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# UK/EU/UNHCR

## Unlawful and Unworkable - Amnesty International's views on proposals for extra-territorial processing of asylum claims

### 1. Introduction

In February 2003, a draft United Kingdom (UK) Government proposal to send asylum-seekers arriving in the UK and other European Union (EU) states to transit processing centres (TPCs) in states bordering, but outside, the EU, was leaked to *The Guardian*.<sup>1</sup> The proposal entitled “A new vision for refugees”<sup>2</sup> contained provision for regional protection areas (RPAs) in refugee-producing regions, and included the idea of establishing centres in transit countries. Based on the presumption that current asylum systems are failing, the proposal claimed to meet international obligations as well as to be responsive to domestic political and economic concerns. It would effectively substitute the spontaneous quest for asylum with a discretionary, quota-driven approach to protection, through “managed refugee resettlement programmes.”<sup>3</sup>

The real goal behind the UK proposal appears to be to reduce the number of spontaneous arrivals in the UK and EU states by denying access to territory and shifting the asylum-seekers to processing zones outside the EU, where responsibility, enforceability and accountability for refugee protection would be weak and unclear. Although the UK proposal might not explicitly envisage amendment to or withdrawal from the 1951 Convention relating to the Status of Refugees (the Refugee Convention), it clearly represents an attempt to circumvent important domestic and international legal instruments, including the Refugee Convention. In Amnesty International's view the proposal contravenes the intent and purpose of the right to seek and enjoy asylum set out in the Universal Declaration of Human Rights

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<sup>1</sup> See Alan Travis, *Shifting a problem back to its source – would-be refugees may be sent to protected zones near homeland*, *The Guardian*, 5 February, 2003.

<sup>2</sup> CO/HO Future of Migration Project, *A new vision for refugees*, Final Report, January 2003, page 4. (the UK New Vision)

<sup>3</sup> The proposal bears striking similarities to the highly controversial Australian “Pacific Solution”. Under the “Pacific Solution”, the Australian government persuaded Nauru and Papua New Guinea to permit the establishment of Australian funded detention centres where asylum-seekers were held, pending determination of their status and resolution of their plight. See Amnesty International (AI) *Australia – Pacific: Offending human dignity - the "Pacific Solution"*, 25 August 2002 (AI Index: ASA 12/009/2002). Welcoming the proposal, the Australian Immigration Minister recognized the “remarkable similarity” between the UK proposal and the Australian scheme. See Minister for Immigration, Multicultural and Indigenous Affairs, Media Release, *UK Asylum Proposals Worth Consideration*, MPS 21/2003, 3 April 2003.

(UDHR) and the protection regime established by the Refugee Convention, and also seeks to avoid other binding obligations of international human rights law.<sup>4</sup>

Amnesty International welcomes the UK commitment to support efforts to ensure that states in which refugees first arrive are better able to provide protection (increasing their “protection capacity”). Likewise, Amnesty International encourages states to expand resettlement programmes and ‘protected entry procedures’, which 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. However, the organization insists that, like other authorised migration channels (for example, for labour migration or family reunification), they can never serve as a substitute for, or as grounds to discredit, spontaneous requests for asylum.

In response to the UK proposal, an April 2003 “counter-proposal” from the Office of the UN High Commissioner for Refugees (UNHCR) appeared on its face to be attempting to rescue refugee protection from the clutches of the UK proposal. Yet in doing so Amnesty International believes it too undermined some fundamental protection principles, notably in accepting that, at least within the EU, some classes of asylum-seekers might be transferred out of the state where they requested asylum for determination of their claims, detained in closed reception centres, and subject to diminished procedural safeguards. The UNHCR proposal includes two additional elements which seek protection and solutions for refugees in regions of origin, and strengthening of national asylum systems.

Development of a further proposal is on the agenda of the European Commission, to be considered at the EU Summit in Thessaloniki, Greece, on 20-21 June 2003. A Communication adopted by the European Commission on 3 June 2003, *Towards more accessible, equitable and managed asylum systems* (the EU Communication), while accepting the UK’s diagnosis of the asylum problem in Europe, rejected the most radical elements of the proposed cure, preferring to explore further the UNHCR proposal.<sup>5</sup>

Amnesty International is concerned that neither the UK nor UNHCR proposals, nor the EU Communication, appears to give sufficient weight to ensuring respect for the rights of asylum-seekers and refugees arriving in Europe. Nor have the proposals or the EU Communication adequately addressed the international legal implications, in particular as regards international refugee and human rights law and standards, and the wider implications for the international refugee protection regime as a whole. Instead, these proposals are being developed in a highly charged political environment with little regard for the long term legal, social, political and human consequences.

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<sup>4</sup> See AI, *Observations to UNHCR’s Consultations on Convention Plus*, 7 March 2003 (AI Index IOR 42/001/2003).

<sup>5</sup> Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, Brussels, 3 June 2003 COM(2003) 315 final. (EU Communication)

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In order to be effective, the Refugee Convention depends on international solidarity and serious, credible and principled sharing of responsibilities for the protection of refugees. Proposals such as these undermine the Refugee Convention in a multitude of ways. They compromise protection not only by seeking to dilute applicable legal standards and procedural safeguards, but also by threatening the principle of international solidarity on which international protection and solutions for refugees depend. They create two classes of asylum states: the rich and powerful states that can select whom they will accept as refugees and the rest who are compelled to host large numbers of refugees and asylum-seekers, including people returned from the rich countries.<sup>6</sup>

While this briefing paper cannot address all aspects of the UK and UNHCR proposals, or the EU Communication, it focuses on a number of the key legal deficiencies that Amnesty International has identified in each. These include whether it is lawful to transfer persons to another country for extra-territorial processing, and the risk of human rights abuses in the course of transfer, in particular forcible transfer. Amnesty International is also concerned that if asylum-seekers are sent to a TPC or an RPA, they would not enjoy effective protection, including effective remedies for breaches of their human rights. Amnesty International is particularly concerned that detention appears to be a necessary element of each proposal. Other concerns include the risk that transfers may amount to discriminatory treatment, in breach of human rights standards.

The briefing paper also addresses some of the policy implications of the proposals, and questions whether they constitute genuine and principled visions for burden and responsibility sharing and, further, or whether the initiatives in fact *promote* “illegal” migration.

Amnesty International believes that the costly preoccupation of each of these proposals on restricting and controlling entry to the UK or other EU countries would not only be ineffective, but would be likely to result (directly and indirectly) in human rights abuses, including but not limited to the forcible return of persons to places where they would face serious human rights abuses. The proposals also risk discouraging people in need of protection from applying for asylum. These persons would most likely still arrive illegally and go underground, vulnerable to abuse and exploitation by traffickers and smugglers, including labour exploitation.

While Amnesty International acknowledges the desire of governments and UNHCR to promote new and more effective ways of dealing with mixed movements of refugees and migrants, the organization believes that such efforts should be firmly grounded in principles of international human rights and refugee law. The organization calls on states and international agencies alike to focus their attention on the development of strategies for the

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<sup>6</sup> See AI, *Observations to UNHCR’s Consultations on Convention Plus*, 7 March 2003 (AI Index IOR 42/001/2003).

protection of refugees rather than allowing only self-interest to drive their responses to the movement of people.

The briefing paper makes recommendations that, *inter alia*, call on states, UNHCR and the EU to suspend further consideration of the UK or related proposals, including the UNHCR proposal, pending a comprehensive and independent review, by a legal review committee, of their compliance with international legal standards. Further recommendations are made for the expansion of resettlement schemes and protected entry procedures, as well as enhancing the protection capacity of host states. Recommendations are made to clarify the meaning of “effective protection” and to ensure that responsibility sharing arrangements are firmly grounded in refugee and human rights law standards.

## 2. Background

The debate relating to the rights of migrants and the forcibly displaced has become increasingly high profile, controversial and polarized over recent years. Much of this, though not all, can be attributed to the post-Cold War dynamic where geo-political and strategic interests in protecting the rights of nationals of other countries, in particular refugees, have shifted, diminished or, in extreme cases, evaporated. The commitment of the international community as a whole to refugee protection is now at a critical turning point. Some states, most notably some of the wealthiest countries in the world, are persistently trying to circumvent and indeed openly flout their voluntarily assumed legal responsibilities.

In 2000, UNHCR launched the Global Consultations on International Protection, triggered by the ongoing crisis of international protection plaguing the world’s refugees. The Global Consultations also marked the 50<sup>th</sup> anniversary of the Refugee Convention. In December 2001, in a Declaration of States Parties to the Refugee Convention, Ministers reaffirmed their government’s commitment to implement their obligations under the Refugee Convention and/or its Protocol “fully and effectively” and in accordance with the “object and purpose” of these instruments.<sup>7</sup> In 2002, the Executive Committee of the Programme of the UNHCR (UNHCR’s governing body) endorsed the Agenda for Protection which emerged from the Global Consultations. The Executive Committee recognized it as a statement of goals and objectives, intended to guide action by states and UNHCR.<sup>8</sup> On 26 March 2003, the European Commission adopted a *Communication on the common asylum policy and the Agenda for Protection*, which resolves to implement the Agenda for Protection.<sup>9</sup>

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<sup>7</sup> *Declaration of States Parties to the 1951 Convention relating to the Status of Refugees and or its 1967 Protocol relating to the Status of Refugees*, as adopted on 13 December 2001 in Geneva at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/MMSP/2001/9, 16 January 2002.

<sup>8</sup> See EXCOM Conclusion No. 92 (LIII), *General conclusion on international protection*, 2002.

<sup>9</sup> While the Communication makes clear commitments regarding the implementation of the Agenda for Protection, ambiguities in the Convention Plus initiative (see footnote 19 below) make it possible for the Communication to leave open to interpretation the meaning of responsibility-sharing arrangements. See

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The Agenda for Protection is an ambitious document covering a broad spectrum of issues relating to the continuing crisis of refugee protection. It is designed as a programme of action which should “progressively reinforce protection over a multiyear period” through the implementation of a series of six inter-related goals:

1. strengthening implementation of the Refugee Convention and its Protocol;
2. protecting refugees within broader migration movements;
3. sharing of burdens and responsibilities more equitably and building of capacities to receive and protect refugees;
4. addressing security-related concerns more effectively;
5. redoubling the search for durable solutions; and
6. meeting the protection needs of refugee women and refugee children.<sup>10</sup>

In addition to commitments made in the Agenda for Protection, states have made other recent high-level statements, including when they met at the August 2001 World Conference Against Racism in Durban, South Africa. At that conference, states recognized that some of the most compelling contemporary forms of racism and xenophobia were against migrants, refugees and asylum-seekers,<sup>11</sup> and urged states to comply with their international human rights, refugee and humanitarian law obligations towards refugees, asylum-seekers and displaced persons.<sup>12</sup>

However, these high-level commitments seem hollow when lined up against the actual current practices of a number of states seeking to circumvent their international legal obligations or to undermine the international refugee protection regime by taking asylum-seekers out of the jurisdiction of these states and according them only limited access to protection and procedures, such access itself being granted with diminished procedural safeguards, with the effect of “locating the refugee beyond the domain of justice”.<sup>13</sup>

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Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for Protection, Brussels, COM (2003) 152, 26 March 2003. This Communication identifies three priorities: access to protection; durable solutions and better responsibility-sharing with third countries, and paves the way for the June Communication COM(2003) 315.

<sup>10</sup> UNHCR, Agenda for Protection, A/AC/96/965/Add.1, 26 June 2002, page 5.

<sup>11</sup> See World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), *Declaration*, paragraph 16: “We recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”

<sup>12</sup> WCAR, *Programme of Action*, paragraph 34.

<sup>13</sup> Gregor Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, Working Paper, June 2003. Available at [http://www.jur.lu.se/Internet/forskare/Noll.nsf/\(public.web.object.byname\)/4C000C5347BC3B6EC1256D3600458D52](http://www.jur.lu.se/Internet/forskare/Noll.nsf/(public.web.object.byname)/4C000C5347BC3B6EC1256D3600458D52). (A revised version is forthcoming in the European Journal of Migration and Law, Volume 5, Issue 3, 2003.)

### 3. The UK Proposal

This briefing paper examines the UK proposal as appended to a letter from UK Prime Minister Tony Blair, to Greek Prime Minister Costas Simitis, as Greece currently holds the EU Presidency.<sup>14</sup> Prior to the proposal that was attached to the Blair-Simitis letter, the “UK proposal” had considerable fluidity with a range of different drafts surfacing.<sup>15</sup> These earlier drafts from the UK Home Office and Cabinet Office remain informative as regards the thinking behind the proposal.

#### 3.1 Objectives of the UK proposal

The domestic context for the UK proposal belies its claim that its starting premise is that the current global system for protecting refugees is failing. The UK domestic asylum agenda has long been driven by an obsessive preoccupation with numbers,<sup>16</sup> procedural failings that result in an inability to remove failed asylum-seekers,<sup>17</sup> as well as highly inflammatory headlines and reporting in the media, which the Government has done little to prevent. At the same time, to deter asylum seekers from applying in the UK, more obstacles to prevent arrival have been put in place; safeguards have been eroded and the right to subsistence denied to the majority of those seeking asylum in the UK.

The stated aim of the UK proposal is “better management of the asylum process globally”. It claims to be designed to complement the outcomes of the European Council meeting held in Tampere, Finland on 15-16 October 1999. However, the UK proposal effectively treats the Tampere Conclusions as the final, rather than the first step in the harmonization of EU-wide asylum procedures.<sup>18</sup> It also claims to tie in with the Convention Plus initiative<sup>19</sup> of the High

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<sup>14</sup> See letter from PM Tony Blair, to PM Costas Simitis, 10 March 2003. This letter is posted on the Statewatch website: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>

<sup>15</sup> This briefing paper deals principally with the proposal attached to the Blair-Simitis letter (the UK proposal) as well as a January 2003 version: CO/HO Future of Migration Project, *A new vision for refugees*, Final Report, January 2003 (the UK New Vision). Another variation of the ‘New Vision’ document is entitled “UK Home Office, *A new vision for refugees. Final Report. Draft*” (the UK draft New Vision). It is dated 5 February 2003. Although this draft post-dates the earlier document, not described as a draft, its text suggests that it was an earlier working document of the January 2003 Final Report. The explanation for the later date may be that the electronically generated date on the later document was automatically updated when printed.

<sup>16</sup> For example, on 7 February, 2003, in an interview on BBC’s *Newsnight*, UK Prime Minister, Tony Blair, committed the government to meet its objective, by September 2003, of halving the number of asylum-seekers in the UK from its peak in October 2002 of 8,900.

<sup>17</sup> See House of Commons, Home Affairs Select Committee, *Asylum Removals*, Fourth Report of Session 2002-03, Volume I, 8 May 2003.

<sup>18</sup> The Tampere Conclusions state, *inter alia*, that: “The European Council in Tampere agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application



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Commissioner for Refugees, Ruud Lubbers. It puts forward two approaches: the creation of “transit processing centres” (TPCs) on transit routes to Europe; and regional management of migration flows, through the creation of “regional protection areas” (RPAs).

### **3.2 Transit Processing Centres**

Under the TPC scheme, asylum-seekers arriving in the UK (and other participating EU member states) would be transferred to a TPC – outside the EU - where they would effectively be detained while their claims were assessed. The proposal envisages that there might be exceptions for certain categories of persons, including minors and disabled persons, however it is not clear whether minors or disabled persons accompanied by others would benefit from this exception. Earlier drafts of the UK proposal also suggest that the concept of “effective protection” of refugees would need to be analysed, the concept being seen as important in determining whether a person can be transferred or returned to a TPC or RPA.

The question of whether asylum-seekers intercepted en route to a destination country would also be transferred to TPCs is left open, but the proposal clearly envisages this as a possibility. TPCs would be located outside the EU. The UK envisages locating asylum-seekers in centres managed by the International Organization for Migration (IOM), a screening procedure approved by UNHCR with reduced procedural safeguards,<sup>20</sup> and close involvement of the European Commission. Diminished procedural safeguards envisaged in the UK New Vision (and also the EU Communication – see below),<sup>21</sup> would seriously undermine the fairness of

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of the Geneva Refugee Convention. In the long term, it would be necessary to establish a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.”<sup>19</sup> Convention Plus is an initiative announced by the High Commissioner for Refugees, Ruud Lubbers, in September 2002, following the conclusion of UNHCR’s Global Consultations on International Protection. Its basic premise is that the Refugee Convention “does not alone suffice”. Convention Plus seeks to create a basis on which states might negotiate “special agreements” to address issues which are said not to be adequately covered by the Refugee Convention. Convention Plus does not seek to revise the Refugee Convention but to build on it through the adoption of non-binding agreements between states. Subject to content they may in some cases be legally binding. In terms of content Convention Plus seeks to develop comprehensive plans of action to ensure more effective and predictable responses to mass influx, to secure development assistance as a way of addressing burden-sharing arrangements, to bring about multilateral commitments for resettlement, and to find clarity on roles and responsibilities of states in the context of irregular and secondary movements. Convention Plus draws, as the legal basis for the special agreements that it proposes, on paragraph 2(b) of General Assembly Resolution 428(V) of 14 Dec 1950, and paragraph 8(b) of the UNHCR Statute, namely “the execution of any measures calculated to improve the situation of refugees falling within the competence of the Office and to reduce the number requiring protection”.

<sup>20</sup> The UK New Vision foresees, page 16, that UNHCR would undertake the review procedure and, “[a]s UNHCR would be an independent body the only remedy would be an administrative review of the decision, perhaps by a senior board on the papers only.” Likewise, according to Gregor Noll, a Danish Memorandum produced in connection with discussion on the UK proposal (*see 3.5 Interest from other states*) envisages a downgrading of legal safeguards in the determination procedures in TPCs. *Ibid.*, page 17.

<sup>21</sup> See EU Communication COM(2003) 315, at paragraph 6.3.1.

procedures to which asylum-seekers would have access. These would include administrative (but not judicial) review of the decision on the refugee claim, as well as denial of the right to remain in the UK pending the outcome of an appeal against being sent to a TPC or RPA. Amnesty International is concerned that transferees would be exposed to a procedure which would accord them lesser rights in off-territory processing, not least of which would be the practical difficulties in pursuing appeal rights from a TPC or RPA. Such difficulties can render appeal rights meaningless. The UK New Vision also specifically excludes legal appeal rights on resettlement applications as well as judicial review rights in relation to asylum applications.<sup>22</sup> It is silent about important safeguards such as access to counsel.<sup>23</sup>

Recognized refugees would be resettled inside the EU and rejected asylum-seekers returned to their country of origin. Temporary status would be granted in the EU for rejected asylum-seekers who could not be returned. The UK proposal notes that both UNHCR and the IOM have expressed interest in working with the European Commission and Members States on these proposals.

In the shorter term, the UK Minister for Immigration, Beverley Hughes, has indicated that the UK is working with a number of EU partners to develop pilot schemes which the UK government hopes will be underway by the end of 2003.<sup>24</sup> According to the UK proposal, the TPCs are designed to act as a deterrent to persons abusing the asylum system.

### **3.3 Regional Protection Areas**

The establishment of RPAs is viewed as a long-term agenda, and envisages returning failed asylum seekers who have been found not to be refugees, but who cannot be immediately returned to their country of origin, to an RPA pending return to their country of origin. "The aim would be to provide temporary support until conditions allowed for voluntary returns."<sup>25</sup>

The UK New Vision recognized the importance of having UNHCR on side to secure credibility both internationally and through the courts. The pursuit of UNHCR support was, however, crafted in a way which put UNHCR on notice that, should the refugee agency be hesitant, the UK was willing to opt instead for engaging with IOM, an organization which has no protection mandate. The UK New Vision further seeks to link in with UNHCR's Convention Plus initiative but with a view to moulding UNHCR "into the organisation we would wish it to be."<sup>26</sup>

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<sup>22</sup> See UK New Vision, page 16.

<sup>23</sup> Amnesty International considers that it is vital for asylum-seekers to have access to counsel in order to be able to pursue their claims for protection through a fair and satisfactory procedure.

<sup>24</sup> UK Home Office Minister, Beverley Hughes, commenting on the EU Communication COM(2003) 315, 3 June 2003.

<sup>25</sup> UK proposal (attached to Blair-Simitis letter).

<sup>26</sup> UK New Vision, January 2003, page 25.

### **3.4 Legal framework of the UK proposal**

The UK proposal claims as its legal framework the Refugee Convention, on the basis that “[t]here is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application”. The proposal cites in addition, an “obligation on 1951 Convention signatory countries, derived from the European Convention on Human Rights and Fundamental Freedoms (ECHR), to ensure that decisions under the asylum process do not expose applicants to inhuman or degrading treatment”, acknowledging that conformity with this obligation would apply both to the processing centres<sup>27</sup> themselves as well as the decisions taken in them.

### **3.5 Interest from other states**

Since the UK proposal surfaced, the Dutch and Danish governments have shown particular interest in the proposal, both governments having put forward similar agendas in 1986, 1993 and 2001.<sup>28</sup> Following a meeting on 23 April, 2003, attended by the UK, Denmark and the Netherlands, as well as the European Commission, the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC),<sup>29</sup> UNHCR and the IOM, the Danish government produced a memorandum (the Danish Memorandum) setting out a number of legal, practical and financial issues.<sup>30</sup> Subsequently, the UK representative to the Convention on the Future of Europe, proposed an amendment to Article 11 which would dramatically shift the focus of the Common European Asylum System to provide protection in the region of origin, facilitate resettlement “where appropriate”, and facilitating processing of asylum applications in countries of transit “ensuring that applicants for asylum lodge their applications in the first safe country they reach”.<sup>31</sup> Another state to have taken an interest in the UK proposal is believed to be Austria, with Germany and Sweden believed to be strenuously resisting the proposals. Despite

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<sup>27</sup> The language of the proposal is “processing centres”, which obviously means TPCs but may also be intended to mean RPAs.

<sup>28</sup> Gregor Noll, *ibid.*, page 3. As Noll notes, page 8, as far back as 1986, Denmark had proposed a draft resolution in the UN General Assembly, which suggested the establishment of regional UN processing centres administering resettlement. UN General Assembly, International procedures for the protection of refugees: draft resolution/ Denmark, 12 November 1986, U.N. Doc. A/C.3/41/L/51. A 1993 Dutch proposal for regional processing of asylum claims was considered by the IGC (see footnote 29) in 1994, and in 2001, the Danish government revisited the issue.

<sup>29</sup> The IGC is an “informal, non-decision making forum for information exchange and policy consultation for innovative solutions and strategies to the rapidly changing asylum, refugee and migration situation.” Participants include the 16 governments of Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States of America and inter-governmental organisations, the UNHCR and the IOM.

<sup>30</sup> Gregor Noll, *ibid.*, page 5.

<sup>31</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/3111/11Hain.pdf>

resistance from some states, the UK has indicated that whether or not the UNHCR or the European Commission show a willingness to coalesce around their initiative, they are prepared to go ahead.

## 4. UNHCR's response – a “counter-proposal”

UNHCR provided preliminary comments on earlier versions of the UK proposals. While foreshadowing willingness on the part of UNHCR to compromise, the comments raised a number of legal and policy considerations. These comments underscored the primary responsibility of states to ensure protection. They also raised issues of compatibility with national asylum systems and the EU harmonisation process, compatibility with international legal standards, including Articles 3 and 13 of the ECHR,<sup>32</sup> interpretation of the concept of “effective protection” and legal implications of detention. Comments addressed problems with the idea of return to a “safe country of origin”, envisaged in earlier drafts of the UK proposal.

In April 2003, UNHCR put forward a “counter-proposal” setting out an alternative framework designed to “complement national asylum systems through new multilateral approaches”. Broadly speaking, the proposed framework provides for strengthened national asylum systems, as well as the building of protection capacity and promoting solution in regions of origin. Furthermore, it proposes relocation of asylum-seekers with claims deemed to be ‘manifestly unfounded’ to “common processing centres” which would be located near to but *inside* the EU's external borders (either the current EU or, more likely, the EU as enlarged in 2004).

### 4.1 National Asylum Systems

A summary of the UNHCR proposal states that “UNHCR is further prepared to examine with States how national asylum systems, and in particular their procedural aspects, could be rendered more efficient”.<sup>33</sup> However, UNHCR makes no diagnosis of the deficiencies in national asylum systems, and no suggestions or recommendations given to improve the systems so that they would more effectively deliver protection. Indeed, the only suggestions that are made are to tighten the procedures through “an enhanced induction/ pre-screening/ admissibility phase together with first instance processing in reception centres, and making first instance decisions less open to challenge”.<sup>34</sup> Nor does the UNHCR proposal give any space to the time-honoured safeguards of judicial scrutiny that accompany in-territory status determination and ensure visibility and public accountability. The proposal effectively ignores

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<sup>32</sup> Article 3 ECHR prohibits torture, inhuman or degrading treatment or punishment; Article 13 ECHR provides for the right to an effective remedy for violations of rights under the ECHR.

<sup>33</sup> UNHCR Internal document, *Summary of UNHCR proposals to complement national asylum systems through new multilateral approaches*, April 2003.

<sup>34</sup> UNHCR Proposal, *Considerations in relation to the Second Prong in the UK context*, undated.

commitments made in the Agenda for Protection to ensure that national asylum systems are accessible, fair and effective. Instead the proposal treats as a given that there is a need for multilateral approaches to complement national asylum systems.<sup>35</sup> Yet, the remainder of the proposal seems to be replicating what is considered by the UK to be one of its key problems - difficulties with effecting removals of failed asylum-seekers.<sup>36</sup>

## **4.2 Protection and solutions in regions of origin**

UNHCR also claims that the counter-proposal would strengthen protection capacity in host countries in regions of origin. This would be done by assuring effective protection, by substantial financial and material “investment” in regions of origin “to implement agreed objectives”, and by improving self-reliance in regions of origin in order to avert secondary movement of refugees.<sup>37</sup>

In addition, comprehensive durable solutions arrangements would be developed through:

- actively promoting voluntary repatriation and sustainable reintegration;
- development through local integration (DLI) through which additional development assistance would be solicited in order to achieve local integration;
- commitments to expand resettlement as a protection tool; and
- enabling access to effective protection through, where necessary, individual screening procedures in countries of first asylum to which all asylum-seekers in the country would have access.

Finally, return and readmission to countries of asylum would be facilitated through an admissibility procedure “to determine whether responsibility for providing protection lies in the country of destination or the country of first asylum”, and readmission agreements which would involve “prompt transfer under acceptable conditions”, “assistance schemes” and other “supportive incentives”.<sup>38</sup>

Strengthening protection capacity involves a multiplicity of initiatives, including enhancing capacity of national authorities, laws and policies. It also presupposes the promotion of positive attitudes, technical training, advisory services, as well as financial and material assistance.<sup>39</sup> To be feasible, the elements that UNHCR sets out in its proposal depend heavily

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<sup>35</sup> See Goal 1, Objective 2, Agenda for Protection, A/AC.96/965/Add.1, 26 June 2002

<sup>36</sup> Amnesty International does not oppose the return of rejected asylum-seekers, if they have had access to a fair and satisfactory asylum procedure, can be returned in safety and dignity and with full respect for human rights, and have no other legal basis to remain.

<sup>37</sup> Although beyond the scope of this briefing paper, it is questionable whether self-reliance, as opposed to local integration, would actually avert secondary movements of refugees.

<sup>38</sup> UNHCR Internal document, *Summary of UNHCR proposals to complement national asylum systems through new multilateral approaches*, April 2003.

<sup>39</sup> See UNHCR Global Consultations, Track 3, *Strengthening Protection Capacities in Host Countries*, EC/GC/01/19/\*, 19 April 2002.

on achieving massive increases in protection capacity in regions of origin, which need to be developed over time in order to be sustainable. Amnesty International considers that it is therefore incumbent on UNHCR and states to ensure that the palpable sense of urgency that emanates from the UK and UNHCR proposals, and the EU Communication, does not permit the international community to lose sight of the complexities of building protection capacity. Moreover, EU states should demonstrate their good faith by observing a parallel duty to maintain and indeed increase their own protection capacity.

In comparison, the UK proposal is surprisingly less ambitious, conceding not only that host states in regions of origin may be unwilling to host RPAs, but also that:

“it will not be possible to provide Regional Protection Areas with a level of protection that is sufficient for the courts in Europe to recognise the protection as sufficient to safeguard human rights. It will be challenging to provide consistently adequate protection in regions where conflict and poverty are often the norm. If the courts do not consider the Areas safe then it will not be possible to send asylum seekers there for protection.”<sup>40</sup>

### **4.3 An EU-based mechanism - towards a common asylum system**

In relation to the EU based mechanism proposed by UNHCR, caseloads would be composed primarily of economic migrants, targeting designated countries of origin. On the basis of their nationality, asylum-seekers would be presumed to be economic migrants and to have claims considered to be manifestly unfounded.

Claims would be deemed to be manifestly unfounded on the basis of the country of origin of the asylum claimant.<sup>41</sup> This would be along the lines of the so-called UK “white list”, which designates certain countries as “safe countries of origin”, deeming claims from those countries to be “clearly unfounded”.<sup>42</sup> This represents a departure from EXCOM Conclusion 30 (of the UNHCR’s Executive Committee) which defines manifestly unfounded claims as “clearly fraudulent or not related to the criteria for the granting of refugee status . . . nor to any other criteria justifying the granting of asylum,”<sup>43</sup> a higher standard which is not based on nationality.

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<sup>40</sup> UK New Vision, page 6.

<sup>41</sup> UNHCR Internal (Rev. 1), *Explanation of the EU Prong*, April 2003, page 2.

<sup>42</sup> The effect of the “white list” is to and remove the individual’s appeal right to remain in the UK pending the outcome of her appeal. In the UK, the current “white list” consists of 17 countries - Republic of Cyprus; The Czech Republic; Estonia; Hungary; Latvia; Lithuania; Malta; Poland; Slovenia and Slovakia; Albania; Bulgaria; Jamaica; Macedonia; Moldova; Romania; Serbia and Montenegro (includes all of Kosovo).

<sup>43</sup> EXCOM Conclusion 30 (XXXIV), 1983, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*.

Failed claims at first instance would be subject to a “simplified review procedure”. Determination of refugee status would be undertaken by a consortium of decision-makers drawn from participating states. Recognized refugees would be resettled through an EU-wide distribution scheme and rejected asylum-seekers would be returned to their countries of origin. Asylum-seekers would be held in “closed reception centres”, i.e. detention centres.<sup>44</sup> UNHCR had hitherto resisted the safe country of origin concept “where it [would result] in serious inroads into procedural safeguards” and on the basis “that decisions about “safety” are extremely difficult, given volatile human rights situations and the inherently biasing effect of political or foreign policy considerations”.<sup>45</sup> Amnesty International is concerned that the simplified review procedure as envisaged by UNHCR would seriously undermine the fairness of procedures to which asylum-seekers would have access. Depending on the country to which they were located, there is a real risk that they would be denied meaningful access to independent and judicially reviewable appeal procedures.

UNHCR gives assurances of speed that are surprising considering the legal, financial and practical challenges that the proposals present. According to the UNHCR proposal, asylum-seekers would be subject to *immediate* transfer to closed reception facilities, where their claims would be *rapidly* determined. Recognized refugees would then be *rapidly* transferred to their designated country of asylum (taking into account effective links), and rejected asylum-seekers would be subject to *rapid* return to their countries of origin. Given the delays occasioned in even the most well-resourced asylum procedures that generally satisfy the requirements of procedural fairness, it seems implausible that such haste could be assured at all, much less with sufficient procedural safeguards.

#### **4.4 Bali Conference on Smuggling and Trafficking**

Since putting forward the UNHCR counter-proposal in the UK/EU context, UNHCR presented a Background Note to the April 2003 Bali II Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime.<sup>46</sup> The UNHCR Background Note puts forward elements for an international framework for co-operation to address the irregular movement of asylum-seekers and refugees.<sup>47</sup>

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<sup>44</sup> UNHCR “considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.” See UNHCR’s *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February, 1999.

<sup>45</sup> UNHCR, *Background Note on the Safe Country Concept and Refugee Status* EC/SCP/68.

<sup>46</sup> See UNHCR, *Co-operation to address the irregular movement of asylum seekers and refugees: Elements of an International Framework*, 17 April 2003.

<sup>47</sup> Cf. EXCOM Conclusion No. 58 (XL) – 1989, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*. The Bali II paper states that it will draw and buttress EXCOM Conclusion 58.

While once again highlighting the primary obligations of states to accord protection to those under their responsibility, the Background Note differs from the UNHCR counter-proposal in certain important respects. The counter-proposal apparently relied upon the EU legal framework and common asylum policy as a justification for its EU-based mechanism, whereas the Bali II Background Note envisages processing centres specifically established, equipped and supported for the purpose of adjudicating claims. This would, of course be outside an EU-type framework. Furthermore, unlike the counter-proposal these processing centres would not be limited to those considered to have manifestly unfounded claims. Although a conference paper and therefore not a proposal as such, this development signals an institutional willingness on the part of UNHCR to depart from the framework put forward in its own EU-based April 2003 proposal, shifting seamlessly into an all-purpose TPC framework whereby all asylum-seekers, in particular so-called 'irregular movers', could potentially be transferred to extra-territorial processing facilities. In its effect, this brings the UNHCR position more closely into line with the much criticized UK proposal, and from which UNHCR had apparently sought to distance itself by putting forward its counter-proposal in the first place

## 5. The EU Communication

As noted above, on 3 June, 2003, the European Commission adopted a Communication, *Towards more accessible, equitable and managed asylum systems* (the EU Communication), that accepted the UK's diagnosis of the asylum problem in Europe, but rejected the most radical elements of its proposed cure, preferring instead to explore further the UNHCR counter-proposal.<sup>48</sup> A significantly more cautious document than both the UK and UNHCR proposals, the EU Communication recognizes a number of the legal, practical and financial obstacles to the implementation of such an initiative. It raises concerns, for example, about the compatibility of the UK proposal with EU legislation, national legislation of EU member states, legislation of proposed host countries, and the ECHR.<sup>49</sup> In particular, the EU Communication raises questions about the legality of transfer of persons who "have not transited through or otherwise stayed in" relevant zones or countries, recognising that this represents a significant departure from the "safe third country" concept.<sup>50</sup>

The EU Communication also raises another key legal question: the definition of "effective protection". In considering the UNHCR counter-proposal, the Communication acknowledges outstanding questions about exact legal modalities as well as financial and practical consequences, but (focusing its comment on the EU-based component of the UNHCR proposal) is generally of the opinion that the UNHCR counter-proposal "is worthwhile giving further consideration".

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<sup>48</sup> EU Communication COM(2003) 315.

<sup>49</sup> *ibid.*, page 6.

<sup>50</sup> See discussion on the relevance of the safe third country concept, at 6.2.1.2 below.



The Communication then sets out 10 basic premises, which it states should underpin new approaches to asylum. In summary, these are:

1. full respect for international legal standards;
2. addressing the root causes of forced migration;
3. ensuring access to legal migration channels (citing in particular family reunification, skilled, unskilled and seasonal labour);
4. combating “illegal” migration, whilst respecting humanitarian obligations;
5. genuine burden-sharing (as opposed to burden-shifting) arrangements;
6. building upon existing policy objectives, including improving the quality of decisions as early as possible in national asylum systems (“frontloading”), consolidation of protection capacity in regions of origin, protected entry procedures<sup>51</sup> and resettlement schemes;
7. complementarity with the commitment to develop a Common European Asylum System (CEAS);<sup>52</sup>
8. no delay to present negotiations on directives for the CEAS;<sup>53</sup>
9. consistency with the UNHCR’s Agenda for Protection and Convention Plus;<sup>54</sup>
10. financial consequences and current budgetary priorities.<sup>55</sup>

Amnesty International welcomes the EU Communication insistence on full respect for these 10 basic premises. In new approaches to asylum systems, the EU Communication draws out what it sees as three specific, complementary policy objectives of equal importance: orderly and managed arrival; burden and responsibility sharing within the EU and with regions of origin; and efficient and enforceable asylum decision-making and return procedures. Finally, the EU Communication stipulates that “economic migrants should as much as possible be discouraged from abusing the asylum system for non-protection related reasons”. In doing so, the EU Communication recognizes the necessity of opening up legal migration channels to address such abuse, while recognising that there will, regardless, still be some demand for illegal migration channels.

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<sup>51</sup> The EU Communication COM(2003) 315 of 3 June, 2003, states that: “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.”

<sup>52</sup> See footnote 18 above.

<sup>53</sup> See footnote 18 above. Note that the second phase of Tampere is to develop a common asylum procedure.

<sup>54</sup> See earlier background discussion on the Agenda for Protection. For an explanation of Convention Plus, see footnote 19.

<sup>55</sup> One of the concerns of the EU Communication COM(2003) 315 appears to have been that any budgetary allocation to the UK or UNHCR proposals should ensure that development resources are not diverted from the objective of poverty reduction. Note that on 11 June, 2003, the European Commission adopted a proposal for the creation of a new budget line specifically to address “financial and technical assistance to third countries in the field of migration and asylum”. The areas to be covered by the new budget line would include “pilot projects to design measures upstream of the borders so that clandestine migration could be reduced”.

The EU Communication also proposes three legislative elements covering the establishment of an EU resettlement scheme, Protected Entry Procedures, as well as a budgetary framework.<sup>56</sup> These would build upon a set of preparatory actions which would, as a first step before starting a pilot project, require the EU to assess the feasibility of the entire scheme. However, the resettlement scheme would be based on member states establishing their own quota, their own procedures, their own policy and approach on arrival and reception, and longer-term integration. This raises important questions about how this could be reconciled with the objective of a Common European Asylum Policy.

A somewhat inconsistent document, the EU Communication also aligns itself with the objectives of the UK proposal, suggesting that the European Commission remains open to exploring further the feasibility of locating TPCs *outside* the EU through pilot projects.<sup>57</sup> These variations cast a shadow over the strength of the commitment of the EU Communication to give sufficient consideration and weight to the legal, practical and financial obstacles that it cites.

## **6. Objections to key aspects of the proposals**

### **6.1 Failure to learn from past experience**

Amnesty International has identified a number of legal objections to the UK and UNHCR proposals, some of which the EU Communication appears at least to have acknowledged. Whilst the organization recognizes that these are not the first attempts to “extra-territorialize” asylum procedures, the organization is not satisfied that states have ever undertaken a comprehensive or, for that matter, objective human rights analysis of earlier extra-territorial initiatives. This applies in particular where those proposals envisage transfer of persons to another country for extra-territorial processing of their asylum claims.

From 1989, and during the 1990s, the Comprehensive Plan of Action (CPA) in South East Asia responded to the protection crisis developing from the Vietnamese exodus, the

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<sup>56</sup> The EU Communication COM(2003) 315 recognizes that there is a need for a legal basis for the implementation of a UNHCR-type proposal in the context of the European Commission. One of the principal reasons for this appears to be that the European Commission has needed to draw on a specific budget line, in this case ‘Co-operation with Third Countries in the area of migration’ (B7-667). A necessary precondition would be the adoption of a directive. The Commission has indicated that it will present to the European Council and the European Parliament a proposal for a Regulation for projects “serving the multilateral interest of all stakeholders involved”. In the meantime, it proposes drawing on Budget line B7-667 in 2003, to undertake specific “preparatory actions”, including an analysis of source region ‘groupings’, an assessment of protection capacity, an analysis of the legal, financial and practical questions relating to RPAs and TPCs, a feasibility study for the creation of EU Regional Task Forces to clarify their exact legal and institutional nature, and proposals for future programmes and projects. cf. footnote 55 above.

<sup>57</sup> See EU Communication COM(2003) 315, 3 June 2003, at paragraphs 6.2.2.1, in particular point (b), in contrast to paragraph 6.3.

reluctance of nearby states to accord protection and resultant life-threatening push-offs of overcrowded fishing boats. Like the present proposals, the CPA had a deterrence rationale, the underlying assumption of the parties to the agreement being that most of the boat people subject to it were not refugees.<sup>58</sup> This deterrence rationale undermined fair and satisfactory implementation of procedures; the status determination procedure was flawed; accelerated procedures compromised fairness; questionable credibility assessments were made; and criteria misapplied.<sup>59</sup> Detention was a core element of the CPA, most notoriously in Hong Kong. A supposedly temporary arrangement, refugees still spent as much as eight years in detention camps in South East Asia, with untold social consequences. As one commentator who worked in Hong Kong observed:

“... no one person will ever be able to grasp or tell about the mental, psychological and emotional damage to thousands of human beings – children and women, truly the most vulnerable in any society.”<sup>60</sup>

Acknowledged by the IGC to have been “tremendously expensive”,<sup>61</sup> the CPA also resulted in serious human rights abuses. Relevant to present discussions, Amnesty International considered Hong Kong legislation providing for the detention of asylum-seekers as being in violation of the prohibitions on arbitrary and unlawful detention contained in Articles 9(1) and (4) of the International Covenant on Civil and Political Rights (ICCPR).<sup>62</sup> In 1994, the IGC itself considered and dismissed proposals by the Netherlands and Denmark for exclusive reception in the region. The IGC considered them as unworkable, facing significant moral, political and humanitarian obstacles, and in contravention of a number of relevant provisions of international law, as well as national Constitutions.<sup>63</sup>

In July 1994, the United States of America (US) established a temporary holding centre on the US Naval Base on Guantánamo Bay, Cuba, where Haitian asylum-seekers were processed for settlement in the US or returned to Haiti. In parallel, the US military intervention in Haiti,

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<sup>58</sup> Arthur C. Helton, *Refugee Determination under the Comprehensive Plan of Action*, 5 IJRL 544 (1993), page 556. Amnesty International published numerous reports in relation to human rights concerns during the CPA. See for example, AI, *Hong Kong: Ill-treatment of Vietnamese asylum-seekers at Sek Kong Detention Centre*, August 1989 (AI Index ASA 19/001/1989); AI, *Hong Kong: Arbitrary detention of Vietnamese asylum-seekers*, April 1994 (AI Index ASA 19/04/94).

<sup>59</sup> Helton, *ibid.*, page 557. See also, for example, AI, *Memorandum to the governments of Hong Kong and the United Kingdom regarding the protection of Vietnamese asylum seekers in Hong Kong*, January 1990, (AI Index: ASA 19/001/1990); AI *News Release: Hong Kong refugee screening process still flawed*, Amnesty International says, July 1990 (AI Index: ASA 19/006/1990).

<sup>60</sup> Carole McDonald, *The CPA and the Children: A Personal Perspective*, 5 IJRL 580 (1993), page 581.

<sup>61</sup> IGC, *Working Paper on Reception in the Region of Origin*, September 1994.

<sup>62</sup> See AI, *Hong Kong: Arbitrary detention of Vietnamese asylum-seekers*, April 1994 (AI Index ASA 19/04/94), page 6.

<sup>63</sup> See IGC, *Working Paper on Reception in the Region of Origin*, September 1994, and IGC, *Reception in the Region of Origin – draft follow-up to the 1994 Working Paper*, August 1995.

according to the IGC, ensured that the Guantánamo “safe haven” was temporary.<sup>64</sup> Likewise, in parallel to the US initiative to interdict Cuban asylum-seekers, legal channels of migration were established from Havana for Cubans seeking residence in the US.<sup>65</sup> Although both initiatives raise the dilemma of human rights compliance, they are qualitatively different from other initiatives, including the ones being considered in this briefing paper, as those granted protection were accorded it in the US, the state whose protection obligations the asylum-seekers had engaged. The current proposals, like the “Pacific Solution” (see below) seek a different result, namely distribution of recognized refugees to resettlement countries not necessarily of their choosing.

Threats to the international protection regime increased in August 2001, with the Australian government’s refusal to land more than 400 mostly Afghan asylum-seekers rescued off the Australian coast by the *MV Tampa*, a Norwegian freighter. The resultant, and highly controversial, “Pacific Solution” scheme, which effectively amounted to a trade in the human misery of those on board the *Tampa* and other vessels seeking entry to Australia, set the scene for a new phase in state responses to the demands of their voluntarily assumed international legal obligations.<sup>66</sup>

Amnesty International publicly condemned the “Pacific Solution” both in its conception and impact, describing it not only as unilateral action that undermined international efforts aimed at persuading other countries to respect the needs and rights of refugees and asylum-seekers. It also described the “Pacific Solution” as offensive to human dignity and in violation of international human rights and refugee law standards.<sup>67</sup> In September 2002, Human Rights Watch exhorted “[t]he international community [to] decisively reject Australia's efforts to export this approach”.<sup>68</sup>

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<sup>64</sup> IGC, *Reception in the Region of Origin – draft follow-up to the 1994 Working Paper*, August 1995, Annex 2, page 27. See also AI, *United States of America : Forcible return of Haitian asylum-seekers by the United States*, January 1994 (AI Index: AMR 51/007/94); *United States of America/Haiti : The price of rejection - Human rights consequences for rejected Haitian asylum-seekers*, May 1994 (AI Index: AMR 51/031/1994).

<sup>65</sup> Ibid.

<sup>66</sup> For further comment by Amnesty International, see *Australia/Pacific: The “Pacific Solution” - offending human dignity*, 26 August 2002 (AI Index 12/009/2002); see also Irene Khan, *Trading in human misery: a human rights perspective on the Tampa incident*, *Pacific Rim Law & Policy Journal*, Vol. 12, No. 1, January 2003.

<sup>67</sup> Ibid. See also AI, *Australia must not shirk its obligations towards asylum-seekers*, 29 August 2001 (AI Index ASA 12/002/2001); AI, *Australia: Asylum seekers - where to now?*, 5 December 2001 (AI Index ASA 12/010/2001).

<sup>68</sup> See Human Rights Watch Briefing Paper, *“NOT FOR EXPORT”, Why the International Community Should Reject Australia's Refugee Policies*, September 2002.

In the context of the UK and related proposals, Amnesty International has called for an independent evaluation of Australia's "Pacific Solution".<sup>69</sup> In view of the controversy that surrounded the "Pacific Solution", it would seem irresponsible to forge ahead with the UK or similar proposals without first examining the impact of the "Pacific Solution" on refugee protection and solutions. Such an approach would be in keeping with UNHCR's supervisory role under Article 35 of the Refugee Convention.

## 6.2 Legal concerns

Perhaps most striking about each of the UK and UNHCR proposals, as well as the EU Communication, is the fact that the authors have failed to analyse the lawfulness of the schemes they propose not only under the Refugee Convention itself, but also in relation to the range of applicable international human rights standards. While European regional human rights represent a particularly powerful tool in the region, states are also bound by wider international human rights standards.

It is well established that the provisions of a treaty to which a state is party are binding on it, and must be performed in good faith.<sup>70</sup> It follows that a state that is seeking to give effect to its obligations under the Refugee Convention, cannot do so selectively. The Refugee Convention is founded on the principle that all human beings should enjoy fundamental human rights and freedoms without discrimination.<sup>71</sup> Where it is reasonably foreseeable that an interpretation of the Refugee Convention is incompatible with provisions of an instrument by which the state is also bound (for example, prohibitions on discrimination and arbitrary detention in the ICCPR<sup>72</sup>) and will therefore place the state in breach of that instrument, such an interpretation is not sustainable as a matter of law. On the other hand, where an alternative interpretation of international refugee law would maintain compliance with other international human rights standards, the good faith requirement would compel states to favour the interpretation which places the state in compliance with both instruments.

Central legal questions relevant to all proposals are transfer, the definition of "effective protection" (whether in TPCs, RPAs, or countries of first asylum), and the scope and content of the obligation of states to accord protection vis à vis both the putative transferring state and its counterpart, the receiving state. In addition, the relationship between asylum and resettlement schemes and protected entry procedures is relevant.

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<sup>69</sup> See AI, *Amnesty International's observations to UNHCR's Consultations on Convention Plus*, 7 March 2003 (AI Index: IOR 42/001/2003); AI, *Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Trans-national crime must address human rights concerns*, 28 April 2003 (AI Index: IOR 40/005/2003).

<sup>70</sup> Article 26 and 31, Vienna Convention on the Law of Treaties.

<sup>71</sup> See Refugee Convention, Preamble.

<sup>72</sup> See Articles 2 and 9, ICCPR.

## 6.2.1 Transfer

The starting presumption of each proposal appears to be that, as the UK proposal puts it, “[t]here is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application”. The Refugee Convention does not explicitly oblige a state party to undertake refugee status determination. Unless states parties are to accept all claims made for refugee status, however, some form of determination procedures must be carried out.<sup>73</sup> There is a reasonable presumption, not least on the basis of state practice, that such determination ought to be made in the territory where the asylum-seeker claims protection. The UK interpretation seeks to defeat the object and purpose of the Refugee Convention which, in the spirit of international co-operation, is to bind states parties to respect the rights of asylum-seekers and refugees arriving in their territory.<sup>74</sup> Indeed, the text of the Refugee Convention itself points to the conclusion that obligations are not only intended to be engaged but also delivered in the territory of a state.<sup>75</sup> Moreover, while the Preamble to the Refugee Convention clearly contemplates responsibility sharing arrangements, such arrangements cannot be elevated above the specifically articulated rights of a refugee and concomitant obligations of a state party to deliver them, which are set out in Articles 2-34 of the Refugee Convention.

### 6.2.1.1 Legality of transfer

The Refugee Convention is silent on whether transfer in the terms contemplated by the UK and UNHCR proposals and the EU Communication is permissible, and its *travaux préparatoires* shed no light on the question, suggesting that transfer to another state for the purpose of carrying out refugee status determination was not within the contemplation of the drafters.<sup>76</sup> Furthermore, state practice since 1951 in light both of Article 14 UDHR and the provisions of the Refugee Convention effectively creates a presumption against transfer being implicitly authorized by the Refugee Convention, instead imposing an obligation on the state in which an asylum-seeker arrives to accord her protection. Such an approach would not, of course, prevent the asylum-seeker herself from moving onward in search of protection in another state, if the state in which she has arrived does not accord her effective protection pursuant to its obligations.<sup>77</sup> Indeed, it is clear that “[t]here is no obligation under international law for a person to seek international protection at the first effective

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<sup>73</sup> See also Article 9, Refugee Convention.

<sup>74</sup> Rights under the Refugee Convention attach not once a refugee is *recognized* to be so, but once she *becomes* a refugee.

<sup>75</sup> See also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979, Foreword.

<sup>76</sup> cf. Geneva Convention IV, which expressly provides for transfer of “protected persons” to the protection of another state party, subject to certain carefully prescribed safeguards.

<sup>77</sup> See EXCOM Conclusion No. 58 (XL) – 1989, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*.

opportunity.”<sup>78</sup> Transfer also raises questions and concerns about an asylum-seeker’s vulnerability not only to the forcible return of a person to a territory where she would face serious human rights abuses (*refoulement*), which international law prohibits “in any manner whatsoever”,<sup>79</sup> but also to breaches of other basic human rights in the course of transfer procedures, in particular forcible transfer.<sup>80</sup> In the context of forced returns under national asylum procedures, a significant number of cases have been documented which give rise to real and grave concerns about human rights abuses in the course of those returns. Amnesty International considers that if forcible transfers are to be undertaken in the present context, it is unrealistic to suppose that they will take place without incident.

The UK and UNHCR proposals open up other possible breaches that would include transfer constituting a punitive measure amounting to a penalty under Article 31 of the Refugee Convention,<sup>81</sup> which would be disproportionate. This would be especially so in the context of collective expulsion, prohibited by Article 4 of Protocol 4 of the ECHR.<sup>82</sup>

#### 6.2.1.2 Relevance of the safe third country concept

Another obstacle to lawful transfer in the terms envisaged by the proposals is the concept of “safe third country” and the scope of its application.<sup>83</sup> This is more obviously relevant in the context of return of persons who “have found protection” that is effective.<sup>84</sup> As the EU

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<sup>78</sup> *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers*, Lisbon Expert Roundtable, 9 and 10 December 2002, (organized by UNHCR and the Migration Policy Institute hosted by the Luso-American Foundation for Development).

<sup>79</sup> Article 33 of the Refugee Convention. *Refoulement* is considered to be a principle of customary international law, binding all states, irrespective of their treaty obligations.

<sup>80</sup> In the case of Australia’s “Pacific Solution”, the model which at least the UK proposal is seeking to emulate in a number of respects, serious questions abound about human rights breaches in the course of transfers, which included holding transferees in incommunicado-like detention, where they were denied access to lawyers, to legal remedies, contact with the outside world, and information relating to their rights, status and destination.

<sup>81</sup> While a penalty under Article 31 might include expulsion, the penalty must be proportionate and necessary.

<sup>82</sup> See for example *Čonka v. Belgium*, 5 February 2002, in which the ECtHR found that the collective expulsion of 74 Roma from Belgium to Slovakia in October 1999 constituted a violation of the ECHR.

<sup>83</sup> “The “safe third country” notion presumes that the applicant could and should already have requested asylum if he/she passed through a safe country *en route* to the country where asylum is being requested. This notion is applied in most European States, although it is less widely used elsewhere. It is applied in various ways: to deny admission to the procedure (including directly at the border), to channel applications into accelerated procedures, and/or to reduce or exclude appeal rights. Several States have publicly available “safe third country” lists, while others apply the notion in a more informal manner.” UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001.

<sup>84</sup> EXCOM Conclusion No. 58 (XL) – 1989, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*.

Communication acknowledges, it is also relevant to the question of whether the Refugee Convention, as well as EU and national legislation, permit the transfer of persons to places through which they have not previously transited and with which they do not already have a connection or close links.<sup>85</sup> An earlier draft of the UK proposal acknowledges that it would be a “step further on [from the safe third country concept] to extend the principle to artificially created internationally controlled areas that are Regional Protection Areas”.<sup>86</sup> It should be noted that in earlier versions of the UK proposal the RPA was used as a generic term which included TPCs, described as “off-territory processing centres.”<sup>87</sup>

The EU Communication suggests that the EU’s draft Directive on Asylum Procedures could be adapted to set up complementary mechanisms for examining certain categories of applications. This implies that the EU may be willing to leave the way open to expand the criteria for “safe third country”, despite the legal implications.<sup>88</sup>

In the context of proposed transfers to a state with which an individual asylum-seeker has no prior connection there is little in the way of precedent, other than in the most controversial of circumstances, and in relation to which there is no authoritative international jurisprudence.<sup>89</sup>

Whatever the case, given that both the UK and UNHCR proposals envisage diminished procedural safeguards, a fundamental problem remains. UNHCR itself has acknowledged that an asylum-seeker can resist return to a “safe third country” on the basis that she could, for example, demonstrate that on the facts of her case, the third state would apply *more restrictive criteria* in determining her status than the state where the application has been presented.<sup>90</sup>

### 6.2.1.3 Discrimination

The final issue that this briefing paper addresses that is relevant to the legality of transfer is the question of whether transfer may amount to discrimination, in particular on the grounds of

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<sup>85</sup> EXCOM Conclusion No. 15 (XXX) – 1979, *Refugees Without an Asylum Country*.

<sup>86</sup> UK New Vision, page 17.

<sup>87</sup> *Ibid.*, page 18.

<sup>88</sup> See EU Communication COM(2003) 315, at paragraph 6.3.2.1.

<sup>89</sup> The only examples of transfer to a state with which asylum-seekers had no prior connection are the transfer of Haitians to a US Naval Base in Guantánamo Bay, Cuba, by the US Government in 1994, and the transfer of asylum-seekers intercepted by Australia to Nauru or Manus Island, Papua New Guinea, under the “Pacific Solution”. In the case of Guantánamo Bay, albeit in a different context, the US Court of Appeals in Washington DC, found Guantánamo Bay to be outside the reach of US federal laws saying that they could not seek release based on violations of the Constitution, treaties or federal law. *No. 02-5251, Khaled A.F. Al Odah et al. vs. U.S.A. et al*, 11 March 2003. In the case of Australia, a raft of hastily formulated legislation was passed by both Houses of Parliament in the wake of both the *Tampa* crisis and the September 11 attacks on the World Trade Centre and the Pentagon. This legislation sought to put asylum-seekers beyond the reach of the Australian judicial system, even when they were under the effective control of the Australian government or its agents.

<sup>90</sup> Referring to *T.I. v. UK*, (judgement of 7 March 2000, req. 43844/98, unpublished), see UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001.



race, nationality or ethnicity. Gregor Noll posits that “[t]he objective to improve migration management and refugee protection cannot be achieved by the means proposed [by the UK proposal] or would be as well achieved with less intrusive and cheaper means, which implies that it is discriminatory and thus illegal under international human rights law.”<sup>91</sup>

Both the ICCPR and the ECHR oblige states parties to ensure enjoyment of rights therein without discrimination, including most relevantly on the basis of national origin or other status. UNHCR’s proposal envisages the transfer of persons with ‘manifestly unfounded claims’ which would be determined on the basis of nationality. The UK proposal would effect transfers on the basis of ‘other status’, that is on the basis of an individual’s immigration status as an asylum-seeker arriving in its territory.

As the UN Human Rights Committee has stated, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”<sup>92</sup> While the Committee acknowledges that there is no general right of an alien to enter and reside in the territory of a state party, where “considerations such as non-discrimination, prohibition of inhuman treatment or respect for family life arise, aliens “may enjoy the protection of the Covenant even in relation to entry or residence”<sup>93</sup> Under European law, tests of comparability, justification and proportionality are required in determining whether an allegation of discrimination may be sustained.<sup>94</sup> These are consecutive tests, each subject to the outcome of the earlier test. Thus, if a person in a comparable situation enjoys better protection of her rights than the individual in question, discrimination may be established but would need to stand the test of justification. In order to amount to discrimination, difference of treatment would need to be unjustified on the basis of standards of reasonableness and objectivity. Thus the aim would need to be both legitimate *and* proportionate.<sup>95</sup>

Amnesty International is concerned that the UK and UNHCR proposals may breach principles of non-discrimination, by exposing asylum-seekers to the risks inherent in procedures with diminished safeguards.

#### **6.2.1.4 The responsibility of a state to provide protection to those under its jurisdiction**

Amnesty International considers that involuntary transfer from a destination state is inherently problematic because it would violate international legal standards. If, however, a state were to proceed with a transfer, it would not divest itself of legal responsibility by doing so.

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<sup>91</sup> Gregor Noll, *ibid.*, page 19.

<sup>92</sup> CCPR, *The position of aliens under the Covenant : 11/04/86. CCPR General comment 15*, paragraph 2.

<sup>93</sup> *Ibid.*, paragraph 5.

<sup>94</sup> For a more comprehensive discussion of this issue see Gregor Noll, *ibid.*, pages 27-28.

<sup>95</sup> See *Belgian Linguistic Case No 2* (1968), Series A, No 6; 1 EHRR 252.

UNHCR has made it clear that it considers the responsibility of states to be an essential element of any scheme.

It appears, however, from earlier drafts of the UK proposal that the intention of the UK initiative is to reduce asylum obligations either by circumventing obligations under the Refugee Convention or withdrawing its signature to that instrument.<sup>96</sup> The UK's objective would also appear to be to circumvent other international human rights obligations, seeking to limit itself to extra-territorial obligations under Article 3 of the ECHR, which it cannot avoid. This is illustrated by the fact that the UK appears to be concerned only with the provisions of Article 3 of the ECHR, without regard to other human rights standards which the UK apparently considers not to have extra-territorial application. The UK also fails to address obligations under other international instruments such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention on the Rights of the Child (CRC). These instruments outline protection obligations applicable to asylum-seekers, some of which find parallels in the ECHR. They oblige states parties to ensure, *inter alia*, protection against *refoulement* to torture, principles of non-discrimination, a prohibition on arbitrary detention, the obligation to treat persons deprived of their liberty with respect for the inherent dignity of the human person, and special obligations relevant to the treatment of child asylum-seekers and refugees.

Amnesty International considers that it is not possible for states to divest themselves of these legal responsibilities in the manner envisaged by the UK proposal. The UNHCR proposal does not substantively address these questions, and the EU Communication, while alert to them, does not provide substantive analysis of the problems.

Amnesty International believes that the **transferring state** would retain legal responsibility for ensuring protection of the fundamental human rights of persons transferred. This position

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<sup>96</sup> UK New Vision, page 11-12: "If we want to reduce our asylum obligations we could completely withdraw from the Convention. However, this will bring us little gain unless we can withdraw from or alter Article 3 of ECHR. If we could change Article 3 then withdrawal from the Geneva Convention may be worth considering. The danger here is that a UK or European withdrawal would lead to the collapse of the Convention with developing countries reasoning that they need not tie themselves to obligations that the developed world is not prepared to keep. This would result in increased global flows of refugees with millions of people being left in limbo without protection. Therefore any future withdrawal from the Geneva Convention needs to be coupled with an alternative protection regime for refugees." And further: "We would need to change the extra-territorial nature of Article 3 if we wanted to reduce our asylum obligations. Article 3 is the only article of ECHR, which applies to actions that occur outside the territory of the State. If we only had to concern ourselves with torture, inhuman and degrading treatment that happens in the UK we could remove anyone off the territory without obligation. Coupled with a withdrawal from the Geneva Convention *refoulement* should be possible and the notion of an asylum seeker in the UK should die."

is consistent with European case law,<sup>97</sup> the law of treaties,<sup>98</sup> and, by analogy, Geneva Convention IV which sets out circumstances in which “protected persons” under international humanitarian law may be transferred to the protection of another state.<sup>99</sup> Thus states would be obliged to ensure that critical safeguards were incorporated into transfer arrangements. These should include, amongst others, the obligation to receive transferees back in the face of protection failures unless or until they are determined not to have a sustainable claim to international protection, can be returned to their country of origin in safety and dignity, with full respect for their human rights, and have no other legal basis to remain.

In addition, the **receiving state** would, by virtue of having the transferred person on its territory and therefore within its jurisdiction, also be responsible for ensuring respect for refugee and human rights law and standards.

### 6.2.2 The meaning of “effective protection”

The notion of “effective protection” arises in the context of assessing whether an asylum-seeker may be returned to a country of first asylum. While the test appears to be widely considered to be whether she has received “effective protection” in that country,<sup>100</sup> there is no international agreement on what constitutes “effective protection”.<sup>101</sup>

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<sup>97</sup>The ECtHR in the case of *T.I. vs. United Kingdom* (judgement of 7 March 2000, req. 43844/98, unpublished), held that Member States “cannot rely automatically in that context on the arrangement made in the Dublin Convention (...). It would be incompatible with the purpose and object of the ECHR if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”. In the light of this jurisprudence, a Member State can only be considered to be a safe third country if they provide effective and durable protection, which includes effective access to a fair and satisfactory asylum procedure. Such guarantees must be obtained in each individual case, regardless of any responsibility sharing agreement. Several appellate courts have already adopted this approach: see House of Lords, *R v. SSHD ex parte Adan & Aitseguier*, 19 December 2000 (1999) 1, AC, 293; Austrian Supreme Administrative Court (*VwGH*), 08.03.2001, G 117/00.

<sup>98</sup> See Vienna Convention on the Law of Treaties requirement to perform and interpret treaty obligations in good faith: Articles 26 and 31.

<sup>99</sup> See Article 45, Geneva Convention relative to the Protection of Civilian Persons in Time of War, which prescribes circumstances in which a ‘protected person’ in time of war may be transferred to the protection of another Power.

<sup>100</sup> See EXCOM Conclusions 15 and 58.

<sup>101</sup> Preliminary conclusions on the meaning of “effective protection” emerged from an expert roundtable held in Lisbon on 9-10 December 2002: *The Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers*, organized by the UNHCR and the Migration Policy Institute, hosted by the Luso-American Foundation for Development. See also Stephen H Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, February, 2003, a paper commissioned by UNHCR as part of its Legal and Protection Policy Series.

### 6.2.2.1 State definitions of effective protection

Both the UK proposal and the Danish Memorandum<sup>102</sup> put forward ‘working definitions’ of effective protection. An earlier draft of the UK proposal suggests that, even without international agreement on the scope and content of effective protection, it would include primary humanitarian assistance, protection against *refoulement*, and compliance with Article 3 ECHR.<sup>103</sup>

According to Gregor Noll, the Danish Memorandum, suggests that “effective protection” should, as a minimum, comprise a guarantee against *refoulement*, physical protection and an appropriate level of social protection, placing emphasis on the importance of being able to agree a level of protection which may be implemented in practice.<sup>104</sup> Strikingly absent from this definition is any reference either to human rights or to legal protection.

### 6.2.2.2 Other ‘definitions’ of effective protection

Summary Conclusions from an Expert Roundtable in Lisbon in December, 2002, co-hosted by UNHCR, provided a non-exhaustive set of elements considered to be critical factors for the appreciation of “effective protection” in the context of secondary movements of refugees and asylum-seekers. These elements encompass the principle of *non-refoulement* including chain *refoulement* where the individual has a well-founded fear of persecution on one of the Convention grounds in the third state, as well as requiring protection from torture, and of the rights to life and freedom from arbitrary detention. There should also be agreement on the part of the third state to readmit, and the third state to which the person would be returned should normally be a party to the Refugee Convention and/or its Protocol. In any event, compliance with standards of the Convention would need to be demonstrated. There should be access to fair and efficient procedures, unless the third state provides *prima facie* recognition of refugee status. An individual should have access to means of subsistence such as would be sufficient to maintain an adequate standard of living. There should be access to durable solutions, and account should be taken of special vulnerabilities.<sup>105</sup> While the Lisbon

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<sup>102</sup> The Danish memorandum was produced following a meeting on 23 April, 2003, attended by the UK, Denmark, and the Netherlands, as well as the IGC, UNHCR and the IOM.

<sup>103</sup> UK New Vision, page 14: “it is clear that at a basic level there must be primary humanitarian assistance – food, shelter, and health services – and there must be no risk of persecution or *refoulement* to the source country. In order for the UK and the rest of the EU to use Regional Protection Areas [and TPCs] the notion of *effective protection* must also be sufficient to be compliant with Article 3 of ECHR. This means that there must be no risk of torture, inhuman or degrading treatment, either directly in the Protection Area itself or by removal from the Area.”

<sup>104</sup> See Gregor Noll, *ibid.*, page 16.

<sup>105</sup> Lisbon Expert Roundtable, Summary Conclusions, *ibid.*, paragraph 15.

elements do not purport to be a definition, or to be exhaustive, notably absent is the requirement that the individual would enjoy a legal status.

The EU Communication outlines a less elaborate articulation of “effective protection” covering requirements of protection against *refoulement*, access to procedures with sufficient safeguards and access to primary healthcare, primary education, and the labour market or means of subsistence consistent with an adequate standard of living.<sup>106</sup> The EU Communication recognizes that “[i]n certain regional contexts ... EU Member States may need to accept higher standards.”<sup>107</sup> However, similar to the Lisbon elements, this definition does not attach sufficient weight to legal security, which includes having a recognized legal status and thus recognition as a person before the law. The EU Communication is also silent on the question of detention.

While legal status may be implicit in the requirement to comply with the Refugee Convention, Amnesty International considers that this is an element of effective protection which deserves separate and explicit attention. It is also a critical factor in ensuring that effective protection includes access to effective remedies.

### 6.2.2.3 “Effective protection” and “effective remedies”

Amnesty International considers that an important failure of the above “definitions” is that they do not shed sufficient light on the question: “*effective protection*” of or against what? Rather than pointing to effective protection of or against a given set of legal standards, the definitions are highly contextualized in that they are informed by the desire for effective protection to provide a basis for return. Although this may not be fatal in itself, it renders the definitions ‘blind’ to remedies, which are an essential factor in ensuring that protection is effective. In order for remedies to be effective, including the right to compensation, safeguards would need to ensure not only legal protection, but also the means to access that protection.

That access to effective remedies should necessarily attach to the notion of effective protection is not only logical, but also finds favour in the context of asylum. The case of *T.I. v. UK*<sup>108</sup> concerned an asylum-seeker who the UK sought to return to Germany under the Dublin Convention. In that case the Court found that any measure adopted by member states individually or collectively had to ensure the fulfilment of their obligations under the ECHR. One such obligation is to provide for effective remedies against violations of the rights guaranteed by the Convention. In the case of *Jabari vs. Turkey*, the Court held that “given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist

<sup>106</sup> EU Communication COM(2003) 315, page 6.

<sup>107</sup> EU Communication COM(2003) 315, *ibid.*.

<sup>108</sup> ECtHR *T.I. vs. United Kingdom*, judgement of 7 March 2000, Application no. 43844/98, unpublished.

substantial grounds for fearing a real risk of treatment contrary to Article 3 and to the possibility of suspending the implementation of the measure impugned”.<sup>109</sup> Likewise, in the case of *Conka v. Belgium*, the Court held that it was inconsistent with the right to an effective remedy for expulsion measures to be executed before the national authorities had examined their compatibility with the ECHR. Furthermore, given that Article 3 permits for no exception on the grounds of public order or national security,<sup>110</sup> issues of public policy or administrative convenience would be unlikely to overshadow the obligation under Article 13 ECHR to ensure access to an effective remedy.

Given that the obligations of a transferring state towards an individual would not be broken by transfer of that individual to another state, the competent authorities would maintain a duty to ensure that victims of human rights abuses during or after transfer have effective remedies against those breaches.

#### 6.2.2.4 “Effective control”

An asylum-seeker who enters the territory of a state party to the Refugee Convention, or who (whether voluntarily or involuntarily) falls under the effective control of the state or those acting on its behalf (such as IOM),<sup>111</sup> engages not only the obligations of that state under the Refugee Convention, but also the human rights obligations by which that state is also bound. In the European context this will include not only obligations under the ECHR, but also other international human rights standards.<sup>112</sup>

It logically follows that a state is bound to ensure the effective protection of an individual in its territory *or* under its effective control against breaches of the human rights by which that state is bound, including effective remedies.

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<sup>109</sup> ECtHR, *Jabari v. Turkey*, judgment of 11 July 2000, Application no. 40035/98, paragraph 50.

<sup>110</sup> See ECtHR, *Chahal v. the UK*, judgment of 15 November 1996, 70/1995/576/662.

<sup>111</sup> Under the “Pacific Solution”, the Australian Government engaged the support of the IOM (funded by Australia) in both the transfer of asylum-seekers to Nauru and Manus Island, Papua New Guinea, and the administration of the detention centres in which they were held. In that context, IOM was effectively acting on behalf of the Australian government. In its own right, IOM should also ensure that its policies and practices comply with international human rights and refugee law standards. See *Australia-Pacific Offending human dignity - the “Pacific Solution”*, 25 August 2002 (AI Index: ASA 12/009/2002).

<sup>112</sup> In a new draft General Comment, the UN Human Rights Committee recognizes that the ICCPR has extra-territorial application where a state party exercises effective control of a person(s) “even if not situated within the territory of the State Party”, noting also that enjoyment of such rights covers all individuals, explicitly including refugees, asylum-seekers and migrant workers, in the territory of a state party, subject to its jurisdiction, or within its power or effective control. UN Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* : . 05/05/2003. CCPR/C/74/CRP.4/Rev.3., Draft General Comment on Article 2, paragraph 9.

### 6.2.2.5 “Comparable protection”

At least under European law, “effective protection” would also have to comply with the test of “comparable protection”, as found in the case of *Amuur v. France*. This would oblige states to ensure that the putative transferee is able to access protection comparable to the protection they might expect to find in the country where they are seeking asylum.<sup>113</sup> This would necessarily include effective remedies.<sup>114</sup> Where the human rights and refugee protection obligations of a state have been engaged, it is logical that states should not be absolved of these obligations simply by abandoning an individual to a territory where they would not enjoy comparable protection. The test of comparable protection also ensures that an individual does not lose rights that she would otherwise be able to assert, were it not for the transfer.

### 6.2.2.6 Detention

The issue of detention and the vulnerability of asylum-seekers and refugees to arbitrary and unlawful detention is a central element in defining “effective protection”. It is given separate attention here because of its prominence as an issue in relation to both the UK and UNHCR proposals. In its proposal, UNHCR uses the term “closed reception” which falls within the definition set out in its guidelines on detention of asylum-seekers as a form of detention.<sup>115</sup> Although the UK proposal does not use the language of detention explicitly, except in the context of detention prior to transfer, the proposals as they have been conceived would not function without detention. That UNHCR has incorporated ‘closed reception’ into its proposals suggests that it too recognizes it to be an unavoidable element of the proposals. That it is implicit in the notion of TPCs becomes more apparent from the Danish Memorandum, which clearly expects TPCs to be a form of detention.<sup>116</sup> Detention appears also to be an inevitable part of arrival in the destination state, and transit to the TPC or RPA, especially where transfer is not voluntary.

The RPA component of the UK proposal envisages stay beyond the determination procedure both for refugees and for rejected asylum-seekers who could not be returned to their country

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<sup>113</sup> *Amuur v. France*, ECtHR, 19776/92, at paragraph 48: “The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.”

<sup>114</sup> See Article 2(3) of the ICCPR as well as Article 13 of the ECHR.

<sup>115</sup> UNHCR *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, *ibid.*

<sup>116</sup> Danish Memorandum, at 5, “... due to the deterrent of transfer to Transit Processing Centres and detention, Australian and American experiences show that the number of resettled persons is unlikely to exceed the number of persons of the same nationality who at present remains [sic] in destination countries following an asylum procedure.” See Gregor Noll, *ibid.*, at 18.

of origin. UNHCR suggests that the maximum period of detention in a TPC would be one month, but does not indicate how it proposes that such processing (including reasonable appeal periods) could be finalized in that time, much less into which jurisdiction a TPC detainee would be entitled to be released.

Amnesty International opposes the detention of asylum-seekers unless they have been charged with a recognizably criminal offence, or unless the authorities can demonstrate in each individual case that the detention is necessary, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum-seekers. Amnesty International calls for each asylum-seeker who is detained to be brought promptly before a judicial or similar authority whose status and tenure afford the strongest possible guarantees of competence, impartiality and independence, to determine whether her detention is lawful and in accordance with international standards.

In addition to the applicable international human rights standards which prohibit arbitrary and unlawful detention,<sup>117</sup> there is an increasing body of jurisprudence which points directly to this prohibition in relation to asylum-seekers, including rejected asylum-seekers.<sup>118</sup> Detention is arbitrary and unlawful if it cannot be justified in the individual case, or is not open to periodic review so that the grounds justifying detention can be assessed. Provisions authorising the deprivation of liberty must be “sufficiently accessible and precise, in order to avoid all risk of arbitrariness”.<sup>119</sup>

Even where there is a notional ‘choice’ to leave, confinement in such a centre may constitute detention if the individual believes that she has no other choice and/or rights to which she believes she is entitled will be denied.<sup>120</sup>

International human rights monitoring mechanisms have expressed grave concern about the detention of asylum-seekers in a number of contexts, including in the UK,<sup>121</sup> as well as the detention of migrants.<sup>122</sup>

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<sup>117</sup> Article 9, ICCPR, Article 5 ECHR.

<sup>118</sup> See for example *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997); *Zadvydas v. Davis*, 121 S.Ct. 2491 (US Jun 28, 2001); *Al Masri v. MIMIA*, [2002] FCA 1009 (Australia); *Case of Conka V. Belgium*, judgment of 5 February 2002, Application no. 51564/99.

<sup>119</sup> *Amuur v. France*, ECtHR, 19776/92, at paragraph 50.

<sup>120</sup> See *Amuur v. France* ECtHR, 19776/92, at paragraph 48.

<sup>121</sup> See for example Working Group on Arbitrary Detention, *Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, E/CN.4/1999/63/Add.3, 18 December 1998, *Report of the Working Group on Arbitrary Detention – Visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002; Working Group on Arbitrary Detention, Deliberation No. 5, *Situation regarding immigrants and asylum-seekers*. UN Sub-Commission on Human Rights, *Detention of asylum-seekers*, resolution 2000/21. UN Human Rights Committee, *Concluding*



Article 31 of the Refugee Convention provides the legal force behind UNHCR's own guidelines on detention of asylum-seekers,<sup>123</sup> which require states to look first to alternatives to detention resorting only to detention where there is evidence to suggest that alternatives will not be effective in the individual case.<sup>124</sup> The presumption of "closed reception" not only runs counter to UNHCR's own guidelines, which state unequivocally that "[t]here should be a presumption against detention,"<sup>125</sup> but also exposes both receiving states and transferring states to the very real risk that they will be found to have transgressed international and regional human rights standards applicable to detention.

Amnesty International does not expect that states would be able to deliver on the one month period of detention envisaged by the UNHCR proposal (both other proposals are silent on the point), if asylum-seekers are to be given access to a fair and satisfactory asylum procedure, including appeals. The recent, and continuing experience, of the "Pacific Solution", suggests that detention could be significantly more prolonged.<sup>126</sup>

However, even if detention were not to exceed one month, this cannot in itself mend the breach. Although there are serious questions about whether administrative efficiency is, in itself, a justification for detention, detention in a TPC would remain subject to international human rights standards of arbitrariness and unlawfulness, including the question of proportionality.<sup>127</sup>

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*Observations of the Human Rights Committee : United Kingdom of Great Britain and Northern Ireland*, 6 December 2001. CCPR/CO/73/UK;CCPR/CO/73/UKOT.

<sup>122</sup> Report prepared by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, submitted pursuant to resolution 1999/44 of the Commission on Human Rights, Visit to Canada, E/CN.4/2001/83/Add.1, 21 December 2001.

<sup>123</sup> UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, *ibid.*

<sup>124</sup> Article 31(2) provides that restrictions on the movements of refugees "other than those which are necessary" shall not be applied.

<sup>125</sup> UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, *ibid.*, Guideline 3.

<sup>126</sup> There are still 437 people held on Manus Island, Papua New Guinea, and Nauru. On Manus Island there are three Iraqis, two of whom have been recognized as refugees and are awaiting resettlement, and third which the Australian government says "will be returned as soon as returns are possible." Furthermore, of the 434 remaining on Nauru, 49 are recognized refugees and the claims of the remaining 386 have been rejected. Amongst that group, there is only a pool of some 30 rejected asylum-seekers that Australia is in a position to return, over and above 125 who have apparently accepted a reintegration package to Afghanistan, but who have not yet been returned apparently still waiting for passports. Australian Senate Estimates Committee, Hansard, evidence of Mr. McMahon. Thursday 29 May, 2003, page 413.

<sup>127</sup> See House of Lords, *Secretary of State For The Home Department Ex Parte Saadi (Fc) and Others (Fc)*, [2002] UKHL 41, 31 October, 2002.

### 6.2.3 Resettlement and Protected Entry Procedures

As a means of regulating the onward movement of asylum-seekers from countries of first asylum, where they may not be secure, the UK proposal promises expanded resettlement procedures. Likewise, the UNHCR proposal foresees the development of a joint EU-resettlement scheme and the EU Communication demonstrates an openness to expanded resettlement schemes. Such procedures allow refugees, often screened and recognized by UNHCR, to apply through embassies for a visa to enter the chosen country either as a refugee or as a migrant. In a similar vein, the EU Communication sets out as one of its bases for new approaches to asylum “regulating access to the Union by establishing protected entry schemes”.<sup>128</sup>

A regional meeting on resettlement held in Norway in November 2001 as part of UNHCR’s Global Consultations on International Protection, recommended that resettlement should be treated as a complement to, rather than as a substitute for, the right to seek asylum.<sup>129</sup> Amnesty International strongly supports this position, recognising that there is a pressing need to increase the availability of resettlement as a durable solution. The organization considers it also to apply to protected entry procedures.<sup>130</sup> Resettlement and protected entry procedures can never be a substitute for the legally binding rights that attach to a refugee who has directly engaged the protection obligations of a state party to the Refugee Convention. This means that failure to access such procedures should never be used as a reason to deny an asylum-seeker access to a procedure, or to draw adverse inferences about the genuineness of her claim.

## 6.3 Policy issues

States, international agencies and non-governmental organisations increasingly recognize the so-called asylum-migration nexus. The very act of seeking asylum is migratory, whether temporary or permanent and migration, forced or voluntary, is an essential part of the human condition. However, this does not mean that asylum-seekers who move in search of protection, in particular outside their region of origin, can or should be discredited for doing so. Yet, it is becoming the starting presumption of many governments intent upon restricting

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<sup>128</sup> EU Communication COM (2003) 315, page 13.

<sup>129</sup> Global Consultations on International Protection, Nordic Regional Resettlement Meeting on ‘Resettlement as a Multi-Faceted Protection Tool and its Relationship to Migration’, Oslo, 6 - 7 November 2001, EC/GC/02/4, 16 April 2002, page 2.

<sup>130</sup> However, an asylum application lodged at an embassy or other office in the country where the asylum-seeker is under threat of human rights violations cannot provide the fundamental safeguards that would be provided in an asylum procedure established in conformity with international standards dealing with refugee protection - safeguards such as the right to appropriate legal advice and to an effective review of the case if the application is rejected. See Amnesty International, *United States of America : Forcible return of Haitian asylum-seekers by the United States*, January 1994 (AI Index: AMR 51/07/94).

the rights of ‘onward movers’ that they are less entitled and less deserving than the largely impoverished masses of “good refugees” who remain in camps and urban areas in developing countries.

Assumptions are made too that ‘onward movers’ are actually economic migrants who, if they were “real refugees” would have stayed in their first country of asylum, however precarious and inadequate the protection available to them. Yet, the demographic distribution of asylum-seekers indicates that the majority of asylum-seekers are coming from countries where serious human rights abuses are widespread.<sup>131</sup> Furthermore, it is unfair to condemn those who try actively to find protection rather than waiting for protection to come to them.

Amnesty International emphasises that there is a pressing need, and a duty, on the part of governments and politicians to demonstrate leadership to their publics and political constituencies and, with the support of both the UNHCR and the European Commission, to raise awareness of the rights that refugees have and should enjoy and the obligations that states have to protect them. As noted earlier in this briefing paper, the most compelling contemporary forms of racism and xenophobia are often against migrants, refugees and asylum-seekers coming from countries wracked by armed conflict and/or human rights abuses.<sup>132</sup>

### 6.3.1 Responsibility-shifting

Promises of resettlement and protected entry are, apparently, intended to reassure countries of first asylum that they would not face an increased refugee burden as a result of the TPC and RPA initiatives (if implemented).

The key problem with promises to increase resettlement opportunities, of course, is that it is difficult to accept that they will be acted upon. Presented in the context of the UK proposal, which seems so clearly aimed at pushing the refugee problem back onto countries of first asylum, there is reason to doubt the worth of such promises, especially given that resettlement as a durable solution is currently available to less than one percent of the world’s refugee population.

While Amnesty International welcomes efforts to enhance resettlement and protected entry procedures, the organization believes that if the UK and other countries genuinely wish to reduce onward movement of asylum-seekers through greater possibilities for resettlement, then they must give firm commitments to resettlement and protected entry. Further, they should show a willingness to resettle refugees recognized by UNHCR promptly and not, as is currently the case, subject them to lengthy additional procedures, the outcome of which is often to accept only the most skilled. Such an approach would be consistent with the Agenda

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<sup>131</sup> See UNHCR Asylum Applications Lodged in Industrialized Countries: Levels and Trends, 2000-2002, March 2003.

<sup>132</sup> See WCAR, *Declaration*, paragraph 16, *ibid*.

for Protection, as well as Convention Plus, which Amnesty International considers should be focused on ensuring protection and durable solutions in protracted and acute refugee situations such as, for example, West Africa where the refugee crisis is deepening.

All states parties to the Refugee Convention have made a commitment to collectively assume responsibility for solutions to the plight of refugees. Where resettlement is purely a discretionary act, states fall short of living up to this commitment. In any case, states are already under some obligations in relation to their consideration of accepting refugees for resettlement abroad. For example, these arise from provisions relating to non-discrimination and protection of the family unit in international human rights law. Refugees have a right to protection, and where a country of first asylum does not or cannot provide that protection, the obligation to do so may fall to other countries.

In addition, as has been discussed earlier, parallel commitment to increase protection capacity are also extremely important. It must of course be reiterated that increasing protection capacity requires a complex mix of time, resources, legal, political, social and economic capacity, first and foremost on the part of the host state.

Amnesty International is concerned that the UK and UNHCR proposals, and the EU Communication, amount, to a greater or lesser extent, to a responsibility shifting arrangement rather than responsibility sharing. The heightened demands that the proposals would place on EU accession countries, states bordering the EU or countries of first asylum would be considerable. EU accession countries may have little choice but, however heavily subsidized, their capacity to accord protection would be severely stretched, with the requirement of effective protection likely to be seriously compromised.

If states are to be serious about developing multilateral agreements which are principled and genuinely share responsibility, it is imperative that they do so in a principled manner. Such principles should be focused on the protection of refugees rather than driven solely by state interests, and should establish a rights-based framework for the crafting of agreements. Amnesty International considers that this is an essential first step in safeguarding both the legal foundation for and the central purpose of High Commissioner Lubbers' Convention Plus initiative.

### **6.3.2 Inadvertently promoting illegal migration**

One of the primary stated objectives of the UK and UNHCR proposals, and of the EU Communication, is to combat "illegal" migration. The UK proposal fails to address an obvious implication that it is likely to *increase* "illegal" migration. While its implementation may result in some reduction in the numbers of people claiming asylum in the UK, or other EU states, if the UK proposal were to succeed in reducing the numbers of asylum claimants, it

is likely that some refugees would “choose” to go underground opting for the hazards, including human rights abuses, of “illegal” migrant work.<sup>133</sup>

The UNHCR proposal addresses this issue only in passing, stating that its proposal “does not address the irregular entry and stay of economic migrants who do not resort to the asylum channel.” This problem, it says, requires “different responses”.<sup>134</sup> However, there is a real risk that TPCs, and to some extent RPAs also (although RPAs are not part of the UNHCR plan), would attract business for people smugglers and traffickers and resulting vulnerabilities for their residents. The British Refugee Council has warned that the UK proposal could create “super-Sangattes”, referring to the Red Cross asylum-seekers centre near Calais, France, closed in 2002.<sup>135</sup>

The EU Communication takes a different view, recognising at least to some extent that it is necessary to take a realistic view of the movement of people. The Communication makes a sensible and non-absolutist statement noting that while abuse of the system should be discouraged as much as possible, it implicitly acknowledges (a) the difficulty in accurately identifying abuse, and (b) the negative impact on persons in need of protection, of strategies to eliminate rather than minimise abuse.<sup>136</sup> Although just one element in ensuring protection for refugees, Amnesty International believes that it is important to give stronger voice to the need to open up legal migration channels. It is the plethora of restrictive measures imposed on those seeking both protection and even modest economic security that creates the greatest demand for both trafficking in humans and smuggling in migrants. At the same time, like resettlement and protected entry procedures, the availability of legal migration channels should never be taken as providing the basis for denying an asylum-seeker access to a procedure, or to draw an adverse inference about the genuineness of her claim.

A further dimension to the problem that is also not addressed by the UK proposal, or in detail by UNHCR, is that “[n]either EU-based nor ‘transit’ processing would resolve the situation of persons without identification or fraudulent identification documents”.<sup>137</sup> Indeed, TPCs would be likely to encourage persons to travel without or destroy identity documents or with

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<sup>133</sup> This is not a new phenomenon. Amnesty International is aware of a number of countries where the asylum processes and refugees’ rights are so chronically deficient that refugees opt for illegal migrant work rather than coming forward to claim protection. See for example *Myanmar-Lack of Security in Counter-Insurgency Areas*, 17 July 2002 (AI Index: ASA 16/007/2002).

<sup>134</sup> However, one of the main reasons why Article 31 of the Refugee Convention was included, was to ensure that those entering a country illegally would be encouraged to come forward and present themselves without delay to the authorities. This provision is undermined by the transfer to TPCs which effectively amounts to a penalty on those who seek to access the asylum system in good faith.

<sup>135</sup> *Unsafe havens, unworkable solutions*, British Refugee Council position paper on the UK proposals for transit processing centres for refugees and regional management of asylum, May 2003.

<sup>136</sup> As Gregor Noll notes, “[t]he idea that a change in the protection system could limit inward migration to qualified cases only is about as realistic as projections of a tax system operating without any incidents of error or fraud.”, *ibid.*, page 12.

<sup>137</sup> See UNHCR proposal, *Explanation of the EU-prong*.

fraudulent documents in order to avoid transfer. Quite apart from the fact that the unlawfulness of the proposals means that they are not feasible, the failure to even confront these issues comprehensively compounds the problem and attests to their being unworkable.

## 7. Conclusion

The starting presumption of each proposal and the EU Communication is that asylum-seekers transferred to TPCs would enjoy – and implicitly only deserve – lesser rights than those arriving in destination countries. Likewise, asylum-seekers returned to RPAs or countries of asylum in regions of origin, would presumably also enjoy lesser rights.

Amnesty International considers that the involuntary transfer of persons to another country for extra-territorial processing is inherently unlawful, and the risk of human rights abuses in the course of transfer is high. Amnesty International is also concerned that if asylum-seekers are sent to a TPC or an RPA, they would not enjoy effective protection, including effective remedies for breaches of their human rights. Of particular concern, in this regard, is detention as it is apparent that it is a necessary element of both the UK and UNHCR proposals, as well as the EU Communication. The organization is also concerned that there is a risk that transfers would amount to discriminatory treatment, in breach of human rights standards.

Given the legal obligations that are engaged upon arrival in the territory of a state and the fact that the thread of state responsibility is not broken by expulsion or involuntary transfer, not least in situations where effective control is maintained, Amnesty International also believes it is not possible, in any event, for states to divest themselves of legal responsibility in the context of TPCs, or indeed RPAs.

The implications for refugee protection policy and practice are also significant, given the need not only to address all aspects of the perceived problem, but also in a manner which does not intrude on the inherent dignity of the individuals concerned. Amnesty International strongly urges states to pursue solutions for refugees' plight solely through respect for the rule of law, and in particular international human rights and refugee law norms. The organization welcomes the interest in establishing and expanding resettlement schemes and protected entry procedures, as well as initiatives to build protection capacity in regions of origin. However, Amnesty International urges states to ensure that such efforts are undertaken primarily to enhance access to protection and durable solutions for asylum-seekers and refugees and never viewed, either legally or politically, as a substitute for the long-established obligation to accord protection to those spontaneously seeking asylum on their territory. As an earlier version of the UK proposal has noted:

“[there is a] danger ... that a UK or European withdrawal [from the Refugee Convention] would lead to the collapse of the Convention with developing countries reasoning that they need not tie themselves to obligations that the developed world is not prepared to keep. This would result in increased global flows of refugees with millions of people being left in limbo without protection.

This sounds a sobering warning to states that, even in the name of self-interest, preserving their commitment to protection standards is critical to maintaining international solidarity in refugee protection in the long term.

## 8. Recommendations

In light of the analysis and findings in this report, Amnesty International makes the following recommendations:<sup>138</sup>

1. All states and UNHCR should agree to suspend any further consideration of the UK or related proposals, including the UNHCR proposal, pending a comprehensive and independent review of the degree to which these proposals are in line with international human rights and refugee law standards.
2. The UNHCR has a duty (under Article 35) to supervise the implementation of the Refugee Convention, and its Executive Committee (EXCOM) also has responsibilities in this regard. UNHCR, States parties to the Refugee Convention, and Member States of EXCOM, must object to proposals that would clearly breach the Convention and relevant human rights standards, including the plans of some European Governments to forcibly transfer asylum-seekers to countries outside the EU, where they will be detained and their claims determined through procedures falling short of international standards.
3. The Member States of the EXCOM (UNHCR's governing body) should appoint a legal review committee to carry out an independent review of the various proposals. It should be made up of independent experts, and should hear the views of all interested states (including countries of first asylum), organisations representing refugees and asylum-seekers (or their legal advocates) and NGOs. The committee should report publicly on its findings.
4. All states and UNHCR should further explore the expansion of resettlement schemes, protected entry procedures and initiatives for building protection capacity in countries of first asylum and regions of origin. These should be driven by the rights and needs of the individual asylum-seekers and refugees. The expansion of legal migration channels should also be considered. None of these initiatives should in any circumstances prejudice or substitute for the right to seek asylum.

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<sup>138</sup> These should be read in conjunction with a set of recommendations made in an Open Letter from Amnesty International to EU Heads of State and Government, Thessaloniki European Council, *Losing Direction: The EU's Common Asylum Policy*, annexed to this report.

5. UNHCR should prepare an authoritative statement on the scope and content of the concept of “effective protection”, so that there is clear, and legally-sound, guidance for states. This statement should take full account of international human rights and refugee law standards, including legal status and rights to effective remedies.
6. UNHCR should, in the context of the Convention Plus initiative, develop a set of core principles firmly grounded in international refugee and human rights law standards, that would guide the development of international responsibility-sharing arrangements.
7. UNHCR should ensure that the Convention Plus initiative gives priority to developing international responsibility-sharing arrangements which will focus on protection and solutions for refugees in host states in regions of origin currently experiencing the most protracted and acute refugee crises.
8. The European Commission should support the setting up of an independent legal review committee, before giving further consideration to starting a pilot project. It should also restate its commitment to ensure that on-going negotiations on asylum policy in the EU (in relation to developing a Common European Asylum System and in the Convention on the Future of Europe) are protection-oriented and consistent with international human rights and refugee law standards.
9. The IOM should make public its official position regarding the scope and content of the IOM’s obligation to comply with international human rights and refugee law standards, in particular with regard to arbitrary detention, unlawful detention, conditions of detention, and safe-guarding the principle of *non-refoulement*.





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Brussels, 18 June 2003

LOSING DIRECTION:  
THE EU'S COMMON ASYLUM POLICY

**OPEN LETTER FROM  
AMNESTY INTERNATIONAL  
TO EU HEADS OF STATE AND GOVERNMENT**

**THESSALONIKI EUROPEAN COUNCIL**

Amnesty International understands that the Thessaloniki European Council will be taking major decisions on future orientation in the field of Justice and Home Affairs. This Open Letter to all European Union Heads of State and Government outlines Amnesty's concerns at the direction in which the Common European Asylum System (CEAS) is heading, and calls on EU leaders to provide European citizens with a clear vision of what they are hoping to achieve and how.

**Amnesty International's general concerns regarding on-going negotiations**

Amnesty International believes that the evolution of the CEAS shows a lack of strategic thinking, the absence of a long-term perspective and an overriding emphasis on control and repression, rather than a managed response to current issues surrounding the flow of asylum seekers to Europe.

Although we are aware of the political pressure that EU Member States are facing in meeting the deadlines set up by the Seville European Council, where it was decided “to speed up the implementation of all aspects of the program adopted in Tampere for the creation of an area of freedom, security and justice in the European Union”, Amnesty International is very concerned that such pressure may lead Member States to adopt common standards that would breach the Geneva Convention and other relevant principles of international refugee and human rights law.

There is a real risk that EU instruments will end up as “empty boxes”, leaving the most critical elements of the CEAS at Member States’ discretion. These concerns seem also to be shared by the European Commission, which has recently pointed out that the discussions in the Council revealed a lack of political maturity and the absence of an ambitious vision of harmonization<sup>139</sup>. Amnesty International has stressed repeatedly that a purely defensive and control-driven approach to forced displacement has proved to be inefficient both within the EU and outside it.

### **The external JHA dimension: an example of where the EU is going astray**

Amnesty International is concerned that the overriding restrictive trend in the development of the CEAS - i.e. to deprive access to EU territory - has manifested itself recently in the newly emerged external JHA dimension. In order to underline what it sees as the lack of clear, strategic thinking in regard to the CEAS, Amnesty International today releases a major analysis of the UK proposal and the subsequent Commission Communication (3 June, 2003) which discusses the idea of extraterritorial processing of asylum applications<sup>140</sup>.

### **New vision or new restrictions?**

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<sup>139</sup> Communication from the European Commission to the Council and the European Parliament, *The common asylum policy and the agenda for protection*, COM (2003) 152 final, 26 March 2003.

<sup>140</sup> Amnesty International, UK/EU/UNHCR: Unlawful and Unworkable: Amnesty International’s view on proposals for extra-territorial processing of asylum claims, June 2003.

Under this proposal, which first became public in February 2003, the UK government promotes the idea of offshore processing of asylum applications by setting up, on the one hand, "Regional Protection Areas" (RPA) in refugee-producing countries and, on the other hand, off-territory "Transit Processing Centres" (TPCs) located at the external borders of the European Union. In a commentray to the JHA Council in March 2003, Amnesty International severely criticized the proposal<sup>141</sup>. In response to the UK proposal, an April 2003 "counter-proposal" from the UNHCR appeared to be an attempt to "rescue" refugee protection from the clutches of the UK proposal, yet in doing so undermined some fundamental protection principles<sup>142</sup>.

On the basis of the mandate received at the 28-29 March 2003 JHA Council to further explore the ideas of the UK proposal, the European Commission adopted a communication on 3 June 2003<sup>143</sup>. While accepting the UK's diagnosis of the asylum problem in Europe, this Communication seems to reject its most radical elements, preferring to explore further the UNHCR proposal. The Commission thus suggests that the feasibility of this scheme be assessed further by means of a pilot project and that an adequate legal basis be developed.

### **Commission response lacks clarity**

Although Amnesty International is aware of the political pressure in such a highly charged environment, it deplores the European Commission's failure to seize this opportunity to depart from the drive for control and develop a coherent and integrated approach that maintains the Tampere commitments to a common asylum system that is based on "full and inclusive implementation of the Geneva Convention", and that gives substance to the stated intention to tackle the root causes of refugee flows. This lack of political clarity reinforces

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<sup>141</sup> AIEU Office, *Strengthening Fortress Europe in Times of War*. Amnesty International Commentary on UK Proposal for External Processing and Responsibility Sharing Arrangements with Third Countries, 28-29 March 2003; Amnesty International's Observations to UNHCR Consultations on "Convention Plus", IOR 42/001/2003, 7 March 2003.

<sup>142</sup> UNHCR, *New Approaches on Asylum-Migration Issues*, Statement of High Commissioner R. Lubbers, at the informal JHA Council 28-29 March 2003, Veria, Greece.

<sup>143</sup> Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, Brussels, 3 June 2003 COM (2003) 315 final.

the impression that the Commission lacks the resolve to counter-balance the radical push by certain governments to stop the “irregular” movements of asylum seekers to Europe, while not being able to articulate convincingly the external JHA dimension with its overall objectives in the fields of co-operation and development. Within this context, Amnesty International recalls that the external JHA dimension has so far produced little more than an extension of the restrictive asylum and immigration policies, rather than giving direction to political, development or economic co-operation from a human rights perspective to prevent the causes of people fleeing their countries. It rejects the punitive approach endorsed by the conclusions of the June 2002 Seville European Council, which held retaliation measures could be taken under CSFP and EU policies in case of “persistent and unjustified denial” of co-operation regarding readmission<sup>144</sup>.

Amnesty International considers that neither the Commission’s communication nor the proposals of the UK and the UNHCR have given sufficient attention to the international legal standards that are at stake, including in particular refugee and human rights law standards, and what the implications are for the international refugee protection regime as a whole.

**Of particular concern to Amnesty International is the suggestion to “adapt” EU asylum instruments. Amnesty International fears that the forthcoming discussions may undermine the Tampere commitments and have a detrimental effect on the on-going negotiations concerning minimum common standards for the definition and the status of refugees and persons in need of international protection, as well as current negotiations on common minimum guarantees for asylum procedure<sup>145</sup>. Regarding the latter text, the Commission’s suggestion is likely to have a negative effect on the adoption of common criteria for designating safe third countries, and safe countries of origin, as well as manifestly unfounded claims.**

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<sup>144</sup> Amnesty International’s Appeal to the Seville Summit, EU war on “illegal immigration” puts human rights at risk, 12 June 2002.

<sup>145</sup> See Amnesty International’s Comments on the Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001), 510 final, October 2002; Amnesty International’s Comments on the Amended Proposal for A Council Directive on Minimum Standards on Procedures in Member States For Granting and Withdrawing Refugee Status COM (2002) 326 final, February 2003

While the Communication supports the establishment of closed reception centres within the enlarged EU in order to cope with abuses of asylum procedures, Amnesty International is concerned that the real objective is to deter spontaneous arrivals by shifting asylum seekers to processing zones where responsibility and accountability for refugee protection would be diminished, weak and unclear. As already mentioned in Amnesty International's March critique, this proposal, if adopted, is likely to reinforce the "Sangatte syndrome" because zones located at the external frontiers of the EU are likely to attract trafficking and related criminal activity.

### **Failing to address realities on the ground**

Another important element of the overall approach is to support the concept of protection in the region. While it is not opposed to the concept as such, Amnesty International considers that the communication fails to address squarely the realities of the movement of people. These proposals represent restrictive measures that fail to deal meaningfully and realistically not only with the realities of protecting refugees and asylum-seekers in developing regions, and the causes of onward movement, but also with the current realities of the movement of people, not least of which is that many countries of first asylum cannot offer effective protection or assistance, due to their own political and economic difficulties. Indeed, these proposals cultivate a short-term political vision without fully considering the long-term social, political and legal consequences for countries close to refugee producing regions.

While Amnesty International appreciates the desire of governments and the UNHCR to promote new and more effective ways of dealing with mixed movements of refugees and migrants, the organisation believes that such efforts should be firmly grounded in principles of international human rights and refugee law. The establishment of any responsibility-sharing mechanism must take into account international responsibility for the protection of refugees so that a regional approach to refugee protection does not undermine efforts carried out at international level to protect refugees world-wide and to find safe and durable solutions for them.

**AMNESTY INTERNATIONAL'S RECOMMENDATIONS  
TO THE THESSALONIKI EUROPEAN COUNCIL**

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- 1. While stressing that the on-going negotiations should fully comply with the commitments of the Tampere Council, Amnesty International urges Heads of State and Government to endorse protection-oriented objectives for the future development of the JHA policy within the framework of the Convention on the Future of Europe.**
- 2. Amnesty International calls on the Heads of State and Government to give clear and unambiguous direction to the development of protection strategies rather than allowing the preoccupation with the EU's and Member States' perceived self-interested objective of control to determine their responses to the movement of people to Europe.**
- 3. Amnesty International calls on Heads of State and Government to develop a coherent approach to ensure adequate protection of refugees and support for their humanitarian needs rather than exploring ways of shifting their responsibility to vulnerable States.**
- 4. Specifically, Amnesty International calls on the Heads of State and Government to refrain from any financial commitments which enable the implementation of these controversial proposals to set up closed processing centres.**