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International Protection and reception in the region: The specific European understanding of the principle of international co-operation

1. Introduction

Starting in the beginning of 2003, a number of models of international protection are being discussed within the European Union (EU) which largely aim at granting refugees protection within their region of origin. These are not the first attempts to >>*extra-territorialize*<< refugee status determination procedures.[1] Already back in 1986, Denmark proposed a draft resolution in the United Nations' General Assembly suggesting the establishment of regional United Nations processing centres administrating resettlement.[2] In July 1994, the United States of America established a temporary holding centre on the US Naval Base on Guantánamo Bay, where Haitian asylum-seekers were processed for settlement in the US or return to Haiti. Furthermore, in August 2001 the Australian government refused to admit about 400 mostly Afghan asylum-seekers rescued off the Australian coast by the Norwegian freighter MV Tampa[3] and removed them outside Australian jurisdiction to Nauru and Papua New Guinea. It is feared that this incident, called the >>*Pacific solution*<<,might have set the scene for a new phase in state responses to the demands of their voluntarily assumed international legal obligations.[4] It appears that, in particular, the U.K. proposal >>*A new vision for refugees*<< of 5 February 2003 replicates the Australian model for wider use in the OECD world.

Although, the drafters of the British proposal concede that refugees seek protection predominantly within their region this does not hinder some European governments, the EU and also UNHCR to elaborate a variety of concepts of reception in the region. Considering the obvious fact that refugees usually remain in their region of origin one might question the necessity for Europe to push for a further regionalisation of international protection. The doubts are further increased by the risk of a weakening or total abolition of fundamental standards of protection for refugees and asylum-seekers spontaneously seeking asylum in the EU as a result of a realisation of the models under discussion. The underlying perception of the following reflections is that international protection is still of particular importance for the EU and that the Union has to meet the challenge to promote a generous reception policy for refugees in need of protection, who have found only temporary protection in transit countries. This article will not deal with the notion of "effective protection" which is a key

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1 This phrase rightly is used by *Amnesty International*, UK/EU/UNHCR. Unlawful and Unworkable – extraterritorial processing of asylum claims, 18 June 2003 – IOR 61/004/2003, to describe the rational of these concepts.

2 See *Gregor Noll*, Visions of the Exeptionel: Legal and Theoretical Issues raised by Transit Processing Centres and Protection Zones, Vol. 5, EJML, 2, 8 (2003).

3 *Chantal Marie-Jeanne Bostock,* The International Legal Obligations owed to the Asylum Seekers on the MV Tampa, Vol. 14, IJRL 278 (2002).

4 *Amnesty International*, ibid, 18

element of reception in the region. Rather the focus is on the question of transfer of state responsibility in the context of international protection in its specific relationship to reception in the region.

2. The European understanding of State Responsibility in International Refugee Law

The legal basis for the granting of international protection is the Convention relating to the Status of Refugees of 28 July 1951 (CSR51). The Convention is a *universal* treaty. The treaty is open for ratification to all states and obliges the member states to apply the treaty's provisions to all persons in need of protection *irrespective* of their *geographical or ethnic origin* or *nationality*. Although article 1 B of the Convention allows all states considering accession to limit the applicability of the treaty through a declaration accepting only reasons for flight which occurred in Europe. The member states do however overwhelmingly dispense with this geographical restriction. The initial limitation of grounds for flight to events occurring in Europe before 1 January 1951 has been repealed through the New York Protocol of 31 January 1967 (CSRP67). At last since the entry into force of the Protocol, there is certainty about the universal character of the CSR51. This interpretation and application is also reflected in state practice.

The Convention contains legal obligations for states and thus does not leave it open to them whether refugees and asylum-seekers will be granted protection. Hoewever, it remains a wide scope of how to respond to these obligations. The Magna Charta amongst the binding Convention obligations is the *prohibition of refoulement* (article 33). It obliges the requested state, not to return the applicant to a country where his or her life or freedom would be threatened on Convention grounds. The Convention does not however prevent contracting states from deporting the applicant to another country, if it is sufficiently guaranteed that he or she will not be persecuted on Convention grounds there and will not be deported onward to the country where he or she fears persecution. To the extent that the Convention lays down legal obligations for individual contracting states, it remains ambivalent in respect to the granting of international protection. It is lacking a treaty system to determine and legally regulate by means of a detailed multilateral procedure which contracting state is finally responsible for the granting of protection. Section D of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons does however call upon Governments to continue to receive refugees in their territories and act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.

The agreements which have been developed within the framework of the EU since 1990 do contain rudimentary provisions for such a system. They do however manifest an *inclusive* character as they tend to exclude non-European refugees. The initially agreed multilateral agreements between the member states of the EU oblige the states to remove non-European asylum seekers not to a state which is primarily responsible but to a third country outside the EU. This specific system of burden sharing as stipulated in the Convention Implementing the Schengen Agreement (CISA) and which was subsequently replaced by the Dublin Convention (DC) is hence only to be applied where the applicant cannot be removed to a state which has not signed the agreement. The aim was thus to remove asylum-seekers as far as

possible to a non-European third country (cf. article 29 (2) (ii) CISA, article 3 para. 5 DC)[5]. This practice was based on the London resolution "*on a harmonized approach to questions concerning host third countries"* of the ministers in charge of immigration of the EU of 30 November 1992, which developed a specific model of "safe third countries" for the application of article 3 para. 5 DC and which in par. 1 lit. c) expressly stipulated that "*if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country."* This inclusive scheme has once again been reaffirmed by the recent EU Directive No. 434/2003 of 18 February 2003 which replaces the DC (cf. article 3 par. 3). The EU pursues herewith a systematic policy – at first by means of treaty and now by a community law instrument - to place the refugee burden on countries outside Europe, in contrast to their public proclamation of wanting to reduce the number of "*refugees in orbit*" as far as possible. Only those asylum-seekers and refugees, who as a result of evidential problems, technical difficulties or a lack of security in the target country cannot be pushed away, benefit from a systematic and co-ordinated procedure of burden-sharing exclusively related to member states of the EU.

Since the beginning of the 1970s, there has been an obvious trend in Western, i.e. European-Atlantic state practice to avoid the granting of asylum through the referral of asylum-seekers to third countries. Since then, the countries from which refugees seek protection in Europe have significantly changed. Until the beginning of the 1970s, asylum applications in Western countries were predominantly lodged by applicants stemming from countries of the former Eastern bloc. Since the mid-70s, however, most asylum seekers originated from non-European countries as well as Turkey. Conflicts in the Balkans in the 1990s led to a predominance of applicants from Europe seeking asylum in European countries during this period. In response to the change in the geographical structure of asylum-seekers in the 70s, Western countries started to apply a model of *safe third country* according to which it was attempted, foremost within the national framework and pursuant to highly contradictory and differently devised patterns, to remove asylum-applicants, where possible, to non-European transit countries and countries of first asylum. An assessment of the evolution of state practice demonstrates, irrespective of the universal character of the Refugee Convention that European states have always pursued the concept of the regionalisation of international protection. Until the beginning of the 1970s, the predominant geographical European structure of asylum-seekers meant that international protection in Europe was related to European refugees. Safe third country concepts were applied to asylum-seekers who were seeking protection in Europe since the 1970s as a result of decolonisation and the creation of new political systems in their countries of origin. The legally binding obligations of the CSR51 could not prevent this specific form of regionalisation of international protection. It always was and continues to be impossible to create a systematic and co-ordinated procedure of burden-sharing and international co-operation between European and non-European countries solely on the basis of individual state obligations.

It is against this legal and historical background, that the U.K. proposal and the following responses of UNHCR and the EU must be scrutinized. They pursue the concept of the regionalisation of international protection in a particularly rigid manner.

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[5] *Agnez Hurwitz,* "The 1990 Dublin Convention: A Comprehensive Assessment", Vol. 11, IJRL 646, 649 (1990); *Reinhard Marx*, "Adjusting the Dublin Convention: New Approaches to Member State responsibility for Asylum Applications", Vol. 3, EJML 7, 10 (2001).

The British Government expressly relies on the High Commissioner's creation "*Convention Plus*". This term is said to pursue the better protection in the region of origin of refugees and to prevent secondary movements of refugees. The British Government canvasses support for its proposal on the European and international level. The governments of Denmark, the Netherlands, Ireland and Austria support its endeavours. At its meeting in Thessaloniki on 19 and 20 June 2003 the European Council took note of the Commission's Communication on more accessible, equitable and managed asylum systems which presented a revised model of the U.K. proposal as well as UNHCR's response to it and a proposal of the Commission itself and invited it "*to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine ways and means to enhance the protection capacity of regions of orgin"* with a view to presenting to the Council, before June 2004 a comprehensive report suggesting measures to be taken, including legal implications.

No one will question the necessity to explore ways to ensure more orderly and managed entry of asylum-seekers in the EU. It is, hoewever, evident that the political realisation of the British proposal and the responsive models may render the CSR51 virtually irrelevant in Europe. This was already indicated by the fact that the original British proposal intended to deduce the level of protection from the ECHR, not from the CSR51, whereby the Government evidently failed to mention that no humanitarian standards could be deduced from the ECHR and that the Convention should have no applicability outside the territory of the contracting states of the Council of Europe. In the following the legal implications of the specific European understanding of enhancing the principle of international co-operation will be scrutinized.

3. Extent and scope of individual treaty obligations

3.1. Protection from refoulement pursuant to article 33 of the Convention Relating to the Status of Refugees

3.1.1. Procedural aspects of the non-refoulement principle

The cornerstone of the treaty obligations of each Contracting state of the CSR51 is the protection of refugees from refoulement as contained in article 33. Pursuant to this article, no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to a country where his or her life or freedom would be threatened on Convention grounds. This includes that he or she may not be expelled or returned to a country, from where there is a risk that he or she will be deported onwards to the country in which he or she is persecuted (*prohibition of chain refoulement*). This obligation does not only bind the contracting states but all states pursuant to the customary law character of the refoulement-prohibition. The state from which the asylum-seeker requests protection hence is not obliged to accept him, however it is generally obliged to carry out a refugee status determination procedure and – in case of recognition of refugee status – to grant him the rights contained in articles 2 to 33 CSR51. The referral to third state is admissible only in exceptional circumstances. Prior to that, the state from which protection has been requested has to examine whether the refugee would be sufficiently safe from onward deportation. For the duration of this examination, there exists a right to remain conditional upon the

procedure. The asylum-seeker is also to be granted an effective remedy against the decisions of the contracting state (cf. also article 13 ECHR).

The *procedural requirements* deriving from the non-refoulement principle which has gained importance only during the 1970s bridges the gap between the individual interests of the asylum-seekers and the immigration concerns of the contracting states. Although it is true that the Convention does not grant a *right to asylum*, it does contain a right to protection from deportation, expulsion and extradition to the persecuting state. This right obliges states to devise procedures, in which the interests of the asylum seeker in admission to the country as well as the interests of the state (from which protection has been sought) is reflected in a gradual examination. The corresponding international standards which have been developed since the second half of the 1970s are meant to ensure that the prohibition of refoulement is being observed in an effective manner in state practice. Procedural mechanisms aim at reducing possible infringements of the non-refoulement principle in state practice to a minimum.[6]

Generally, the conclusions of the Executive Committee of UNHCR's Programme relating to the establishment and development of refugee status determination procedures since the end of the 1970s presuppose that it is generally the states from which protection is sought which are to examine the refugee status.[7] The Executive Committee is a body constituted of Government representatives, which supervises the work of the office and which takes fundamental decisions on the institution and development of international protection. Contrary to international human rights treaties developed after 1966, the application of the provisions of the Convention are not supervised by an independent monitoring mechanism. Article 35 CSR 51 solely obliges States to co-operate with the Office of UNHCR. Conclusions of the Executive Committee hence are not binding upon states and do not possess the same legal character as, for instance, General Assembly resolutions. Irrespective of this, they have an interpretative function in relation to the application of the Convention. They reflect the jointly developed expertise on refugee law issues of the Governments constituting the Executive Committee. They hence develop international standards and guide state practice. This is furthermore underlined by the fact that decisions of the Executive Committee are always taken unanimously.[8]

The principle developed in 1977, that the states from which protection is requested are generally obliged to examine refugee status, is further followed by the General Conclusions on international protection passed since 1993. General Conclusion No. 71 (XLIV) of 1993 and No. 74 (XLV) of 1994 which highlight the importance of access to a refugee status determination procedure. General Conclusion No. 74 (XLV) furthermore stresses the particular importance of the fundamental principle of "ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection are identified and granted such protection". General Conclusion No. 82 (XLVIII) of 1997 reiterates

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6 *UNHCR,* Note on International Protection, A/AC.96/694, No.28 (1987).

7 Cf. Especially Conclusion No.8 (XXVIII) on the "Determination of refugee status" (1977) and Conclusion No.30 (XXXIV) on the "Problem of manifestly unfounded or abusive application for refugee status or asylum" (1983).

8 *Jerzy Szucki* "The Conclusions on the International Protection of refugees adopted by the Executive Committee of the UNHCR Programme", Vol. 1, IJRL 285, 308 (1989).

this principle. In General Conclusion No. 85 (XLIX) of 1998, the Executive Committee calls upon states not to reject any refugees "at frontiers without access to fair and effective procedures for determining their status and protection needs".

The refusal of the examination of refugee status in order to affect a referral to a third country is thus an *exception* rather than the rule. This is again supported by General Conclusion No. 87 (L) of 1999 which reiterates that "the institution of asylum is of crucial importance to the international protection of refugees". Subsequently, it reaffirms "the importance of ensuring access to asylum procedures". Finally, the Executive Committee refers in this conclusion to its Conclusions No. 15 (XXX) and No. 58 (XL) and *affirms*, in this regard, that "notions such as 'safe country of origin', 'internal flight alternative' and 'safe third country', should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*".

The theory which is still partially propounded that the Convention grants no right to asylum, but only rights after the granting of refugee status does not adequately reflect this development of international refugee law. The evolution in international standards demonstrates that the inflexible mechanistic application of this theory is incompatible with the modern understanding of refugee law. Furthermore, the state from which international protection has been sought is under a primary obligation to examine the refugee status of the applicant and can dispense with this examination only in exceptional circumstances. In order to do so, the state has to invoke special grounds. Such grounds exist where, inter alia, the applicant has already received protection in a third country or possesses special links which guarantee that he or she will receive protection after his or her return there. If he or she cannot indicate such grounds, then the state from which protection has been sought has to examine the refugee status and, in case of a positive examination, accept the refugee for lack of referral possibilities to another state. Conceptions for the regionalisation of international protection, which aim to deny applicants who are spontaneously seeking asylum in the EU these procedural rights are thus hardly compatible with article 33 CSR51.

3.1.2. Compatibilty of third country concepts with international refugee law

The starting point of international refugee law for state practice is the differentiation between the concept of the "*first country of asylum*" on the one hand, and the concept of the "*safe third country*" on the other hand. This distinction is central to guaranteeing international protection. Someone who has already received protection in a third country ("first country of asylum") and can still invoke this protection, is not in need of international protection. A state from which protection has been sought is not obliged to examine the refugee status again, but restricts its examination to the issue of protection already granted by the third country as well as its continued willingness to grant admission and, subsequently, protection. Consequently, Conclusion No. 58 (XI) of the Executive Committee of the Programme of UNHCR restricts the admissible referral of refugees to a third country to those asylum-seekers who have already found protection in a third country.[9]

[9] *R. Fernhout/H. Meiyers*, A New Immigration Law For Europe?, Standing Committee of experts in international immigration, refugee and criminal law (ed.), 1993, p.18.

The understanding by means of which legal principles the concept of the safe third country is to be interpreted and applied is controversial. Unanimity exists regarding the requisite preconditions to that extent that *close links of the asylum seeker with the third country* can be taken into account. In as far as the importance of the *possibility* of the asylum seeker *that he could have requested* access to a refugee status determination or an adequate procedure during transit through the third country is in question, there exists dissent between the universal interpretation of the 1951 Refugee Convention and the European understanding. Conclusion No. 15 (XXX) of 1979 states that regard should be had to the fundamental principle that "*asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, he may if it appears fair and reasonable be called upon first to request asylum from that state*". The Executive Committee has again referred to the unchanged applicability of this conclusion in its General Conclusion on international protection (No. 87 (L) – 1999). The Lisbon Expert Roundtable, constituted of Government representatives and non-governmental organisations and experts, which had been organised by the UNHCR, started from this conclusion and stated expressly that international law did not oblige refugees to seek protection at the first effective opportunity.[10]

This understanding is based on the general conviction that it is only under these conditions that there exist sufficient guarantees, that the third country will accept the asylum-seeker and not return him to the alleged country of persecution. The application of article 33 CSR51 thus presupposes that the *subjective* assessment of the country selected by the refugee for admission is to be taken into account to a certain extent. Close personal ties with a third country, previously granted protection or a pending application for asylum or equivalent protection are indicators from which the respective subjective assessment could be deduced, and which could justify the presupposition of safety from persecution in this third country and, where applicable, the consideration of a removal to it. This interpretation is further strengthened by the existing international standard. Pursuant to Conclusion No. 15 (XXX), as mentioned above, "the intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account". The jurisprudence of the Federal Republic of Germany also supports this international standard, according to which the hopeless situation of a refugee created by persecution and flight is only annulled in the case where the flight has already been terminated in another state before the planned entry into German territory.[11] Where an applicant reaches federal territory "in his stage of flight", then the principle of subsidiarity does not apply.[12] Although this jurisprudence can no longer be used with regard to third countries which are generally considered to be "safe" pursuant to article 16 (a) (2) of the Basic Law, it does continue to apply to the question of the admissibility of the removal of asylum-seekers to third countries outside Europe which are not on the list of "safe counries".

The London resolution of the EU ministers in charge of immigration of 30 November 1992 determined, on the other hand, that the third host country rule was to be applied

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[10] No. 9 of the Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers, Lisbon Expert Roundtable, 9 and 10 December 2002.

[11] Federal Administrative Court, Vol. 79, Collection of Decisions, 347, 349 (1988); Federal Administrative Court, Vol. 84, Collection of Decisions, 115, 116 (1989).

[12] Federal Administrative Court, Vol. 78, Collection of Decisions, 332, 345 (1987).

where an asylum-seeker has already been granted protection in a third country or where he *has had an opportunity,* at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection. Thus a concept have been developed which did not accord the applicant a pause to consider further flight movements during his stay in the third country. Only in the case where he did not have the possibility of receiving protection, is the application of the safe third country rule dispensed with.[13] It is on this principle that article 28 par. 1 lit a) of the draft directive on minimum standards on procedures in EU's member states for granting refugee status is based. [14] Pursuant to the draft directive, and contrary to general understanding, already the transit through a third country in which the possibility of demanding protection existed, justifies the presupposition of sufficient protection from persecution and from the danger of onward deportation. The mere transit through a country is however not a sufficient guarantee for the development of actual links which would support the expectation that the third country would provide sufficient protection against onward deportation to the state of origin.[15]

Pursuant to the international standard, the understanding guiding the application of article 33 CSR51 holds that the objective safety in the third country cannot be evaluated in complete disregard for the subjective intentions of the applicant. Alone the fact that the asylum-seeker could have applied for protection there, does not indicate willingness on behalf of the autorities of the third country to readmit him or her. Generally, such willingness would presuppose the prior lodging of a claim by the refugee. This would enable the application of the principle of non-refoulement contained in article 33 CSR51 in light of recognised international principles of burden-sharing and international solidarity. These principles are no empty phrases but guide the application of legally binding state obligations, as illustrated above. Article 33 is hence implemented by *three legal principles*: the removal to a third country *firstly* presupposes that there is no threat of persecution and that there is no risk of onward deportation to the persecuting state. *Secondly*, if the refugee has *concluded* his flight in this state on his own initiative or due to personal links, then he can be expected to return provided he or she is objectively safe there. *Thirdly,* if no such links have been illustrated, then it is contrary to the principle of international solidarity to burden the third state with the responsibility of a refugee, who is not connected with the country either through his actions or personal ties. This effective mechanism of the non-refoulement principle is an expression of a modern understanding, anchored in human rights law, of international obligations. Especially human rights and refugee law treaties serve the interest of the individual and not independent from that only that of states. To the contrary, it is the case that enforcement mechanisms of immigration policy have to respect individual interests protected by international treaties. The state-centred view of the European Union hence contradicts modern understanding of human rights law and international refugee law. The concept of the regionalisation of international protection has to respect these fundamental principles: insofar as refugees are to be removed forcibly to third countries where they have not developed any links, either through asylum-applications or through personal ties, such a practice is not compatible with international standards. This

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13 *R. Fernhout/H. Meiyers*, A New Immigration Law For Europe?, Standing Committee of experts in international immigration, refugee and criminal law (ed.), 1993, p.17.

14 Cf. Version of 28 May 2003, No. 9947/03, p.36.

15 *Reinhard Marx,* "Non-refoulement, access to procedures, and responsibility for determining refugee claims", Vol. 7, IJRL383, 397 (1995), with references to state practice.

applies in particular where applicants are to be referred to camps in third countries, which they have never transited through.

3.2. Rejection at the border and interception measures.

One of the most pressing problems since the 1980s is the systematically devised policy of flight prevention through internationally agreed measures such as the introduction of visa requirements for the main refugee producing countries, the punishment and monitoring of transport companies, the observation of flight routes and the strict monitoring of border crossings. Although it is the legitimate right of states to freely decide about the admission to their terrirtories and to enforce this fundamental decision through manifold domestic measures, also in agreement with other Governments, they must not act contrary to their international obligations. Measures which aim at or result in the obstruction or suppression of the ability of persons in need of international protection to flee from their countries or regions of origin and which prevent their flight to safe receiving countries, are incompatible with state obligations under the Refugee Convention. This is endorsed by the Executive Committee of UNHCR's Programme which in its 2002 Note on International Protection raised its concern that migration control measures like reinforced visa regimes, imposed carrier sanctions, pre-boarding and pre-disembarkation document checks, other interception measures, e.g. using infrared cameras to detect clandestine passengers at borders and ports, and increased resort to first asylum country and safe third country concepts hamper protection efforts.[16] In literature it is criticized that the continuation of current deterrence policies will neither address the concerns of destination countries nor ensure legal access to Europe for those in need of protection. Rather, the lack of legal access will, in turn, continue to increase the numbers of asylum-seekers and migrants alike turning to smuggling and traffickung networks.[17]

On the other hand refugee movements are shaped by *mixed migratory flows* and especially by the phenomenon of *secondary movements*. According to the understanding of European states as well as the EU Commission, these question the capacity and administrative competence of Western countries to distinguish without delay and pursuant to clear criteria and evidential requests between persons in need of international protection and those who are not, and to return the latter without delay to their countries of origin or receiving countries. This phenomenon is said to impact negatively on the societal consensus necessary for the functioning of the system of international protection and hence to threaten the integrity of the asylum system as a whole.[18]

Such descriptions of the state of affairs conceal, however, that the Euro-Atlantic states, by their genuine policy of regionalisation of international protection since the beginning of the 1970s as well as their policy of flight prevention have contributed to the trafficking and smuggling of persons and the dependent organised criminality having become pressing political and social problems. Due to these policies, a flight

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[16] Executive Committee of the High Commissioner's Programme, Note on International Protection, 11 Sept. 2002, A/AC.96/965, par.19.

[17] *Gil Loescher/ James Milner,* The missing link: the need for comprehensive engagement in regions of origin, Vol. 79, International affairs, 595 (2003).

[18] Communication on "Towards a more accessible, equitable and managed international protection", on 3 June 2003 – COM(2003)315, p. 8.

to Europe without reliance on organised forms of transport denoted as criminal has become virtually impossible. On the other hand, adequate alternative avenues of a regulated and co-ordinated entry for persons in need of protection are lacking. Every measure which generally targets all fleeing persons without distinction between those in need of international protection and those who are not, in order to prevent flight and migration is incompatible with international obligations. This policy has proved the most dire and grave legal deficit of Euro-Atlantic policies of the last twenty years. In order to reduce the spontaneous *"secondary movements of refugees",* states should develop generous resettlement programmes. The phenomenon of "*mixed migratory flows*" is being strongly exaggerated. On the other hand, research is lacking about this phenomenon which has always impacted on refugee movements. Since 1951, effective procedures have been developed by which a distinction between those in need of international protection and those who are not could be made. However, during the last twenty years the political will to make this differentiation benevolently to preserve and improve the system of international protection has largely disappeared.

The international campaign against the *trafficking in persons* aims at the protection of human beings, who have become object of criminal organisations specialised in migration against their will through violence or the threat of violence. Instruments which have ensued from the Vienna process target this phenomenon. The *smuggling of persons* is however of benefit to persons who voluntarily rely on organised help in order to leave their countries, for whatever reasons. Neither in the one case, nor in the other must the victims of the exploitation of criminal organisations be punished. In refugee law, it is further the case that asylum-seekers can invoke article 31 CSR51. This norm ensures access to a refugee status determination procedure independent from the manner of entering state territory.

No one wants the adverse and ugly criminal implications of the trafficking in persons, which are to be condemned and combated. Respect for human rights dictates that the trafficking in persons is to be suppressed by all acceptable means in terms of human rights. For this reason, the ratification of instruments against the trafficking in persons is hence a necessary demand in terms of human rights. In the application of these instruments, persons in need of international protection have to be identified and protected by respective administrative law mechanisms however. At the same time, persons who assist refugees on humanitarian grounds must not be punished as a result of the application of these conventions.

Interception at sea or similar measures are incompatible with international refugee law. Although the US Supreme Court did not want to detect any legal concerns ensuing from article 33 CSR51 against such a policy of the INS administration in its Haiti decision,[19] this decision has been subject to sharp criticism in literature[20] in relation to this norm. It is incompatible with its clear content which prohibits the forced removal of refugees to the persecuting country "*in any manner whatsoever*". Although the Executive Committee of UNHCR's Programme has not expressly addressed this question in particular in its general conclusions on international protection[21], in its goal No. 2 of the "Agenda for Protection", it calls upon itself to consider a conclusion

[19] US Supreme Court, *Sale v Haitian Centers Council Inc.,* 113 S.Ct.2549 (1993).

[20] *Guy S. Goodwin-Gill*, "The Haitian *refoulement* case", Vol. 1, IJRL 103 (1994); see prior *Arthur Helton* "What is refugee protection?", IJRL*,* Special Issue, 120, 122 ff (1990).

[21] Conclusions No. 81 (XLVIII) – 1997 -, No. 85 (XLIX) – 1998 – and No. 87 (L) – 1999.

to seek to reach common understandings on responsibilities in the context of rescue at sea of asylum-seekers and refugees, including with regard to rescue itself, the disembarkation of those rescued and the solutions to be pursued.

Concluding it is to be stated that article 33 CSR51 does not only prohibit *refoulement*. Rather the international discourse has been influenced by an interpretation according to which it is prohibited to prevent the onward flight of asylum seekers and refugees through targeted measures. Article 33 prohibits the enforced removal of asylum-seekers to their country of origin "in any manner whatsoever". Contracting states hence have to ensure that measures in the fight against illegal immigration have to strictly distinguish between those in need of international protection and those who are not, and have to protect the first group from forced removal to their country of origin by providing for procedures in administrative law.

4. Extent and scope of collective state obligations

4.1. Relevant international principles of interpretation for the application of the Refugee Convention

4.1.1. The principle of international solidarity

Although the 1951 Refugee Convention was passed before the entry into force of the Vienna Convention on the Law of Treaties, according to general understanding, articles 31 to 33 of the Vienna Convention codified previously crystallised customary international law.[22] For this reason, international treaty law which entered into force before the Vienna Convention, including the CSR51, is to be interpreted pursuant to the rules of interpretation of the Vienna Convention.[23] According to article 31(1) of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. For the purpose of the interpretation of a treaty, the context shall comprise, in addition to the text, including its preamble and annexes, also subsequent agreements and practices, as well as any relevant rules of international law applicable in the relations between the parties (articles 31(2) and (3) of the Vienna Convention).

In the preamble of the CSR51, the contracting states affirmed that refugees *should* be assured "*the widest possible exercise of ... fundamental rights and freedoms*". As the grant of asylum may place unduly heavy burdens on certain countries, it is stated in the preamble that a satisfactory solution to the refugee problem cannot be achieved without *international co-operation.* It follows that the contracting states pursuant to section D of the Final Act of the Conference of Plenipotentiaries on the CSR51 should continue to receive refugees in their territories and act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement. *Object* and *purpose* of the Convention is thus to grant refugees *the widest possible exercise of fundamental rights and freedoms.* This

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[22] *Wolfram Karl,* Vertragsänderung und Vertragsbedingungen durch die spätere Praxis im Lichte der Wiener Vertragsrechtskonvention (WVK), Vol. 84, Beiträge zum ausländischen öffentlichen Recht, 353, 361 (1983); *Wolfram Graf Vitzthum*, Begriff, Geschichte und Quellen des Völkerrechts, in: Völkerrecht, *Wolfram Graf Vitzthum* (ed.), 1997, p. 1, 74.

[23] *Johannes Masing,* Methodische Grundlagen für die Auslegung der Genfer Flüchtlingskonvention, in: Offene Staatlichkeit, Festschrift für Ernst-Wolfgang Böckenförde, *Rolf Grawert* (editor), 1996, p.51, 61.

is the purpose of the rights contained in articles 2 to 33 CSR51. A systematically devised or enforced active policy of a contracting state or even of a group of states such as the EU, which results in refugees being generally denied these rights is contrary to the purpose of the Convention. A legal interpretation used in certain countries based on it is in violation of the general rules of interpretation of the Vienna Convention and hence incompatible with international law.

Although "transit processing areas" in the region of origin are to be instituted on the basis of agreed treaties, those may not be concluded in violation of basic principles of international law. Purpose of the Convention is – pursuant to its preamble and the Final Act, which are to be taken into account in its interpretation pursuant to article 31(2) of the Vienna Convention – that the granting of asylum is to undertaken in a *spirit of international co-operation*. The contracting states shall continue to grant asylum to refugees spontaneously seeking protection, in reliance on the respect for this basic principle by the other contracting states. This system can however only work, if this trust is not frustrated and other states subsequently provide refugees received with the possibility of resettlement. Contracting states which are unduly burdened by the initial reception of asylum seekers, should be relieved through the possibility of resettlement programmes by other states.

4.1.2. Scope and object of the principle of international solidarity

The principle of international co-operation dating back to the Refugee Convention has been affirmed in numerous conclusion of the Executive Committee of UNHCR's Programme, in which especially the reach and the direction of the principle from the countries of first asylum to other countries has been stressed: according to Conclusion No. 22 (XXXII) on the "*Protection of asylum-seekers in situations of large-scale influx*" (1981), states which are unduly burdened by the mass influx of refugees should be relieved in the spirit of international co-operation. For this reason, States shall, "*within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, states which have admitted asylum seekers in large-scale influx situations"*. General Conclusion No. 74 (XLV) of 1994 reaffirms the "importance of international solidarity and burden-sharing in reinforcing the protection of refugees" and calls upon states "to take an active part, … in efforts to assist countries, in particular those with limited resources, that receive and care for large numbers of refugees and asylum-seekers". This close connection between international protection and the principle of international solidarity is also reflected in General Conclusion No. 77 (XLVI) of 1995, in which states are called upon to "manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways which reinforce their capacity to maintain generous asylum policies, through co-operation in conjunction with UNHCR to support the maintenance of agreed standards in respect of the rights of refugees". In Conclusion No. 82 (XLVIII) on "Safeguarding Asylum" (1997), the Executive Committee again called upon all States "to respect and comply with the precepts on which the institution of asylum is based, and to implement their obligations in a spirit of true humanitarianism, international solidarity and burden-sharing."

The Conclusions of the Executive Committee clearly stress the *principle of international solidarity and burden-sharing* which is inherent in the Convention and central to its function. Its respect is crucial for ensuring international protection. The

Conclusions make crystal clear that these principles are addressed to the less affected OECD countries which are located at the periphery of refugee movements. Conclusion No. 85 (XLIX) on "International Protection" hence stresses the "*utmost significance to refugee protection of the institution of asylum*, which serves the *purpose* of "providing a structured framework for protection and assistance to persons in need of international protection while ensuring that appropriate solutions can be achieved". The principle of international solidarity thus requires the mobilisation of resources to assist countries receiving refugees, particularly "developing countries who host *the large majority of the world's refugees* and bear a heavy burden in this regard". According to the Conclusion, access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles are an obligation for all members of the international community. Already Conclusion No. 79 (XLVII) of 1996 stressed that "in particular developing countries with limited resources and those which, due to their location, host large numbers of refugees and asylum-seekers" were dependent on the need to uphold the principle of international solidarity.[24] Conclusion 87 (L) of 1999 also notes the particularly heavy burden carried by developing countries. Conclusion No. 89 (LI) of 2000 affirms that, in particular, developing countries, countries in transition and countries with limited resources which host large numbers of refugees and asylum-seekers, carry a "heavy burden" arising from the refugee problem. For this reason, the Executive Committee *reiterated* in this regard the need for "strong commitment to international solidarity, burden-sharing and international co-operation to share responsibilities".

The Convention contains no international enforcement mechanism, which could put the principle of solidarity - which is crucial to its functioning - into practice. It can hence only be enforced through political means. This does not mean, however, that the principle is without importance for legal practice. To the contrary, the principle of international solidarity as contained in the preamble of the Convention and in its Final Act guids practice of states in individual cases. State practice which in the application of concepts of safe third country or other tools realising regional concepts further imposes heavy burdens on countries which are already overburdened by a considerable refugee influx contrary to the clear content of this principle fails to interprete principles of international refugee law in good faith. It further restricts the sovereignty of states and prohibits that especially burdened countries are made to accept additional asylum seekers and refugees through more or less soft pressure and financial incentives by states which are not affected by the reception of refugees to the same extent.

4.2. Incompatibility of the Western concepts of regionalisation with international refugee law

The group of OECD states has failed to meet the purpose of the Refugee Convention in its application of the safe third country rule. The purpose of the principle of international co-operation is the relief of receiving states burdened by the first reception of refugees through an agreement to receive refugees for resettlement. Contrary to this, the Western states, from the very beginning, have *reversed the direction* of the principle of international solidarity by application of their safe third

[24] See also *Guy Martin,* "International Solidarity and Co-operation in Assistance to African Refugees", Vol.7, IJRL 201, 254 (1995).

country concepts and have increased the burden on already disproportionately affected states by the forced removal of asylum seekers, who had only transited through these countries. The Western group of states has laid a claim to the interpretative monopoly of international refugee law in their political discourse and state practice in its specific interpretation of the principle of solidarity. Contrary to the purpose of the Convention to relieve the burden borne by these countries, Western states have turned the object of the principle of international co-operation on its head.

The policy of regionalisation promoted during the last years burdens countries to a great extent, which are already confronted with considerable numbers of refugees. This is illustrated, inter alia, by the political preparations of the former EU's "*High Level Working Group on Migration and Asylum"* which was instituted in 1998. It had the aim of reducing the number of asylum seekers in the EU. For this purpose, it developed a number of actions plans for the following countries: *Afghanistan/Pakistan, Albania and its neighbouring countries, Iraq, Morocco, Somalia and Sri Lanka.* Co-operation was to be increased with these countries with the aim of influencing refugee movements. The Working Group failed as a result of internal problems, as it could not reconcile the interests within the spheres of justice and home affairs with those of EU foreign policy. Countries named as possible receiving countries for "Regional Protection Areas" in the original British proposal were *Turkey, Iran, Northern Somalia, Morocco, Rumania, Croatia and the Ukraine.*

4.3. Common responsibilities of the Community of all Contracting States

In addition to obligations arising in particular individual cases for contracting states, an international treaty requires them in its entirety to promote the treaty in general as much as possible. The basic principles of interpretation contained in articles 31 to 33 of the Vienna Convention on the Law of Treaties describe the scope and extent of state obligations which are to be observed by the contracting state in an individual case. The obligations on the entirety of contracting states concern especially human rights and refugee law treaties. Thus, the ECHR has stressed in its long standing jurisprudence, that – in the interpretation of the ECHR – its special character as a *treaty for the collective enforcement of human rights and fundamental freedoms* would have to be taken into account. The object and purpose of the Convention as an *instrument for the protection of the individual* demanded for this reason that its provisions, as *protective provisions*, were *practical and effective,* and effectively interpreted, understood and applied.[25] As such, the Court has always denoted the Convention as a "*living instrument*" and has hence not interpreted its provisions according to the understanding of contracting parties prevalent when the Convention was adopted, but in the light of present day conditions and changes in judicial interpretations.[26]

Although the ECHR imposes obligations on a unified and relative homogeneous group of states which are characterised by common historical, legal and constitutional traditions, and was entered into force with the goal of achieving a common public order of free European democracies, it is stressed in literature that the dynamic interpretative method applies to human rights treaties in general.[27] This interpretative method goes beyond the basic principles of interpretation contained

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[25] ECHR, Decision of 7 July 1989, No. 1/1989/161/217 – *Soering*, since then constant jurisprudence.

[26] ECHR, Decision of 25 April 1978, *Tyrer*, since then constant jurisprudence.

[27] *Alfred Verdross/Bruno Simma,* Universelles Völkerrecht, 3. edition, 1984, para.782 (p.498).

within the Vienna Convention on the Law of Treaties and refers back to the *evolving common tradition of the contracting parties*, which finds expression in the application of the treaty, especially as influenced by the monitoring bodies. This also gives rise to *a common obligation of the contracting states for the protection and development of the treaty*. Following from the same starting point, the Executive Committee of UNHCR's Programme assumes in its Conclusion No. 85 (XLIX) on "International Protection" for the interpretation and application of the provisions of CSR51 and CSRP67 that states have to "*co-operate to promote a universal and full implementation of these instruments*". In its Conclusion No. 89 (LI) of 2000, the Executive Committee stresses expressly "that international protection is a *dynamic* and *action-oriented function*, carried out, in co-operation with states and other partners". In literature, the CSR51 is described as a "*living and evolving document*".[28] This also rules out that the contracting parties deprive a treaty or parts of a treaty of its full effect, contrary to the basic principle of the "*effet utile".* Furthermore, the application of a treaty may not give it an aim which contradicts its object and purpose.

5. Europe's responsibility towards refugees

5.1. The role-model function of Europe in human rights and refugee protection

The regionalisation concepts currently discussed within the EU require for the assessment of their legitimacy not only an empirical but also a historical evaluation. European history in the 20th century is predominantly a *history of violence* and hence also a *history of expulsion and enforced resettlement.* The numerical proportions lie between 60 and 80 million refugees and leave no doubt as to the extent of the suffering. It was a mass experience, a collective experience, as opposed to just an individual one. The Europe which has emerged from the refugee movements is a new one. The socio-demographic revolution, which has taken place in the territories of refuge, belongs to the most important and most underrated revolutions of the 20th century.[29]

The European Communities have drawn conclusions from this history of violence: after 1945, Europe has always taken a pro-active and progressive leadership role in promoting human rights law and refugee law. The ECHR became a role model for the ICCPR1966 and its Protocols, as well as for other regional human rights systems. The CSR51 was initially conceived for the solution of the European refugee problem, however from the very beginning it was devised, both in its concept, legal structure, and, through the previously passed UNHCR Statute, institutionally to be universal. As the core group within the European States, the EU hence possesses a special historical, political and legal responsibility in the field of human rights and international protection. This prohibits the development of dramatic scenarios in the light of relatively low refugee figures and the subsequent suggestion to the public that the EU is bearing the brunt of the refugee problem.

5.2. The lack of legitimacy of enforced concepts of regionalisation

Independent from the question of the historic responsibility of Europe for the protection of refugees, statistics attest to the lack of legitimacy of the regionalisation concepts pursued by the Western group of states. Even the European Commission

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[28] *Guy S. Goodwin-Gill*, "Asylum 2001- A Convention and a Purpose", Vol. 13 IJRL, 1, 13 (2001).

[29] *Karl Schlögel,* Tragödie der Vertreibungen, in: Lettre International Nr.60, 78, 81 f. (Issue 1/2003).

admits that developing countries have to cope with numbers of refugees which by far outnumber those seeking protection in the EU. Of 13 million refugees in 2002, only 1.9 million (15%) claimed asylum in the EU. Furthermore, 20 million internally displaced persons in the world would have to be taken into account, of which nearly half lived in Africa. On the other hand, the number of asylum applications in the EU fell by half in the last ten years and constituted less than 400.000 persons per year. In contrast, Iran and Pakistan accepted more than a million refugees each in 2001.[30] According to information from the UNHCR, 388.400 asylum seekers had been registered in the European Union in 2001. At the same time, the number of refugees in the world were set at 12 million.[31] Hence, the proportion of registered asylum seekers in the EU in 2001 constitutes 3,23% of the overall number of refugees.

Furthermore, due to the already existing factual regionalisation of the refugee problem, no legitimate need can be recognised for the introduction of specific refugee programmes which would relieve the region with the lowest numbers of refugees, i. e. the EU. Mass refugee influxes as they were developed for the solution of "large-scale influx" in non-European countries on the basis of Conclusion No. 22 (XXXII) of 1981, cannot be detected. Should they occur, however, as *inter alia* during the war in Bosnia in the 1990s, the EU has already developed a relevant instrument by the Council directive 01/55/EC of 20 July 2001 on temporary protection.

6. Regionalisation models in the current political debate

Bearing the discussed content and reach of the obligations of international refugee law in mind in the following the currently debated models of reception in the region will be scrutinized. The revised version of the orginal British proposal as contained in the letter of the UK Prime Minister of 10 March 2003 to the Greek Prime Minister, UNHCR's EU Prong and the Commission's position are the main features so far.

6.1. The British proposal

The British Government's stated aim is "better management of the asylum process globally" and to further this objective it puts forward two approaches, the creation of *"Transit Processing Centers"*(TPCs) on transit routes to Europe but outside Europe and regional management of migration flows through the creation of "*Regional Protection Areas*" (RPAs). Under the TPC scheme asylum-seekers arriving in the European Union would be transferred to a TPC outside the EU where they would effectively be detained while their claims were assessed. These would include administrative but not juducial review of the initial decision. Recognized refugees would be resettled inside the EU and rejected asylum-seekers returned to their country of origin. In the shorter term the British government has indicated that the UK is working with a number of member states, notably Austria, Denmark, Ireland and the Netherlands, to develop pilot schemes. Additionally, RPAs are viewed as a long-term agenda. Its purpose is to host failed asylum-seekers who cannot be immediately returned to their country of origin. Temporary support would be provided until condition allowed for voluntary returns.

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[30] Commission of the European Comminities, Communication from the Commission to the Council and the European Parliament. Integrating Migration Issues in the European Union's Relations with third Countries, 2 Dec. 20002 – COM(2002) 703 final, p 12.

[31] UNHCR, Statistical Yearbook 2001, S. 46 ff.

6.2. UNHCR's EU Prong

The High Commissioner for Refugees, *Ruud Lubbers,* has *given* his idea of "Convention Plus" a particular form in reaction to the original British proposal. In his address to the EU ministers of justice and home affairs on 28 March 2003 in Veria in Greece, he firstly pointed out that "Convention Plus" essentially contained two key elements, namely burden-sharing and sharing of responsibility. It followed that new special agreements should be agreed on the basis of CSR51. In a concept presented as "EU Prong", the office of UNHCR proposes that all asylum-seekers of certain designated countries of origin would be transferred immediately to "closed reception centres" upon arrival at the border of a EU member state. This centres could be located initially in one or two EU member states. Previous stay or transit through the country hosting the centre is perceived to be irrelevant. Processing would be done by a consortium of national asylum officers and second instance decision-makers and should be completed within one month. The High Commissioner endorsed that asylum-seekers in need of international protection should be granted asylum in one of the EU member states on the basis of their needs, abilities, family links and other characteristics such as mastering of the language of one of the member states. Joint actions would be necessary to immediately remove those who are not in need of international protection to their countries of origin.

The office of UNHCR concedes that the detention of asylum-seekers could hardly be prevented unless there is no fear of absconding and irregular movement in a particular case. The "EU Prong" should furthermore be devised as an integral part of a "*comprehensive durable solutions strategy".* It redefines the traditional concept of international protection, which – so far – has consisted solely in the three key terms "*repatriation, local integration* and *resettlement*" and develops a "strategy of the four Rs": *repatriation, reintegration, rehabilitation* and *reconstruction*. It is said to bring together humanitarian and developmental actors in order to bridge the transitional process between emergency aid and long term development assistance. Refugee status determination procedures in countries of first asylum as well as facilitated return and repatriation agreements with countries of first asylum in the region of origin are defined as an integral part of this strategy. Admissibility procedures form part of the return component and are to be introduced in the countries from which protection is being sought as part of the strategy for comprehensive and durable solutions.[32]

6.3. The EU Commission's Position

On 3 June 2003 the EU Commission adopted the Communication "*Towards a more accessible, equitable and managed asylum systems"* (COM(2003)315) that confirmed the UK diagnosis of the current failures of the asylum system, but rejected its most radical elements, preferring instead to explore further UNHCR's proposal. Evidently, the Communication is a more cautious document than both the UK and UNHCR proposals[33] and, particularly, raises questions about the legality of transfers of persons who have not transited through or otherwise stayed in relevant zones or countries, recognizing that this represents a significant departure from the safe third country concept. However, in the latest version of a draft directive on asylum procedures of 28 May 2003 (9947/03) the Commission reshaped this concept. In

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[32] Pursuant to the EU statement of 28 May 2003.

[33] *Amnesty International*, footnote 1 above, p. 14.

applying the safe third country concept member states may consider now whether the claimant "has either a connection or close links with the country and has an oppurtunity to avail himself/herself of the protection of that country" (article 28 par. 1 lit a)) *or* the applicant "will be admitted or re-admitted to this country" (article 28 par. 1 lit b)). Hence, the second option allows the removal of an asylum-seeker to a third country through which he or she has neither transited or otherwise stayed. Furthermore, the proposed criteria for the designation of safe third countries in Annex II could form the basis for the realization of the UK proposal since member states are entitled to designate safe third countries outside Europe.

As already has been mentioned at its meeting in Thessaloniki on 19 and 20 June 2003 the European Council took note of the Communication and the various proposals presented by it and asks the Commission to present a comprehensive report suggesting measures to be taken before June 2004. In addition the Council allows the British government and its allies to develop the envisaged pilot projects, since it took note that a number of member states plan to explore ways of providing better protection for refugees in their region of origin.

6.4. Criticism of the proposals

6.4.1. A reshaped model of safe third countries

All models under discussion propose a significant departure from the traditional concept of safe third countries. Whereas pursuant to the universal approach it does not suffice if the asylum-seeker has only transited through the third country, explicitly the mere possibility that he or she could have sought protection there is one traditional key element of the EU's respective concept. However, the discussed proposals move a step further than this and contain as a cornerstone of the reshaped model of safe third countries that it will not be taken into account whether the asylum-seeker has transited through the third country. Whereas UNHCR insist on the location of processing centres within the EU the British government envisages to locate them outside Europe, and the Commission's actual draft directive on procedures support this endeavour by reshaping the relevant criteria of the safe third country rule. It is true that article 33 CSR51 contains no clear-cut obligation to abstain from forcible removal to a third country if the claimant has not transited through it. On the assumption that the third country has freely and explicitly consented to readmit the particular asylum-seeker there is no evident basis for complaint. That destination countries often utilize their superior bargaining power to extract concessions from less powerful countries contradicts however the objectives of international co-operation and burden-sharing.[34] International refugee law contains a strong commitment to international solidarity, burden-sharing and international co-operation to share responsibilities and hence stand against a practice by which already overburdened countries of first asylum are required to admit further refugees from European destination countries.

In addition to this EU member states may not forcibly remove an asylum-claimant to a processing centre without a preceding thorough examination of the risks to be feared in the state in which the centre is located. The ECHR in *T.I.* rightly has held that member states cannot rely automatically in that context on arrangements to

[34] *Stephen H. Legomsky,* Secondary Refugee Movements and the Return of Asylum Seekres to Third Countries: The Meaning of Effective Protection, February 2003, p. 82, available at http://www.unhcr.ch/protect.

transfer responsibility to third states. It would be incompatible with the purpose and object of the ECHR if the member states were thereby absolved from their responsibilities under the ECHR in relation to the field of activity covered by such attribution.[35] The consequence of this jurisprudence is that EU member states must see to it that prior to the transfer to the third state an assessment of the individual situation upon arrival in that country are to be conducted which satisfies the requirements of articles 3 and 13 ECHR. Given the "irreversible nature of harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which it attaches to article 3 ECHR", the ECHR in *Jabari* held that the notion of an effective remedy under article 13 ECHR requires "independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3 ECHR and to the possibility of suspending the implementation of the measures impugned."[36] It is in particular inconsistent with the right to an effective remedy for expulsion measures to be executed before domestic authorities had examined their compability with the ECHR.

6.4.2. Inherent procedural insufficiencies of processing centres

UNHCR's EU Prong envisages that a refugee status determination procedure in the processeing centre should be concluded within one month. A procedure within such a short duration can however hardly be carried out without incurring considerable legal short-comings. So far, UNHCR has stressed in relation to accelerated procedures that these could introduce appeal procedures which are "more simplified" (Conclusion No. 30 (XXXIV)), however that they would have to provide for satisfactory procedural guarantees in the light of the grave consequences of an erroneous determination.[37] It is even propounded that refugee law requires the establishment of judicial appeal procedures pursuant to article 14 ICCPR.[38] This is accounted for in the draft of an EU directive on procedural minimum standards. The tolerance or even encouragement of different procedural standards within the European Union is inimical to the traditional policy of the UNHCR.

UNHCR's confidence that asylum claims will be examined in a thorough and unprejudiced manner by "national teams" in remote "closed reception centres" presumedly located at the Eastern rim of the accession territory of the EU, to which public and independent networks of legal representatives or advisors do not have or only have difficult access is unfounded judging from the experience with decision-making practices in EU member states in the last decades. Particularly, this cannot be expected because those concerned have been previously stigmatised as "economic migrants", which induces a psychologically negative climate in respect of the refugee status determination procedure. UNHCR ensures that all persons in need of protection are not treated according to particular political interests of the receiving countries, but according to uniform substantive and administrative criteria. It is especially worrisome in this context that homage is being paid to the woolly term of "economic migrant" which lends itself perfectly to abuse by states.

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35 ECHR, Decision of 7 March 2000, No. 43844/88, *T.I. vs. UK*.

36 ECHR, Decision of 11 July 2000, No. 40035/98, *Jabari vs. Turkey*.

37 *Ivor C. Jackson*, "Ensuring that the Exercise of the UNHCR's Traditional Functions is Maintained and Reinforced in the 21st Century", Vol. 12, IJRL 589, 595 (2000).

38 *Michael Alexander*, "Refugee Status Determination Conducted by UNHCR", Vol. 11, IJRL 253, 259 (1999).

6.4.3. Detention of asylum-seekers

The proposed ideas of detention of processed asylum-seekers can hardly be reconciled with Conclusions No. 44 (XXXVII) and 85 (XLIX), as, contrary to those conclusions, in UNHCR's EU Prong detention is devised as the rule and release as an exception. Practical experience renders the idea that determination procedures could be concluded within one month purely illusionary. As it is asylum-seekers without passports who will generally be affected, the conclusion of the refugee status determination procedure will be followed by an indefinite period of detention in the camps. According to the proposal of the UK Government, "regional protection areas" in the region of origin and "transit processing centres" with conditions akin to detention to prevent flight to the EU should be instituted. Especially countries neighbouring the new Eastern borders of the EU, such as the Ukraine, or North-African countries would be particularly suitable for the institution of such centres. According to the British proposal, no-one would be forced to live in the camps. Asylum seekers would be free to leave them. However, only those in the camps would be eligible for international assistance. Although the British proposal combined the concept of the regionalisation with military operations of the international community in the countries of origin and hence created the impression that an immediate return of the asylum-seekers to their countries of origin became possible, this is only an option for very few countries of origin. It is further to be kept in mind that the military success of an outside intervention does not yet create the conditions for a return in safety and dignity. Whoever has followed the contradictory and highly selectively influenced history of peace-making operations since 1991 cannot share the British optimism. Expectations which are not supported by empirical facts can hence not be a basis for the development of *concepts of refugee policy*. As the chance of resettlement is only to be available to few asylum seekers, for the majority of inhabitants in the camps this will lead to indefinite detention.

In Conclusion No. 44 (XXXVII) about the "Detention of Refugees and Asylum Seekers" (1986), the Executive Committee of UNHCR's Programme expresses the opinion that "*in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or to protect national security or public order*". At the same time, the conclusion stresses the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from "unjustified or unduly prolonged detention". In Conclusion No. 85 (XLIX) of 1998, the Executive Committee reaffirmed only recently the continuing and unchanged validity of Conclusion No. 44 (XXXVII), and has noted that the "*routine*" detention of asylum seekers "*on an arbitrary basis, for unduly prolonged periods*" is inconsistent with established human rights standards.[39]

[39] See also *Office of UNHCR,* UNHCR revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers, Febr. 1999; Executive Committte of UNHCR's Programme, Detention of asylum-seekers and refugees: The framework, the problem and recommended practice, 4 June 1999, EC/49/SC/CRP.13P.

Furthermore, the jurisprudence of the ECHR on accommodation during the airport procedure which may well be of relevance in relation to the closed processing centres must be taken into account. Pursuant to this jurisprudence, the retention of foreigners in international zones entails a deprivation of liberty, which cannot be equated in all aspects to that to which foreigners are subjected who are awaiting expulsion or removal to the border. Linked with satisfactory guarantees for asylum-seekers, such a measure as a means to combat illegal immigration is only allowed as long as states are observing their international obligations, especially those ensuing from the CSR51 and the ECHR. Such a detention may not be considerably prolonged, as it would run the risk of turning into arbitrary detention contrary to article 5 ECHR.[40]

As long as the camps are located in the member states of the Council of Europe, the jurisdiction of the Court is directly applicable. If they are erected outside the jurisdiction of the ECHR, it is to be borne in mind that the camps are to be established on the basis of an agreemant under involvement of the EU and that the contracting states of the ECHR carry out the deportation. Furthermore, it has to be stressed that the protection provided by article 9 ICCPR is no different to that provided by article 5 ECHR. The Human Rights Committee has held that the Belgian practice of detaining asylum-seekers for more than five months without the right to habeas corpus constituted an arbitrary measure contrary to article 9 ICCPR.[41] The accommodation in camps which restrict freedom of movement to the camps and which cannot be justified on legitimate grounds such as those enumerated in Conclusion No. 44 is thus not in conformity with international human rights law. In his context the latest version of the draft directive on procedures of the Commission of 28 May 2003 gives reason to criticism since it contains no binding restrictive regulations on member states' practice to detain asylum seekers. It just prohibit detention for the sole reason of being an asylum-seeker. Hence member states will be creatively enough to resort to other reasons.

The comment by the British government that asylum-seekers are free to leave the camp does not exclude a violation of article 5 ECHR. The freedom to leave one's own country, as contained in the fourth optional protocol to the ECHR would have a purely theoretical character, if no other country, which could offer similar protection to that offered by the country which hosts the claimant was able or willing to accept him or her.[42] If the asylum-seeker only has the option of returning to his or her country of origin after leaving the camp, and if no alternative protection is offered by another country, then the possibility of leaving the camp does not change the character of a deprivation of liberty of the accommodation.

6.4.4. Lessons to be learned from past experience

In 1989 the "Concerted Plan of Action" and the "Comprehensive Plan of Action" (CPA) were set into operation. The first plan was decided upon during the "International Conference on Central American Refugees" (CIREFCA)[43] in

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40 ECHR, Decision of 25 June 1996, No. 17/1995/523/609, *Amuur*.

41 CCPR/C/79/Add.99, para. 18, 19; see also Human Rights Committee, Communication 794/1998, Vol. 20, Netherlands Quarterly of Human Rights, p.494, 495: detention to ascertain the identity of a refused asylum-seeker is only not arbitrary, where the removal can be carried out.

42 ECHR, Decision of 25 June 1996, No. 17/1995/523/609, *Amuur*.

43 For text see: Vol. 2, IJRL, 83 (1990).

Guatemala City, the second one during the "International Conference on Indo-Chinese Refugees" (ICIR) [44] in Geneva. Neither of the plans, however, foresaw any deportation of asylum seekers to other countries for accommodation in closed reception centres and for the determination of asylum claims. The CIREFCA-plan was developed before a background of a large-scale flight movement of hundreds of thousands of persons in Central America as a consequence of civil wars and general violence. It included refugees as well as internally displaced. Its primary goal was to get the participating countries to solve the refugee problem through development programmes. The refugees themselves were accommodated in camps. The predominant aim was the facilitation of voluntary return. As far as this was not possible, the integration of refugees was to be supported in the receiving countries. In few exceptional cases, resettlement was facilitated. The plan included, however, no element of refugee status determination. The refugees had fled from general violence and, presumably for this reason, were treated as refugees according to the Cartagena Declaration without individual examination of claims. The plan was limited to a time frame of three years.

The primary purpose of CIREFCA was to address all aspects of a regional refugee crisis from a geopolitical point of view and not solely to concentrate on coping with a mass refugee problem on an administrative level. Countries of origin and receiving countries belonged to the same region. Compared with CIREFCA the first point of question which must be raised is that neither the British proposal nor the EU Prong focus on a certain group of refugees defined by regional criteria in order to contribute to the solution of regional conflicts through specific political programmes. In particular, the British proposal and models alike try to serve exclusively the interests of a certain receiving region, namely the EU, and work exclusively from the perspective of Western states, and are deeply flawed. They do not conform to human rights and refugee protection standards and fail to understand the burdens, pressures and priorities of developing countries. They ignore that their realization would place asylum-seekers at considerable risk, and that the UN agencies supposedly charged with the management of processing centres outside Europe are understaffed, underfunded and unable to assume this responsibility. Hence, it is criticized that such proposals are misguided and unworkable, for political, legal and ethical reason.[45]

The EU Prong includes asylum-seekers from certain countries of origin, which do not stem from a particular region, but from certain selected countries of orgin from different regions. An all-encompassing peace-keeping approach which would address all regions of origin is not feasible for conceptional and political reason. The EU Prong has not been marked by specific historical features and political interests of a specific region of origin but solely by the interests of the receiving EU region. Whilst CIREFCA due to its regional limitation, could credibly develop the aim of solving the refugee problem in the framework of a regional peace-making programme, the EU-Prong cannot even place a claim to this stake from the start. As a result of experiences with peace-keeping measures in the past, it is not imaginable that the whole globe could potentially become the object of concrete peace-enforcement operations and that the refugee question could be subject to a political solution in this context. The likely consequence is that no political influence will be taken on the situation in most regions of origin or cannot be undertaken with any likelihood of

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44 For text see: Vol. 5, IJRL, 617 (1993).

45 *Gil Loescher/ James Milner,* footnote 17 above, p. 601.

success, but that – contrary to the historical example of CIREFCA – the EU Prong will lead to the continual institution and to prolonged detention in individual cases. In its foreground is the administrative solution to a refugee problem. The development and enforcement of a geopolitical perspective for the solution of the flight reasons appear unrealistic.

The historical background of the CPA[46] was the phenomenon of the Vietnamese boat people. After the end of the Vietnam war, they had left their country of origin in masses, predominantly in insecure boats, and were initially treated as refugees by South Asian receiving countries without individual examination of their asylum claims and subsequently accepted in the framework of resettlement programmes in which more than thirty countries participated. In the mid-1980s, the willingness of the participating countries decreased rapidly with the decreasing recognition of the Vietnamese boat people. The majority of boat people were now being seen as "economic refugees". The first receiving countries were lacking any experience in the examination of individual asylum claims. The CPA hence obliged the Vietnamese Government to suppress the refugee movements. On the other hand, it co-operated in facilitating an orderly departure of those nationals who wanted to do so, in the framework of the "Orderly Departure Programme" (ODP). The asylum claims of the boat people and of the ODP- refugees were examined in South East Asian receiving countries, especially in Hong Kong. UNHCR supervised the creation and the running of the asylum determination procedures. The refugees were detained in camps according to the traditional practice. Hence, *detention* was a *core element* of the CPA, most notoriously in Hong Kong. A supposedly temporary arrangement, refugees still spent as much as eight years in detention camps in South East Asia.[47] Bearing this historical example in mind there are serious indications that the British model but also UNHCR's proposal of "closed reception centres" will in practice lead to numerous cases of indefinite detention and thus undermine the system of international protection.

7. Conclusions

Developing countries are confronted with numbers of refugees which by far outnumber those seeking protection in the EU. Reception in the region hence need not be advanced by the EU, but has always been the underlying pattern of the world refugee problem. If the richest group of countries, which is faced by a relatively small number of refugees, vehemently advocate a regionalisation of international protection, then considerable doubt would have to arise as to the legitimacy of the demands raised by this group. On the other hand, the discussion initiated by the British Government has induced a positive development in that it has led to a revitalisation of the discourse about resettlement programmes which had been stifled over twenty years as a result of the European fortress mentality. The dualist conception underlying the British proposal is strictly to be rejected however and a *holistic* or *proactive* understanding of the development of political concepts is to be developed. The Executive Committee of UNHCR's Programme has highlighted in

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[46] See *Rita Fan*, "Hong Kong and the Vietnamese Boat People", Vol. 2, IJRL 144 (1990); *Daniel Wolf*, "A subtle form of inhumanity: Screening the Boat people in Hong Kong", Vol. 2 IJRL 161 (1990); *Shamsul Bari*, "Refugee Status Determination under the Comprehensive Plan of Action", Vol. 4, IJRL 487 (1992); *Arthur C. Helton*, " Refugee Determination under the Comprehensive Plan of Action", Vol. 4, IJRL 545 (1993); *Tang Lay Lee*, "Stateless persons and the 1989 Comprehensive Plan of Action, Vol. 7, IJRL 201 (1995).

[47] *Amnesty International,* footnote 1 above, p. 17.

goal 3 of its "*Agenda for Protection*", that states should contribute to the solution of mass refugee movements and continuing refugee situations through specific bi- or multilateral burden-sharing agreements.

Resettlement programmes are hence supposed to relieve the countries of first asylum from pressure pursuant to the guiding principle of the Refugee Convention and to realise the international responsibility for the acceptance of refugees. This principle was already developed in the Final Act of the Conference of Plenipotentiaries and has also been reaffirmed in numerous conclusions of the Executive Committee since. The discourse on "Convention Plus" initiated by the High Commissioner himself has to be understood in the same vain, namely as a political challenge for the parties of the Convention to justly share responsibility in the reception of refugees and to relieve the burden of non-European countries through international agreements.

Resettlement programmes should relieve the burden of the main receiving countries without weakening the existing legal achievements in international protection. For this reason, asylum-seekers who during their flight request protection in a EU member state are to be granted access to a refugee status determination procedure by means of relevant and effective procedural provisions in the responsible member state pursuant to Dublin II. Such an examination can only be dispensed with where the applicants have already been granted effective protection in another state before admission, in which access to a refugee status determination procedure or an equivalent procedure aiming at the securing of protection from persecution had been granted or where personal or other links exist with another state and the third country has agreed to readmit the applicant and grant protection from persecution or access to an effective determination procedure. Article 33 CSR51 does not prohibit states from reaching inter-state agreements or agreements with international organisations, in order to provide protection to asylum-seekers in "transit processing centres" within the region of origin for resettlement. In the realisation of such agreements however, the obligations arising from article 33 have to be respected however. They prohibit that asylum-seekers who seek protection in the EU and who, during their flight, have not been granted protection in a third state and who have not claimed asylum in this state be removed to a third country.