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# Europe's response to the arrival of asylum seekers: refugee protection and immigration control

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## Introduction: the protection dilemma

The dilemma of reconciling migration control and the protection of refugees characterizes many contemporary debates on immigration and asylum policy, often dividing policy makers, public opinion, and experts into diverging positions and schools. It is, however, basically nothing but a modern feature of the classical dichotomy between states' claims to sovereignty and their *bona fide* participation in international cooperation. This dichotomy is particularly remarkable within the field of human rights protection; here, asylum procedures are the key mechanism used to maintain human rights norms and principles *vis-à-vis* states' legitimate concerns to control their borders.

Attempting to reconcile border control and human rights protection, it therefore seems relevant to break down the interests and concerns underlying each of the two concepts. By referring to experience within the field of human rights protection in general, it is thus possible to demonstrate, or at least indicate, methods of balancing states' and individuals' interests, even though this presupposes important restraints on the exercise of state sovereignty.

The opening section of this paper (which was commissioned by UNHCR and presented to a Technical Symposium on International Migration and Development held in July 1998 in The Hague) defines the objectives of immigration control. After a brief survey of various general control objectives, the more specific objectives of control in asylum procedures will be pointed out. Against this background, the following section of the paper presents the legal norms and principles which structure and restrain states' jurisdiction in the context of immigration control.

The paper then goes on to look at recent tendencies in asylum law and policy which partly merge immigration control and asylum procedures, normally to the detriment of the latter. The paper analyses various mechanisms of policies of *non-admission* and *non-arrival*, such as the restriction of access to asylum procedures based on formal admissibility requirements, and the tendency to externalize immigration control. Simultaneously, positive examples of maintaining protective principles within immigration control systems can be found, and these are also described in the paper. The analysis draws attention to the evolving recognition of the fact that the control dimension has certain inherent limitations which are likely to necessitate modifications of the present restrictionist tendencies. The concluding section of the paper examines the possibilities and prerequisites for revitalizing human rights and refugee protection principles in the context of immigration control, and makes some recommendations in this respect.

The perspective of the paper is predominantly European, due first and foremost to the author's background and field of experience. It is, however, both reasonable and relevant to give a good deal of attention to European developments, because both migration control and refugee protection systems have reached a relatively high degree of refinement in this region; and, indeed, contemporary challenges to traditionally recognized principles and objectives of protection are largely o be found in the policy and practice of European states, and in the process of harmonization of European Union (EU) asylum policies, in recent years. Although Western Europe of

course has no sole responsibility among members of the international community for the crisis of refugee protection, it may therefore not be unreasonable to suggest that Europe's policy choices are influencing developments in other regions and, to some extent, setting trends at the international level, for good and for bad.

## The objectives of immigration control

Before discussing law and policy issues relating to asylum procedures as the domestic implementation of international obligations, it may be useful to try to clarify some of the main objectives of immigration control. Even though these are likely to be well-known and generally recognized in principle, their proper role in the context of asylum procedures needs to be clarified with a view to determining the extent to which certain control objectives are *not* relevant, or at least *less* weighty, if questions of human rights and refugee protection are at stake. It is not being posited here that states' legitimate interest in controlling immigration should defer in each and every claim to the protection of human rights. The importance of the latter has to be recognized though, and some guidelines for striking the balance must be defined.

In our further analysis this will allow us first of all to qualify the objectives of immigration control *vis-à-vis* human rights issues, in order to secure the fundamental respect for protection norms and principles. Some conclusions may also be drawn as to the potentially negative effect of giving too much weight to restrictionist control policies; could there possibly be certain limits beyond which restriction becomes ineffective and even counter-productive in terms of undermining control itself at other points?

The survey of control objectives given below by no means pretends to be comprehensive; it certainly does not include all relevant state interests, neither does it attempt to analyse their relative impact on states' policies. As various states have different conceptions of their self-interest, and may attach varying degrees of importance to any particular objective in setting up their control systems, it is clearly not an exhaustive typology. In spite of the apparent futility in setting up a typology of the objectives of immigration control, it may help us to identify the underlying interests and concerns of states, and thus to understand better how to balance these objectives against the protection principles of international law. Simply put, it may give some idea of what the protection of human rights is up against in the context of immigration control.

### *General control objectives*

Border controls play an important role as the primary symbol of sovereignty, both in terms of the separation of independent states' exercise of jurisdiction, and in the general perception of independence and nationhood. Even though the symbolic function should not be disregarded, especially in newly independent states and in popular skepticism towards the abolition of border controls, it only plays an indirect role *vis-à-vis* asylum procedures.

Border controls may emphasize the fact that there is often a general sense of the necessity of being able to keep the arrival of asylum seekers under control. On the one hand, this runs foul of the very nature of refugee protection as being something uncontrollable, a palliative and urgent response to human need. On the other hand, it may also help us to distinguish between *controlling* borders as merely a technical exercise of jurisdiction, and *immigration control* as a wider concept of policy objectives. In the latter sense there is nothing conceptually in the conduct of control being incompatible with honouring the commitment to human rights, taking heed of international obligations in the realization of state interests is precisely a feature of sovereignty in an era of intensified international cooperation.

*Public order and the prevention of crime*

Being core elements of the exercise of state jurisdiction, the maintenance of public order[1] and the prevention of crime play an important role in carrying out immigration control at the micro-level. In striking a balance with issues of refugee protection, these interests may therefore prevail, in so far as they necessitate the effective scrutiny of individuals entering the territory. As regards access to protection, however, they can only under narrow conditions outweigh the protection need under the refugee definition,[2] or go against the prohibition of *refoulement*.[3]

*Labour market and housing*

Protection of national markets for labour and housing has been a key rationale behind setting up immigration controls in modern times. It is generally recognized that these interests may justify restrictions of certain human rights, the protection of which might otherwise mean an implied right of residence. As much as policies of non-immigration may therefore be based on such interests, so such opportunities to improve living conditions will attract outsiders to affluent states. This of course

[1] This notion here includes both the external and the internal security of the state, as well as public safety in the wider sense.

[2] The exclusion clauses in Article 1F of the 1951 Geneva Convention relating to the Status of Refugees reads: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

[3] Cf. Article 33, para. 2 of the 1951 Refugee Convention: "The benefit of the present provision [prohibiting *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Importantly, however, the *non-refoulement* principle as laid down in Article 3 of the European Convention on Human Rights and Article 3 of the Convention against Torture allows for no derogation.

necessitates the screening of asylum seekers, but may result in perverting the refugee protection system due to the conception of this as a "back door" to immigration.

*Social welfare benefits*

In reality, the safeguarding of social welfare benefits for genuine community members is largely a particular aspect of the former control objective.[4] The relative weight attached to this concern may be greater in some countries with an emphasis on non-immigration policies, than in others which have official schemes for labour immigration. Again, this may have an impact on public opinion and the conception of asylum seekers as abusive receivers of social benefits, and may ultimately result in more restrictive screening of people in need of protection.

*Specific controls and asylum procedures*

The necessity of establishing the personal identity of individual asylum seekers is evident and requires no further motivation inasmuch as this information is intrinsically connected with the very basis of refugee status determination. However, in more recent practice of industrialized states, the focus on identity information has partly shifted away from the merits of the refugee status claim; instead, the *admissibility* issue has increasingly become the rationale of this particular element of control. Viewing the establishment of identity as a technical control objective must therefore be analysed in connection with non-admission policies and the narrowing criteria for admissibility to asylum procedures; more specifically, "safe third country" practices have had an increasingly important role in the initial stages of asylum procedures and draw much attention to the travel route the applicant has taken, as discussed further below.

*Travel documents: a mechanism of non-admission policies*

States' practice of setting up specific admissibility criteria has not only resulted in increasing further rejections at the border which are made on "safe third country" grounds, but also in policies of *non-arrival* or *non-entrée*.[5] The underlying rationale of these policies is simply to prevent asylum seekers gaining access to the jurisdiction of the potential country of protection; the most frequent mechanism resorted to is a combination of visa requirements for citizens of refugee producing countries and the imposition of sanctions on transport companies carrying passengers without the required documentation. Leaving aside the legal objections against this, it is important in this context to point out that such non-arrival policies have triggered a whole industry in the irregular trafficking of persons, which not only undermines to a certain extent the effects of such policies, but also creates new and often uncontrollable problems.

[4] On the development of legislation in Denmark, see Vedsted-Hansen, 1997, chapter 1.

[5] Cf. Hathaway, 1992.

*Information relating to the individual protection need*

As with personal identity information, the substantive information and evidence establishing the basis for the claim to refugee status which has to be provided by the asylum seeker must necessarily be subject to scrutiny and control. While this is in itself uncontroversial, it is nonetheless at risk of perversion due to the recent control policies described above. Along with the efforts of desperate asylum seekers to evade the barriers to protection, and those of traffickers to exploit their often desperate situation, asylum procedures have become more and more focused on issues of irregular movement, false documents and the implications of dissembling information. Over time, the potential for distracting attention from the protection needs and the proper basis for refugee status becomes increasingly strong, leaving aside the inherent risk of stigmatization of asylum seekers and refugees.

## Immigration control and international obligations

As already mentioned, the international protection of individual rights has often been refuted or modified by states claiming sovereign jurisdiction over their citizenry, and the corresponding notion that other states and the international community should abstain from interference with that jurisdiction. For evident reasons, the primary concern in international standard-setting was for a number of years the safeguarding of the right of individuals to move freely *out of* their country of residence or citizenship.

The individual right to leave any country, including one's own, has been generally recognized for many years. Correspondingly, there is general recognition that persons holding the citizenship of a state can not be expelled from or denied entry into the territory of that state.[6] Likewise, in the context of the Helsinki process set in motion by the Conference on Security and Co-operation in Europe (CSCE), it is noteworthy that from the first statement of the 1975 Helsinki Final Act and until the Final Document of the 1989 Vienna meeting, the primary Human Dimension Commitments focused on obstacles preventing individuals from leaving their country.

While a significant strengthening of *citizens*' rights to exit from and return to their country has taken place over the past decades, states have consistently been reluctant to undertake specific obligations as regards the rights of *non-citizens* to enter or reside in their territory. In respect of asylum seekers, this appears clearly from article 14 of the Universal Declaration of Human Rights, which provides only for the right to *enjoy* asylum if and when it is granted by a state.[7] This position prevailed at the 1977 UN Conference on Territorial Asylum at which states were insistent on their

[6] Article 13(2) of the 1948 Universal Declaration of Human Rights; Article 12(2) and (4) of the 1966 UN Covenant on Civil and Political Rights; Article 2(2) and Article 3 of the 1963 Protocol No. 4 to the European Convention on Human Rights.

[7] Kjaerum, 1992, pp. 218-20; Goodwin-Gill, 1996, p. 120.

sovereign right to grant or refuse asylum.[8] More recent expression of states' reluctance to surrender their exercise of immigration control to international commitments has occurred in relation to the protection of migrant workers and their families, resulting in vaguely phrased provisions on entry and residence rights, and in the manifest absence of state signatures and ratifications of international instruments.[9]

Notwithstanding the fact that the control of non-citizens' entry and residence on the territory remains one of the core features of state sovereignty, the exercise of discretionary powers by national authorities is not unfettered by international law. Over the past decades, international obligations have come into being, as a result of which states have gradually undertaken to observe certain self-restraints in the exercise of their power to exclude non-citizens. The rationale behind these undertakings varies significantly, reflecting a diversity of perceived self-interests by members of the international community.

Firstly, and most importantly in relation to our discussion, the international protection of human rights requires states to abide by certain norms and principles which inevitably affect the exercise of immigration control. Human rights obligations have particular relevance for actions and decisions taken concerning asylum seekers and refugees for whom the normal exclusionary powers have been considerably curtailed.[10] The implications of such restraints on state sovereignty will be further analysed in the next sub-section of the paper.

Secondly, it should also be mentioned that certain regional arrangements providing for the right of mobility of persons result in the reduction or even abandonment of certain aspects of immigration control. An important recent example is the attempt of the European Union to abolish internal border controls; it should not be forgotten, though, that this has been generally conditioned upon the establishment of increased external border controls to compensate for the free movement within the EU territory.[11] In other regions similar arrangements have been agreed on a multi- or bilateral basis, as was the case in European sub-regions already by the 1950s.[12] Lastly, as an interesting consequence of the abolition of internal border controls within a majority of EU states, states have actually undertaken, under certain conditions, to (re)admit non-citizens to their territory in order to examine their asylum

[8] Grahl-Madsen, 1980; Goodwin-Gill, 1996, pp. 180-1.

[9] See, as remarkable examples, the 1975 ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (18 ratifications as of February 1999), and the 1990 UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (11 ratifications, 6 signatures and yet to enter into force as of May 1999).

[10] Cf. Van Dijk and van Hoof, 1990, pp. 235-40 and 386-9; Harris, O'Boyle and Warbrick, 1995, pp. 73-80, 343-4 and 351-3.

[11] On entry and residence rights under general EC Law, see Jørgensen, 1996, chapters 2 and 3. For the most recent developments concerning external border controls, see Title IV of the EC Treaty, as amended by the 1997 Treaty of Amsterdam.

[12] See, for example, the 1957 Nordic Passport Control Agreement, concluded between Denmark, Finland, Norway and Sweden, acceded to by Iceland in 1965.

cases and, if necessary, grant asylum to refugees.[13] This is obviously an important restraint on the sovereign right to refuse entry to aliens, which follows from increased international cooperation and even concerns citizens of third countries.

*Asylum procedures as a specific element of immigration control*

As already mentioned, international obligations undertaken by states in the field of human rights protection must be taken into account in the exercise of otherwise legitimate immigration controls. Such obligations include both human rights conventions in the wider sense, and more specific norms and principles under the refugee protection regime.

Whereas Article 14 of the Universal Declaration of Human Rights recognizes the right of individuals to *seek* asylum and it is generally held that this "soft law" provision has developed into a binding norm of customary international law, it is still unclear whether this entails a specific right to have such applications processed under a formalized asylum procedure. What is sure, however, is the obligation under international law to extend certain forms of *protection* to refugees and other individuals at risk of harm if returned to their country of origin. Consequently, unless a state agrees to grant refugee rights to everyone claiming to be a refugee, it will have to examine such claims in order to determine which persons actually have refugee status. Otherwise it would violate the obligations undertaken towards those individuals who, upon scrutiny of their cases, would prove to have the status of refugees and the consequent right to be treated in accordance with the standards of the 1951 Refugee Convention.[14]

It has to be emphasized that immigration authorities cannot evade the convention obligations of their state by simply *omitting* to make a decision on an asylum application. This can be inferred from the basic principle that refugee status is not derived from, or dependent on, *formal recognition*; rather, recognition of refugee status is a declaratory act, resulting from an examination of the status of the individual which, as such, is extant from the very moment the person falls within the refugee definition of Article 1 of the 1951 Refugee Convention.[15]

To sum up, in order to be sure *not* to violate basic protection obligations towards asylum seekers, states must necessarily examine individuals' claims to be at risk of harm upon return. While many refugee rights under the 1951 Refugee Convention can

[13] See 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, and the 1990 Schengen Convention on the Implementation of the Schengen Agreement of 14 June 1985 between the Governments of the States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, relating to the Gradual Abolition of Controls at their Common Borders.

[14] Hyndman, 1994, p. 246; Hathaway and Dent, 1995, pp. 21-2; UNHCR, 1996, p. 12.

[15] See UNHCR, 1979, para. 28; Amann, 1994, pp. 85, 109 and 145-9; Hathaway and Dent, 1995, p. 7; Goodwin-Gill, 1996, pp. 32 and 141.

reasonably be suspended for a certain period, pending examination of the case, some standards of treatment must be implemented without delay for everybody whose claim to refugee status has not been proven to be unfounded. Most importantly, by its very nature, the prohibition of *refoulement* must be observed irrespective of recognition, unless and until the examination of the case has shown no risk of persecution.[16] This is particularly clear in respect of Article 33 of the 1951 Refugee Convention, but the principle applies equally in cases of alleged risk of torture or other inhuman treatment falling within the scope of Article 3 of the European Convention on Human Rights or similar provisions in other human rights treaties.[17]

**Meeting the dilemma: the design of asylum procedures**

The dilemmas described above – between state sovereignty and international obligations, between control and protection – recur when it comes to drawing consequences of the obligation of states to examine asylum obligations. As clearly as this obligation presupposes the existence of certain authorities and procedures for the examination of individual cases, the absence of any specific international norms on the modalities for national asylum procedures is just as remarkable. At the time when international standard-setting had just begun, the Office of the United Nations High Commissioner for Refugees (UNHCR) articulated this state of affairs quite succinctly by stating:

> It is obvious that, to enable states parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status … is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.[18]

Setting standards for asylum procedures in the UNHCR Executive Committee and other inter-governmental bodies has apparently been a rather delicate balancing process. This is so not only in the sense of providing meaningful, normative guidance for states without interfering with their sovereign rights and legal traditions, but particularly in the attempt to safeguard the adequate examination of individual cases, taking account of the fact that these will often appear before immigration control

[16] Cf. UNHCR, 1993, para. 11; Amann, 1994, pp. 109 and 148; Marx, 1995, p. 403.

[17] See Einarsen, 1990, pp. 364-73; van Dijk and van Hoof, 1990, pp. 235-40. On the similar extraterritorial effects of Article 3 of the 1984 UN Convention against Torture, see Suntinger, 1995.

[18] UNHCR, 1979, para. 189. Notably, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* was itself issued as a result of the international cooperation on setting standards for appropriate asylum procedures, cf. Executive Committee Conclusion No. 8(g), 1977.

authorities, which have no particular expertise in such examination and whose work may even be counter-productive as regards protective goals.[19]

These modest initiatives at the international level, and the cautious wording adopted by these organizations, have in themselves been expressions of the dilemma between refugee protection and immigration control. When times started changing in the 1980s, and some asylum states felt bound to expedite procedures for certain types of poorly founded asylum applications, the international community was also ready to adjust its standards by the adoption of specific recommendations for national procedures to take account of this phenomenon.

The concern that increasing numbers of asylum applications were abusive or otherwise clearly ill-founded actually met a quite early response in the international standard-setting process. There are, however, two crucial aspects to these efforts to strike a balance between control and protection concerns. Firstly, they were consistently premised on asylum seekers being able to gain access to procedures where their protection needs could be examined. In this respect they distinguished themselves clearly from *non-admission* policies. Secondly, the standards for processing manifestly unfounded applications were characterized by defining this category of cases objectively and narrowly, and by emphasizing the necessity to maintain certain procedural safeguards notwithstanding the assumption of the case being clearly unfounded.

As to the latter, the category of manifestly unfounded asylum applications was defined in a clear and restrictive manner by the Member States of the UNHCR Executive Committee as early as 1983. With reference to "applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria", the Executive Committee considered that

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[19] The balance struck in this respect was expressed in the following provisions of UNHCR Executive Committee Conclusion No. 8 (Determination of Refugee Status) 1977:

> … (e) (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
>
> ...
>
> (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.

See also Executive Committee Conclusion No. 15 (Refugees without an Asylum Country), 1979, section (j); Committee of Ministers of the Council of Europe Recommendation No. R(81) 16 (Harmonization of National Procedures Relating to Asylum), 1981, paras. 2 and 3; EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, O.J. C 274/13, 19 September 1996; reprinted in UNHCR, 1997b, annex III.B.2.7, paras. 4-7.

> national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are *clearly fraudulent* or *not related to the criteria for the granting of refugee status* laid down in the 1951 United Nations Convention relating to the Status of Refugees *nor to any other criteria justifying the granting of asylum*.[20]

In addition, the members of the Executive Committee, recognizing the *substantive character* of the decision that an application for refugee status was manifestly unfounded or abusive, warned of the *grave consequences of an erroneous determination* for the applicant, and the resulting need for such a decision to be accompanied by *appropriate procedural guarantees*. On this basis, the Executive Committee recommended certain such guarantees: that the applicant should be given a complete personal interview by a fully qualified official, whenever possible by an official of the authority competent to determine refugee status; that the manifestly unfounded or abusive character of the application should be established by the authority normally competent to determine refugee status; and that there should be a possibility to have a negative decision reviewed, even though this review possibility could be more simplified than that available under ordinary procedures.[21]

*Appeal or review of negative decisions*

The constitutional tradition in many countries allows administrative decisions refusing asylum to be appealed to the courts, either to ordinary courts of law or a special system of administrative courts. It will often then be possible to appeal the court's decision to a court of higher instance. Sometimes there is also a possibility, if not a requirement, that administrative review be carried out before the decision can be taken to the courts.

Thus, the total of administrative and judicial proceedings can take up a considerable length of time which has often been shown to be crucial in the area of asylum cases. The importance of reducing the duration of the examination as much as possible follows both from the human costs involved, due to psychological strain and the legal uncertainty for asylum seekers, and from the concern of states to reduce the financial costs of accommodating asylum seekers. Furthermore, it may serve the purpose of reducing the potential for abuse of the asylum system by persons with invalid claims who might consider long waiting periods as an aim in itself, in order eventually to

[20] UNHCR Executive Committee Conclusion No. 30 (The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum), 1983, section (d) (emphasis added).

[21] Ibid., Section (e).

obtain a residence permit on other grounds, or at least to benefit economically from activities during the examination of the claim.

The asylum procedure in Denmark provides an example of the balancing of the legal safeguards against time factors so as to achieve a relatively high degree of both fairness and efficiency.[22] Indeed, the Danish arrangements have to be seen against the background of the legal and political system in which they have evolved. It is important to notice that Denmark has no specialized administrative courts. As an alternative, administrative decisions can frequently be brought before *appeal boards*, the composition and procedures of which vary according to the particularities of the regulatory area in question. This type of administrative control has a long tradition in Denmark, which can to some extent be explained by the *corporatist* element in many such appeal bodies. This takes account of the influences of various parties in society and seeks to engage their responsibility for the outcome. Another rationale behind establishing administrative appeal boards has been the increased *procedural safeguards* they offer compared to those of traditional administrative review. To this end certain appeal boards have been designed in a way implying legal guarantees of procedure more or less equivalent to those of the ordinary courts.

One of the clearest examples of this can be found in the area of asylum law. The Danish Refugee Appeals Board is normally referred to as a *quasi-judicial* body, yet it is in principle an administrative one, reviewing negative decisions taken by the Danish Immigration Service. In order to enhance further the legitimacy of decisions made in this rather sensitive policy area, the Refugee Appeals Board includes representatives of two non-governmental organizations (NGOs): the Danish Refugee Council and the General Council of the Bar and Law Society. This external participation may be seen as a feature of the corporatist tradition, yet these two particular organizations do provide additional expertise, rather than representing specific interests of society, to the asylum procedures.

The composition of the Refugee Appeals Board when reviewing individual cases is the chair or an alternate chairs, and four other members, among whom one is appointed by the Minister of the Interior, while the others are nominated by the Minister of Foreign Affairs, the Danish Refugee Council, and the General Council of the Bar and Law Society, respectively.[23] Given that the chair and alternate chairs are judges in ordinary courts, a high degree of independence has been secured for the Refugee Appeals Board. For that very reason, and also because of the Board's rules of procedure, this review mechanism offers procedural safeguards beyond the usual administrative control in Denmark. However, the Board can not reasonably be considered equivalent to a judicial instance, neither in terms of independence and impartiality, nor in terms of legal safeguards and transparency of proceedings.

[22] For a general description of the Danish asylum procedure, see ILPA, 1995, pp. 35-40; Justesen, 1997, pp. 292-8.

[23] Modifications may occur in certain types of cases, narrowly defined in Section 53(4)-(6) of the Aliens Act.

The quasi-judicial procedure used normally involves an oral hearing where the appellant asylum seeker can give oral evidence before the Refugee Appeals Board. The lawyer acting on his behalf will be allowed to plead the case before the Appeals Board. It is, however, for the Appeals Board itself to decide on examination of witnesses. Although the Aliens Act has foreseen that witnesses can be called before the Appeals Board, they are, in practice, almost never admitted for an oral hearing. Written statements of witnesses may be submitted. As an indirect, and highly unsatisfactory way of examining witnesses, the Appeals Board may also decide to have the witness in question interviewed by the police, subsequently submitting the interview report to the Appeals Board for consideration.

There are thus strong legal guarantees under this type of appeal procedure, which at the same time allow for flexibility and, as the general rule, relatively quick decision-making in asylum appeals. On the other hand, one also has to conclude that the need for genuine court review of asylum cases, at least as a theoretical option, still persists. Because of the actual modifications of the traditional safeguards in judicial procedures and, perhaps equally important, because of the often politicized aspects of decision-making within the asylum area, it appears inevitable to maintain some possibility of further review in a fully judicial framework as a last resort. It is therefore regrettable that the Danish Supreme Court in June 1997 decided by a narrow majority to refuse access to court review for decisions taken by the Refugee Appeals Board.[24]

*Manifestly unfounded applications*

Again here, and possibly even more so than for the ordinary appeals procedure, the solution chosen in Denmark may serve as an example for other countries.[25] In 1986 a modified determination procedure was introduced in order to avoid long waiting periods for asylum applications with no prospect of success if admitted into proceedings before the Refugee Appeals Board. This procedure, involving a simplified review mechanism, is applied for cases considered initially by the Immigration Service to be "manifestly unfounded".[26] It is important to notice that

[24] Danish Supreme Court judgment of 16 June 1997, reprinted in U.f.R. 1997, p. 1157. The legal premises, as well as the implications, of the decision are still open to interpretation; however, one can hardly avoid assuming that the Supreme Court majority (4-3) was influenced by the arguments submitted by the Government Advocate representing the Appeals Board, claiming that in the sense of article 6 of the European Human Rights Convention the Board should be considered largely analogous to a court, and that allowing access to further judicial review would imply a serious burden for the ordinary courts. This is debatable because of the somewhat unrealistic appraisal of the constitutional status and the legal safeguards of the Refugee Appeals Board, which implies a level of judicial formalization to which the Board can not, and possibly should not, live up. Moreover, the Supreme Court majority failed to consider the extent to which review before the Refugee Appeals Board guarantees the effective implementation of Article 3 of the European Human Rights Convention. The present state of affairs in Denmark is therefore problematic in relation to Article 13 of this Convention, which requires an effective domestic remedy whenever an arguable issue under the Convention is being raised.

[25] Cf. Byrne and Shacknove, 1996, pp. 187 and 225-6; UNHCR and the Graduate Institute of International Studies, 1997, p. 6.

[26] For further details of this procedures, see Kjaer, 1995b.

such cases undergo an examination on the merits. There is thus a clear distinction between this special determination procedure and the rejection of cases on "safe third-country" grounds resulting in inadmissibility to the asylum procedure.[27]

Under the procedure for "manifestly unfounded" cases the applicant will be interviewed by the Immigration Service and, if the case is still considered manifestly unfounded after the interview, the application will be forwarded to the Danish Refugee Council. A staff member of this NGO will then call in the applicant for another personal interview in order to assess whether all relevant information has been given in the written questionnaire and during the interview by the Immigration Service. One important procedural detail is that the Refugee Council always uses different interpreters from those who dealt with the case at the previous stage, in order to prevent factual mistakes or misunderstandings from being perpetuated in the review procedure. In this regard, the simplified review is geared to the implications of the fact that it actually replaces the Appeals Board proceedings.

If the Danish Refugee Council does not agree that the case is manifestly unfounded, the Immigration Service will be notified accordingly, and the case will be referred to the normal procedure, including the right to bring a negative decision to the Refugee Appeals Board. In so far, the Refugee Council has the right of a *procedural veto* in manifestly unfounded cases. This competence delegated to a private organization is strictly procedural, though, and has no implications as to the eligibility decision. If, on the other hand, the Danish Refugee Council agrees that the case is manifestly unfounded, the asylum seeker will be informed by the Immigration Service of a negative and definitive decision. Consequently, there will be no access to appeals procedures, and the applicant will be deported within a short period, in certain cases even immediately after the negative decision.

While the review mechanism as described undoubtedly lives up to international standards, the special procedure for manifestly unfounded cases covers a much broader category of applications than those normally defined as "manifestly unfounded" in international instruments. Not only applications which are clearly abusive or unrelated to the criteria for the granting of asylum are considered manifestly unfounded, also any other case will be referred to the special procedure with no right to appeal if it is deemed without prospect of success, i.e. cases where, according to the current practices of the Refugee Appeals Board, it is considered evident that the applicant will not have any chance of obtaining asylum in Denmark. However, if there are problems in assessing the evidence of the case, the Danish Refugee Council will, as a general rule, veto decision-making within the procedure for manifestly unfounded applications, thereby admitting the case for full review by the Appeals Board with the legal safeguards here available.[28]

[27] See Kjaer, 1995a.

[28] This is one of the reasons for the increased veto rate in 1994 (35 per cent), 1995 (40 per cent) and 1996 (45 per cent), as the Immigration Service attempted to widen the scope of the "manifestly unfounded" procedure to include cases hinging on the assessment of individual credibility; in previous years the veto rate averaged around 20 per cent of cases, and by 1997 it was approaching this level again (25 per cent). Among the vetoed cases, the Refugee Appeals Board went on to grant asylum in an average of 15 per cent of cases. Cf. Kjaer, 1995b, pp. 272-3, and Danish Immigration Service, 1998.

*Shifting the balance: fairness or efficiency?*

Whereas states may, in the past and to varying degrees, have lived up to the standards for ordinary asylum procedures recommended by the UNHCR Executive Committee, they have in recent years, not least in Western Europe, been keen to expand the scope for implementation of *accelerated procedures.* An interesting example is the adoption of harmonized European Community and EU standards on accelerated asylum procedures, which is illustrative of states' predilection for adopting procedural flexibility in international standard-setting while, simultaneously, asserting that national restrictionism is fully compatible with such standards.

The EC Ministers' 1992 London Resolution on Manifestly Unfounded Applications for Asylum includes a wide range of vaguely defined cases and situations in this category. According to the Resolution, "An application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the Geneva Convention and New York Protocol", either because "there is clearly no substance to the applicant's claim to fear persecution in his own country (paragraphs 6 to 8)", or because " the claim is based on deliberate deception or is an abuse of asylum procedures (paragraphs 9 and 10)".[29] While this may as such be rather uncontroversial, the further elements in defining these categories leave much to the discretion of states, and go much further than the definitions previously adopted by the UNHCR Executive Committee. As major examples of cases, the Resolution goes on including into the two categories, respectively:

> 6. All applications the terms of which raise no question of refugee status within the terms of the Geneva Convention. This may be because:
>
> (a) the grounds of the application are outside the scope of the Geneva Convention: the applicant does not invoke fear of persecution based on his belonging to a race, a religion, a nationality, a social group, or on his political opinions, but reasons such as the search for a job or better living conditions;
>
> (b) the application is totally lacking in substance: the applicant provides no indications that he would be exposed to fear of persecution or his story contains no circumstantial or personal details;
>
> (c) the application is manifestly lacking in any credibility: his story is inconsistent, contradictory or fundamentally improbable.
>
> …

[29] EC Ministers' Resolution of 30 November-1 December 1992 on Manifestly Unfounded Applications for Asylum (SN 2836/93, WGI 1505; reprinted in UNHCR, 1997b, annex III.B.2.1), para. 1(a).

9. All applications which are clearly based on deliberate deceit or are an abuse of asylum procedures. Member States may consider under accelerated procedures all cases in which the applicant has, without reasonable explanation:

(a) based his application on a false identity or on forged or counterfeit documents which he has maintained are genuine when questioned about them;

(b) deliberately made false representations about his claim, either orally or in writing, after applying for asylum;

(c) in bad faith destroyed, damaged or disposed of any passport, other document or ticket relevant to his claim, either in order to establish a false identity for the purpose of his asylum application or to make the consideration of his application more difficult;

(d) deliberately failed to reveal that he has previously lodged an application in one or more countries, particularly when false identities are used;

(e) having had ample earlier opportunity to submit an asylum application, submitted the application in order to forestall an impending expulsion measure;

(f) flagrantly failed to comply with substantive obligations imposed by national rules relating to asylum procedures;

(g) submitted an application in one of the Member States, having had his application previously rejected in another country following an examination comprising adequate procedural guarantees and in accordance with the Geneva Convention on the Status of Refugees. To this effect, contacts between Member States and third counties would, when necessary, be made through UNHCR.

Member States will consult in the appropriate framework when it seems that new situations occur which may justify the implementation of accelerated procedures to them.

10. The factors listed in paragraph 9 are clear indications of bad faith and justify consideration of a case under the procedures described in paragraph 2 above in the absence of a satisfactory explanation for the applicant's behaviour. But they cannot in themselves outweigh a well-founded fear of

> persecution under Article 1 of the Geneva Convention and none of them carries any greater weight than any other. [30]

It is not difficult to imagine that these criteria may lead national authorities from discretion to arbitrariness in allocating specific cases to special procedures based on the presumption that the applications are *a priori* "manifestly unfounded". A number of the proposed criteria are not necessarily relevant to the substantive issue of refugee status and protection need – at least, it may take much more than an accelerated procedure to rebut the presumptions on which the criteria are based.[31]

In balancing fairness against efficiency – i.e., a reasonable level of legal safeguards guaranteeing the correct assessment of cases, and the interest of states in reducing the financial costs and the duration of the examination – it would seem appropriate to establish a special procedure for those cases which are likely to result in a *positive* decision. "Manifestly well-founded" applications should be given special treatment, reversing the notion of accelerated procedures already recognized. In spite of proposals to this effect,[32] it is remarkable that this way of maintaining the balance is not known to have been considered in the EU harmonization process, although accelerated procedures are applied to well-founded cases in both Australia and Canada. More recently, this approach has gained further official recognition, being advanced as an element of the preparations for an asylum procedure reform in South Africa.[33]

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[30] Ibid., paras. 6, 9 and 10. Remarkably, this wide definition of cases to undergo accelerated procedures was accompanied by a truly modest description of procedural safeguards:

> Member States will aim to reach initial decisions on applications which fall within the terms of paragraph 1 as soon as possible and at the latest within one month and to complete any appeal or review procedures as soon as possible. Appeal or review procedures may be more simplified than those generally available in the case of other rejected asylum applications.
>
> A decision to refuse an asylum application which falls within the terms of paragraph 1 will be taken by a competent authority at the appropriate level fully qualified in asylum or refugee matters. Amongst other procedural guarantees the applicant should be given the opportunity for a personal interview with a qualified official empowered under national law before any final decision is taken.

[31] Cf. Goodwin-Gill, 1996, p. 346: "This elision is manifestly inappropriate, begging precisely the question which refugee procedures exist to answer" (note 90); "a regrettable example of manifestly incompetent drafting" (note 91). See also UNHCR, 1997b, pp. 397-99.

[32] ECRE, 1990.

[33] Republic of South Africa, Task Team on International Migration, 1997, para. 4.4.2.

## Replacing asylum procedures with migration control

In contrast to the policies and practices described elsewhere in this paper, various mechanisms introduced since the mid-1980s have had the effect of blocking access to refugee status determination. Even though some forms of accelerated procedures, certain definitions of manifestly unfounded cases, and some organizational features of refugee status determination do indicate an inadequate balance between control and protection, they are still in principle based on the idea that each and every asylum application deserves an examination on the merits. Characteristic of the policies to be discussed in this section is the *absence* of substantive examination of applications, by means of mechanisms that either operate as barriers for asylum seekers ever to access a territory where they could seek and find protection. Alternatively, for those who manage to reach the shores of potential asylum states, these may apply formal admissibility criteria which allow them to push back asylum seekers without offering them an effective possibility, if any at all, of examination of their case in substance.

By preventing asylum seekers from having their refugee status determined and their protection need examined, these mechanisms all aim at keeping them "from the procedural door".[34] It is, however, necessary to distinguish between various types of *non-admission* policies as they have widely differing effects on the access to protection, just as the objectives pursued by states in operating them have varying degrees of legitimacy.

Most problematic, in terms of both the detrimental effect to refugee protection and the overall lack of legitimacy, are those mechanisms which can most precisely be characterized as policies of *non-entrée*[35] or *non-arrival*. Such policies may ultimately result in exposing persons to risk of persecution, by means of blocking their flight either in the country of origin or in unsafe transit countries from which they may be forcibly returned to the home country.[36]

We shall now look closer into a few of these policies, beginning with the establishment of formal criteria for *admissibility* to a full asylum procedure, and ending with policies purely and simply aimed at the *containment* of asylum seekers and refugees. Upon presentation of those selected mechanisms, the questions will be asked: Are they legitimate? Are they effective, in accordance with their own logic? Which consequences do they have?

*Restricting admission to asylum procedures: examination without admissibility*

[34] Goodwin-Gill, 1996, p. 333.

[35] Hathaway, 1992.

[36] The notion of "safe third country" will not be further analysed here, yet it is indeed an important element of the overall non-admission strategy. On the legal basis and the implications of "safe third-country" practices, see Byrne and Shacknove, 1996; Vedsted-Hansen, 1999.

As described earlier, it has traditionally been a generally recognized principle that decision-making on asylum applications should not take place in the context of border control. Against this background, it is a disturbing fact that some countries have established special accelerated procedures which more or less merge the substantive examination of cases with the formal decision on the asylum seeker's admissibility.

This mechanism has been indirectly endorsed in the process of EU harmonization of asylum policies. In its 1995 Resolution on Minimum Guarantees for Asylum Procedures, the EU Council does refer to the principle that asylum procedures will be applied in full compliance with the 1951 Geneva Convention and other obligations under international law in respect of refugees and human rights. It also declares that, in order to ensure effectively the principle of *non-refoulement*, no expulsion measure will be carried out as long as no decision has been taken on the asylum application.[37] In keeping with this, for manifestly unfounded asylum applications it is still the general principle that asylum seekers may remain within the territory until the final decision, even when the ordinary possibility of lodging an appeal against a negative decision has been replaced by a review carried out by an independent body.[38]

Importantly, however, this guarantee is undermined by the Resolution as it leaves the possibility open for states to deal with manifestly unfounded applications in the framework of border controls. If a state does so, there is no longer any requirement as to the suspensive effect of the appeal, and the organizational safeguards relating to the review mechanism may be drastically reduced:

> Member States may, inasmuch a national law so provides, apply special procedures to establish, *prior to the decision on admission*, whether or not the application for asylum is manifestly unfounded. No expulsion measure will be carried out during this procedure.
>
> Where an application for asylum is manifestly unfounded, the asylum-seeker may be refused admission. In such cases, the national law of a Member State may permit an *exception to the general principle of the suspensive effect of the appeal*… However, it must at least be ensured that the decision on the refusal of admission is taken by a ministry or comparable central authority and that *additional sufficient safeguards* (for example, prior examination by another central authority) ensure the correctness of the decision. Such authorities must be fully qualified in asylum and refugee matters.[39]

[37] EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures (O.J. C 274/13, 19 September 1996; reprinted in UNHCR, 1997b, annex III.B.2.7), paras. 1, 2.

[38] Ibid., para. 19 taken with paras. 17 and 21.

[39] Ibid., para. 24 (italics added).

Even though this is not a blanket exclusion of asylum seekers from having their application examined on the merits, it does in effect allow states to merge substantive decision-making on whether or not the applicant qualifies for refugee status and protection with decisions on admissibility. The risks inherent in accelerated decision-making in connection with the exercise of border controls, may consequently lead to a pre-screening of applications which allows access to full examination in substance only to those *not* considered manifestly unfounded in such provisional screening. The fact that the decision on refusal of admission has to be taken by a central authority may certainly reduce the risk, yet the important point is still that accelerated procedures will be carried out in the border control context, as summary pre-admission decisions.

Taken together with the widened definition of the "manifestly unfounded" category of applications, this seems to involve a clear possibility of limiting the operation of the ordinary asylum procedure, on a somewhat arbitrary basis, to those cases which appear *prima facie* eligible for refugee status. Putting the emphasis on admissibility, and conditioning this on summary assessment of "unfoundedness" (or, perhaps rather, well-foundedness) under vague criteria, the examination may thus turn into a *proceduralized* approach to the whole issue of protection.

*Time limits for asylum applications*

Some states, in particular transit countries in central Europe, have adopted legislation providing for certain time limits for the submission of an asylum application. Such provisions exist, for example, in Bulgaria (72 hours), the Czech Republic (24 hours), Hungary (72 hours), Latvia (72 hours) and Romania (10 days).[40] Although the relevant provisions may have different legal consequences, and may indeed be subject to differing implementation, they generally operate as procedural barriers to having the application examined in substance.

At best, the alternative to refugee status determination may be some other form of protection against *refoulement*, the availability and status of which will depend on the national legislation of the country in question. This implies a less protected status and less secure residence rights for refugees. Furthermore, the risk of forcible return in violation of international law can hardly be excluded. In this respect, it has to be pointed out that fixed time limits are clearly incompatible with state obligations under the Geneva Convention, as well as with human rights treaties prohibiting the forcible return of persons if they are thereby exposed to risk of harm.[41]

[40] UNHCR, 1997b, pp. 233, 241, 255, 273 and 292 respectively.

[41] On the evidentiary effects on status determination of the failure to apply for asylum in time, see Hathaway, 1991, pp. 50-5. See also UNHCR Executive Committee Conclusion No. 15(I), 1979: "While asylum seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration."

While there may be a certain logic in states requiring the submission of asylum applications at the first possible opportunity, in order to prevent asylum seekers from using their territory for the purpose of irregular transit, the state interest in applying rigid time limits is not unequivocal, leaving aside the legal implications mentioned above. If denial of access to refugee status determination procedures leads the applicant into an unfavourable or even irregular position, this may in itself have negative consequences for the state of actual residence. It may certainly also be an inducement for the individual to make (new) attempts to leave the transit country irregularly. Moreover, failure to determine refugee status will also work as a legal obstacle if the state wishes to return the person forcibly to the country of origin.[42] The apparent control objective of time limit provisions may thus have considerable repercussions on the states intending to implement them.

*Externalized control measures: carrier sanctions*

As mentioned previously, the combination of visa requirements and the imposition of sanctions on carriers for bringing in passengers without valid passport and visa has the effect of engaging private companies in the exercise of immigration control functions. As everyone travelling knows from personal experience, this has resulted in extensive document controls being carried out by transport companies. Within Europe, this is even taking place simultaneously with the gradual abolition of formal border controls.

The regulatory rationale behind this policy is certainly the desire of states to avoid responsibility for action taken by private companies in a setting that is not formally defined as immigration control. As such this is already highly problematic because the decision to deny embarkation is essentially an exercise of control functions exactly the same as that carried out at the border points of the state of destination. Since transport companies are acting under instruction from the authorities of that state, at the threat of being sanctioned for not adhering to those instructions, there are strong reasons to assume that it must be considered an indirect exercise of state jurisdiction, which thus implies responsibility for the state concerned. As often and persuasively stated by various organizations and observers, the effects of carrier sanctions are incompatible with basic norms and principles of international refugee and human rights law.[43]

Irrespective of the legal acceptability of such policies, this mechanism of immigration control has spread widely and rapidly since the mid-1980s, and it may now seem to be such a well-established practice that an effective step backwards is unlikely. Standards of international air transportation have already been partially adapted to fulfill the requirements of this policy, and it has even been codified as a compulsory control mechanism for state parties to the Schengen Convention.[44]

[42] Cf. Nagy, 1997, p. 75.

[43] UNHCR, 1988; Meijers, 1988; Feller, 1989.

[44] Cf. Vedsted-Hansen, 1991.

*Immigration officers abroad*

As a way of further increasing the tendency to *externalize* immigration control, some states have in recent years posted immigration officers at their diplomatic missions in countries from which they want to reduce departures towards their borders. Much of the work done by such officers encompasses traditional administrative activities which do not raise any particular controversy, but there are also highly worrying examples of expanded functions which in turn will breach the illusion of privatized control so far asserted in relation to carrier sanctions.

Even though not too much is known about the nature and extent of these externalized control activities, it has become public that such immigration officers carry out training of airline check-in staff at airports which might serve as exit points for passengers with false documents, or no documents at all.[45] This is already tantamount to taking over important elements of the functions of the transport companies whose private nature has otherwise been the legitimizing basis of delegating control, and thereby responsibility as well.

Information has also been published to the effect that the immigration officers posted abroad themselves carry out document controls in foreign airports. In this connection they may cooperate closely with the border police authorities of the exit or transit countries in question. These controls may result in passengers being prevented from travelling further, in accordance with the terms of reference of the immigration officers on duty.[46]

Training and other forms of cooperation with transport companies or local authorities in third countries is not just a bilateral activity carried out by individual destination states. In order to coordinate such programmes, the EU adopted in 1996 a Joint Position on "pre-frontier assistance and training assignments" which establishes the following objectives and guidelines for these extra-territorial control activities:

> Whereas checks carried out on embarkation on to flights to Member States of the European Union are a useful contribution to the aim of combating unauthorized immigration by nationals of third countries, which, pursuant to Article K.1 (3) (c) of the Treaty, is regarded as a matter of common interest;
>
> Whereas the posting to airports of departure of Member States' officers who are specialized in such checks, to assist the officers who carry out checks on departure locally on behalf of the local authorities or on behalf of the airlines, is a

[45] See, for example, Danish Immigration Service, 1997.

[46] Ibid.

means of helping to improve those checks, as is also the organizing of training assignments aimed at airline staff;

Whereas these matters could be dealt with more effectively by a joint position; whereas the terms of such a position should therefore be established,

…

*Article 1. Assistance assignments*

1. The joint organization of assistance assignments at third-country airports shall be carried out within the Council with full use being made of the possibilities for cooperation offered.

2. Assistance assignments shall have as their objective the provision of assistance to officers locally responsible for checks either on behalf of the local authorities or on behalf of the airlines.

3. Assistance assignments shall be carried out in agreement with the competent authorities of the third country concerned.

4. Assistance assignments may be of varying duration. For this purpose, a list of airports at which joint assignments could be carried out on a temporary or permanent basis shall be drawn up.

*Article 2. Training assignments*

1. The joint organization of training assignments for airline staff shall be carried out within the Council.

2. The purpose of joint training assignments shall be among other things to describe Member States' document and visa requirements and the methods by which the validity of documents and visas may be checked.

3. For this purpose, the following shall be drawn up:

- a list of airports at which joint training assignments could be carried out,

- a six-monthly programme of joint training assignments,

- a collection of information of use to airlines,

- a collection of travel documents and visas of use to airlines.

4. Assignments shall be carried out in agreement with the competent authorities and the airlines concerned.

*Article 3. Common provisions*

1. Joint assistance or training assignments shall be carried out by specialist officers designated by the Member States and forming part of a joint assignment.

2. Member States shall inform each other if they wish to participate in an assignment covered by this joint action.

3. In so far as the costs incurred by the officers designated by a Member State are not borne by the third country and/or airline concerned, such costs shall be borne by the Member State concerned.

4. The embassies of the Member States present in the country in which the assignment is carried out shall be informed by the Presidency of the Council in time to enable them to lend any assistance.

5. The Member States shall inform each other within the Council of any assistance or training measures which they conduct outside the framework of this joint position.

6. Each year the General Secretariat of the Council shall draw up a report on the activities carried out under this joint position.

7. Subject to the necessary adjustments, the assignments provided for in this joint position may also be carried out at sea ports.

8. The Member States shall take all necessary steps to implement this joint position without prejudice to any cooperation organized bilaterally or in the framework of other organizations; in this context there shall be the widest possible coordination between the Member States.[47]

There is no indication, however, of the nature of such cooperation, or whether any protection aspects are being taken into account, in order to apply human rights norms modifying the purely technical control of travel documents. It can therefore by no means be excluded that externalized control activities affect persons in need of

[47] Joint Position of 25 October 1996 defined by the Council on the basis of Article K.3 (2)(a) of the Treaty on European Union, on pre-frontier assistance and training assignments (O.J. L 281, 31 October 1996).

protection, preventing them from gaining access to territories where they can apply for asylum, and even exposing them to the risk of persecution.

To the extent that this results from the potential destination states sending their own officials to carry out pre-screening of passengers in airports through which they might otherwise arrive at their borders, then the active involvement of those same states is sufficiently clear to engage their responsibility under international law. Irrespective of their possibility to disengage, by invoking the private nature of the agents, from being held responsible for the indirect control carried out by transport companies, states have at least here given up the legal construction of delegated powers.

*Making third countries 'safer third countries'*

The containment of refugees, regardless of the safety of their situation, has taken place over the years. Some of the policies described above can indeed be considered as examples of such a strategy, in so far as they may result in asylum seekers being caught up either in their home country or in a transit country that does not offer any protection.

Giving effect to containment policies may also be left fully to the authorities of third countries. In the Baltic region, for instance, the fear that great numbers of asylum seekers might arrive via Estonia, Latvia or Lithuania from intermediate transit countries, made the Nordic states very active in various assistance programmes with the three eastern Baltic states. These programmes, which came as part of these three states' general strategy of becoming integrated with the EU, aimed to establish asylum procedures and other protection structures. The purpose obviously was to make these countries safe enough to be "safe third countries", thus allowing for the return on these grounds of asylum seekers who might arrive in Finland, Sweden, Denmark or Norway through one of the three eastern Baltic states.

In addition, the assistance programmes also aimed at the establishment and reinforcement of border controls. An important aspect to this effect was to enable the authorities of the Baltic transit countries to stop asylum seekers from continuing to the West, by carrying out tight exit controls, if necessary backed by military and other authorities of the Nordic countries.[48] What distinguishes this from the delegated controls described below is the fact that they were actually accompanied by serious efforts to improve refugee protection in the transit countries.

*Engaging third country authorities in immigration control*

The externalization of immigration control has come close to completion with the recent Action Plan adopted by the EU in order to prevent Iraqi asylum seekers from seeking asylum in EU countries. Following the arrival of increased numbers of Iraqi asylum seekers in Western Europe over the past few years, and in particular the

[48] See Vedsted-Hansen, 1996.

arrival of quite high numbers in Italy during the winter of 1997-1998, the EU Council adopted on 26 January 1998 an Action Plan on the "influx of migrants from Iraq and the neighbouring region".[49] Given the language used and the actions proposed in this document, it is worth quoting it extensively. Before doing so, it should be mentioned that a situation of mass-influx into any EU country has in no way occurred, neither is such a situation known to have been imminent.[50]

The EU Action Plan presents an array of control measures, many of which involve third countries rather than EU states themselves. In the section entitled "Combatting illegal immigration" it describes a number of measure to be taken by the EU or its Member States:

> 23. Member States to exchange information within the Council about the visa issuing process at Embassies and Consulates in the region and identify whether procedures require amendment.
>
> 24. Member States to arrange appropriate and specialized training of staff at embassies and consulates in the region.
>
> 25. In the longer-term, the Council to monitor the application of the Recommendation on consular cooperation and consider proposals for action at posts in the area.
>
> 26. The Council to ensure effective application of the Joint Position on pre-frontier assistance and training assignments in relation to countries of origin and transit.
>
> 27. Member States, bilaterally or within the Council, to promote joint missions to specific departure points to train carriers in the detection of false documents in accordance with the Joint Position on pre-frontier assistance.
>
> 28. Member States to provide mutual assistance in the training of border control staff and airline personnel, e.g. by bilateral exchange programmes.
>
> 29. Member States to arrange training and exchanges between officials of Member States and third-countries concerned, in cooperation with the Commission where EU financial programmes exist. The Odysseus programme establishing a programme of training, exchanges and cooperation in the fields of asylum, immigration and external frontiers is an

[49] Influx of Migrants from Iraq and the Neighbouring Region. EU Action Plan, adopted by the EU Council 26 January 1998.

[50] In its consultations with the EU and Member States, UNHCR also held the view that the numbers of Iraqi asylum seekers, even though they were rising and were concentrated in a few states, could not be considered a mass-influx.

> important element in this regard: Member States to commit themselves to resolving current difficulties over this programme.
>
> 30. In the longer-term, the Presidency to review the outcome of the Airline Liaison Officer seminar and bring forward to the Council any proposals for future action at EU level emerging from it. Member States and the Commission to consider seminars for other officials involved in security checks.
>
> 31. Member States to operate consistent and effective border controls, for Schengen States in accordance with Schengen requirements.
>
> 32. Member States to exchange officials by mutual agreement, both between themselves and with the third-countries concerned, in order to observe the effectiveness of measures to prevent illegal immigration.
>
> 33. Member States to send experts to the third-countries concerned, by mutual agreement, to advise on the operation of controls at land and sea frontiers.
>
> 34. Member States with particular experience to share technical knowledge and expertise with other Member States and, subject to their agreement, with the third-countries most heavily affected.
>
> 35. Routine and effective implementation by Member States at national level of security measures and carriers' liability legislation against carriers bringing undocumented passengers and passengers with forged documents to the EU. The introduction and implementation of sanctions against carriers.
>
> 36. Member States and the Commission to consider the best use of existing EU funding programmes to support effective controls at the frontiers, including programmes of cooperation in the relevant third-countries.[51]

It is noteworthy that these measures are generally far more operational than the relatively few protection-oriented measures adopted.[52] Whereas the overall logic appears to be containment of asylum seekers in Turkey and other "third-countries concerned", the protective response is relatively modest, limiting itself to exchange of information, policy review, monitoring of humanitarian needs, and the like.[53] Due to

[51] EU Action Plan, adopted 26 January 1998.

[52] Cf. Van der Klaauw, 1998, pp. 92-3.

[53] EU Action Plan, paras. 4-6 (on humanitarian aid) and 7-12 (on effective application of asylum procedures).

the active and systematic involvement of the EU and its Member States in the controls carried out by the authorities of third countries, there are strong reasons to assume that these EU states may also incur responsibility for the consequences of this more or less indirect form of jurisdiction.[54]

Along with its strong emphasis on externalized border control, the Action Plan does not provide any qualification of the notion of "illegal immigration" as distinct from issues of refugee protection and asylum. In this connection it is pertinent, though possibly not even necessary, to draw the attention to the fact that the "migrants from Iraq" are to a large extent genuine refugees. Although a part of them may have other, or complex, motives for leaving their country of origin, there is thus a presumption that they are in need of international protection. The same is the case for those moving on from transit countries in search of protection they have not thus far been able to find.[55] Processing their asylum applications might rebut this presumption, while blocking access to such procedures makes it meaningless and unsustainable to describe the persons involved as "migrants" pure and simple.

**Limits to restrictionism**

Much attention has been given to restrictionist tendencies in the asylum policies of the EU and other industrialized states in the preceding section, pointing at the harm this may cause to individuals and recognized principles. This section mentions some recent developments that seem to modify these tendencies. In the medium-term they could even turn out to form the basis of new and more constructive approaches to refugee protection, thereby eventually reversing certain aspects of restrictionism.

Firstly, there is growing recognition of the fact that some limitations are inherent in the nature of controlling immigration. There are various aspects to this realization. Irrespective of states' attempts to tighten controls and avoid unauthorized arrivals, they can not be totally successful in this. Some irregular movements will occur anyway and they will by no means be unaffected by controls. It is a crucial point here that the composition and nature of irregular movements can change as a result of reinforced controls. As these controls do not normally distinguish between persons according to their need of protection from persecution, and given that irregular entry at the same time gets more costly, those who manage to evade the barriers may include precisely some of the migrants whom states officially wanted to catch. In any case, the arrivals are not necessarily based on genuine protection need.

This is just one aspect to the reality that tightening control mechanisms may have serious disadvantages for the states themselves. As in other regulatory areas,[56] there

[54] Cf. Goodwin-Gill, 1994, and 1996, pp. 141-5, 252; Hathaway and Dent, 1995, pp. 10-17.

[55] This is supported not only by UNHCR assessments of the status of the persons involved and the nature of their movements, but certainly also by the practice of national asylum authorities in European countries which would be likely to recognize the need of protection of many Iraqi asylum seekers, were they allowed to have their cases examined.

[56] For examples from combatting drug abuse, see Christie and Bruun, 1985.

are a number of costs, if not damages, stemming from the reinforcement of control efforts which have to be taken into account. Apart from their negative effects on people in need of protection, and the lack of efficiency as regards other types of migrants, the control mechanisms set up to implement non-admission policies have also created a basis for a lucrative industry in the irregular trafficking of persons. This industry is by its very nature a part of organized transnational crime, which is likely to integrate human trafficking with the illegal transport of other illegal items. In turn, it may also force some of the persons arriving irregularly to join these same organizations, due to financial and other forms of dependence upon their traffickers.[57]

Interestingly, in recent years some of the states which advocated and implemented the reinforcement of control mechanisms have started seriously discussing their possible negative effects both on refugee protection and on the self-interest of states, and how such effects could be compensated for. In 1997, UNHCR and the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC) made a joint effort to discuss whether "control measures adopted by European Governments for the purpose of preventing illegal immigration have an impact on refugee protection". According to a paper prepared for that meeting, "the introduction of visa obligations is primarily justified by States on the basis of their legitimate interest to prevent and control migration at the source … However, it remains unclear how this immigration control measure is affecting refugees and persons in need of international protection, particularly in the absence of a complementary 'refugee visa policy' in line with States' obligations under the relevant international instruments."[58]

Facing the limits of success for this control strategy, it was assumed that a certain portion of asylum seekers have been "diverted from the open channel of asylum to the closed channel of clandestine immigration"; and "difficulties faced both by economic migrants and refugees to reach the industrialized world in a legal manner have fostered the emergence of a huge underground industry involving the illegal movement of people across borders".[59] This depicts in a very precise manner the consequences of redefining asylum seekers as "illegal migrants", a policy of *criminalization* which in itself creates new methods and victims of transnational criminality.

While states have had good reasons for introducing some kinds of restrictive measures, these may sometimes appear inappropriate or relatively meaningless. As people nonetheless still have good reasons for fleeing human rights violations, and such violations have not been effectively eradicated at the roots of flight, it is therefore inevitable now to reformulate strategies of immigration control.

[57] Cf. UNHCR, 1997a, pp. 199-202, referring to information from the International Organization for Migration (IOM).

[58] IGC and UNHCR, 1997, p. 4.

[59] Ibid., pp. 4 and 5; for an earlier assessment to the same effect, see IGC, 1994, p. 4.

*Distinguishing refugee protection from immigration control*

One of the main reasons posited for reinforcing immigration control by means of non-admission policies is that, due to official halts on immigration, the asylum system is the only channel for non-citizens into industrialized states, and therefore becomes abused. In so far, the logic seems to be that in order to prevent the asylum system from turning into a "back door" to permanent immigration, it should rather be closed in the first place.[60]

With a view to the possibilities of reinforcing refugee protection in the future, it must therefore be considered a positive sign that some industrialized states are now beginning to reconsider the desirability of maintaining a total halt on immigration. This would in turn allow them to be less keen on the progressive tightening of border controls, as well as more prepared to regularize the status of some of the aliens already residing illegally in their territory. Moreover, it should to some extent reduce the pressure on asylum procedures from migration movements totally unrelated to human rights protection. As a result this might facilitate states' efforts to separate refugee protection from ordinary immigration, thus also making the overall objective of the former clearer to both states and individuals concerned.

A very interesting example of this is the current preparations for a new system of immigration and refugee protection in South Africa. According to policy proposals in the Draft Green Paper published in 1997, there will in principle be three distinct categories of migration movements into South Africa: immigrants intending to settle permanently, refugees being offered temporary protection, and a special system of legal migration. This latter category is aimed at providing temporary access for certain groups of persons (traders, students, cross-border family visitors, labour quotas) from the member states of the Southern African Development Community (SADC).[61] As a consequence, the Draft Green Paper advances a comprehensive system of refugee protection, including a mechanism of sharing responsibility between SADC states.[62]

Although less concrete, there has also been consideration as to whether some legal immigration would be in the interest of European "non-immigration" countries.[63] The outcome still has to be seen, yet there seems to be a growing recognition of the need to reconsider the immigration policy taken for granted in the past few decades.

[60] Cf. Hathaway and Neve, 1997, p. 117.

[61] Republic of South Africa, Task Team on International Migration, 1997, chapters 1 and 2.

[62] Ibid., chapter 4.

[63] See, for example, Rasmussen, 1997.

*Restructuring refugee protection?*

Last, but not least, it is also worth mentioning a few recent reform initiatives within the area of asylum policy itself which could contribute to enhancing refugee protection and, at the same time, to reducing those conflicts with immigration policy which lead to the reinforcement of control mechanisms.

In response to the arrival of refugees from former Yugoslavia, a number of European states established various forms of *temporary protection*. Subsequently, there has been a significant tendency to emphasize the temporary nature of refugeehood, and adjust the overall asylum strategy accordingly. Along the same lines, in 1997 the EU Commission issued a proposal for a harmonized system of temporary protection of displaced persons.[64] As the suspension of refugee status determination has been a key element of these protection models, they serve the purpose of alleviating the administrative burdens on the examination system; in addition, they maintain the distinction between refugee protection and immigration by explicitly not aiming at the permanent residence of refugees.

Although not conceptually connected with temporary protection, the question of *burden-sharing* in practice often becomes an element of discussions about such asylum models, primarily because both have been put on the agenda in relation to mass-influx situations. At the EU level, the harmonization of temporary protection is even likely to depend on some kind of agreement on sharing the responsibilities and burdens of refugee protection. Reflecting the interdependence of these two aspects of sustainable solutions to protection problems, analytical contributions to the groundwork for reform of the international refugee protection regime have included combinations of temporary asylum and burden- or responsibility-sharing mechanisms.[65] A comprehensive inter-governmental study on burden-sharing has also been carried out within the IGC framework in 1997-1998 as part of a review of the international response to situations of conflict and displacement.[66]

## Conclusion and recommendations

None of the contemporary developments, analyses and policy proposals described in the preceding section are, in themselves, sufficient as a basis for reconciling immigration control and refugee protection. Taken together, however, they provide reason to assume that the possibilities for some degree of reconciliation exist; in any

[64] Proposal to the Council for a Joint Action based on Article K.3 (2)(b) of the Treaty on European Union concerning temporary protection of displaced persons, submitted by the Commission on 20 March 1997 (COM(97) 93 Final – 97/0081(CNS); O.J. C 106/13, 4 April 1997; reprinted in UNHCR, 1997b, annex III.B.5.1).

[65] Einarsen, 1995; Hathaway and Neve, 1997.

[66] IGC and Danish Immigration Service, 1998.

event, this is unlikely to happen without serious efforts towards restructuring the international protection system.

Revitalising fundamental principles of human rights and refugee protection is equally important. Upholding the commitments and the basic responsibilities of states in this regard must be the point of departure, legally as well as politically. That said, there is certainly a need to review core elements of protection policies and immigration control strategies.

Thus, a few recommendations would be the following, among which the first three aim at overall policy reform; the next three insist on established principles; and the last one proposes conceptual clarity to facilitate all the rest:

1. The objectives of immigration control ought to be reconsidered; some of the objectives are less absolute than others and thus open to modification, which might shift priorities in the reinforcement of control.

2. The direct costs and the indirect damages caused by reinforced immigration control ought to be assessed, in order to inform reconsideration of the control objectives.

3. To the extent immigration control actually blocks access to asylum procedures, alternative protection mechanisms have to be devised for persons otherwise contained in unsafe conditions.

4. The exercise and premises of immigration control being carried out in relation to exit and entry movements, respectively, needs to be clarified.

5. Irrespective of the logistical framework within which control is carried out, it has to be sensitive to human rights protection aspects since this is, after all, an exercise of state jurisdiction.

6. Within existing national asylum procedures, the generally recognized principles of balancing fairness and efficiency must be revitalized; simplified review mechanisms should be established for objectively defined categories of cases, in such a manner as to guarantee the examination in substance of all applications.

7. Terminology has to be clarified in order to reflect relevant legal and social distinctions; in particular, refugees and asylum seekers must be distinguished from "immigrants" and "migrants", and notions of "illegal" or "irregular" movements must be reserved to clearly defined situations.

With a view to upcoming UN discussions on the Programme of Action adopted at the 1994 Cairo Conference on Population and Development,[67] some additional recommendations shall be made regarding the implications for human rights and refugee protection:

[67] International Conference on Population and Development, *Programme of Action* (UN Doc. A/Conf.171/13, 18 October 1994), Chapter X: International Migration, Cairo, 5-13 September 1994.

(a) A clearer distinction should be elaborated between undocumented migrants in general, and the sub-category in need of international protection (cf. para. 10.16 (b) of the 1994 Programme of Action).

(b) The right of undocumented migrants to seek asylum should be operationalized (cf. para. 10.17).

(c) Those root causes of the international trafficking in asylum seekers which are an indirect impact of some states' non-arrival policies should be assessed and addressed (cf. paras. 10.16 and 10.18).

(d) Access to a fair hearing must be ensured for all asylum seekers within the jurisdiction of states (not merely for those in the territory, cf. para. 10.27).

(e) Efforts to ensure gender sensitivity of guidelines and procedures for the determination of refugee status should be reinforced (cf. para. 10.27).

(f) In order to prevent the erosion of the institution of asylum, refugee definitions should be effectively applied, and protection standards and repatriation rights fully respected, in accordance with the letter and spirit of the international instruments for the protection of refugees, including those fleeing persecution in the context of war and systematic violations of human rights (cf. paras. 10.21, 10.22 (d), 10.28 and 10.29).

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