

NEW ISSUES IN REFUGEE RESEARCH

Working Paper No. 99

From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate

Gregor Noll

Assistant Professor of International Law
Lund University
Sweden

E-mail : Gregor.Noll@jur.lu.se

December 2003



Evaluation and Policy Analysis Unit

**Evaluation and Policy Analysis Unit
United Nations High Commissioner for Refugees
CP 2500, 1211 Geneva 2
Switzerland**

**E-mail: hqep00@unhcr.org
Web Site: www.unhcr.org**

These working papers provide a means for UNHCR staff, consultants, interns and associates to publish the preliminary results of their research on refugee-related issues. The papers do not represent the official views of UNHCR. They are also available online under 'publications' at <www.unhcr.org>.

ISSN 1020-7473

Introduction: the Janus Face of the access crisis

Academics, governments in affluent states and human rights lawyers seem to agree: refugee law is, as so often, in a crisis. This crisis is all about access. Access means different things to different people. Some identify the 1951 Refugee Convention to be part of its cause, obstructing the effective enforcement of migration control. They invoke what is said to be “rising” or “high numbers” of asylum applications (with the base of comparison rarely being made explicit), which would be the symptom of an all too liberal access regime. Others blame precisely indiscriminatory migration control regimes and specify that the crisis of access is indeed a crisis related to the seeking of asylum: corpses of asylum seekers washing ashore at Italian, Spanish and Portuguese shores testify to its existence. Seen such, the access crisis is caused by restrictionism rather than excessive liberalism.

The access crisis is janus-faced. From a governmental perspective, the crisis of seeking asylum is about asylum seekers circumventing ever more sophisticated measures of migration control and continue to arrive on state territory to do just that: seek asylum. For would-be refugees, the perspective is a different one: where states prevent migration, they prevent access to asylum as well. In the meantime, human smugglers bridge the widening gap between migration prevention policies and the territorial asylum offers in domestic legislation. But access to smuggling costs money and presupposes the acceptance of high risks by migrants.

In Europe, domestic debates are mostly engaged with the “inhumanity” or “softness” of asylum systems towards applicants who have already arrived. Few observers ask questions about those who have not. After all, the combination of migration control and human smuggling has selective effects. The well-connected, affluent and strong might make it to the North, the others stay put. Amongst them will perhaps be those most in need of protection. As the non-governmental organizations assisting refugees have focussed on how asylum seekers are dealt with inside Europe, denial of access has long been on the fringes of their optics. NGOs could also have been more vocal on the class stratification brought about by human smuggling, where protection is a commodity sold to a middle class of protection seekers. Unsurprisingly, government officials saw their chance and used the spectre of the human smuggler to legitimise further restrictions to the seeking of asylum.¹

The planned economy of resettlement

But are we really faced with a dilemma? Is effective migration control per se inimical to the seeking of asylum? Do we have to choose between a libertarian practice of free

The author would like to thank Ms Jessica Fagerlund, LL M, for her valuable research assistance in relation to Section 3. This working paper will be published in G. Alfredsson and R. Ring, *Liber Amicorum in Honour of Professor Göran Melander* (Martinus Nijhoff Publishers, The Hague 2004).

¹ The so-called UK proposal drew heavily on the argument that the distribution of resources in the global refugee protection system was starkly unjust. However, the proposals of erecting so-called “regional processing areas” would come at a greater expense than territorial protection in the North, and thus be inherently unfit to optimise resource distribution. See G. Noll, ‘Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones’, forthcoming in (2003) 5:3 *European Journal of Migration and Law*.

migration, with all its consequences for the sustenance of welfare states, and the status quo of rigid migration control, sacrificing asylum seekers to uphold the personal limitations of our societies? Not so. Migration control can very well be selective, and open legal avenues for persons in need of protection.

Selective and discerning migration control is certainly no new phenomenon. It has been practices for decades, mainly in the framework of resettlement programmes. Resettlement has, however, two major drawbacks which makes it unfit as a response to what has been termed the “asylum and access challenge”.² First, resettlement is about policy rather than law. It is about inviting individuals in need of protection rather than entitling them to access protection. Second, its quantitative contribution to refugee protection is minuscule, with less than 0,1 percent of the world’s refugees being protected through resettlement.³ Indeed, resettlement should be rightly termed a plan economy of protection, and it shares the inadequacies of plan economies in general. Resettlement cannot possibly match demands for protection with offers, as it is currently structured. It offers individuals statistically bad odds in a gamble for protection. If we study the behaviour of would-be refugees, illegal migration seems to remain the better choice for those who can afford its costs.

Illegal migration is structured as a market, whether states like it or not.⁴ Access to protection needs to be bought via human smugglers, with prices being set by the difficulty in delivering the service asked for. States can intervene in this market by restrictive legislation. This will push up prices. Theoretically, states could close down the market with harsh and draconian border defense policies, reminiscent of the Iron Curtain and similar arrangements. In practice, they cannot: this would imply the concurrent abandonment of their character as liberal democracies.

If illegal migration is indeed a market, the planned economy of resettlement alone can hardly be an adequate tool to diminish its attractions. This is why radical initiatives as Australia’s so-called Pacific Solution or the UK proposal on regional processing centres combine the plan economy of resettlement with a draconian prevention of immigration. The harshness of the latter is, however, violative of international law⁵ and would thus cast doubt on how serious its agents are about the values typically associated with liberal democracy: respect for the rule of law and for human rights as well as transparency in and judicial control of public administration.

This is not to make the point that states should abandon the traditional techniques of implementing personal sovereignty and deal with immigration and the seeking of

² ECRE/USCR, *Responding to the Asylum and Access Challenge. An Agenda for Comprehensive Engagement in Protracted Refugee Situations* (London/Washington D.C. 2003).

³ In 2001, a total of 92,260 resettlement arrivals were registered by UNHCR. The size of the global refugee population was at 12.0 million persons in 2001, and the total population of concern to UNHCR was at 19,8 million. UNHCR, *Statistical Yearbook 2001. Refugees, Asylum-seekers and Other Persons of Concern – Trends in Displacement, Protection and Solutions* (UNCHR, Geneva 2002), p.19 and p. 60.

⁴ Apparently, the idea of personal sovereignty makes it difficult to concurrently think immigration as a market mechanism. Given that there is no perfect exercise of sovereignty in the real world, there is nothing inherently contradictory in conceiving immigration as concurrently subjected to sovereign regulation and non-state market forces.

⁵ For an analysis of the legal implications of transit processing centres and regional processing centres, see Noll 2003, *supra* note 1. For an analysis of the Pacific Solution, see Human Rights Watch, ‘*By Invitation Only*’: *Australian Asylum Policy*, New York, December 2002.

asylum as markets only. However, the ideological contradiction is striking. While the efficiency of state governance has been called into question in many areas of public policy, and a wave of deregulation rolled through a couple of areas relevant in international relations, migration has taken the opposite way and is being ever more densely regulated, albeit its enforcement is increasingly subcontracted to private actors.

The emergence of resettlement in the discourse of governments is indicative of this phenomenon. It raises the question of coherence. If we do believe that individuals know best what is good for them (as liberals teach us to do) and that state planning alone is not the best way of coordinating individual preferences (as free market proponents tell us), why should we suddenly embrace resettlement as a protection solution? Because states like its suggestion of controlled numbers? Because it brings work for international institutions as UNHCR and IOM? To avoid misunderstandings: resettlement is an important contribution to protection, well worth of being refined in selection and enlarged in capacity. However, neither governments nor refugee advocates should mistake resettlement for a silver bullet. At best, it may complement a response to the access crisis, but it is no response to that crisis in itself.

The legacy of protective passports

While the last five decades of refugee discourse pivoted around the three solutions of voluntary repatriation, local integration and resettlement, the history of protection is so much richer. It is striking that the protective techniques practised during the Second World War are little discussed, although they are clearly of relevance to our contemporary discourse. On an overarching level, there are important analogies between the current situation and the protection crisis during the Second World War. As today, forced migration during the Second World War was characterised by a crisis of access. Armed conflict itself blocked migratory moves, and immigration regimes were tightened gradually, disallowing those in need of protection to reach safety. Visa regimes were fine-tuned to keep refugees out, as the practices of Sweden and Switzerland illustrate.⁶

However, the extermination of the European Jewry during the Second World War as well as Nazi persecution of political opponents brought about significant counterstrategies by foreign diplomats and embassy staff in a number of cases. Best known is perhaps the example of Swedish diplomat Raoul Wallenberg, who served at the Budapest legation in the critical end phase of the German occupation of Hungary. But already before Wallenberg's arrival in Budapest, staff at the Swedish embassy and the Swedish foreign ministry had issued visas and other documents intended to shield their holders from persecution.

Levine has mapped the interaction between actors and structure behind this historical endeavour, and launched the concept of "bureaucratic resistance" to describe the role of protectors assumed by civil servants.⁷ This effort was backed up by the Swedish government, and reinforced substantially with the arrival of Raoul Wallenberg, who

⁶ G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers, The Hague 2000), pp. 3-4.

⁷ P. A. Levine, *From Indifference to Activism. Swedish Diplomacy and the Holocaust; 1938-1944* (Acta Universitatis Uppsaliensis, Uppsala 1996).

contributed the idea of “protective passports”. With the support of the Swedish government, he saved thousands of Hungarian Jews from falling victim to persecution by German occupants and members of the Hungarian Arrow Cross Movement.

Wallenberg and his colleagues issued documents which shielded their holders – at least temporarily – from harm by persecutors. Their protective power rested on the implication that the carrier was a presumptive Swedish citizen on her way to Sweden.⁸ As actual emigration to Sweden was impossible for Hungarian Jews in 1944 due to the effects of war and occupation in Central Europe, the willingness of Sweden to deliver on its promise of presumptive citizenship was never fully tested in reality.

This does, however, in no way detract from its value. At the very least, the Swedish authorities endorsed the use of these novel instruments *although* parts of the domestic debate in Sweden was inimically disposed towards refugees, and an actual immigration of Hungarian Jews in the thousands might have resulted in a refuelling of anti-Semitic sentiment in Sweden. Hence, the diplomats and civil servants involved – including the Foreign Minister – indeed took professional risks when assisting those who sought the protection of the Budapest Embassy.

In May 1944, the Hungarian government was considering whether it should allow all “foreign Jews” to be repatriated to the countries claiming them, which raised the question of the actual value of presumptive citizenship. The Swedish Foreign Office was asked by the legation whether it was prepared to accept “Swedish Jews... and also other people with a close connection to Sweden?”⁹ It gave an unambiguous positive response.¹⁰

Did Sweden issue protective documents to anybody asking for them? Most certainly, such a liberal attitude would have quickly depleted respect for the documents. Therefore, the Swedish legation operated a procedure for processing claims, which was based on Wallenberg’s written instructions to the decision-makers. In September 1944, affirmative decisions were limited to applicants proving family relations, business connections or membership in the cultural and administrative elite, on condition that the latter provided “something outstanding for Sweden”.¹¹ Thus, the

⁸ “The passport stated that the holder was to go to Sweden within the framework of repatriation authorized by the Swedish Foreign Office, and until departure, the carrier and his property were under the protection of the Swedish legation.” H. Rosenfeld, *Raoul Wallenberg* (Holmes & Meier, New York 1995), p. 34.

⁹ Letter by the Budapest legation to the Swedish Foreign Office, quoted by Levine, *supra* note 7, p. 270, note 96.

¹⁰ Levine, *supra* note 7, p. 270, text accompanying note 97.

¹¹ The instructions were remarkably detailed and also contained rules on evidence. They are reproduced in J. Lévai, *Raoul Wallenberg. His Remarkable Life, Heroic Battles and the Secret of his Mysterious Disappearance*, (White Ant Occasional Publishing, Melbourne 1988), p. 81-2. However, not meeting the requirements did not necessarily mean being denied protection by the Swedish representation in Budapest. The representation sent applicant’s names to the Foreign Ministry in Stockholm, which returned them split up in two categories, one featuring persons with stronger links to Sweden, the other those with weaker links. Apparently, no names were struck out from the list, and listing persons with “weaker links” did not amount to an instruction to the embassy staff not to deal with those cases. Personal interview with Paul Levine, 3 September 2002. An official report by a Swedish-Russian working group researching Raoul Wallenberg’s Budapest activities and his disappearance confirms that protection was gradually extended, and comprised a much larger group than those having close connections to Sweden. Given that the financing of Wallenbergs operations stemmed from US sources,

beneficiaries were defined in a detailed manner, inspired by both communitarian and utilitarian ideas. It is reported that until 15 October 1944, 8.000 applicants were dealt with under the procedure, and, out of those, “more than 3.500 applicants” received a protective document.¹²

The Swiss legation in Budapest took upon itself a critical role in a similar arrangement. First, Switzerland took over the interests of El Salvador, and, after lengthy negotiations with the Hungarian government, was allowed to grant documents giving its holder the status of “citizen of El Salvador”.¹³ Second, in its role as representative of British interests, the Swiss legation had assumed the role of issuing certificates to those Jews who had been granted entry into Palestine. While actual emigration again was blocked by the German occupation, the Swiss consul amplified the protective effect of the certificates by issuing legitimations to its holders, which stipulated that its bearer was under the protection of the Swiss legation until such time that the journey to Palestine could begin.¹⁴ Again, these efforts must be appreciated against the backdrop of Swiss refugee policy before the war, which produces an image full of contradictions and incoherence.¹⁵

Similar protective techniques were used by other diplomatic representations in Hungary.¹⁶ The estimated numbers of persons saved through these efforts are considerable, one quote for the Swedish rescue activities in 1944 being some fifty thousand persons.¹⁷ Levine’s detailed study refrains from estimates, and points to the fact that quantification would require a research effort in its own right.¹⁸

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

However, protection needed not go as far as extending a presumptive citizenship through a protective passport. There are other examples, where the use of visas was sufficient to facilitate emigration. Japanese diplomat Chiune Sugihara issued transit visas to Lithuanian Jews threatened by persecution during the German occupation of

there is logic to this broad approach. Utrikesdepartementet, *Raoul Wallenberg. Redovisning från den svensk-ryska arbetsgruppen* (Fritzes, Stockholm 2000), p. 35.

¹² Lévai, *supra*, at p. 83.

¹³ Rosenfeld, *supra* note 8, pp. 33-4.

¹⁴ *Ibid.*

¹⁵ In this context, one should recall that the Swiss government had struck a deal with Germany in 1938 to the effect that the passports of German Jews be stamped with a ‘J’, making it possible for Swiss border police to turn back would-be Jewish refugees, while maintaining visa-free travel for non-Jewish Germans. For an overview with further references, see Noll, *supra* note 6, pp. 2-4.

¹⁶ Rosenfeld, *supra* note 8, p. 37, naming efforts by the Portuguese *chargé d'affaires* Carlos de Lix-Teixeira Branquinho and by Spanish *chargé d'affaires* Miguel San-Briz.

¹⁷ Rosenfeld, *supra* note 8, p. 37.

¹⁸ Levine, *supra* note 7, p. 277, note 127.

the Baltics in 1940. Such visas were a precondition for its holders being able to cross the Lithuanian-Soviet border.¹⁹

In the same year, Portuguese diplomat Aristides de Sousa Mendes issued Portuguese entry or transit visas to Jews and other persecuted persons fleeing the threats of seizure after the French defeat. De Sousa Mendes acted contrary to express instructions by the Salazar government, who ordered his immediate recall and dispatched two emissaries to escort him home. His rescue efforts led to his dismissal. In 1988, he was fully rehabilitated by the Portuguese National Assembly.²⁰ These examples add another aspect to the mosaic of paperwork protection, giving the term “bureaucratic resistance” a sharper edge. De Sousa Mendes not only resisted the persecutors’ project of extermination, he also resisted the insulative policies of his own government.

What is to be learned from these rescue attempts? First, there is an interesting correlation between non-access policies stopping flight attempts and diplomatic activities. When diplomats tried to help, regular emigration had long become impossible. Before the war, and in the wake of the 1938 pogroms in Germany, all important destination countries were limiting their reception of refugees or even sealing off their borders.²¹ The outbreak of the war meant additional hurdles to the movement of persons, and, at the same time, the proper extermination of Jews began. In other words, the desperate rescue attempts of diplomats came at a stage where access to protective territories was blocked long ago, and refugee policies had turned into anti-immigration policies. The memory of this failure should inform policy choices even today, where access to protective territories is regularly blocked by would-be states of asylum.

Second, the examples show how many lives can be saved through the powers diplomatic representations actually enjoy even in the most desperate of situations. All of the named examples put the role of the decision-maker at the diplomatic representation in the limelight. The Swedish selection instructions illustrate that this does not mean complete discretion or arbitrariness. On the contrary: rescue efforts imposed a selection of beneficiaries by diplomats, and, to that effect, a set of rules and procedures was developed in a very tense and difficult work situation. This heritage would be well administered, if future policies would transform this exceptional endeavour into an everyday practice – as rule-governed, predictable and transparent as possible. On the other hand, reliance on rules should not obscure the fact that the single decision-maker remains central to the process of protection and rescue. Any future scheme for facilitating territorial access to refugees should take this experience

¹⁹ D. Eagleman, *The Sugihara Project*, available at:

<<http://www.eagleman.com/sugihara/sugimain.html>>, accessed on 31 August 2001.

²⁰ Entry on Aristides de Sousa Mendes, in *Encyclopaedia of the Holocaust* (Macmillan, New York 1990).

²¹ By way of example, the Swedish National Board of Health and Welfare (*Socialstyrelsen*) sent out a circular in 1938 to the effect that holders of German passport stamped with a ‘J’ were not to be admitted to Sweden, save for cases in possession of a residence permit or a ‘border recommendation’ (*gränsrekommendation*). Border recommendations were only available in cases where return to Germany was deemed unproblematic. See Statens Offentliga Utredningar (SOU) 1967:18, p. 160. For a detailed account, see H. Lindberg, *Svensk flyktingpolitik under internationellt tryck 1936-1941*, (Allmänna Förlaget, Stockholm, 1973), pp. 123–80.

into account, and entrust sufficiently trained and experienced persons with this crucial role.

Finally, it might be relevant to recall how much contemporary constructions of European identity owe to persons as Raoul Wallenberg and Aristides de Sousa Mendes. But merely celebrating them as hero personalities ultimately risks diverting attention from the ethos that Europe now claims as its own.²² Against this background, the significant heritage of protective passports and transit visas needs to be transformed into a permanent element of the international system for transnational human rights protection.

Contemporary transformations: protected entry procedures

Interestingly, certain tangible elements of the Wallenberg legacy to refugee law have been picked up in domestic refugee law and practice after the war. In 2002, six European states formally accepted asylum applications at their embassies²³, and another six allowed access to their territory for protection-related reasons in exceptional cases.²⁴ These additional inroads into the asylum system have been sparsely used and domestic practices vary widely. On a technical level, the introduction of “protection elsewhere”, i.e. safe third country mechanisms referring asylum seekers to protection in transit countries, contributed to the resurfacing of this form of extraterritorial processing. After all, states relying on the safety of third countries needed to add a form of safety valve to their systems in order to meet the critique of refugee advocates. Regardless of this context, the idea of using embassies as a platform for processing asylum claims owes much to the legacy of the 1940s.

Although some countries have abolished formal procedures, a countermove can be tracked at the level of the European Union. Its institutions are presently exploring new approaches to counter the access crisis, and look into extraterritorial processing under the label of “Protected Entry Procedures”. The notion of Protected Entry Procedures “is understood to allow a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final”.²⁵ The present section shall attempt to capture this development.

²² Another line of argument is that it is precisely the heroic nature of single personalities that relieves us from the call to act as they did. After all, heroes are exceptional, while we are living in normalcy. Raising a monument to Wallenberg testifies to this difference. Seen thus, a state pursuing the harshest refugee policies and an intense cult of Wallenberg as a hero personality would not necessarily contradict itself.

²³ Austria, Denmark, France, the Netherlands, Spain and the UK. See G. Noll, J. Fagerlund and F. Liebaut, Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure (European Communities, Luxemburg 2003), available at:

europa.eu.int/comm/justice_home/doc_centre/asylum/common/asylumstudy_dchr_2002_en.pdf

[hereinafter Externalized Processing Study]. However, Austria, Denmark and the Netherlands abolished formal procedures in 2002 and 2003 due to the adoption of increasingly restrictionist political agendas.

²⁴ Belgium, Germany, Ireland, Italy, Luxembourg and Portugal. Externalised Processing Study, *supra*, at 169-172.

²⁵ European Commission, *Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM(2003) 315 final. The

The Conclusions by the 1999 European Council in Tampere are generally regarded as catalysts in the development of European asylum and migration policies. They contain a clear reference to the issue of access to territory, thus sending out a strong signal on the balance between border control and refugee protection. Conclusion 3 addresses the issue, and states that for those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes. These common policies must be based on principles which are both clear to EU citizens and also offer guarantees to those who seek protection in the EU or access to it.²⁶

The debate on externalised processing was given a new impulse by the speech of former UK Home Secretary Jack Straw at the 2000 Lisbon Conference on Asylum.²⁷ Straw underscored the importance and potential of reception in the region, and pointed to the recent Kosovo experience as an example of how to cope with “a particularly acute situation”.²⁸ However, many refugee advocates perceived his intervention as a further step in Western European burden-shirking. A closer look at its content, and the elaborations which Straw made on a later occasion,²⁹ indicate that the Home Secretary’s suggestions were far more differentiated than many earlier proposals.

Straw’s 2001 suggestions feature three elements: assisting countries in the region of origin, improving access to asylum for genuine refugees and dissuading those who are not refugees from benefiting from the 1951 Refugee Convention. The second element merits a full quote: “[We] must make it easier for genuine refugees to access the protection regimes of Europe and other Western States, for example by making their journeys less hazardous.”³⁰ In developing this element, Straw focussed on resettlement schemes, and expressed his support for the endeavours of the European Commission in that area.

As a whole, Straw conceived regional processing as complementary to ordinary territorial processing. However, his interventions indicated a strong concern with numbers: “Any moves towards the implementation of ideas for processing of claims overseas or substantial resettlement programmes will have to be in parallel with driving down the numbers of unfounded applications.”³¹ This shall not be understood to imply that an externalised processing scheme must bring down the number of spontaneous arrivals to be seen as successful. Rather, Straw sought to make clear that

Communication herein endorsed the earlier suggestion of a definition made by Noll, Fagerlund and Liebaut in the Externalised Processing Study, *supra* note 23, at 24.

²⁶ European Council, Presidency Conclusions, Tampere European Council. 15/16 October 1999 [hereinafter Tampere Conclusions], Conclusion 3.

²⁷ Speech by UK Home Secretary Jack Straw at the European Conference on Asylum, *Towards a Common Asylum Procedure*, Lisbon 16 June 2000, available at:

<<http://www.ind.homeoffice.gov.uk/default.asp?PageId=92>> (accessed on 17 September 2002).

²⁸ *Ibid.*

²⁹ Jack Straw, *An Effective Protection Regime for the 21 Century*, Speech to the IPPR, 6 February 2001, available at <http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763,434341,00.html> (accessed 15 September 2002).

³⁰ *Supra*, at para. 30.

³¹ *Supra*, at para. 49.

externalised processing must be part of a comprehensive package, which should also contain measures countering unfounded applications.

An important contribution to the debate on forms and content of a Common European Asylum System was offered by the European Commission in November 2000. It adopted a Communication, which intended to signpost the way “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”.³² Under the heading “Access to the territory”, the Commission suggests that processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme may be ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or smuggling gangs or having to wait years for recognition of their status.

This option, as the Commission sees it, must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals.³³ The Commission subsequently launched two separate feasibility studies on the matters of asylum requests made outside the European Union and resettlement schemes at EU level.

The Communication triggered a number of responses, and not all of them were supportive of the Commission’s strategy. The Committee of the Regions “doubted the relevance of options such as resettlement.”³⁴ A strong signal of concern and qualified support was sent out by UNHCR. The Office pointed out that “the Tampere European Council’s commitment to the absolute respect of the right to seek asylum is in jeopardy if no adequate safeguards are put in place to mitigate the negative effects of migration control measures on people who need protection and are seeking access to safety in the European Union. The question of access to territory is indeed key to any asylum process; [...]”³⁵ The Office encouraged the further exploration of possibilities to facilitate the visa procedure in specific situations, including the delivery of “humanitarian visa [sic] to individuals who are at risk in their country of origin and in need of international protection”.³⁶ With regard to processing in the region, the Office insisted that this should be seen as a complement to, and not a replacement of territorial processing. UNHCR’s comments are limited to regional processing as part of either resettlement or assistance to regional host countries in conducting determination procedures.³⁷

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

³² European Commission, Communication of 22 November 2000, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM (2000) 755.

³³ *Supra*, at Chapter 2.3.2.

³⁴ European Commission, Communication from the Commission to the Council and the European Parliament. On the common asylum policy, introducing an open coordination method, Brussels, 28.11.2001, COM (2001) 710 final, p. 27.

³⁵ UNHCR, Towards a Common Asylum Procedure and Uniform Status, Valid Throughout the European Union, For Persons Granted Asylum, Geneva, November 2001, para. 8.

³⁶ *Supra*, at para. 10.

³⁷ *Supra*, at para. 11-13.

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

...

j. by evaluating the merits of resettlement programmes, the possibility of processing asylum applications outside the Member State, the use of cessation and exclusion clauses and the system and arrangements for transferring protection.³⁸

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

In its 2001 Communication on a Common Policy on Illegal Immigration, the Commission underscores again that “the fight against illegal immigration has to be conducted sensitively and in a balanced way”³⁹ and goes on to state that:

Member States should, therefore, explore possibilities of offering rapid access to protection so that refugees do not need to resort to illegal immigration or people smugglers. This could include greater use of Member States’ discretion in allowing more asylum applications to be made from abroad or the processing of a request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by resettlement scheme. Such approaches could ensure sufficient refugee protection within and compatible with a system of efficient countermeasures against irregular migratory flows.⁴⁰

When reacting to the Commission’s Communication on a Common Policy on Illegal Immigration, UNHCR took the opportunity to develop its position on visa policies further. The Office suggested inter alia the introduction of the possibility of processing asylum applications in countries of origin in cases “where the feared harm emanates from non-State agents and there is no State complicity, but the State is unable to provide the necessary protection in any part of the country.”⁴¹

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

I would like to encourage you to explore new protection mechanisms nearer to the origin of refugee movements. One proposal is that EU Member States should offer opportunities for those few individuals who

³⁸ Supra note 34, p. 18

³⁹ European Commission, Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, Brussels 15. November 2001, COM (2001) 672 final, p. 8.

⁴⁰ Ibid.

⁴¹ UNHCR, Communication from the European Commission on a Common Policy on Illegal Immigration COM(2001) 672 final. UNHCR’s Observations, Geneva, July 2002, para. 19.

have a need for international protection to make asylum visa applications at embassies in their countries or regions of origin.⁴²

On 3 June 2003, the European Commission presented a Communication to the Council and the European Parliament under the title “Towards more accessible, equitable and managed asylum systems”.⁴³ The Communication suggests that Member States should consider the introduction of Protected Entry Procedures and resettlement schemes. On 19-20 June 2003, the Thessaloniki European Council took note of the aforementioned Commission Communication and invited the Commission to present a report on the orderly and managed entry of persons in need of international protection to the EU.⁴⁴ The report is to be finalised before June 2004.⁴⁵

In all, observers are left with a set of divergent tendencies: at the domestic level, some states formerly offering Protected Entry Procedures have dismantled them. In a marked contrast to the recalcitrance at domestic level, the European Commission is promoting a process of reflection that might lead to the formulation of norms on Protected Entry Procedures at EC level. UNHCR as well as parts of the NGO sector⁴⁶ have followed suit, and lend cautious support to this initiative. Other NGOs are wondering whether there is more to be lost than to be gained in the process, and warn that states may use the existence of Protective Entry Procedures as a pretext to justify ever harsher policies of “protection elsewhere”. To refocus the current debate, it might indeed be helpful to revert to the Wallenberg legacy, which also pivots around a crisis of access.

Conclusion

Reverting to the metaphor used in the introduction of this essay, it is worth recalling that Romans revered Janus as the spirit of doorways and passages. The Janus face of the access crisis displays numerous expressions. It holds the antinomy of individual and sovereign, of inclusion and exclusion, of plan and market and of right and grace.

Resettlement alone is too monodimensional and too limited to bring relief in this crisis. A look back at the historical access crisis preceding the Second World War and culminating after the beginning of extermination in the 1940s illustrated that long-term access policies and rescue attempts in exceptional situations must not be analytically severed, if we are to draw lessons from history for the formulation of a future Common European Asylum System. After all, Wallenberg and his colleagues attempted the rectification of a massive failure of protection by potential asylum

⁴² Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council, Copenhagen, 13 September 2002.

⁴³ European Commission, Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems, 3 June 2003, COM(2003) 315 final.

⁴⁴ European Council, *Presidency Conclusions*, para. 26, 19-20 June 2003.

⁴⁵ On 13-14 October 2003, the Commission and the Italian Presidency of the EU co-organised a seminar where the potential of Protected Entry Procedures and resettlement schemes at EU level were discussed by Member States, representatives of international and non-governmental organisations and academics. The conclusions on Protected Entry Procedures reflect diverging views on their usefulness amongst Member States.

⁴⁶ The authors of the ECRE/USCR report, *supra* note 2, recommend European states *inter alia* to “develop a system for ‘asylum visa’ or ‘humanitarian visa’ to gradually extend the possibilities for people to obtain legal access to their territories” (p. 48).

states. The techniques used by them – with the protective passports being one of the most famous – are not confined to their historical context, and should be considered again in addressing the present access crisis. The agenda pursued by the European Commission thus draws on the lessons taught by the Wallenberg legacy.

Today, the EU is the right actor to transform that legacy into coherent and consistent policies on access to protection. The introduction of Protected Entry Procedures throughout the European Union would address a problem magnified by European harmonization of immigration and border control legislation. Presently, visa requirements are determined by EC law, not by domestic law. Carrier sanctions are bindingly prescribed in supranational law, and domestic legislatures are bound to follow suit.

Beyond that, Protected Entry Procedures allow states to bypass human smugglers and to communicate directly with the potential migrant: dissuading those with weak claims or no claims at all, and offering documented and legal migration to those fulfilling the set criteria. Such procedures replicate the ideology of liberal democracies rather than contradicting them. Unlike resettlement, Protected Entry Procedures are not limited by fixed numerical ceilings. They are characterized by legal predictability rather than political expediency.

It is to be hoped that the European Commission will succeed in engaging Member States in a serious discussion on the role of Protected Entry Procedures in the future Common European Asylum System. Indeed, this would save the memory of Wallenberg, de Souza Santos and their colleagues from being abused as decorum in a non-committal culture of commemoration. It might well be that a collective turning back to history would facilitate the passage into an “area of freedom, security and justice”, promised to us by Title IV of the EC Treaty. May Janus look favourably at such an endeavour.