/or voluntary repatriation is not a precondition for the implementation of the concept. The Protection Zone element is developed to respond to protracted refugee situations, where repatriation or local integration would not be available in the near future. However, the non availability of repatriation or local integration may well require a significant resettlement component as part of the Protection Zone agreement.⁷⁶

The Memorandum also states that the implementation of resettlement is conditioned on the beginning “fulfilment of all relevant elements of the agreement”. To this author’s mind, this means that protection shortfalls in the Protection Zone are not compensated by resettling people out of the Zone. Instead, refugees are deliberately left in the Zone as bargaining chips, until the host state has delivered on the agreement underlying the Zone.

b. Transit Processing Centres

UNHCR had earlier insisted that TPCs should be placed within the EU. However, the three avantgarde states are apparently not impressed, and believe this to be open to further negotiations: “If standards are acceptable, UNHCR would be less worried with regard to whether a Transit Processing Centre is placed inside or outside the Union”.⁷⁷ It is unclear whether this conclusion is based on signals given by UNHCR, or merely on the relative

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Danish Memorandum, p. 4.

⁷⁷ Danish Memorandum, p. 5.

weakness of the Office in withstanding the pressure from important donors. In addition, the drafters seem to have taken impression by UNHCR's suggestion to return manifestly unfounded cases to closed processing centres.⁷⁸ The Memorandum proposes to define "manifestly unfounded" to include nationalities in general with a very high rejection rate, e.g. more than 90 percent.

It emerges in the Memorandum that the three avantgarde states envisage a downgrading of legal safeguards in the determination procedures at TPCs, and perceive processing as unconstrained by norms applicable in the jurisdictions of destination states:

The refugee status determination-procedure at the Transit Processing Centres need not be absolutely identical with present national procedure as long as it is in accordance with standards accepted by UNHCR. As such, in the case of the Australian offshore processing programme, Australian jurisdiction would not apply to the refugee status determination of the claims of the transferred asylum seekers and a quicker system based on administrative review was established and implemented.⁷⁹

The Memorandum continues as follows:

One could also envisage a system, where destination countries participating in the Transit Processing Centre-agreement, using their own staff, process the claims at the Transit Processing Centre in the first instance and where the review is carried out by an independent body, consisting of UNHCR or a panel of UNHCR and government representatives.

The content of this paragraph is largely coextensive with UNHCR's proposal of how Transit Processing Centres could function.⁸⁰

The Memorandum underscores that "in particular" TPCs would require amendments to national legislation. While it is acknowledged that resettlement capacities of destination countries may well need to be boosted, the drafters expect the deterrent effect of the whole system to keep total numbers low: "However, due to the deterrent of transfer to Transit Processing Centres and detention, Australian and American experiences show that the number of resettled persons is unlikely to exceed the number of persons of the same nationality, who at present remains in destination countries following a full asylum procedure."⁸¹

c. Joint Considerations

With regard to both Protection Zones and Transit Processing Centres, there seems to be agreement that readmission agreements between destination state and host country, as well as between host country and country of origin need to be in place before implementation.

The Memorandum foresees that the responsibility for delivering care and maintenance to Protection Zone and TPC inhabitants would be shared by the host country, the destination

⁷⁸ UNHCR, Explanation of the EU Prong, Geneva, March 2003, p. 1.

⁷⁹ Danish Memorandum, p. 5.

⁸⁰ UNHCR, Explanation of the EU Prong, Geneva, March 2003, p. 1.

⁸¹ Danish Memorandum, p. 5.

country, UNHCR and IOM. There is no analysis how legal responsibility under international law is to be allocated between the destination state and the host state.

Regarding the financing of Protection Zones and TPCs, the Memorandum reiterates earlier UK analysis when stating that “the cost per capita might initially appear disproportionate, but should be viewed in conjunction with the saving generated in the medium and long term”.⁸² Whether such savings will materialize, is questionable, and we shall devote some attention to this issue below. The Memorandum presumes that there will be a “very considerable reduction in numbers and thus a decrease in related costs”⁸³, and supports this by a sweeping referral to US and Australian experiences. In drawing this conclusion it is doubtful whether both cases have been studied adequately and whether the analogy indeed supports the conclusion noted in the Memorandum.

E. Legal and Practical Problems

To clear our minds on the viability and legality of future pilot projects or indeed a large-scale implementation of a network of Centres and Zones, we need to revert to the overarching goal of reducing the numbers of spontaneous arrivals in destination states, thus enabling the transfer of resources from their domestic asylum procedures to protection and processing in TPCs and Protection Zones. A fully-fledged analysis needs to intertwine legal, financial and practical issues.

In the following, we shall first reflect on the responsibility for any violations of international law taking place in the context of operating the proposed schemes. We shall go on to argue that an implementation of the plans to erect TPCs and PZs would result in an exercise of discrimination. The UK, Denmark and any other participating state will pay more money to get less protection in offshore processing. To justify expenses, these states might resort to overbroad criteria to channel certain groups into such processing. This makes the arrangement doubly irrational – on account of increased expenses, and on account of selection based on deterrence rather than protection need. The objective to improve migration management and refugee protection cannot be achieved by the means proposed or, at the very least, would be equally well achieved with less intrusive and cheaper means, which implies that it is discriminatory and thus illegal under international human rights law. In addition to this reasoning, we would like to develop specific arguments on the right to a remedy, the use of detention, and the issue of collective expulsion.

1. State Responsibility

The question of state responsibility for any violations of individual rights occurring in TPCs or Protection Zones is central for the viability of the proposals, yet none of the documents care to enter into its analysis. This much is clear: by returning individuals to either Transit Processing Centres or Protection Zones, destination states cannot absolve themselves from legal responsibility under norms prohibiting refoulement and norms protecting human rights. This has been clearly spelt out by the ECtHR in the case of *T.I. vs. the UK*.⁸⁴ Beyond that, a

⁸² Danish Memorandum, p. 4 and p. 6.

⁸³ *Ibid.*

⁸⁴ “The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom

concurrent responsibility by the territorial state hosting a TPC or PZ is not excluded. The precise allocation of responsibility cannot be assessed in the abstract, as it would depend on the facts of the case, any agreements concluded and the degree of control *de facto* and *de jure* of the different states involved in the operation of the scheme.

A related issue is the implementation of state responsibility when states attempt to contract out their international legal obligations, which is part and parcel of the TPC scheme. This will be increasingly problematic in case of such detentions and processing taking place outside the territory of destination states. Although state obligations remain unimpaired by this form of outsourcing, as the ECtHR noted in the case of *TI vs. the UK*, it would be practically difficult to bring a cause of action against an offending state or states, or at a minimum, gather the required evidence in the host state (moreover in a closed camp situation) to support any legal challenge. Access to authentic information in such circumstances as off-shore or extra-territorial processing has indeed been a recurring problem in the recent Australian and earlier US experiences. As inhabitants of TPCs and PZs are not likely to be accorded legal aid sufficiently qualified to deal with state responsibility issues in a multi-actor setting, the risk prevails that they will abstain from filing a claim or file it against the wrong party.

2. Costs

The expectations of savings resulting from a reduction in the number of asylum seekers in destination states is based on a blend of plan economy with a dose of science fiction. If there is genuine complementarity between Transit Processing Centres and the territorial processing system, there cannot be an expectation of a saving sufficiently certain to factor it into financing. If TPCs and Protection Zones would be the exclusive inroad to protection, there may well be a reduction in the number of spontaneous applications in destination countries for specific caseloads. Yet, it remains unlikely that such a system could be cheaper than domestic processing systems in destination states. In all essence, the proposed TPCs and PZs feature all cost-intensive parts of processing on UK or other EU territory, and add a number of new items:

- the acquisition of the host state's consent⁸⁵,
- the acquisition of the consent by countries of origin to conclude readmission agreements and to deliver on them (earlier experience shows that package deals may well be necessary for states in the North to convince states in the South to deliver on their readmission obligations),

rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [...]" ECtHR (Third Chamber), *Decision as to the Admissibility of Application No. 43844/98 by T.I. against the U.K.*, 7 March 2000 (unpublished), [henceforth *T.I. vs the U.K.*], p. 16.

⁸⁵ Australia allocated AUD 1 million to a "trust account" for Papua New Guinea and AUD 20 million of assistance to the government of Nauru during Fiscal Year 2001/2. The data was presented by Australian Immigration Department officials at a Senate hearing on 16 April 2002 and are quoted in Julia Gillard, Shadow Minister for Population and Immigration, "Time for Truth on 'Pacific Solution' Costs", Media Statement of 17 April 2002, available at: <<http://www.alp.org.au//media/0402/jgmspancif170402.html>> (accessed on 23 May 2003). 1 AUD equalled 0,53 EUR on 12 May 2003.

- the provision of human rights to the population in Centres and Zones corresponding to Refugee Convention, ECHR and other relevant obligations,
- the funding of UNHCR, IOM or any other organisation tasked with running the camp,
- the expeditious screening of spontaneous arrivals in destination states,
- the cost caused by cases not accepting removal to a TPC/PZ and appealing all the way to Strasbourg or the CAT Committee,
- the funding of potentially large-scale detention to inhibit onward migration⁸⁶ and of centre security⁸⁷,
- the funding of the return of rejected cases (which is only superficially dealt with in the Danish Memorandum),
- the funding of the complex processing system required (the identification and resettlement selection of Convention refugees, the identification of other non-returnable cases and the finding of a protection solution for them), including salaries and wages for expatriate expert staff, and
- the costs of an effective system of physical transfers (from destination state to host state, from host state to resettlement state, from host state to country of origin, and, in accordance with UK suggestions, from PZs to TPCs). Some of these transfers will be involuntary, triggering additional costs for escorts.

As stated in the Danish Memorandum, Australian experiences can be indicative. Yet they point in quite a different direction than the Danish and UK governments might hope. The budget of the Australian government indicates that all savings from reduced onshore arrivals are consumed by the massive costs for offshore processing in the excised zones of Australian territory and in third countries (Nauru and Papua New Guinea). On top of that, additional funds are allocated to offshore processing, making the Pacific Solution a net loss of some AUD 900 million for the Australian taxpayer from Fiscal Year 2002/3 to Fiscal Year 2005/6.⁸⁸ The Australian government calculates with a decline from a total of 5500 to a total of 4500 processing places per year effectuated through the Pacific Solution, which one commentator recalculated to an investment of AUD 300.000 per boat refugee dissuaded from the journey.⁸⁹ Against this backdrop, the claim that there will be leftover funds from decreasing spontaneous arrivals in the UK or Denmark, which can be reallocated to improve refugee protection in the South is simply untenable.

Likewise, the Australian experience illustrates that there are no dramatic changes in the quality of applications to be expected. The overall recognition rate in Australian offshore processing in Nauru and Papua New Guinea was 49 percent as of 10 November 2002.⁹⁰ This is not a far cry from the Australian and British recognition rate in first instance territorial

⁸⁶ Detaining an asylum seeker on Christmas Island (part of the Australian territory excised from Australian jurisdiction to effectuate screening and removal without court interference) costs AUD 293 per day, to be contrasted to AUD 87 at Port Hedland and AUD 102 at Woomera, both on Australian mainland. Data obtained by *The Australian* and quoted in Megan Saunders, "Costs Soar for Island Detainees", *The Australian*, 16 April 2002.

⁸⁷ The provision of centre security in the Australian-controlled processing centres in Nauru and Papua New Guinea is sub-contracted by IOM to private companies (Nauru: Eurest Support Services, Chubb Security Pty Ltd.; Papua New Guinea: Protect Security). In practice, this complicates the issue of legal responsibility for human rights violations at the centres further, and adds another layer of intransparency. Human Rights Watch, *'By Invitation Only': Australian Asylum Policy*, New York, December 2002, p. 64, note 326.

⁸⁸ For a detailed analysis based on data from the state budget, see Margo Kingston, "Terror, boat people, and getting old", *The Sydney Morning Herald*, 15 May 2002.

⁸⁹ *Ibid.*

⁹⁰ Human Rights Watch, *'By Invitation Only': Australian Asylum Policy*, New York, December 2002, p. 64.

processing (30 and 32 percent respectively in 2001) and almost identical with Denmark's first instance recognition rate (52 percent in 2001).⁹¹ It should be recalled that an outright comparison of caseloads and recognition rates is improper, given the differences between the countries involved. This notwithstanding, the Pacific Solution may well serve as an indicator that European hopes for tangible reductions in costs and applications without protection grounds are wishful thinking. The UK Vision Paper has used the fact that "between half and three quarters of those claiming asylum do not meet the criteria of full refugees"⁹² to argue the failure of the presently existing system. To the extent the Australian numbers can be extrapolated, the TPCs and the PZs are a failure in the making.

With a certain degree of generalization, Europe is geographically easier to access than Australia. The UK Discussion Paper flagged for the risk that persons who would have otherwise sought asylum might simply become illegal immigrants.⁹³ This is indeed likely, and casts doubt on whether the pursuit of the UK vision is an adequate means to bring about more effective forms of migration control. Societal costs for addressing illegal migration are hard to pin down, but should be added to the projected budget for any pilot project devised.

3. Targeted Groups

With regard to the groups targeted, the documents reflect a grave dilemma. To deliver on the UK vision of moving almost all processing and much of the protection work outside the territory of the EU, and to deter spontaneous arrivals, a large majority of such arrivals would need to be removed to PZs and TPCs. To deliver on international legal obligations, the group of persons to be removed after screening would need to be carefully tailored in accordance with their protection need, thus undermining the objectives of volume, speed in processing and deterrent effect.

In the section dedicated to Transit Processing Centres, the Memorandum relates exclusively to cases deemed as manifestly unfounded. "Following the UNHCR proposal"⁹⁴, those are defined to include "nationalities in general with a very high rejection rate, e.g. more than 90 percent".⁹⁵ It does not say what the term "rejection rate" denotes⁹⁶, and whose rejection rate will be relevant – that of a certain nationality in a single destination country, or, the aggregate recognition rate of a nationality in the global refugee system. To this author, the latter would be a correct approach, minimising the risk of distortions by specific recognition practices in single jurisdictions.

A look at UNHCR statistics reveals that very few nationalities fulfil the criterion suggested in the Danish Memorandum. If total recognition rates in 2001 were taken as a benchmark, a list of relevant countries of origin would comprise Algeria, the Former Yugoslav Republic of

⁹¹ UNHCR, *Statistical Yearbook 2001*, Geneva, October 2002, pp. 50-3.

⁹² See text accompanying note 56 above.

⁹³ UK Discussion Paper, p. 9.

⁹⁴ Danish Memorandum, p. 4. In its suggestion to create processing centres within the EU, UNHCR related to "asylum applicants originating from designated countries or origin who are primarily economic migrants resorting to the asylum channel". UNHCR, *Explanation of the EU prong*, UNCHR Geneva, March 2003, p. 1.

⁹⁵ Danish Memorandum, p. 4.

⁹⁶ A major issue is whether it includes cases allowed to remain on grounds of subsidiary protection or other grounds related to international law. Another question is how rejection rates are to be measured in a context of international cooperation, given that different states apply different statistical methods.

Macedonia, Mali, Mexico, Sierra Leone, Ukraine, and Vietnam.⁹⁷ None of these countries are among the top ten refugee producers.⁹⁸ It is clear that the reduction in total numbers of spontaneous applications envisaged by the UK cannot be achieved by applying this criterion. The efficiency of Transit Processing Centres would be further reduced, as applicants from targeted “safe countries of origin” would be advised by human smugglers to conceal their nationality when seeking asylum within the EU.

However, in the section on screening in the destination state, the Danish Memorandum named three criteria for singling out persons for removal: nationality, undocumented arrival, possible place of application.⁹⁹ It does not make clear whether these criteria govern removal to Protection Zones, Transit Processing Centres or both. The criterion of nationality will presumably be relevant for removals to Transit Processing Centres, and it might also govern removal to PZs, together with the last criterion on “possible place of application”.

The criterion on “undocumented arrival” is cause for concern, though. It is estimated that a large number of protection seekers apply for asylum in the EU without proper documentation. The lack of proper documentation is not necessarily attributable to protection seekers. Where they exist, travel documents are in part destroyed on instructions by the human smuggler, or returned to the smuggler after the border has been crossed. Boat arrivals may not carry documents at all, as they do not pass official migration controls. The absence of proper documentation is unrelated to protection need – a person arriving without passport and visa can obviously have objectively valid reasons for seeking asylum. Channelling such persons into TPCs providing decreased procedural and material protection for deterrent reasons might raise issues under Article 31 of the 1951 Refugee Convention, prohibiting the imposition of “penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. As we shall see below, it might also amount to discrimination.

The Danish Memorandum also points out that lacking cooperation of the individual in establishing his or her identity could be considered as a factor triggering removal to a Transit Processing Centre.¹⁰⁰ In practice, this criterion will spawn a host of difficulties. If the applicant maintains to come from one country, while the screening officer holds that she is from another country, does this make the applicant uncooperative? If applied along clear and predictable criteria, this factor might only affect a small number of obviously recalcitrant applicants, who sabotage their own case. Those should be few, and the deterrent effect will be minimal.

Beyond these piecemeal considerations, the high transactional costs of starting up pilot projects risk to push destination states towards overbroad criteria¹⁰¹, going beyond reasonable assumptions of diminished protection need and into a realm of prospective discrimination. Or,

⁹⁷ UNHCR, *Statistical Yearbook 2001*, Geneva, October 2002, p. 54.

⁹⁸ The list was compiled on the basis of the origin of asylum applicants in industrialized countries between 1992 and 2001. UNHCR, *ibid.*, p. 116.

⁹⁹ Danish Memorandum, p. 2.

¹⁰⁰ *Ibid.*

¹⁰¹ On an IGC Workshop on Protection in the Region held on 19-20 May 2003, the UK and Denmark apparently tinkered with the idea of expansion. They distinguished between “largely unfounded” and “manifestly unfounded” cases, suggesting that largely unfounded cases which could be processed quickly be dealt with in TPCs.

following the example of the Danish legislator set in 2002¹⁰², states simply calculate with an irrational deterrent effect, scaring away even those who would not be affected by the implementation of TPCs and PZs.

4. Standards of protection

There are three dimensions to the protection of rights held by persons coming under the ambit of the suggested schemes. The first relates to screening procedures in the territory of the destination state, the second regards processing in the host country, and the third includes reception and protection standards in the host country.

With regard to screening procedures, the Danish Memorandums suggests that these procedures include “no substantial examination”.¹⁰³ This statement is self-contradictory, unless everybody was to be removed. As the UK Discussion Paper implies, this is illusory: “But we envisage that there will always be certain categories of people, such as disabled persons or minors, who would never be sent to a transit centre”.¹⁰⁴ Singling out those to be exempted from removal will presuppose material considerations, in which the availability of adequate protection in the host country will play a decisive role.

The Danish Memorandum further suggests that “[i]deally, if appeal in the screening procedure is necessary, it should not have suspensive effect”.¹⁰⁵ There is a double fallacy in this formulation. First, some form of legal remedy *will* be necessary in cases where removal would arguably amount to a violation of rights and freedoms under the ECHR, most notably article 3 ECHR. This follows from article 13 ECHR, guaranteeing an effective legal remedy where a grievance is an arguable one in terms of the ECHR.¹⁰⁶

Second, the concept of an effective remedy implies *inter alia* that there must be a possibility to suspend removal. In a case where issues under article 3 ECHR had been raised, the ECtHR has concluded that “the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned”.¹⁰⁷

However, it could be that the drafters of the Danish Memorandum wished to deny appeal rights merely to a specific group which has no arguable claim that removal would amount to a violation of the ECHR. Drawing on a parallel to the determination of cases as “manifestly ill-founded” in the admissibility stage, the ECtHR has concluded that “some serious claims might give rise to a *prima facie* issue but, after ‘full examination’ at the admissibility stage, ultimately be rejected as manifestly ill-founded”.¹⁰⁸ Hence, cases qualified as manifestly ill-founded after a material assessment may very well be arguable, provided they are “serious”

¹⁰² In 2002, a number of amendments to the Danish Aliens Act entered into force, drastically diminishing the number of applications. In this particular case, the symbolism of restrictive policies was perhaps more effective than the technical downgrading of legal protection. The amendments aimed to depreciate the image of Denmark at the stock exchange of rumours guiding human smugglers.

¹⁰³ Danish Memorandum, p. 2.

¹⁰⁴ UK Discussion Paper, p. 6.

¹⁰⁵ Danish Memorandum, p. 2.

¹⁰⁶ ECtHR, *Boyle and Rice v. UK*, Judgement of 27 April 1988, Appl. No. 9659/82-9658/82, para. 52.

¹⁰⁷ ECtHR, *Jabari vs. Turkey*, Judgement of 11 July 2000, Appl. No. 40035/98, para. 50.

¹⁰⁸ ECtHR, *Powell and Rayner vs the UK*, Judgement of 24 January 1990, Appl. No. 9310/81, para. 32.

and can be formulated “in the terms” of the ECtHR. This category of claims is a narrow one, and would comprise only a fraction of those presently processed as “manifestly unfounded” in certain EU jurisdictions. Most importantly, persons which would be channelled into the category of “manifestly unfounded cases” according to the Danish Memorandum could very well have an arguable claim, which would trigger the right to a legal remedy, including a right to have removal suspended until a final decision.

According to the Danish Memorandum, it would not be necessary to operate determination procedures in all situations where Protection Zones are used.¹⁰⁹ This would presuppose that all inhabitants of such Zones were treated in accordance with obligations owed to refugees lawfully in the territory of a state party to the 1951 Refugee Convention. Going below that standard should not be acceptable, as such zones would be established through international law, and its inhabitants’ presence stay there can hardly be considered unauthorised, as long as states actively redirect them to PZs as a matter of granting protection. Otherwise put, refugee status determination is not owed to an individual under international law. Without status determination, however, the full gamut of rights under the 1951 Refugee Convention has to be granted to anyone claiming to be a refugee.

With regard to procedures in TPCs, the drafters of the Memorandum appear to be under the impression that this would be an activity outside their jurisdiction, and therefore completely at their discretion. This would amount to a grave misunderstanding. Evidently, processing will be effectively controlled by destination states, and the Memorandum has suggested the involvement of governmental experts into the process. Hence, processing is an act attributable to destination states under the international law of state responsibility.¹¹⁰ Delegation to international organisations or private actors does not relieve states from this responsibility. It follows that procedures must conform to obligations incumbent on destination states under international refugee law and human rights law. The prescriptions of the ECHR prove to be particularly apt, as they apply to all persons under the jurisdiction of a contracting state, regardless of whether jurisdictional acts take place within or outside state territory.¹¹¹ In principle, such obligations are not affected by changing the theatre of processing.

From a doctrinal point of view, the question of what standards have to be applied in PZs and TPCs cannot be determined in an enumerative and exhaustive list. The minimum elements of physical safety and shelter are necessary, yet insufficient from the perspective of international law, if they are provided across the board without taking into account the individual needs of persons reallocated to TPCs and PZs.

Invariably, there must be an element of legal protection. In the case of *T.I. vs the UK* the respondent government argued that the applicant was safe in Germany, *inter alia* because the country was party to the ECHR and any violation of its Article 3 by German authorities could

¹⁰⁹ Danish Memorandum, pp. 2-3.

¹¹⁰ The ILC Draft Articles on State Responsibility offer guidance on the regulation of state responsibility in customary international law. As destination states consider to process cases in TPCs through their own state organs, or through lawfully empowered entities, acts would be attributable to them under Article 4 and 5. International Law Commission, “State responsibility. Draft articles provisionally adopted by the Drafting Committee on Second reading”, 11 August 2000, UN Doc. No. A/CN.4/L.600.

¹¹¹ Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, *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*, European Commission 2003, available at: http://europa.eu.int/comm/justice_home/doc_centre/asylum/common/asylumstudy_dchr_2002_en.pdf, Chapter 3.2.3.2.

be brought before the Strasbourg judges again.¹¹² The same logic would apply to the return from the UK or another contracting state to a TPC or a PZ. There must be an effective legal remedy to avert violations of the ECHR. In this regard, it should be recalled that economic, social and cultural rights are, to a certain degree, amalgamated into the rights guaranteed by the ECHR.¹¹³ The question of protection standards in TPCs feeds back into the legality of removal to a TPC. Inevitably, the removal decisions will be challenged before courts and monitoring bodies. Where the protection in a TPC is sub-standard, removals will be stopped, calling into question the investment into the new regime.

5. Detention

A central element of the reform envisaged with TPCs and PZs is that the linkage between stating protection need and actual protection is broken. While a person determined to be a refugee in territorial procedures of destination states as the UK or Denmark is regularly granted refugee status, there is no evident nexus between protection need and protection offer in the Danish Memorandum. Resettlement is not a right, but a discretionary act of a potential host state. Consider a situation where a refugee in a TPC or a PZ finds that all resettlement quotas are exhausted, local integration is unavailable and voluntary repatriation inconceivable due to persistent risks in her country of origin. Given that TPCs are conceived as closed centres, such a refugee would be confined to indefinite detention. The same would apply to a person whose claim was rejected in a TPC, but who cannot be returned to his or her home country for whatever reason beyond that person's control, e.g. the formal denial of readmission by the home country.

Under international law, decisions to detain asylum seekers must *inter alia* conform to article 5(1)(f) ECHR. This implies not only that such decisions are to be based on law and decided in a proper procedure, but also a limitation to specific purposes. The first is "to prevent his effecting an unauthorised entry into the country", and the second is circumscribed by the phrase "action is being taken with a view to deportation". A refugee without prospects for any durable solution is *de facto* detained in the TPC¹¹⁴, and this detention would relate to the first purpose. The detention of a rejectee who cannot be repatriated would relate to the second one.

There is no temporal limitation implied in the first purpose. Yet, one should be observant to the fact that a decision to detain triggers ancillary rights. Article 5(2) ECHR provides that a detainee has "the right to be informed promptly, in a language which he understands, of the reasons for his arrest...". In addition, there is a right to have the lawfulness of one's detention reviewed by a court flowing from Article 5 (4) ECHR. Practically, this would mean that a refugee who fails to obtain a resettlement place after status determination in a TPC would be entitled to have a court review the concomitant deprivation of liberty.

The second purpose was included in Article 5 (1) (f) ECHR to allow for the implementation of removal.¹¹⁵ Thus, a deprivation of liberty in order to prevent that the alien goes into hiding

¹¹² T.I. vs. the UK, p. 13.

¹¹³ For a theoretical framework and a presentation of relevant case law, see Ida Elisabeth Koch, "The Justiciability of Non-Divisible Rights", forthcoming in *73 Nordic Journal of International Law* (2003).

¹¹⁴ Provided we define detention as a deprivation of liberty in the sense of Article 5 ECHR, the ECtHR case *Amuur v. France*, Judgement of 25 June 1996, Appl. No. 19776/92, para. 43, confirms this assessment.

¹¹⁵ Stefan Trechsel, "Zwangsmassnahmen im Ausländerrecht", in *Aktuelle Juristische Praxis* 1/1994, pp. 43-59, at p. 48.

is covered by paragraph 1(f), as well as the deprivation of liberty inherent in forcible removal itself. Trechsel underscores that the serious intention to remove, held by the authority in question, is of decisive importance. If it turns out that actual removal cannot be performed, this does not make past detention illegal. But, by the same token, it would be illegal to continue detention in spite of the fact that removal is rendered impossible.¹¹⁶ Against this backdrop, a rejectee without repatriation perspective must be allowed to leave the TPC, if conflicts with Article 5 (1)(f) ECHR are to be avoided. This might lead to irregular secondary movements, which is precisely what the reform proposals aim at avoiding.

6. Collective Expulsion

The physical removal of spontaneously arriving asylum seekers selected for processing in TPCs on the basis of their nationality might raise issues under the prohibition of collective expulsion, explicitly prohibited *inter alia* by article 4 of the Fourth Protocol to the ECHR.¹¹⁷ Plender rightly states that not all expulsions *en masse* constitute collective or mass expulsions.¹¹⁸ With regard to the expulsion of undocumented aliens, he opines that “[o]f the principles of customary international law governing such cases, the prohibition of arbitrary conduct and the rule of proportionality are likely to prove particularly apt; reasons must be advanced which could reasonably and properly lead the expelling state to the conclusion that its action is necessary in the public interest.”¹¹⁹

Ultimately, this compels lawyers to look into the issue of proportionality between the goals pursued by the “vision” and the means employed. The issue of proportionality is familiar from discrimination reasoning. Below, we will test whether the distinction in treatment foreseen in the “vision” constitutes reasonable distinction in treatment or unreasonable discrimination. If the latter is the case, any expulsion action to TPCs and PZs will automatically attain the character of collective expulsion, and imply a violation of international law.

7. Selection and Discrimination

If certain nationalities are channelled to TPCs and PZs offering less protection *de facto* and *de jure*, while being more costly than territorial processing, there are reasons to anticipate discrimination arguments. As nationalities selected for processing in TPCs and protection in PZs are treated differently than those nationalities allowed into territorial processing, the proportionality of this distinction in treatment could be questioned.

One pertinent norm¹²⁰ is Article 14 ECHR, obliging Contracting Parties to secure the enjoyment of *inter alia* Article 3 ECHR without discrimination on any ground. Among the grounds enumerated in Article 14 ECHR, we find “national origin”, which would be relevant

¹¹⁶ Ibid.

¹¹⁷ Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963, ETS. No. 46.

¹¹⁸ Richard Plender, *International Migration Law*, Dordrecht 1988, p. 459.

¹¹⁹ Ibid., p. 475.

¹²⁰ Prohibitions of discrimination can be found in a number of human rights instruments. We chose to focus on the ECHR as it offers a rather unique monitoring mechanism in the ECtHR.

to consider if manifestly unfounded cases selected on the basis of nationality would be sent to TPCs or PZs.

To assess an alleged violation of Article 14 ECHR, the reasoning of the ECtHR regularly passes a number of discernible stages. The Court sets out with a comparability test, deliberating whether the person claiming to be discriminated actually finds herself in a situation similar to that of the person she compares herself with.¹²¹ If this is the case, the Court proceeds to a justification test. The justification test, in turn, consists of two consecutive operations.¹²² First, the Court scrutinises whether the aim pursued by the difference in treatment is a legitimate one. If and only if this is the case, the Court ponders whether there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".¹²³ Reverting to the scenario relevant here, one would compare a spontaneously arriving protection seeker from a country listed as safe with one coming from a country not on the list.¹²⁴ While the former would be sent to a TPC or a PZ, the latter would be allowed access to the territorial determination procedure, providing access to better prospects for protection as well as prospects for better protection.¹²⁵ Apart from nationality and recognition rate, no other factors introduce relevant differences between the two applicants. Hence, the comparability test would be passed.

The aim pursued by TPC and PZ schemes would be to control immigration, which is perfectly legitimate.¹²⁶ In addition, the schemes aim to realize an improved global refugee regime. We can assume that any court would consider this aim to be a legitimate one as well. This brings us to the proportionality test, and the question whether it is reasonable to pursue this aim by means of the two schemes.

Following an established doctrine, the proportionality test in the broad sense can be broken down into three subordinate rules.¹²⁷ The rule of appropriateness excludes means that are not suitable for the pursuit of a given goal. The rule of necessity lays down the precedence of less intrusive over more intrusive means in pursuit of a given goal.¹²⁸ Finally, the third rule consists of the proportionality test in the narrow sense, excluding such means as are excessive for the pursuit of a given goal.

¹²¹ See, *inter alia*, ECtHR, Case of Moustaquim vs. Belgium, Judgment of 18 February 1991, Series A 193, para. 49, where the ECtHR denied that Article 14 ECHR was violated on grounds of lacking comparability.

¹²² This two-step methodology was first expounded in the Belgian Linguistic Case, Judgment of 23 July 1968, Series A 3.

¹²³ ECtHR, Abdulaziz, Cabales and Balkandali Case, Judgment of 28 May 1985, Series A 94 [henceforth Abdulaziz], para. 72.

¹²⁴ If a rejection rate of more than 90 percent will indeed be used as a discerning criterion, as suggested in the Danish Memorandum, one might wish to compare a person possessing a nationality with a 91% rejection rate with a person possessing a nationality with a 89 % rejection rate.

¹²⁵ In particular, a fine-tuning of group characteristics could suggest that they were indeed in a similar situation. Let us imagine that female applicants of a certain nationality possess markedly higher recognition rates than their male counterparts, but that the large numbers of male applicants push rejection rates over 90 percent. Would it be correct to relegate the female applicants of that nationality to a procedure and location with a diminished level of protection, compared to other nationalities or subnational groups with similar recognition rates?

¹²⁶ See, e.g., Abdulaziz, paras 76 and 81.

¹²⁷ R. Alexy, *Theorie der Grundrechte*, Suhrkamp, Frankfurt am Main 1985, p. 100, with further references in note 82.

¹²⁸ The test of necessity is structured as a test of pareto-optimality: state A is to be preferred to state B, if a shift from B to A will not leave any of the actors involved worse off than before, but at least one of them better off. Alexy, *supra*, p. 149 note 222.

This leads us to two arguments. It cannot be excluded that a scheme launching TPCs and PZs, once implemented along the lines sketched up in the documents scrutinised here, would be unsuitable to pursue the double goal of improved immigration control and improved refugee protection. As argued earlier, migrants might as well move to destination states as the UK in the same numbers, but abstain from filing an asylum application. We have also analysed whether there would be any resources left for an enhancement of the global refugee protection regime, once the TPCs and PZs start to operate, and concluded that this is unlikely to be the case. Hence, one could maintain that the rule of appropriateness would be violated, leading to the conclusion that both schemes are discriminatory in nature.

Should one be unconvinced by the argument on appropriateness, consideration should be given to the rule of necessity. As the proposals are formulated now, refugees are worse off than in territorial processing, while destination states are not necessarily better off. Hence, a reinforced and improved system of territorial processing would be a better investment of the additional resources needed, and turn out to be less intrusive vis-à-vis refugees, whom the system is intended to serve according to one of its goals. By conclusion, a violation of the rule of necessity would make TPCs and PZs an exercise in discrimination.

Then again, if destination states take the risk of discrimination reproaches seriously and tailor-make the screening system to accommodate special needs of individuals, the deterrent effect of TPCs and PZs is lost. In the end, states will choose between a discriminatory and ultimately illegal system with a deterrent posture, and a legal, non-discriminatory one that is patently unable to deliver in terms of deterrence and control.

F. Conclusion: The Camp as the Location of the Exceptional

The pursuit of “new approaches” by the UK and Denmark reflects an ongoing paradigm shift. The injustice of the global refugee regime, so vigorously decried in the UK Vision Paper, is addressed by locating the refugee beyond the domain of justice. This is precisely what the state of exception is all about. The vision will introduce a permanent state of exception in asylum and migration policies. To argue this point, we will employ Giorgio Agamben’s work as an analytical tool.

“Exception” as a term is derived from Latin; “*ex capere*” means to “take outside”. Once implemented, the vision will literally take the refugee outside the territory of the destination state, and take her institutionally outside the ordinary mechanisms for assessing her claim. The institutional “outside” relates to the perception and political control by the public as well as a fully-fledged judicial control exercised by courts and competent authorities. This “outside” has been labelled “Safe Haven”, “Regional Protection Area”, “Protection Zone” and “Transit Processing Centre”. These euphemisms notwithstanding, the “vision” has brought back a spectre to European migration and population policies. It is the spectre of the camp.¹²⁹

“The camp is the space that is opened when the state of exception begins to become the rule”, writes Giorgio Agamben.¹³⁰ The concept of Transit Processing Centre is the most pertinent

¹²⁹ “Camp” is a term charged with historical associations. We wish to emphasise that our point in analysing the “new approaches” with the conceptual tools of Agamben’s political theory is not to create creeping associations to the annihilation policies by the totalitarian regimes of the last century.

¹³⁰ Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Stanford University Press, Stanford 1998, p. 168.

articulation of that exceptional space. As any camp, such centres will be “closed” by a boundary of barbed wire. The regulation of living conditions in them will be subjected to a totalized economy of incentive and deterrence. Ultimately, they threaten inhabitants with the denial of any existential perspective, be it resettlement or local integration. There is more to the term than its drafters might be aware of: these camps will as much constitute centres for the processing of human beings in transit as the location for a transition process changing the parameters for the relationship between states and migration.

The camp regime presupposes a normative order, which is not necessarily a legal one. Giorgio Agamben’s sovereign nomos surfaces in it: “the sovereign nomos is the principle that, joining law and violence, threatens them with indistinction”.¹³¹ At large, the project articulated in the UK Vision Paper presupposes the threat or use of force against persons as well as states. Refugees and other undocumented migrants will be deprived of their liberty upon arrival at the screening stage, deported to a camp and detained there. States producing refugees will be threatened with intervention on a scale including the use of military force. But this violent potentiality is produced by the law. The UK Draft Vision proposed the change of the 1951 Refugee Convention, and the Danish Memorandum reminds us that amendments in domestic legislation will be necessary. Therefore, it would be wrong to misconceive any violence exercised in realising the vision as illegal. Some of it might be illegal though, as the state of exception opens the possibility for violent excess.

There is an interesting line of development stretching from the introduction of Temporary Protection in the early 1990s to the contemporary discussion of “new approaches” comprising TPCs and PZs. The notion of “Temporary Protection” can be validly described as a state of exception imposed on the European refugee regime. Temporary Protection denoted a regime allowing states to opt out of ordinary asylum processing by leaving the question of status undetermined. Its promoters amongst European states endowed UNHCR with the task to conceptualize and legitimize this state of exception.¹³² Yet, the introduction of Temporary Protection was largely reactive. The war in the Federal Republic of Yugoslavia was an external factor which set off a spiral of events culminating in its launch. *Ex post facto*, there was an attempt to mould the concept into a legal form, which eventually resulted in an EU Directive agreed on in 2001¹³³, but never used in practice.

The debate on “new approaches” was not fuelled by a war at the doorstep of the Union.¹³⁴ The number of asylum seekers in the UK is hardly “exceptional” if compared to the ratio of applications in terms of population, surface or wealth in other states, within or outside the EU.¹³⁵ Proactively rather than reactively, the UK and Danish governments are creating a state

¹³¹ Agamben, *Homo Sacer*, supra, p. 31. Agamben’s use of the nomos concept is inspired by Carl Schmitt, who describes the taking of land, and the determination of juridical and territorial ordering as constitutive of the sovereign nomos.

¹³² Against this backdrop, it should not surprise that the UK seeks UNHCR’s endorsement for Transit Processing Centres and Protection Zones.

¹³³ 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, OJ L 212/12, 7 August 2001.

¹³⁴ It was set off by Denmark, whose government had just won the game of counting asylum applications with its electorate, to be amplified by the UK government, eager to repeat the success of their Danish colleagues. Yet, the UK wished to avoid the cost of international bad-will associated to restrictionist policies and displayed a more intelligent approach to marketing than their Danish predecessors.

¹³⁵ According to the British Refugee Council, “the UK ranks only 32nd in the world in terms of its share of the refugee ‘burden’ in relation to its national population, surface and wealth”. British Refugee Council, ‘Unsafe

of exception *ex nihilo*, the source of which has to be sought in their political will alone. As the objective of the “new approaches” is the transformation of the global refugee regime, the suspension of normalcy is unlimited in time. Indeed, the goal is to eradicate normalcy, implying that the state of exception becomes a permanent one.¹³⁶ “The camp is thus the structure in which the state of exception – the possibility of deciding on which founds sovereign power – is realized *normally*.”¹³⁷

Even if the outcome of negotiations within the EU, the IGC or a “coalition of the able and the willing” will merely be a single pilot project, it will nevertheless be a sign of deep transition. It will liberate an exercise of discretionary sovereignty which we believed to be fettered in refugee law since 1951. It is a sovereignty which maintains itself in the confluence of law and violence, of exception and decision, of right and might. This sovereign will have to accept the comparison with other sovereigns of the exceptional.

To avoid this, the drafters of the “new approaches” should permit themselves a historical and analytical detour. They should study the dynamics in the debate on population politics prevailing until the 1930s in Europe. They should analyse how this debate could take a pointed turn towards the inhuman with the advent of totalitarian governments.¹³⁸ They should then revert to the blueprints of the proposed “new approaches” and institutionally insure them against any abuse by radicalised politics. The advantages of “old approaches” – onshore processing, public scrutiny and judicial control by courts – might appear in another, sharper light then.

Havens, Unworkable Solutions’. May 2003, available at <http://www.refugeecouncil.org.uk/publications/pub007.htm> (accessed on 23 May 2003), p. 3.

¹³⁶ Is it appropriate to speak of a state of the exceptional when nothing in the governmental documents indicates that their drafters are thinking in those terms? Agamben quotes an extreme, yet enlightening example from the history of the exceptional. In his study on the sovereign nomos, he compares the frequent, yet explicit usage of the state of exception during the Weimar era with its permanent and tacit establishment by the Nazi government through the 1933 decree for the protection of people and state. The decree made no mention whatsoever of any “state of exception”, yet effectively abrogated constitutional rights and freedoms for the whole duration of the Third Reich. Agamben concludes that “[t]he state of exception thus ceases to be referred to as an external and provisional state of factual danger and comes to be confused with juridical rule itself”. Agamben, *supra* note 130, p. 168.

¹³⁷ Agamben, *supra* note 130, p. 170 [emphasis in the original].

¹³⁸ An excellent overview over the emergence of “population sciences” in the early 20th century and their escalation to support systematic deportation policies and annihilation in Nazi-occupied Europe can be found with Götz Aly/Susanne Heim, *Vordenker der Vernichtung. Auschwitz und die deutschen Pläne für eine neue europäische Ordnung*, Fischer, Frankfurt am Main 1993, pp. 102-124.