2119352

Anna Nielsen Kjær
EIUC – European Master Programme in Human Rights and Democratisation 2003 - 2004

The European Refugee Regime
– Towards a Permanent State of Exception?

Human Rights
E.MA LIBRARY
INV. N. 12358
COLL. THESES 2003/2004 62

Supervisor: Dr. Gregor Noll
Raoul Wallenberg Institute of Human Rights and Humanitarian Law
University of Lund
July 2004

TABLE OF CONTENTS:

Abstract

The paper analyses whether the European refugee regime is developing towards a permanent state of exception. With a discourse analytical frame of analysis combined with a Foucauldian governmentality perspective on power, the paper analyses selected policies within European immigration and asylum policy. The paper is written through the paradigm of a parallel logic of desperateness, which the author finds to be the concept which captures and explains most accurately the current exceptional developments within European refugee politics. The selected policies emerging from the logic of desperateness are non-admission qua an adoption of 'safe countries'-principles, non-arrival policies, registration and surveillance, naval interception, detention of asylum seekers, offshore processing, and regional protection. It is argued that the continuous outcome of the parallel logic of desperateness is a production of more and more security and insecurity for the immigrants, for the European native citizens and for the politicians. The paper concludes that the policies materialising from the logic of desperateness constitute both a *violation* of the refugee regime (state of exception) and a *change* of the regime (normalisation of the exception).

"Desperate diseases require desperate remedies" (Guy Fawkes, 5/11 1605)[1].

> "The concept of the refugee (and the figure of life that this concept represents) must be resolutely separated from the concept of the rights of man, and we must seriously consider Arendt's claim that the fates of human rights and the nation-state are bound together such that the decline and crisis of the one necessarily implies the end of the other. The refugee must be considered for what he is: nothing less than a limit concept that radically calls into question the fundamental categories of the nation-state, from the birth-nation to the man-citizen link, and that thereby makes it possible to clear the way for a long-overdue renewal of categories in the service of a politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights"[2].

1. Introduction*

In the beginning of 2003, plans by the UK government to deport asylum seekers arriving in the UK to "Regional Protection Areas" and closed "Transit Processing Centres" outside Europe gradually leaked in the media. Implied in the proposal was the setting up of closed camps for the processing and protection of refugees outside EU. The UK proposal is a clear indicator of very restrictive recent tendencies in European refugee politics. Now, one year after, it is relevant to ask whether the proposal constitutes a radical change in the European refugee discourse or if it is simply part of a continuous development in a non-entrée regime, given the proposal's ground-breaking content, at least in a European context[3], and given the proposal's very serious consequences for the affected individuals if implemented. Human rights organisations as *inter alia* Amnesty International[4] have stated that these developments constitute a fundamental challenge to the international refugee regime. A second relevant question is hence whether the UK proposal is an indication of that the European Refugee regime is developing towards a permanent state of exception?[5]

---

* My thanks go to Dr. Gregor Noll for his assistance in supervising this paper and particularly for his involvement and drive in doing research about refugees and asylum seekers. This has been very inspiring throughout the last year, both in Venice and in Lund.

[1] Vogel-Jørgensen, *Bevingede Ord*, Copenhagen, Gads Forlag, p. 119.

[2] Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1998, p. 134.

[3] Similar policies are currently taking place in Australia under the heading "the Pacific Solution" and in the 1990s, the US implemented interception policies on Guantanamo when a huge number of Haitian boat asylum seekers approached Florida.

[4] Amnesty International, *The EU's Common Asylum Policy. Open letter from Amnesty International to EU Heads of State and Government Thessaloniki European Council*, Brussels, 18 June 2003.

[5] In the paper, the state of exception is defined as "a (temporal) suspension of the law" (Agamben, *Means without End.* Minneapolis. University of Minnesota Press, 2000, p.39 – emphasis added).

Over the last fifty years, the international refugee regime has been built up very cautiously. Refugees, one could say, form the test case of human rights. States are the ones protecting individuals' human rights and since refugees by definition have lost state protection – who is to safeguard refugees' human rights? The international community is, i.e. other states, but in the end it depends on states' *political* will to offer protection. Regrettably, it always has been and continues to be a myth that the content of the refugee regime is the idealism as some assume it to be. A regime depends on the political will of states which create it and therefore no sanctions towards the states exist. The sovereignty of states and the sovereignty of human beings (given by the human rights regime) are asymmetrical in nature, as states are the entities protecting human rights.

The perspective of the paper is a regime perspective. In international relations theory a regime is defined *as "sets of implicit or explicit principles, norms, rules, and decision making procedures around which actors' expectations converge in a given area of international relations"*[6]. Thus, they comprise a normative element, a legal element, state practice, and organisational roles. The European refugee regime consists of applicable legal instruments, States' and Court's interpretation of these instruments, and state practice. European states are parties to and bound by the 1951 Refugee Convention[7], international and regional human rights treaties as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) just to mention the most important ones[8]. The Universal Declaration for Human Rights provides in article 14 for the right to seek asylum, but the Declaration is merely of "soft law" character and is not binding on the State parties. The legal obligations taken into consideration, states have a sovereign right to control access to their territories.

---

[6] Krasner in Little, *International Regimes*, in Baylis and Smith, *The Globalisation of World Politics. An Introduction to International Relations*, Oxford, New York, 1997, p. 235. Krasner is not belonging to the social constructivist camp of international relations but to the realist one. Nevertheless, I read and interpret this definition of regimes as moderat social constructivist in the Berger and Luckmann sense (Berger and Luckmann, *The Social Construction of Reality*, New York, Doubleday Anchor, 1967). This means that a regime is a dynamic concept evolving in a *dialectic interaction* between the states and the structure of the international system. A regime is a social construction, which states create through written conventions, the interpretation of these conventions (state practice), norms and rules. At the same time a regime is again regulating the behaviour of states. Regimes are dynamic institutions constructed by states in order to regulate international relations and promote order in an international system of anarchy.

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

[8] The European Charter for Human Rights and Fundamental Freedoms (EU) includes as well important rights regarding asylum seekers; article 18 provides for the right to asylum. The Charter will be binding if the new Constitution is adopted, which one can only speculate about.

Throughout the last two decades, refugees and other kinds of irregular migrants have to an increasing extent been *perceived* as a security issue in the official (and unofficial) discourses in Europe. Immigrants, asylum seekers and refugees[9] have been and are framed in the discourse as a security problem and not a human rights question that requires human rights instruments to solve it. The consequences of this securitisation have been increasingly restrictive policies, both externally and internally in Europe, amounting to what some have called "Fortress Europe" or a "European non-entrée regime".

European refugee politics takes place within broader macro developments, all of which can be joined under the simplifying and very fluid term *globalisation*[10]. A refugee is a person placed in the middle of a complex macro sociological and political game determined by structural as well as human factors. From a statist perspective it is a person finding herself in between the humanitarianism and the sovereignty of states. From a non-statist perspective, it is a person challenging the sovereignty of states and hereby the current structure of the international society: the nation-state system. As globalisation indicates a move towards dissolution of the traditional (b)ordering of the world, the non-statist perspective seems increasingly relevant. As Peter Nyers has stated, current refugee practice needs to be assessed for how it conforms to or problematises and possibly transforms the constitutive principles of modern statist conceptions of community, identity and world order[11].

Globalisation may facilitate the movement of migrants, firstly, in the sense that globalisation brings more inequality in the world increasing the incentive for many individuals to search westward for security, freedom and less poverty; and secondly in the sense that the globalisation technologies enable the migrants to emigrate. As western states are increasingly limiting the legal paths to their territories, migrants search for alternative entries, one being to seek for asylum. The potential protection against *refoulement* becomes the only possible way to penetrate the sovereign hermetically sealed shell of western states. The recent asylum pressure on European states is matched by the countermove of states creating more and more restrictive immigration policies[12].

---

[9] See part 2.3. for a clarification of the concepts immigrants, refugees and asylum seekers.

[10] The purpose of using the term "globalisation" is not to go into a discussion about whether globalisation actually exists, what its implications are, etc. The purpose is simply to point out that refugee politics take place within macro sociological developments which from the author's perspective is perceived to be in some kind of a flux.

[11] Nyers, *Emergency or Emerging Identities? Refugees and Transformations in World Order*, in "Millennium", vol. 28, no.1, 1999, p. 4.

[12] Restrictive and controlling immigration policies limiting the free movement of persons constitute a dilemma within the dominant liberal globalisation discourse supported by western industrialised states. Free movement of

In this sense, migrants who are taking towards the west and western states' simultaneous strengthening of fortress policies can be seen as symmetrical developments constituting a *parallel logic of desperateness.* Immanent in this logic are the phenomena of security and risk. Immigrants are perceived as a huge risk for our internal security, e.g. to our identity, culture, welfare, etc. But also for the emigrants their journey entails a genuine risk for their own bodily security. The continuous outcome of the parallel logic of desperateness is a production of more and more security and insecurity for the immigrants, for the European native citizens and the politicians. The paper is written through the paradigm of a parallel logic of desperateness, which I find to be the concept which captures and explains most accurately the current exceptional developments within European Refugee Politics. The paper will focus on the state side of the desperateness and its implications for the adopted policies. This delimited focus on the parallel logic of desperateness is caused by the practical difficulties in studying the discourses and desperate actions of immigrants, nonetheless how relevant it would be. Moreover, one could argue that their actions speak for themselves. To be desperate means to be insecure, to be in a state of fear and unease, in a state of emergency. In order for us to understand and potentially criticise the policies and discourses of European refugee politics, it is necessary to understand this logic of desperateness.

It is the paper's view that it is insufficient to merely state that conduct X and Y is in contradiction with the law, and that policy X and Y is exceptional. It is necessary as well to understand how it came about, to understand the forces at work, in order for us to be able to critically analyse policies and the political reason behind. The UK proposal of offshore processing and regional protection is just one example among other European policies emerging from the logic of desperateness. Moreover, given our definition of a regime, which has a dynamic perspective on the law, it is necessary to have both the critique of the exception and the productivity of the exception in mind, without necessarily seeing the productive side as a normatively good thing. The state of normalcy and the state of exception is in the regime perspective not seen as a dualism. The analysis should therefore not exclusively focus on the exception but as well on the normalisation and routinisation of the exception. What is the normal and how did it come to exist?

---

goods, firms, services, information, capital and highly qualified people but not of people who are poor, unskilled and are escaping persecution imply a critique of western liberalism inherent in the globalisation processes and discourses (Crisp, *A new Asylum Paradigm? Globalisation, Migration and the Uncertain Future of the International Refugee Regime,* UNHCR Working Paper no. 100, Dec. 2003).

The political and sociological macro processes of globalisation constitute a dynamic macro societal context in which the refugee discourse and politics take place. But the discourses and policies are also part of the transformation of these macro processes. In order to analyse this apparently blurred empirical context and to understand what is actually happening in contemporary European refugee politics, one needs a *holistic and a moderate social constructivist* framework of analysis in order to grasp the complexity of the developments. Because migration and refugees are enshrined in a dynamic entity with the constitutive elements of security, identity, border, and order[13], this thesis has a post-structuralist perspective.

It is the ambition of the paper to critically analyse selected European immigration and asylum policies emerging from the logic of desperateness[14]. This is done through answering the three following research questions:

1. What is the appropriate theoretical framework for analysing the refugee and immigration discourses and policies emerging from the logic of desperateness?

2. How can the policies emerging from the logic of desperateness be characterised? Are they exceptional, and if so in what way?

3. If the policies are exceptional, what are the implications for the European Refugee Regime? Is the European Refugee Regime developing towards a permanent state of exception?

My aim is not to carry out an analysis which, intertwined in a lot of theoretical arguments, ends up being detached from the real persons all this is about – the refugees. The situation in which these people find themselves, is exactly the starting point of the whole analysis – European refugee policies have very real consequences for many persons. But for us to be able to understand and challenge the policies, a ***critical*** analysis of states' agenda for immigrants, asylum seekers and refugees, is crucial.

Section two explains the theoretical frame of the analysis. First, the discourse analytical frame of Laclau and Mouffe is in short set out, followed by an explanation of the paper's application

[13] See inter alia Albert, Jacobson and Lapid (eds), *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001.

[14] A critical analysis aims at creating meaning and does not have as objective to explain policies in the positivistic sense.

of Foucault's governmentality perspective. Section three, four, and five constitute the empirical analysis. Section three examines the refugee discourse and policies at EU level by focusing on non-admission policies, non-arrival policies, registration of asylum seekers and naval interception. Section four and five focus on the member state level. Part 4 deals with detention of asylum seekers, while section 5 analyses the UK proposal of offshore processing and regional protection. Against the background of the empirical analysis, the question is raised in section six whether the European Refugee Regime is moving towards a permanent state of exception. It is concluded that the policies materialising from the logic of desperateness imply both a violation of the refugee regime (state of exception) and a change of the regime (normalisation of the exception).

2. Post-structuralism, security, and migration

> "The insecurity continuum connects fear of crime, unemployment, foreigners, drug trafficking, terrorism, and war. It connects fear of the individual with fear of the collective survival. It connects fear of crime and fear of war as well as fear of the future"[15].

Shortly after the terrorist attack in Madrid, March 2004, it was pointed out in a prominent UK journal that "to prevent future attacks will require even closer cooperation between European police and intelligence services, and Europe-wide immigration and asylum procedures. We will finally wake up to the fact that islamist terrorism is a threat geographically closer to us than to America. It will be clear what Europe has to do, although no easier to do it"[16]. This is but one example of the evident link between security, immigration and asylum seekers. Migration is in some sense a meta issue which refers to a question which links a whole range of domestic problems such as the crisis of the welfare state, drugs etc[17]. When analysing immigration, an identity perspective is necessary because immigrants and refugees occupy a liminal position: "Immigrants and refugees are not only a challenge to which one reacts but they also become anchoring points for political (self-) identification, that is, they mark a battlefield of identity politics"[18]. In adopting a broad perspective on security[19], the core of the

---

[15] Bigo, *The Möbius Ribbon of Internal and External Security(ies)*, in Albert et al., *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001, p.113.
[16] Garton Ash, *Is this Europe's 9/11?*, in The Guardian, 13 March 2004.
[17] Huysmans, *Contested community: migration and the question of the political in the EU*, in Kelstrup and Williams (eds.), *International Relations Theory and the Politics of European Integration – Power, Security and Community*. New York, Routledge, 2000, p. 163.
[18] Idem at p. 150.
[19] Cf. the concept of "societal security" developed by Buzan et al. in inter alia *Security. A New Framework for Analysis*. London, Lynne Rienner, 1998.

paper is the connection between immigration, security and identity. The criterion of relevance in the paper is more how changes in the surroundings are perceived and as a result of these perceptions are reacted on than it is what is actually happening in the world.

By employing a regime perspective, the law is only one but an important component. How states interpret the law in their practice is important for understanding the real political practices. Whereas a legal perspective is built around binary oppositions, where the conduct is either in accordance or a violation of the law, the regime perspective adopts a dynamic view on the law. The added value of the combined discourse analytical and governmentality perspective is a capturing of the broad view on the law (and the policies) and its effect on individuals:

> "The study of governmentality is a kind of critique of political reason, in as much as it seeks to investigate some of the hitherto silent conditions under which we can think and act politically"[20].

The following section 2.1. and 2.2. lay out the appropriate theoretical framework for analysing the immigration and refugee discourses and policies emerging from the logic of desperateness.

2.1. Security, identity, and refugees

Security is characterised by logic of survival. This is the common starting point for all security studies. What security is and how it should be studied is, however, debatable amongst different theoretical approaches. In earlier times, positivist and geo-strategic studies dominated the security research agenda, but during the last two decades, the security research field has been broadened by other approaches of which critical security studies is one example.

The paper has its point of departure in a post-structuralist critique of the view that security and threats can be observed as objective facts independent of the meaning attached to them within a community. The perspective is that reality in itself is socially constructed within a discursive formation. Security and threats are endogen phenomena in a discourse which entails another perspective than the positivist one. Security is a social condition defined in and by a social and political communion, in other words: security is not above politics, but is

[20] Dean, *Governmentality*, London, Sage Publications, 1999, p.47.

politics[21]. Immigration defined in security terms is likewise a *political* act and not an objective fact.

Stephen Walt has argued that "the issues of war and peace are too important for the field [security studies] to be diverted into a prolix and self-indulgent discourse that is diverted from the real world"[22]. Following the critical view that realistic perspectives in themselves are contributing to the reproduction of "common sense" and securitising logics, this thesis turns Walt's argument upside down: Security is too important not to be studied in a discourse analytical perspective, because the securitisation of a subject – to construct the subject as a threat to a 'referent object' and implement strategic counter measures – is not a systematic necessity but a political act[23].

Contrary to other social constructivist approaches Laclau and Mouffe make the fundamental move to reject an ontology where social reality is positively given within a discursive construction. Hence, the essential characteristic of the social ontology of discourse theory is contingency. Social reality is constituted negatively because it is founded upon a fundamental impossibility. In other words, a positive truth about society does not exist because it is founded on a lack which renders all social identity contingent[24]. This anti-foundationalism contrasts with other theoretical approaches which are essentialist in character and which rest on a necessity logic; either with the structures as the starting point of analysis like Marxism's class reductionism or with a focus on the individual as in the rational choice theory's assumption of individuals' rationality[25]. As an alternative to a necessity logic Laclau and Mouffe introduce a logic which exactly "contains" the contingency: *articulation*[26]. All identity emerges through the articulation or rearticulation of signifying elements; thus they define articulation as "any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice"[27]. *Moments* are the differential

---

[21] Johansen, *Sikkerhedens politik: Clinton, Kongressen og kampen om missilforsvar*, in "Politica", 35. årg., no. 1, 2003, p. 40.

[22] Walt, *The Renaissance of Security Studies*, in "International Studies Quarterly", vol. 35(2), 1991, p. 223.

[23] Buzan et al., supra note 19.

[24] Howarth, *Discourse Theory and Political Analysis* in Scarborough and Tanenbaum (eds.), *Research Strategies in the Social Sciences. A Guide to New Approaches,* Oxford, Oxford University Press, 1998, pp. 273ff.

[25] Idem at p. 282, Howarth and Stavrakakis, *Introducing Discourse Theory and Political Analysis,* in Howarth, Norval and Stavrakakis (eds.). *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change.* Manchester, Manchester University Press, 2000, pp. 5-6.

[26] Jensen and Hansen, *Indledning*, in Laclau & Mouffe, *Det radikale demokrati – diskursteoriens politiske perspektiv,* Copenhagen, Roskilde Universitetsforlag, p. 23.

[27] Laclau and Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, London, Verso, 2001, p. 105.

positions articulated within a discourse whereas *elements* are differences that are not discursively articulated.

A *discourse* is defined as "the structured totality resulting from this articulatory practice"[28]. The concept of discourse captures hereby two contrary logics. On the one hand "in an articulated discursive totality, where every element occupies a differential position..., where every *element* has been reduced to a *moment* of that totality – all identity is relational and all relations have a necessary character"[29]. On the other hand, these relations are not necessary but the result of a contingent practice[30]. This possibility of contingency and articulation exist because no discursive formation is a sutured totality and the transformation of floating elements into fixed moments is never complete. A discursive totality never exists as a given and delimited positivity. A discourse is a relative fixity/fixation of meaning but there will always be a surplus of meaning which escapes the attempts of fixation. This surplus of meaning is called the field of discursivity and it is this field that makes articulation and hereby politics possible. Hence, neither absolute fixity nor absolute non-fixity is possible and no identity can be fully constituted[31]. "Any discourse is constituted as an attempt to dominate the field of discursivity, to arrest the flow of differences, to construct a centre"[32]. The privileged points for this partial fixation are called nodal points. In other words, one could say that a discourse is a partial attempt to cover the constitutive lack in every identity construction. The fact that every object is constituted as an object of discourse does not, however, mean that there is no external reality. In this sense, Laclau and Mouffe are realists but the meaning of objects is given within a discursive construction[33].

Antagonisms constitute the limits of every social objectivity and hereby the limit of every discourse. An antagonistic relation is a relation between two poles: "The presence of the Other prevents me from being totally myself"[34]. This understanding of the Other is also found in the securitisation theory of the Copenhagen School[35]. Securiti*sation* entails that a subject discursively is constructed as a threat to a referent object whereby it is given overriding political priority. Thus the political field is hegemonised through the construction of an Enemy, that legitimise the use of all necessary means in order to exclude or eliminate the

---

[28] Idem.
[29] Laclau and Mouffe, supra note 27, p. 106.
[30] Jensen and Hansen, supra note 26, p. 24.
[31] Laclau and Mouffe, supra note 27, pp. 106, 110-112; Jensen and Hansen, supra note 26, p.24.
[32] Laclau and Mouffe, supra note 27, p. 112.
[33] Idem at p. 108, Howarth, supra note 24, p. 274.
[34] Laclau and Mouffe, supra note 27, p. 125.
[35] Buzan et al, supra note 19.

threat posed from the Enemy[36]. While the Copenhagen School focus on the performativity of the speech act – the articulation of a subject as a threat is to *make* it into a threat – the discourse analysis of Laclau and Mouffe expands the perspective by including the relational relationship between security and identity.

Social antagonisms are not a representation of a clash between fully constituted identities; rather they result from the ontological condition: "Social antagonisms occur because of the failure of social agents to attain their identity"[37]. Antagonisms are discursively constructed through *relations of equivalence*, in which the specificity of each position is dissolved. Each content "loses its condition of differential moment, and acquires the floating character of an element"[38]. This happens through linguistic techniques of simplification and symbolics which suspend differences within each group. Different positions are rendered equivalent by reference to a common opposite, which is the constitutive outside. Hence, identity is constituted negatively and antagonisms are the negation of a given order[39]. The failure of complete equivalence is caused by the simultaneous existence of a *logic of difference* in the construction of antagonisms. Whereas the logic of equivalence has an excluding function, the logic of difference is including, entailing that elements are transformed into moments of a discourse. "The logic of equivalence is a logic of the simplification of the political space, while the logic of difference is a logic of its expansion and increasing complexity"[40].

Social antagonisms are thus both constitutive of identity and social objectivity and destabilising as they reveal the contingency of all identity[41]. Hence, a paradoxical situation arises: On the one hand each element within the discursive order only has an identity to the extent that it is different from other elements. On the other hand, these differences are equivalent to each other inasmuch as all of them belong within the discourse[42]. This creates a fundamentally split identity for every element. The limit of every discourse, the antagonism, is constitutive of the existence of the discourse, but this limit is never possible to fully achieve. It is in this context, that the concept *empty signifier* is relevant. The empty signifier signifies what cannot be signified: the limit of discursive signification. "An empty signifier can, consequently, only emerge if there is a structural impossibility in signification as such, and only if this impossibility can signify itself as an interruption of the structure of the

[36] Idem pp. 21-26.
[37] Howarth, supra note 24, p. 275.
[38] Laclau and Mouffe, supra note 27, p. 127.
[39] Idem at pp. 126 and 128, Howarth, supra note 24 p. 277.
[40] Laclau and Mouffe, supra note 27, pp. 129-30.
[41] Howarth, supra note 24, p. 275.
[42] Andersen, *Ernesto Laclaus diskursanalyse,* in Andersen, *Diskursive analysestrategier. Foucault, Koselleck, Laclau, Luhman.* København, Nyt fra Samfundsvidenskaberne, 1999, p.95.

sign"[43]. The paradox is solved by the presence of a difference which is radically constitutive of the system's differences. Laclau[44] describes this difference as the exclusionary limit. Inside the limit, a discursive system of relational elements exists. Outside the boundary exists pure negativity of the excluded. The empty signifier is thus a signifier of the pure cancellation of all difference. The being represented through the empty signifier, however, is not realised but is constitutively unreachable. The empty signifier covers the constitutive lack of society, the impossibility of a closure of the discursive structure[45].

Discourses are thus structures of signification which only emerge through language practices. Hence, this language practice is empirically analysed in order to uncover those discursive structures which make some actions meaningful and thereby possible[46]. The approach is hermeneutical in the sense that one needs to understand the meaning produced within a discursive formation. Following the "grounded theory" approach the aim is to analyse the concrete articulatory practices and use the discourse theoretical categories in interaction with the texts in order to achieve an *explainable understanding* of the discourse's scope of meaning[47]. The premise is that actions are only meaningful and possible insofar as subjects identify themselves with the discourse's scope of meaning. The hermeneutical focus on interpretation, however, is rejected. Public sources are analysed and are taken as face value in order to set out the scope of meaning of the European migration discourse. The discourse analysis is based upon a set of texts by different people assumed to be authorised speakers/writers of the dominant migration discourse. It is analysed how the European elite's 'regime of truth' makes possible certain courses of action by states while excluding other policies as unworkable or improper[48].

This ontological approach is not equivalent to radical relativism – i.e. that discourse theoretical insights are just one construction among others. The aim of discourse analysis is to deconstruct the " truth" of the hegemonic discourse by showing its contingency. The aim is not to cover the truth in a positivistic sense but to create meaning[49].

---

[43] Laclau, Ernesto, *Emancipations*, London, Verso, 1996, p. 37.
[44] Idem.
[45] Laclau, 1996, supra note 43, p. 38-40, Andersen, supra note 42, p. 95.
[46] Milliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, in "European Journal of International Relation", vol. 5(2), 1999, p. 231-32.
[47] Idem at p. 234, Laclau, *New Reflections on the Revolutions of Our Time*, London, Verso, 1990, pp. 208-210.
[48] Milliken, supra note 46 pp. 233, 236.
[49] Andersen, supra note 42, pp. 99-102.

2.2. The refugee discourse's production of reality

The fundamental contingency of discursive formations entails that *the political* achieves "a crucial role in all structures as the moment where indefinite structures that require a closure are partially fixed"[50]. A hegemonic practice is the attainment of moral, political, and intellectual leadership by closing the constitutive lack in the discursive order through the construction and stabilisation of nodal points. It has to be kept in mind, though, that a hegemonic practice will always be the never ended attempt to create a fixation of meaning which is always threatened. Politics is hence the fundamental in society as social identities are created and changed through political actions. Immigrants as a security threat are in this understanding a phenomenon which is defined in and by a political community. Consequently, security is part of the political game of signification that produces reality. Everything can be made into an object of political articulations of security, wherefore any a priori ontological assumption about which threats are reel or imaginary must be given up. "Discourse analysis is thus a political analysis of how contingent relations are fixed in one way but could have been fixed in many other ways"[51].

It is, however, insufficient to study but the way a discourse constitutes background capabilities for people to understand their social world. It is also important to study the *productivity* of discourses – "how the discourse renders logical and proper certain policies by authorities and in the implementation of those policies shapes and changes people's modes and conditions of living"[52]. The study of the productivity of discourses distinguishes discourse study from other approaches that do not examine "how foundations and boundaries are drawn – how states (or other entities) are written with particular capacities and legitimacies at particular times and places"[53]. Discourses and the identities produced by the discourse are fundamentally political entities because the process of identification within the discourse is for the subjects about the constitution of self. Thus, construction of discourses and identities imply the exercise of power. Discourses constitute a scope of meaning and action which make possible some practices while excluding others.

The discourse analysis of Laclau and Mouffe, however, lacks a detailed frame for how the discourse on micro level constitutes power in concrete political practices. The discourse analysis therefore does not have a conceptual framework which makes it possible to analyse

---

[50] Idem at p. 92 – my translation.
[51] Idem at p. 92 – my translation.
[52] Milliken, supra note 46, p. 236.
[53] Idem.

how the discourses produce reality in ways that make it possible to regulate it through different strategies. Studies taking their point of departure exclusively in a Laclau and Mouffe inspired discourse analysis tend to simplify or ignore the heterogeneity and change of political practice as a governance logic, focusing in stead on the continuity in the relationship between securitisation and identity[54]. These studies tell the somehow simplified narrative of the securiti*sation* and "restrictio*nation*" of migration, the risk being a slithering into a good-bad narrative. This narrative is a simplification of reality because it implies that there has been a change from a liberal humanitarian discourse and policy (not securitised) to a restrictive hostile discourse (securitised). Firstly, this move from 'good' to 'bad' is a myth. Refugees have always been subject to states' strategic concerns and therefore have only been dealt with in a humanitarian manner when it suited states' strategic interest. Secondly, the narrative does not have an interest in the issue of possible change within the restrictionist discourse and policy.

When telling the story of lamentation over and over again, no matter how much truth it may contain, one tends to ignore the complex of policy *differences*. Then the story often becomes a self-fulfilling prophecy and it becomes difficult to argue against it; and it is furthermore difficult to find any desecuritising strategies. On the one hand, the thesis does not reject the continuity of the restrictionist course within migration discourse. On the other hand, the perspective is that the political practice is different depending on *how* the refugee or migrant is constructed as the Other.

In order to analyse those practices that become possible within the refugee and migration discourse, the thesis takes its point of departure in Michel Foucault's governmentality perspective on power. In this perspective, power is not an essential characteristic one can possess but an ever changing practice:

> "Power in a society is never a fixed and closed regime, but rather an endless and open strategic game: 'At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential freedom, it would be better to speak of an 'agonism' – of a relationship which is at the same time reciprocal incitation and struggle; less of a face-to-face confrontation which paralyses both sides than a permanent provocation'"[55].

---

[54] See e.g. Huysmans supra note 17, and Ceyhan and Tsoukala, *The Securitisation of Migration in Western Societies: Ambivalent Discourses and Policies*, in "Alternatives", vol. 27, February 2002.

[55] Gordon, *Governmental Rationality: An Introduction*, in Burchell et al. *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991; p. 5.

Power is never absolute and the perspective dismisses the classical realist top-down notion of power as absolute advocating in stead a lateral, horizontal perspective on power and sovereignty[56]. In the realist perspective, sovereign power is based on the law which results in a legal perspective built around binary oppositions: Either the conduct of states is within the law or it is a violation of the law. The regime perspective is broader, because by adopting the view that law is a dynamic social construction, law is reduced to one single but an important element of the regime. In this way, the productive side of exceptional policies and laws is included in the analysis. What is important is not solely to state that a conduct is in breach of the law, but also to analyse how the exception came to exist.

To study discourses and politics entails to reconstruct the knowledge which manifests itself in micro physical power mechanisms. "It is a question of analysing a 'regime of practices' – practices being understood here as places where what is said and what is done, rules imposed and reasons given, the planned and the taken for granted meet and interconnect"[57]. An analysis of power through the perspective of governmentality is not descriptive, but a diagnostic reading of the knowledge appearing as the truth within the discourse, and of the technologies of power which the discourse enables in practice:

> "It is to start by asking what authorities of various sorts wanted to happen, in relation to problems defined how, in pursuit of what objectives, through what strategies and techniques"[58].

To sum up, the thesis analyses how the discourse produces and regulates the social and political reality by "implementing" those truths that it constitutes. The perspective demonstrates that discourse has a concrete importance for the involved individuals, groups, and states.

In his perspective on the 'art of government', Foucault differentiates between three ideal typical forms of power which are to be read as perspectives characterised by each their logic of governmentality: sovereignty, discipline, and government. Inspired by a reading of Foucault by Deleuze[59] and Rose[60], the thesis differentiates between the *dispositifs* of sovereignty, discipline and control. 'Government' is defined as "a right manner of disposing things so as to lead not to the form of the common good…but to an end which is 'convenient'

---

[56] For an elaboration on the perspective challenging centralising images of power, see Dean, *Governmentality*, London, Sage Publications, 1999, Chapter 1.
[57] Foucault, *Questions of Method*, in Burchell et al. *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991, p. 75.
[58] Rose, *Powers of Freedom*, Cambridge, Cambridge University Press, 1999, p. 20.
[59] Deleuze, *Negotiations – 1972-1990*, New York, Columbia University Press, 1995.
[60] Rose, supra note 58.

for each of the things that are to be governed...That is to say, of employing tactics rather than laws, and even of using laws themselves as tactics"[61]. Below it is argued that Deleuze's dispositif of control can be seen as a further development of Foucault's 'government'.

The three perspectives are not to be read as a historically teleological development where a society ruled by sovereignty is followed by discipline and, later by control. In stead of dissolving discourses in simple dichotomies of 'before-after', a more productive perspective on the multiple practices and techniques of power is to see the three dispositifs as strategies which are co-existing[62]: "In reality one has a triangle, sovereignty-discipline-government (control), which has as its primary target the population and as its essential mechanism the apparatuses of security"[63]. In the following each perspective and its relation to the others is explained. The perspectives are illustrated in figure 1.

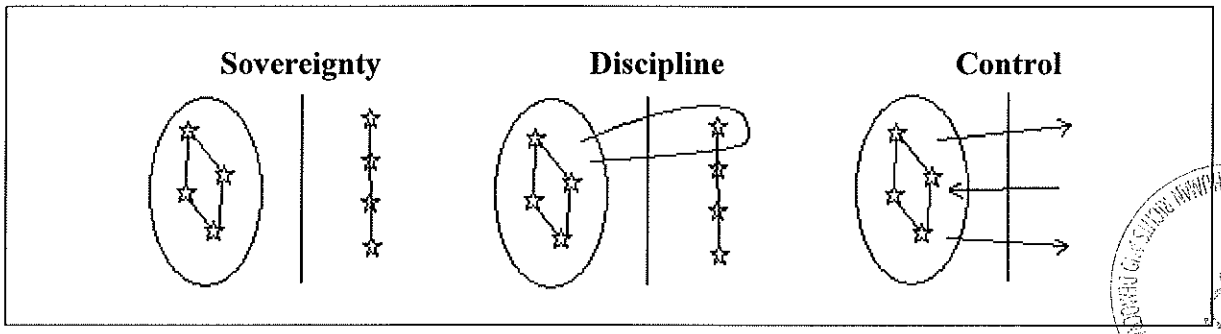

Figure 1. Sovereignty, discipline and control[64].

Firstly, in the sovereign perspective, power is exercised through a constant attempt to draw the line between the sovereign power and its antagonism, "because its task is to explain and justify the essential discontinuity between them"[65]. As complete hegemony is never possible, and as the link between the sovereign and sovereignty (the prince and his principality) is fragile and continuously under threat, the objective of the exercise of sovereign power is to reinforce, strengthen, and protect the sovereign[66]. The aim of the sovereign is survival in facing threats and the end of sovereignty is essentially obedience to the hegemon. A

[61] Foucault, *Governmentality*, in Burchell et al. *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991, p. 95.
[62] Dean, supra note 56, p. 25.
[63] Foucault, supra note 61, p. 102.
[64] The figure is construed on the basis of Foucault, *Governmentality*, in Burchell et al. *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991, Deleuze, *Negotiations – 1972-1990*, New York, Columbia University Press, 1995, and Laclau and Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, London, Verso, 2001.
[65] Foucault, supra note 61, p. 91.
[66] Idem at p. 90.

securitising practice which is repressive, forcing and deterrent is implied in a discourse of sovereignty is. The logic of sovereignty is excluding and eliminating and is based on the removal, exclusion, or eradication of the Other in order to sustain the self. Laclau and Mouffe's logic of equivalence operates exactly in this way by constructing a common enemy with the aim of creating a coherent identity.

Secondly, discipline is a mode of power that works

> "through the calculated distribution of bodies, spaces, time, gazes in attempts to fabricate subjects who were simultaneously useful and compliant. Through hierarchical observation and normalising judgement...competencies, capacities and controls upon conduct were to be inscribed into the soul of the citizen"[67].

The dispositif of discipline involves subjects and populations in production of life, whereas the sovereign is based on the threat of death. In a disciplinary practice, the subject – individuals, groups, states - are socialised and disciplined *ab initio* through panoptic surveillance techniques which alter individual behaviour and motivation. Deviant subjects are pacified, immobilised, punished, and disciplined so as to bring them in conformity with the hegemonic discourse[68]. The dispositif of discipline is based on a dualism, either the subject is normal or it is abnormal. Here, the parallel is Laclau and Mouffe's logic of difference where antagonistic differences are made into positive differential moments of a discourse.

Finally, Deleuze[69] proposes a third form of power, control, as a necessary supplement to sovereign and discipline. Whereas the disciplinary power attempts to form behaviour in fixed identities, control deals with modulating forms of behaviour which are constantly changing: "Control is not centralised but dispersed; it flows through a network of open circuits that are rhizomatic and not hierarchical"[70]. The distinction between the normal and the deviant/the Other is blurred. Whereas the disciplinary mode of power is exercised through the regulation of the Other, the object of power and security is in the control perspective dissolved into factors that probably produce risk. This shift is possible because the notion of risk is made autonomous from that of danger:

> "One does not *start from* a conflictual situation observable in experience, rather one *deduces* it from general definitions of the dangers one wishes to prevent...There is, in fact, no longer a relation of immediacy with a subject *because there is no longer a subject*. What the new preventive policies primarily address is no longer individuals but factors, statistical correlations of heterogeneous elements...Their primary aim is not to confront a concrete dangerous situation, but to anticipate all the possible forms of irruption or danger...To be

[67] Rose, supra note 58, p. 233.
[68] Diken, Bülent og Carsten Bagge Laustsen, *Indistinktion,* in "Distinktion", no. 4, 2002, p. 99.
[69] Deleuze, supra note 59.
[70] Rose, supra note 58, p. 234.

> suspected, it is no longer necessary to manifest symptoms of dangerousness or abnormality, it is enough to display whatever characteristic the specialists responsible for the definition of preventive policies have constituted as risk factors"[71].

The Other or the enemy is not identified ex post facto but is a potential risk as soon as it belongs to a risk group and "everyone is presumed guilty until the risk profile proves otherwise"[72]. In this perspective, the individual is reduced to 'dividuals'[73] - one aspect of our being, hereby eliminating the uniqueness of the individual. The perspective furthermore implies a potentially infinite multiplication of the possibilities for preventive intervention. Contrary to the reactive character of discipline, control is exercised proactively and pre-emptively through risk management strategies and technologies of surveillance, of which the aim is to prevent the risk from developing into a manifest danger. While the perspective of discipline seeks to correct behaviour, the logic of control focuses on managing different degrees of deviance by preventively altering the physical and social *structures* in which the individuals act[74]. The logic of control is characterised by unfixity, process and construction. It is no longer possible to differentiate between self and the Other, between inside and outside, because every element constitutes a risk. As there is no clear dualism between the normal and the abnormal the picture of the Other, The Enemy, becomes reflexive. The Other is in the perspectives of sovereignty and discipline possible to isolate, whereas the logic of control exceeds the limit between inside and outside. The conceptual framework of Laclau and Mouffe has difficulties in dealing with elements which are both outside and inside, excluded and included at the same time.

The dispositif of control is inherent to a discourse controlled by the logic of desperateness. This discourse of risk and unease reflect a high degree of ontological insecurity. By 'ontological insecurity' is meant a state, in which one has no confidence in the surroundings and therefore question those, and where measures subsequently are taken towards those persons, groups or states one *think* or *assume* to be the source of insecurity. Ontological insecurity is "fear of the inability to maintain order"[75]. The Other is thus the one creating ontological insecurity, because it threatens with undermining the ability of the state to provide security. In a discourse of ontological insecurity, the immigrant is perceived as a potential risk

---

[71] Castel, *From Dangerousness to Risk*, in Burchell et al. *The Foucault Effect. Studies in Governmentality.* Chicago, The University of Chicago Press, 1991, p. 288.
[72] Ericsson, and Haggerty, *Policing the Risk Society*, Oxford, Clarendon Press, 1997, p. 42.
[73] Deleuze, supra note 59, p. 180.
[74] Rose, supra note 58, p. 236, Castel supra note 71, p. 289.
[75] Rasmussen, *'A Parallel Globalization of Terror': 9-11, Security and Globalization,* in "Cooperation and Conflict", vol. 37 (3), 2002, p. 333.

for the internal security in Europe and the policies of, *inter alia*, immigration is a way of regulating the ontological insecurity in society.

2.3. Methodology

The discourse analysis is a case study based on official documents from relevant EU agencies and EU Member States. The area of asylum and immigration is *complex* in terms of different governmental levels implied and interacting in the process of developing immigration policies and laws. Asylum, immigration and border politics take place at the supra-national, intergovernmental and national level. Moreover, the area is *dynamic* as new steps in the policy- and lawmaking constantly are taken, both on national levels and on EU level. The harmonisation of asylum and immigration policy in Europe has brought along the adoption of a vast amount of policy and law documents. Given the enormous scope of the area, it is in the context of this thesis impossible to analyse in dept all dimensions and undertakings of the developments. The focus will be on selected policies emerging from the logic of desperateness, where it is most evident that the immigrant and the asylum seeker is constructed as the antagonistic Other, who threatens the security and order of the EU[76]. The perspective of the paper is that an analysis cannot merely focus on the exception in itself. It is necessary to look at the "normal" practices in order to understand what brought about the exceptional policies. How did the exception become normalised and routinised? In this context, as will be shown, the "normal" is the discourse on free movement within the EU. The question analysed is how this imperative automatically have led to restrictive asylum, immigration and border policies. Important to keep in mind is that Member States in the EU present a far from united front on the issue of asylum and immigration. But the tendency is that the "hardliners" and the most restrictive course set the agenda as the result of negotiations often ends up in minimum standards, where the "softliners" can provide a higher level of protection if they so wish.

Regarding the differences between categories of immigrants[77], the UNHCR has noted that "the distinction between voluntary and involuntarily population movements, between the refugee and the so-called 'economic migrant', is not always as clear and definite as it may

[76] The analysis is exclusively focusing on asylum seekers and immigrants and not on the *integration* of refugees when they first are recognised as refugees.

[77] In this paper, immigrants are used as an umbrella concept covering all kinds of migrants entering the EU. A refugee is defined to be a person who is recognised to be in need of international protection. An asylum seeker is a person seeking protection from another country, but who has not yet been recognised as a refugee. An illegal immigrant is a person who does not ask for or is not in need of international protection, and who is unlawfully arriving or present in a country, which is not her country of origin.

appear to be"[78]. In reality, persecution and violent conflict often overlap with, or may be provoked by, economic marginalisation, population pressure, environmental degradation or poor governance. At the same time large numbers of economic migrants not in need of international protection are, due to the absence of legal immigration options, using the asylum channel as an entry route into the EU. The result has been that the line between the voluntarily migrant and the asylum seeker has blurred in the public mind, just as has the distinction between immigration control and refugee protection in the policies of states[79]. But as the legal distinction between the categories is of crucial importance because it gives rise to different treatments, a genuine attempt in distinguishing is important both on the part of states and among the public. The paper seeks to follow this need of clarification throughout the analysis by making clear which category of immigrants is talked about in each situation.

3. Towards a common EU asylum and immigration policy

This section will focusing on the EU seek to answer partly the second research question:
Can the selected policies be characterised to be exceptional and if so, in what way?

The harmonisation of asylum and immigration policy in Europe has brought along the adoption of a vast amount of policy and law documents. The discourse analysis will focus on discourses and policies within the EU that emerge from the logic of desperateness, and which most evidently represent the asylum seekers as the antagonistic Other. Initially, the analysis will first deal with non-admission of the asylum seeker through the adoption of concepts as 'safe third country' and 'safe country of origin'; in the next place, it will provide a short introduction to non-arrival policies; and finally, the analysis will focus on two areas in which the policy of asylum gets intertwined with the policy of fighting illegal immigration and other sorts of crime, representing relatively new directions of the EU asylum policy.

Asylum and immigration policy in the European Union is characterised by involvement of a considerable amount of actors – national governments represented in the Council of Justice and Home Affairs, the European Commission, the European Parliament[80], permanent working groups as for example COREPER, and NGOs etc. The institutional arrangements are in themselves quite difficult to grasp since they have developed with time. The first step in

[78] Quoted in Loescher and Milner, *The missing link: the need for comprehensive engagement in regions of refugee origin*, in "International Affairs", vol. 79, no. 3, 2003, p. 598.
[79] Idem.
[80] The Parliament has merely had consultative status and is therefore of minimal focus in the paper.

attempts to develop some sort of collective approach to asylum and immigration was present in the Schengen Agreement (leading to the Schengen Convention in 1990) and the Dublin Convention as a subordinate side-aspect of the abolition of internal border controls, and were developed outside the formal framework of the EC. With the adoption of the Treaty on the European Union (TEU) in 1992, the area of asylum and immigration was placed within the intergovernmental framework of the third pillar of the TEU. In 1997, with the adoption of the Amsterdam Treaty, most areas of EU asylum and immigration policies were moved from the third pillar to the first supra-national EC pillar.

Indeed, immigration and asylum is a very politically sensitive area, since it is at the heart of sovereignty of states. Because of the legal decision making requirement of unanimity and because of the countries' very different opinions and approaches in this area, it has been extremely difficult for the EU countries to obtain consensus in deciding on common policies[81]. This setting has two major consequences. Firstly, the resulting *policy* documents are very much characterised by a compromising nature of this very heterogeneous scenery and are formulated in a highly neutral and uncontroversial language. The Presidency Conclusions from Tampere (1999) to Thessaloniki (2003)[82] contain human rights and refugee protection language underscoring the humanitarian intentions of the policies. Secondly, the actually adopted *instruments* do not bear much evidence of the political character implied in the regulations and decisions. They are expressed in a technocratic agenda for a tight work programme. The consensus requirement and the compromising nature of the negotiations entail a general EU policy of minimum standards which have proven to be quite contradictory to the human rights oriented language in the policy documents. Within this framework, Member States are allowed to provide a higher level of protection in the implementation of EU law, but they are also invited to lower their level of protection in order not to appear as the "soft spot" that receive all the asylum seekers who cannot enter the other EU member states.
In the context of this paper, the reason that this decoupling between language of policy documents and of adopted instruments on EU level exists[83] is not as important as the *result* of

[81] European Commission, *Communication to the Council and the European Parliament. Area of Freedom, Security and Justice: Assesssment of the Tampere Programme and Future Orientations.* Brussels 2.6.2004. COM(2204) 4002 final, pp. 4-5.
[82] The most important Council meetings in the EU area of asylum and immigration are: Tampere (1999), Laeken (2001), Seville (2002), Thessaloniki (2003).
[83] The explanation of the decoupling is not an aspect addressed by the thesis, but in short some possible explanations could partly be the absence of a "re-election syndrome" on EU level. Politicians at member state level are bound to be sensitive and responsive to the population's wishes in order for them to get re-elected. This is not the case in EU. The overall policy of EU is very distant to the population as they focus more on the

the decoupling. The result is that the *justification* of the adopted instruments is blurred and very indirect, sometimes even absent, because the justification is not consistent amongst the member states in reality. This does not mean that discourse analysis loses its relevance in an analysis of European asylum and immigration policy. The discourse, which creates the scope of meaning for the instruments and measures adopted in EU, is a product of very complex negotiations involving very different positions. One could say there is not one discourse, but many discourses[84]. The partial fixation of EU discourse can be read in the adopted instruments and is expressed in minimum standards which create a scope of meaning and action for certain political practices in the implementation of EU laws on a national level. Some states' political practices are almost identical to the minimum standards set in the EU, others provide more protection than prescribed by the minimum standards. The more hardliners are in the EU, the more restrictive policies and the lower minimum standards. The adoption of very restrictive minimum standards while saying they are in line with international human rights and refugee conventions is a way of hegemonising the discourse and constitute a common identity which is not there – the result being inconsistency between policy language and adopted instruments.

Nevertheless, it is important to include the EU level in the analysis because the restrictive course sets the agenda; even though most instruments allow member states to provide higher levels of protection this also goes the other way around as mentioned above.

So what is actually happening in European asylum and immigration politics? How are the problems defined in the area of asylum and immigration? What are the objectives of the policies and what are the strategies to attain these objectives?

The inherent logic of the developments from the Schengen agreement in 1985 to the Treaty on the European Union in 1992 and further on to the Amsterdam Treaty of 1997 is to build a Europe of security, freedom, justice, and order:

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, *principles which are common to the Member States*"[85].

---

implementation of policies on member state level. As long as this implementation is in line with their political opinions, the politicians are re-elected. The costs of talking human rights in the EU are very low and it indeed makes people think, that policies ARE in line with international human rights and refugee protection standards. Human rights language is way of covering the huge national differences in the area of asylum and immigration.

[84] It is difficult for the EU to establish a hegemonising discourse because it is an aggregate of many different national hegemonising discourses consisting of both soft liners and hard liners.

[85] ECT - Treaty of Amsterdam, art. 1 (8) (a) – my italics.

One of the key objectives of the EU as laid down by the Amsterdam Treaty is

> "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured *in conjunction with appropriate measures* with respect to external border controls, asylum, immigration and the prevention and combating of crime"[86].

The identity of EU is an aggregate of many identities (national, cultural, ethnic, etc) but the *common* identity of EU is articulated and partially fixed around the nodal points, rule of law (order), security, freedom, and justice. In itself, EU is an empty signifier: Outside prevail chaos, insecurity, non-freedom and non-justice whereas Inside is characterised by order, freedom, security and justice. The symbolic scope of imagination of EU, i.e. the fiction of EU, is that it is a non-immigration area. The Other, the Alien, the Foreigner, who seeks to enter this area and thereby challenges the hegemonising discourse, constitutes an antagonistic threat against the imaginary scope of EU[87]. It is important how the Alien is constructed as a threat in the discourse and thus is constituted as an object for the moves of security. In this way a discourse is an answer to the perceived threats against EU identity.

The background of the common European approach to asylum and immigration was the abolition of internal borders as part of the implementation of one of the four freedoms in the internal market – freedom of movement within the Union. The Tampere Presidency Conclusions set out the programme for a common EU asylum and migration policy:

> "The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all...It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiable to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes"[88].

Following the Amsterdam Treaty articles 61-63, the Tampere programme stated that the abolition of internal borders entailed on the one hand a strengthening of the external borders[89] (compensatory measures) and on the other hand a common asylum policy (CEAS) and a common immigration policy[90]. The Tampere programme of a common EU asylum and immigration policy was structured around four subtitles: Partnerships with countries of origin,

---

[86] ECT - Treaty of Amsterdam, art. 1 (5) - my italics.
[87] Kjærum, *Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?*, in "Human Rights Quarterly", vol. 24, p. 535.
[88] European Council, *Presidency Conclusions, Tampere European Council*, 15 and 16 October 1999, paras. 2-3.
[89] The policies that seek to strengthen border controls will be elaborated later in this section and in section 3.3.
[90] The common EU immigration policy covers both legal and illegal immigration, but the focus of the paper is on the latter part.

a common European asylum system, fair treatment of third country nationals, and management of migration flows. Within this discourse the policy realms of asylum, border control and the fight against illegal immigration are very much interlinked. The focus of the analysis in this section is on asylum policy and only on selected parts of the other areas to the extent that they affect asylum seekers.

A factor of crucial importance is the merging of the illegal immigrant and the asylum seeker in the discourse. Even though the policy documents - as for example the Presidency Conclusions - mention the importance and requirement of the "full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement"[91], the measures adopted make no legal provisions for people trying to reach the EU in order to seek asylum, the risk being that genuine refugees are forced into "the world of false documents, 'traffickers' and organised crime"[92].

All the policies that are emerging from the logic of desperateness can be seen as part of a hegomonising discourse of 'migration management': "Migration management (is) a major strategic policy priority for the European Union"[93].

3.1. Non-admission: The concepts of 'safe' countries

The first phase of the Common European Asylum System (CEAS) ended by 1st May 2004 and in this period the following agreements and instruments were adopted: the Dublin Regulation determining the state responsible for examining an asylum claim, directives on the minimum standards for reception conditions for refugees, qualification for refugee status and subsidiary protection, procedures for determination and withdrawal of refugee status and temporary protection[94]. The focus in this part will be on the concepts of 'safe third country' and 'safe country of origin' as devices that facilitate the removal of spontaneously arriving asylum seekers in the EU.

---

[91] Tampere Presidency Conclusions, paragraph 13.

[92] Statewatch Analysis, *Implementing the Amsterdam Treaty: Cementing Fortresss Europe*, May 2004.

[93] Council of the European Union, *Draft Council conclusions on migration and development*, Brussels, 5 May 2003. Doc. No. 8927/03, para. 1.

[94] The Directive on Temporary Protection deals with cases of mass flux (Temporary Protection Directive, 2001) and is neither a measure of non-admission nor full admission. The concept of 'temporary protection' is way of restricting the access and rights of asylum seekers and in reality it entails that persons having received temporary protection and hereby limited rights (compared to recognised refugees under the Geneva Convention), are kept in a state of limbo, not being able to go home and not being able to settle in the country of refuge. In this way the asylum seeker is both inside and outside at the same time and is therefore subjected to constant surveillance and limited rights.

The Dublin Convention (replaced by the Dublin Regulation in 2003) determines that the Member State responsible for the entry of the asylum seekers is responsible for their application. This involves a harmonisation and formalisation of the principle 'safe third country': "Member States, all considering the principle of non-refoulement, are considered as safe countries for third-country nationals"[95]. The empty signifier 'safe third country' attempts to cover the constitutive lack of the migration discourse as member states, due to their different definitions of those who qualify as refugees, are not equally safe and thus imply a risk of refoulement. This argument follows the line that not all Member States agree whether persecution of non-state actors is relevant under the GC[96]. Even though national courts and the European Court of Human Rights constitute a check of the "formal" approaches of some governments and thereby the risks of refoulement, in the end the Dublin regulation allows for every application to be deemed inadmissible on the basis of the 'safe third country' principle[97].

The Dublin Regulation is based on the same principle as the many readmission agreements concluded between Member States and third countries and – recently with the EU's increasing focus on Regional Protection Programmes – also between EU and third countries. While the Dublin Regulation deals with transfers of asylum seekers between Member States of the EU, readmission agreements are conducted between a Member State and a third non-member state. The idea behind the empty signifier 'safe third country' was, and remains, that the international obligations to which states have signed up do not stipulate the state in which a person should seek protection. In not making such a requirement, European states and others found ways of suggesting that protection should be sought as close to their home country as possible. The logic was that if a person is in danger, she will seek protection in the first safe

---

[95] Preamble (2) of the Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, Council of the European Union, Brussels, 21 January 2003, 15408/02. (Hereafter Dublin Regulation).

[96] For an analysis of the consequences of differences between Member States' "formal" respectively "empiristic" approaches, see Noll, *Formalism v. Empiricism: Some reflections on the Dublin Convention on the Occasion of Recent European Case Law*, in "Nordic Journal of International Law, vol. 70, 2001. The "formal" approach is when a country adheres to the fact that the receiving country is party to the GC and removal does not require examination. The "empiristic" approach adheres to the principle that examination of the claim is to be done before removal.

[97] With the adoption of the Directive on minimum standards for the qualification as refugees or persons who otherwise need international protection, particularly article 9 hereof, one could assume that the differences between Member States will disappear.

place she reaches and not begin a very long journey for achieving protection[98]. Following this logic, European states began to introduce rules implying that, if asylum applicants are deemed to have transited through a safe third country, they may be liable for immediate return. These agreements do not differentiate between different groups of individuals from the safe third country, i.e. given the 'safe third country' principle no distinction between illegal immigrants and asylum seekers is done. The concept of 'safe third country' functions in this manner as a logic of equivalence, thereby failing to obligate the receiving country to give access to an asylum procedure. The governmentality technique of sovereignty entailed in the readmission agreements and potentially implicit in the Dublin Regulation seeks to exclude the asylum seeker and immigrant from EU territory. An asylum seeker under the Dublin framework, who is not risking refoulement by removal to another state, can be said to be exposed to a disciplinary technique that seeks to bring him back into the fold of the 'normal'. Secondary movements within the Member States, also called 'asylum shopping', threaten the order of the EU's common asylum policy.

The Procedures Directive on minimum standards for determination and withdrawal of refugee status was the only agreement set out by Tampere which EU failed to adopt before May 1st 2004. The Council, though, agreed on a 'general approach' which will be re-consulted by the new Parliament[99]. The Directive also applies the principle of 'safe third country' in article 27. This allows Member States to reject a claim without considering the particular circumstances of the applicant (article 35A). The criteria for "safety" in the principle (article 27(1a-d)) are: no persecution on any of the Convention grounds, non-refoulement guarantee, protection according to ECHR article 3 standards, and the possibility to request refugee status, and if recognised, to receive protection in accordance with the GC.

The major innovation of the procedure directive, however, is the legalisation of the principle 'safe country of origin' implying that an application is presumed to be manifestly unfounded if the applicant is a citizen of a country where human rights are so well protected that severe persecution never happens (articles 30-30B). There is thus no need for protection in the destination state and the asylum seeker can be returned to her country of origin. 'Safe country of origin' is also an empty signifier implying the possibility of including respectively excluding the countries that over time seem convenient for the member states. The criteria for

[98] van Selm, *The EU as a Global Player in the Refugee Protection Regime*, AMID Working Paper Series 35/2004, p. 14.

[99] Council Directive (amended proposal) on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 30 April 2004, 8771/04, (hereafter Procedure Directive).

"safety" according to annex II of the Directive are: no persecution on any of the Convention grounds, no risk of being subjected to torture, inhuman or degrading treatment or punishment (ECHR article 3), and no threat by reason of indiscriminate violence in situations of international armed conflict. In assessing the safety of a country of origin, *"account shall be taken"* of the extent to which protection is provided against persecution through: national laws, observance of particularly the non-derogable human rights laid down in the ECHR (cf. article 15(2)), ICCPR, CAT; respect of the non-refoulement principle of the GC, and the provision for a system of effective remedies. These criteria for the designation of countries as safe open up for a slithering in the states' interpretation of whether a country is safe or not. While the asylum seeker may rebut the presumption of safety, she may be required to do so in an accelerated procedure in which the burden of proof lies exclusively on her (articles 23(4b) and 30B). The Commission proposed that member states could apply this principle as an *option* in their asylum law, but in 2003 the Council of Justice and Home Affairs agreed that the list of safe countries would be binding on Member States[100]. A common list of countries considered by all EU Member States to be safe will be adopted by the Council by a qualified majority vote, but member states are allowed to add additional countries to their list following the criteria put down in the Directive, art. 30A[101]. Member states, however, do not have the power by themselves to take any states off the EU list. Many member states do not currently have a list of 'safe countries of origin' and the Directive therefore mitigates for some member states to lower their standards. However, a Member State can state that the presumption of safety has been rebutted along the lines set out in article 30B, and in this way the Directive opens up for flexibility. The Directive furthermore entails simplified procedures for the cancellation of refugee status (articles 36 and 37) and that appeal cases have no suspensive effect cf. article 6(2).

In the Directive the Council has ignored the continuous ruling by the European Court of Human Rights against member states with low levels of procedural protection for asylum seekers, requiring an *effective* examination of a claim that expulsion of a person would result in torture or other inhuman or degrading treatment[102]. The Procedures Directive reveals the implicit objective of the EU to bring down the number of asylum seekers and limit access to EU by pro-actively creating a practice which is forcing and deterrent, and which implies a risk of a slithering of the level of protection. Furthermore, "safe countries of origin"-lists may

[100] Statewatch Analysis, *EU law on asylum procedures: An assault on human rights?*, 2003.
[101] In the Procedures Directive, the designation of a country as safe both in the 'safe third country' and ' safe country of origin' is made subject to qualified majority voting (articles 30 and 35A).
[102] See e.g. European Court of Human Rights, *Chahal v UK*, Judgement of 25 October 1996, 70/1995/576/662.

result in discrimination among refugees which is in contradiction with article 3 of the GC. A sovereign logic of exclusion and removal of the Other, the Alien, in order to sustain the Self is appearing in the practices resulting from the Directive. By constructing 'safe countries of origin' and 'safe third countries' in a logic of equivalence, a common Other is created in order to ensure the survival of EU identity. In the discourses of 'safe third country' and 'safe country of origin' the floating signifier 'effective protection' is of crucial importance in the fixation of the discourse as will be discussed further in section 5.

3.2. Non-arrival: A short introduction

In addition to the analysed non-admission policies, an increased focus on preventing emigrants from departing and an increased focus on the regions of origin of refugees, have resulted in various non-arrival policies, which potentially have a negative impact on asylum seeker's possibility of gaining access to EU territory in order to seek asylum. Selected measures of this kind will be dealt with later; at this stage only an introductory note will be given with the purpose of showing the importance of arriving at the territory of the EU when a person is seeking protection. Resisting the system is much easier when the asylum seeker is present on EU territory, because the legal assistance from courts and lawyers, and the assistance from the 'civil society', NGO's, and the media are more available on EU territory than outside the EU.

In the Schengen Convention, incorporated into the Amsterdam Treaty, the abolition of internal borders which secured the freedom of movement was accompanied by 'compensatory measures'. These measures involved setting a common visa regime, improving coordination between the police, customs and the judiciary and taking additional steps to combat problems such as terrorism and organised crime. The implementation of visa restrictions was combined with carrier sanctions. The next step in implementing these policies was the posting of immigration liaison officers abroad in countries of origin of asylum seekers or in important transit countries as for example Turkey or Pakistan[103]. The primary aims of these officers have been and are to detect false travel documents and train local staff[104]. In this way asylum seekers have been prevented from gaining access to EU territory in order to seek asylum, hereby being subject to the sovereign logic of exclusion. In contrast to the mentioned non-

[103] See e.g. the joint position from the EU Council 1996 (Kjærum, supra note 87, p. 516).
[104] Kjærum, supra note 87, p. 516.

admission measures, this has not been characterised by exclusion through sending asylum seekers home, but by preventing their departure in the first place.

In fact, it is possible to read an overall tendency towards increased focus on the region of refugees in the European immigration and refugee discourse. The initial focus on closing off the external borders of EU was soon supplemented by a 'comprehensive approach' to migration control focusing on the source of migration flows. Already in 1998, an Austrian Presidency strategy paper proposed a global approach to migration control: "Agreements with migrants' countries of origin can prove a most effective dissuasive instrument in migration management" (point 106)[105]. This perspective was also included in the Tampere programme[106], in which importance was attached to partnerships with countries of origin in connection with management of migration flows:

> "The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions..., preventing conflicts and consolidating democratic states and ensuring human rights...The European Council stresses the need for more efficient management of migration flows at all their stages...The European Council is determined to tackle at its source illegal immigration"[107].

The "comprehensive" approach in Tampere implied a potential merging of humanitarianism and sovereignty of states: The prevention of flows of refugees towards the west could be obtained by genuine capacity building in developing countries. This potential, however, was put in question at the Seville European Council, 2002:

> "The European Council considers that combating illegal immigration requires a greater effort on the part of the European Union and a targeted approach to the problem, with the use of *all appropriate instruments* in the context of the European Union's *external relations*. To that end..., an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union's constant long-term objective...The European Council points out that closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby *reducing the underlying causes of migration flows*. The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a *clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration*"[108].

---

[105] FECL, *EU Strategy paper on asylum and immigration: Show of "Political Muscle"?*, FECL 56 (December 1998). This proposal, however, was shot down but as will be shown in section 5 the proposal was re-invented last year by the UK with more success.

[106] The High Level Working Group on asylum and migration, established in 1998 as a cross pillar arrangement, had drafted reports on Afghanistan, Iraq, Morocco, Somalia and Sri Lanka the purpose being to establish relations with those countries (see van Selm, supra note 98, p. 8).

[107] Tampere Presidency Conclusions, paras. 11, 22, 23.

[108] Seville Presidency Conclusions, para. 33 – my italics.

The introduction of including a clause in future agreements represents a potential shift towards a forcing approach on behalf of the Member States, in which trade and development assistance will *depend* on host countries' will (and capability) to combat flows of emigrants. Even though in a softer language, this approach was confirmed in Thessaloniki, 2003[109]. Whereas Tampere sets out the vision that asylum and immigration is becoming a foreign policy matter, Seville is more in the direction of foreign policy *being used* for asylum and immigration policy ends[110].

The paramount focus on combating illegal immigration in a common EU policy on migration *and asylum* fails to distinguish between people in need of protection and other kinds of irregular immigrants. Indeed, it is difficult in reality to distinguish, since the lack of legal entrances to seek for asylum in Europe forces asylum seekers into the hands of traffickers, etc. The result of these policies is, firstly, regarding asylum seekers, a governmentality technique that excludes them from EU territory. Because illegal immigrants and therefore asylum seekers are a carrier of disorder and constitutes a threat to the constitutive identity of EU (order, security, etc), they are made into the object of the moves of security. Secondly, refugee producing countries are exposed to the disciplinary techniques of trade, development assistance, democracy, and human rights. The fading of the comprehensive two-sided approach to global management of migration flows is even more evident in the UK proposal of off-shore processing and regional protection, which will be dealt with in section 5. The prevention of arrival as the primary means of combating illegal immigration has been supplemented by a wish of the Member States to improve the legal entry into the EU for people seeking asylum. Following the Tampere Conclusions, paragraph 3, the Commission has proposed to consider Protected Entry Procedures (PEP) and Resettlement Schemes as means of doing that[111]. The two terms have gained ambiguous support from Member States. Subsequent to the conduction of two feasibility studies on PEPs and Resettlement, Member States rejected PEPs in 2003 and only supported resettlement schemes as a strategic means in increased regional protection[112].

To sum up, an immigration discourse with security at its locus is an answer to the perceived threats against EU identity. "So threat definition creates a Self and an Other in a process in

[109] Thessaloniki Presidency Conclusions, para. 19.
[110] van Selm, *Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and Their Countries of Origin*, in van Selm, *Migration and the Externalities of European Integration*, Lexington Books, 2002, p. 3.
[111] European Commission, *Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM(2003)315 final.
[112] See section 5 for a specification on this matter.

which the definition of the Self depends on the definition of the Other"[113]. The immigrant is a floating signifier and can in discourses be fixed with different content of meaning[114]. The EU discourse on migration erases, qua discursive logics of equivalence, differences between immigrants, and the Alien is excluded in the attempt to fix EU identity at a time with very difficult conditions for this fixation. International power structures are in a flux due to the breakdown of bipolarity, change of sovereignty through EU constitutional developments, and globalisation. In this state of flux the picture of the Other, the Enemy, becomes unclear and the terror threat, the welfare crisis, the identity threat/crisis are all connected to the Immigrant. The discourse and the exclusion techniques unify the Immigrant by denying him/her basic characteristic possessed by the natives of EU, the inside characterised by security, order, justice, welfare, etc. The Other, the Immigrant is thus negatively defined in the discourse. By eliminating the positive identity of the migrant (depersonalisation), the positive differences between immigrants are silenced. The Other is defined as a concrete threat in the illegal immigrant as the lawless Other who sets him/herself outside the EU order. Qua discursive logics of equivalence and empty signifiers as 'safe country of origin' and 'safe third country', a fundamental blurring of the categories is taking place: the illegal immigrant is no longer distinguished from the refugee. In this way the asylum seeker is also a potential illegal immigrant and therefore a potential terrorist or carrier of other sorts of criminality and thus constitutes a threat to EU identity. As the Alien sets him/herself outside the EU order, he/she must be eliminated or excluded. In this way, the measures of non-admission and non-arrival challenge the non-refoulement principle and furthermore contradict with the fundamental principle of the Geneva Convention: the obligation that each application must be considered on its own merits.

The remaining part of this section will focus on two areas within the EU where the policies on combating illegal immigration and other sorts of crime (terror etc) and the policies on asylum become indistinguished, which result in a blurring of the categories 'asylum seeker' and 'criminal': first, the recent developments within surveillance and registration of immigrants,

---

[113] Huysmans, *Migrants as a Security Problem: Dangers of 'Securitizing' Societal Issues*, in Miles and Thränhardt (eds.), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, London, Pinter, 1995, p. 59.

[114] Right wing politicians and a lot of EU citizens fix the migrant as a potential criminal and abuser of the welfare system in their attempt to hegemonise the field of discursivity. Many academics and human rights NGOs insist in their discourse on the separation. For governments the Alien could be the Enemy (cf. ontological insecurity) and in line with a hidden agenda on bringing down the amount of asylum seekers, they adopt preventive instruments that do not distinguish between the different categories.

and second, naval border policy. The two policy examples make part of "an effective and preventive policy in the fight[115] against illegal immigration"[116]. The 'effective' and 'preventive' part of the comprehensive plan to combat illegal immigration implies firstly, that all policy areas are coordinated and have this objective in mind. Secondly, it implies a "global/regional" approach with the coordination of third countries in this fight[117].

At the European Council of Laeken, which followed soon after September 11, 2001, a close connection between immigration policy and crime fighting was implied in the increased security focus at external borders:

> "Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created"[118].

The increased security focus has resulted in undertakings towards new policies for the external borders of the EU[119], the most recent being the proposed Regulation for a European Agency for the Management of Operational Cooperation at the External Borders[120]. These measures aim at safeguarding both external and internal security. The Commission followed up on the Laeken Conclusions paragraph 42 by stating:

> "This conclusion of the European Council reminds us that coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen's sense of belonging to a shared area and destiny. It also serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings. The European Council also emphasises on this occasion the *very strong complementarity* of the different tasks which are carried out during checks and surveillance of the crossing of the external borders, even where, from an institutional point of view, certain of these tasks are distributed between the first and third pillar...The check on entry may lead to carrying out a task with a policing or judicial nature, if it appears that the person is wanted or poses a security threat"[121].

The securitisation of the external borders of the EU is a reality for the immigrant seeking to cross the borders into the EU: "The European Union's external borders are also a place where

---

[115] Note the analogous rhetoric to the "fight against terror". By framing the problem in this manner the illegal immigrant constitute together with the terrorist the Enemy which are to be eliminated.

[116] Proposed EC Regulation quoted in Statewatch Analysis, *Cover-up! Proposed Regulation on European Border Guard hides unaccountable, operational bodies*, 2004, p.8.

[117] This effective and preventive policy to combat illegal immigration is also the primary strategy of the UK proposal of offshore processing and regional protection, which is examined in section 5.

[118] European Council, *Presidency Conclusions, Laeken European Council*, 14 and 15 December 2001, para. 42.

[119] European Council, *Presidency Conclusions, Seville European Council*, 21 and 22 June 2002, paras. 31-32, European Council, *Presidency Conclusions, Thessaloniki European Council*, 19 and 20 June 2003, paras. 12-14.

[120] European Council, *Presidency Conclusions, Brussels European Council*, 17 and 18 June 2004, para. 9.

[121] European Commission, *Communication to the Council and the European Parliament. Towards integrated management of the external borders of the Member States of the European Union,* Brussels, 7.5.2002, COM(2002) 233 final, para. 1 – my italics.

a common security identity is asserted. The absence of a clearly stated vision and common policy on external borders would entail major political and strategic risks"[122]. Two areas where crime fighting has a huge impact on asylum seekers are the groundbreaking developments within data exchange as a control device and naval interception. Before analysing the undertakings towards a common border policy, the origin of Eurodac will be the point of focus.

3.3. Registration and surveillance

Another group of policies emerging from states' attempts to control immigration into the EU is the use of data exchange as a carrier of security, Eurodac being the most pertinent example. Eurodac is a database containing fingerprints of individuals who seek asylum in Europe. The origin of the necessity of registering asylum seekers is found at a very early stage of the Dublin cooperation (i.e. outside EC framework). Already in 1992 the Ministers with responsibility for immigration decided to investigate the needs and requirements of Eurodac. Up until the adoption of the Amsterdam Treaty and the Tampere Programme, Eurodac remained at the level of political debate and discussions about the technical feasibility, the legality and functioning[123]. The Eurodac Regulation[124] was adopted by the EU Council in December 2000 and was the first instrument based on Title IV of the EC Treaty[125]. The Eurodac system became operational on 15 January 2003[126].

Eurodac Regulation article 1 defines the purpose of Eurodac as "to assist in determining which Member State is to be responsible pursuant to the Dublin Convention for examining an application for asylum lodged in a Member State, and otherwise to facilitate the application of the Dublin Convention under the conditions set out in this Regulation". Before the launching of Eurodac in 2003, it was not always possible to determine whether an asylum seeker had not already applied for asylum in another member state, which was an obstacle for the effective implementation of the Dublin Convention. There was a need for a system enabling each member state to check whether or not an asylum seeker had already applied in another member state. Considering the circumstances in which people leave their home countries,

---

[122] Idem at p. 5.

[123] Brouwer, *Eurodac: Its Limitations and Temptations*, in "European Journal of Migration and Law", vol. 4, 2002, p. 232-33.

[124] Council Regulation (EC) No 2725/2000 *concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.*(hereafter Eurodac Regulation).

[125] As mentioned above the Dublin Convention was replaced by the Dublin Regulation in 2003.

[126] Denmark is not part of EURODAC, and United Kingdom and Ireland opted in. Moreover, Norway and Iceland participate in the Eurodac cooperation.

fingerprints (or other biometrics) are often the only reliable means of identification. The aim of preventing multiple asylum applications in EU countries is in practice pursued in the way that all asylum applicants over the age of 14 have their fingerprints taken when they apply for asylum either within or outside the EU as part of the normal application procedure. The fingerprints are then compared with finger print data transmitted by other participating states and already stored in the central database. If Eurodac reveals that those fingerprints have already been recorded, the asylum seeker will be sent back to the country where his/her fingerprints originally were recorded for a decision on the asylum application[127].

In addition to asylum seekers, the Eurodac Regulation extends to certain groups of illegal immigrants: firstly, aliens who are apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State coming from a third country and who are not turned back (article 8); and secondly, aliens found illegally present within the territory of a Member State (article 11)[128]. Data of the first group shall be recorded for the sole purpose of comparison with data on applicants for asylum transmitted subsequently to the central database, whereas data of the second group only can be transmitted for the purpose of comparison with the fingerprint data of applicants of asylum transmitted by other member states and already recorded in the database. Article 1 (3) provides for an important restriction to the use of Eurodac by explicitly stating that the database cannot be used for other purposes than set out in article 15(1) of the Dublin Convention.

The Other is threatening the asylum and immigration system of order given by the Dublin Convention and Regulation. The exchange of individual biometric data is thus used as a necessary control device as a carrier of security and order. The governmentality techniques implied in the Eurodac system entail surveillance and biometric registration of ALL asylum seekers and large groups of illegal immigrants. *Asylum seekers* are governed through a disciplinary technique - if an asylum seeker lodges multiple applications, she is send back to the first participating country where she applied for asylum or with which she had territorial contact, whereby she is normalised and brought back into the fold. The justification of Eurodac is to make the Dublin system effective, i.e. to obtain an efficient asylum system which seems like a legitimate aim. But the practice of Eurodac extended to asylum seekers is not natural. Normally, fingerprinting is a practice used in national criminal law systems when

[127] For general information on the functioning of Eurodac, see the Commission's webpage (Justice and Home Affairs).

[128] The purpose and length of storage of data of these groups differ from asylum seekers. For details see Eurodac Regulation articles 9, 10 and 11.

an individual has committed a criminal offence. In this mode, nonetheless how legitimate it seems, Eurodac is a way of policing asylum seekers. The *second* group of the affected *illegal immigrants* (aliens illegally present in a member state) is in the same way controlled by disciplinary techniques normalising those illegal immigrants by sending them back to the member state in which they have already applied for asylum. The *first* mentioned group of *illegal immigrants* (aliens apprehended in connection with the irregular crossing of an external border) is subject to a governmentality technique of control which has a preventive aim: if the individual at a later stage applies for asylum in a member state, the Eurodac will reveal through which country she entered EU territory and she may therefore be send back to this country for the asylum procedure.

In the aftermath of September 11, 2001, the discourses on immigration and the discourses on terrorism slowly became more and more intertwined. The Justice and Home Affairs Council's first meeting following September 11 was characterised by an increased focus on security. The conclusions of the meeting related mainly to cooperation in the areas of police and judiciary, but migration entered the arena in a couple of important points:

> "The Council invites the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments"..."The Council (...) invites the Commission to submit proposals for establishing a network for information exchanges concerning the visas issued"[129].

In response to paragraph 29 of the Council conclusions, the Commission issued a working document[130] on the links between terrorism and refugee protection, which focused especially on exclusion and cancellation of refugee status in the case of terrorists. The thesis will not focus on this aspect of the link between terrorism and refugee protection, but will have a more general focus on how crime fighting and asylum are linked in the policies dealing with guarding the external borders of the EU.

The link between the policies on crime fighting and the policies on immigration and asylum was stated explicitly above in the Laeken Conclusions, paragraph 42. This linking, however, had informally existed for a long time. The initial stages of cooperation on Justice and Home Affairs were in the form of inter-governmental working groups in the 1980s. Two working

---

[129] Council of the European Union (Justice and Home Affairs). *Council Conclusions*, Brussels 20 September 2001. Doc. No. SN 3926/6/01, paras. 29 and 26.

[130] European Commission, *Commission Working Document. The relationship between safeguarding internal security and complying with internal protection obligations and instruments*, Brussels, 05.12.2001, COM(2001) 743 final.

groups emerged: the TREVI group which considered a range of trans-border criminal issues, including terrorism, and the Ad Hoc Working Group on Asylum and Immigration. The two working groups were closely intertwined as they involved many of the same ministers and civil servants. Given this regular exchange of thoughts on crime fighting and immigration, the merging of the two distinct policy areas therefore seems quite natural even though it might actually be considered not be[131].

Within the area of surveillance and registration, the link between crime fighting and immigration and asylum is evident in the emerging *linking of information systems and databases*. The enlargement of the use of databases on asylum seekers and immigrants is illustrated in a proposal given in the above mentioned working document of the Commission:

> "In particular pre-entry screening, including strict visa policy and the possible use of biometric data, as well as measures to enhance co-operation between border guards, intelligence services, immigration and asylum authorities of the State concerned, could offer real possibilities for identifying those suspected of terrorist involvement at an early stage. The functioning of Europol, Eurodac and SIS can also substantially assist in the identification of terrorist suspects[132].

Following the undertakings of the EU member states towards coordinated, integrated management of the external borders, firstly, the purpose and use of Eurodac is expanded. The proposed Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders[133] starts off by stating that "in the field of the EU external borders, Community policy aims at an integrated management, thereby *ensuring a high and uniform level of control of persons and surveillance at the external borders as a prerequisite for an area of freedom, security and justice*"[134]. The Regulation is based *inter alia* on the CIVIPOL feasibility study on the control of the European Union's maritime borders[135], which reads

> "It is also essential to consolidate Community rules on identifying illegal immigrants in EURODAC, by making it into a more permanent database in the interests of measuring and pinpointing migratory movements, carrying out risk analyses, improving controls and the allocation of resources for such controls and closing off the routes. Visa applicants should also

---

[131] van Selm, *Refugee Protection in Europe and the U.S. after 9/11*, in Steiner et al., *Problems of protection: the UNHCR, refugees, and human rights*, London/New York, Routledge, 2003, pp. 241-42.

[132] European Commission, *Commission Working Document*, supra note 130, p. 6.

[133] The Regulation is close to finalisation cf. Brussels Presidency Conclusions, para. 9

[134] European Commission, *Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders*, Brussels, COM(2003)XXX, p. 3 – my italics.

[135] The Council Regulation does not explicit mention the CIVIPOL feasibility study, but the Council's "Programme of measures to combat illegal immigration across the maritime borders of the European Union" (October 21 2003) has as its background the goal of integrated management of the external borders of the EU, stated in the Council meetings at Tampere, Laeken, Seville and Thessaloniki, and this programme of measures is based on the CIVIPOL feasibility study (para. 11).

> be identified in an equally rigorous way (VIS proposal confirmed in Thessaloniki). Biometric identification procedures exist, provided uniform legal bases are available in all the Member States"[136].

As proposed in the Commission's working document quoted above, a widening of the purpose and scope of the Eurodac database is in reality taking place as new justifications emerge (security). The purpose of Eurodac is no longer solely to make The Dublin system effective. In addition, the purpose is now to identify illegal immigrants in Eurodac with *aims* of measuring migratory movements, carry out risk analysis, improve controls, and closing off routes – all aims that affect the asylum seeker as well. The line between asylum seekers and illegal immigrants is blurred.

Secondly, in addition to the expanded use of Eurodac, a linking and co-operation between other types of information systems registering immigrants is emerging in the name of security. In its Communication of May 2002, entitled "Towards integrated management of the external borders of the member states of the EU", the Commission proposes a security procedure (PROSECUR):

> "The permanent process of data and information exchange and processing envisaged here is not a database or a computer network, or even an administrative structure. It is a procedure or code of conduct which, depending on the nature of the information and of the risks identified, would *aim to establish direct links and exchanges between the authorities concerned with security at external borders*"[137].

In order to cover every aspect of security at external borders, these links and exchanges would take place between a plurality of instruments, as for example the Schengen Information System (SIS) and the new Visa Information System, and PROSECUR "should establish privileged links with EUROPOL"[138]. The proposed Council Regulation on establishing a European Border Agency does not explicitly mention PROSECUR but states in article 10 "the Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks with the Commission and the Member States". Neither the Commission Communication nor the Regulation mention (protection of) asylum seekers or data protection[139].

---

[136] Council of the European Union, *Feasibility study on the control of the European Union's maritime borders – Final report*, Brussels, 19 September 2003, 11490/1/03, p. 62.

[137] European Commission, *Communication to the Council and the European Parliament. Towards integrated management of the external borders of the Member States of the European Union*, Brussels, 7.5.2002, COM(2002) 233 final, p. 15 – my italics.

[138] Idem at p. 16.

[139] As the Eurodac Regulation strictly limits the use of Eurodac to the implementation of the Dublin Convention, a widening of its use needs new legislation. Whether the Border Agency Regulation will provide for this remains to be seen.

operated boats that charge immigrants and take them to dangerous boat voyages[143]. The large amount of illegal immigrants arriving at the Southern borders of Europe disturb the EU order and identity, both in terms of their sole presence in the EU without legal status and the EU not being able to send them home, and the humanitarian risk they impose on themselves on their way to the EU. Therefore, the boats have to be intercepted before they arrive at EU territory. In the pilot project this was done by armed navy vessels patrolling the Sea, the first phase patrolling sections of the Mediterranean coastline and the second phase extended to include the Atlantic zone of the Sahara, which includes the maritime frontier of the Canary Islands. The operational aim of the operation was, according to Minister Acebes, to create a "rectangular filter" six nautical miles in width. The patrolling boats would return vessels with illegal immigrants that were intercepted in international waters to their country of origin, or escort them to the coast if they had entered the waters of EU countries[144].

After the pilot project had been carried out, Spanish Minister Acebes evaluated Operation Ulysses in parliament as "very positive", pointing out that it had shown concrete results in reception and interception of irregular immigration. This stands in contradiction to the way European newspapers have depicted the story: two boats capsized in June 2003 after being intercepted by Spanish patrols with the result that twenty-one immigrants drowned[145]. On top, neither the first nor the second phase revealed any concrete results in stopping boats with illegal immigrants[146].

Operation Ulysses was part of broader undertakings at EU level to set up a common European Border police: "If this system of co-operation among patrol boats and radar controls is satisfactory, it could form the pillar of a border police force in the European Union"[147]. On closer inspection, different ad hoc developments reflect a direction towards common management of the external borders of EU.

---

[143] Mr. Acebes, Spanish Interior Minister in Ruuda, Marit, *Joint EU operation against illegal immigration by sea*, in EUobserver, 29 January 2003.

[144] Fekete, *Canary Islands tragedy: did the RAF put border security before human safety?*, 2 October 2003.

[145] Operation Ulysses is similar to Operation Relex, a surveillance operation set up by the Australian government after the notorious Tampa incident. It involves a naval blockade and the deployment of spy planes in the Indian Ocean. Operation Relex has been subject to intense parliamentary debate, particularly after 353 people drowned when a 19-metre wooden vessel (known as SIEV-X) carrying 397 passengers sank in the Indian Ocean, in the Australian Operation Relex border surveillance and interception zone (idem).

[146] Davidsen, Lisbeth et al., *Illegal immigration: Fiasko for fælles havpoliti*, in Politiken 28 July 2003.

[147] Minister Acebes quoted in Ruuda, Marit, *Joint EU operation against illegal immigration by sea*, in EUobserver, 29 January 2003.

Firstly, following up on the Laeken Presidency Conclusions[148], the Commission presented in May 2002 a Communication[149] in which it advocates the setting up of an "External borders practitioners' common unit" tasked with managing operational co-operation at the external borders of the members states. The JHA Council endorsed the creation of such a Common Unit which should be given the tasks of promoting pilot projects and joint operations, monitoring and evaluating results, and helping set up ad hoc centres[150]. Activities under the Common Unit implied, inter alia, Operation Ulysses and a Risk Analysis Centre on illegal immigration.

Secondly, in September 2003 the feasibility study on the control of the European Union's maritime borders, carried out by CIVIPOL and asked for by the JHA Council, was published and the aim was a study on strengthening controls at maritime borders in order to combat illegal immigration[151].The study distinguishes between two categories of immigrants: "political refugees" and "economic migrants". But since the former group represents between five and ten percent of all immigrants, the study is focusing on economic migrants[152]. Illegal immigrants are in the study perceived as an enemy invading the EU: "cases must be brought and damages sought by States that are *victims* of illegal immigration against States whose civilian vessels use their territorial sea for *non-peaceful purposes*"[153]. In this way, the practice of naval patrolling and interception is justified as one of the principal means of combating illegal immigration and controlling the external borders. Of crucial importance is the adoption of the concept "virtual border":

> "Control of the physical border should be reinforced at a 'virtual border' upstream, by bringing control and prevention actions forward in the arc between countries of transit or depart, principally those on the eastern and southern coasts of the Mediterranean"[154].

The discourse is here revealing that the spatial imaginary is important for the control of the maritime borders[155].

---

[148] Particularly para. 42 on better management of the Union's external borders.

[149] European Commission, *Communication to the Council and the European Parliament. Towards integrated management of the external borders of the Member States o the European Union*, Brussels, 7.5.2002, COM(2002) 233 final.

[150] European Commission, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, Brussels, COM(2003)XXX, p. 3 and Council of the European Union, Programme of measures to combat illegal immigration across the maritime borders of the European Union, Brussels, 21 October 2003, 13791/03, p. 12.

[151] Council of the European Union, *Feasibility study on the control of the European Union's maritime borders – Final report*, Brussels, 19 September 2003, 11490/1/03, p. 4.

[152] Idem at pp. 16-17.

[153] Idem at p. 57 – my italics.

[154] Idem at p. 53.

[155] The virtual border concept involves a dissolution of the traditional border concept – the EU actively constructs the border in the way it best suits its strategic interest. The Mediterranean Sea is discursively

Through agreements and co-operation with countries of transit or departure on controlling the emigration, illegal immigrants are no longer intercepted but their departure is prevented. The illegal immigrants intercepted at sea should be repatriated to their country of origin via a "fabric" of readmission agreements. If an individual claims to be "stateless or falsely claims the nationality of a country for which the right of asylum is granted", she will be processed on EU territory to assess possible refugee status. If she is rejected, she will be returned to a host country with whom EU has negotiated an agreement for the readmission of illegal immigrants who declare no nationality. These agreements will be accompanied by a sizeable financial contribution, both to take care of the migrants and to "finance the ultimate repatriation of the migrants to their country of origin once they remember what their nationality is"[156]. The expected effect of increased border control through naval interception is that it will deter others from departing: "If it successfully intercepts overloaded vessels at sea and escorts them back…or - better still – prevents them from setting sail and stops the traffickers, it will have a maximum-impact deterrent effect"[157]. The feasibility study concludes by recommending that operations of the Ulysses type should be further pursued.

Thirdly, on the basis of the Council's stated goal of better and reinforced management of the external borders of the EU as the principal means of combating illegal immigration[158], and on the basis of the feasibility study on the control of EU's maritime borders, the Council adopted a "Programme of measures to combat illegal immigration across the maritime borders of the European Union"[159]. The action programme reaffirms that international co-operation between Member States as well as between them and non-member states will have to involve stepping up pre-border checks and joint processing of illegal immigrants intercepted at sea. The main aspects of this co-operation are, inter alia, "joint sea patrols carried out by navies of Member States and of non-member countries concerned by illegal migration flows; and conducting naval operations to intercept and restrain vessels carrying illegal immigrants"[160]. A way of "facilitating" this co-operation with third countries is to "include a clause on readmission and

---

constructed as a non-territory. It is not the territory of the country of origin of immigrants, EU can therefore intercept on foreign waters (with the consent of third states and in cases of emergency) which is normally in breach of the sovereign non-intervention norm. But the Mediterrean Sea is at the same time also not territory of EU – individuals on board can not claim to be in EU territory.

[156] Feasibility Study, supra note 151, pp. 63-64.

[157] Idem at p. 85.

[158] Presidency Conclusions in Tampere, Laeken, Seville and Thesaloniki.

[159] Council of the European Union, *Programme of measures to combat illegal immigration across the maritime borders of the European Union*, Brussels, 21 October 2003, 13791/03.

[160] Idem para. 26.

management of migration flows" in future co-operation agreements[161] – which is just in line with the Seville Presidency Conclusions.

Finally, in November 2003 the Council proposed the Regulation establishing a European Agency for the Management of Operational Co-operation at the External borders. The Regulation is close to finalising which means that the new European Borders Agency will be operational at the outset of 2005[162]. The Regulation provides a legal basis to many of the activities already undertaken in an ad hoc form. The Agency will essentially take over the tasks of the Common Unit (co-ordination of operational co-operation between Member State in the field of control and surveillance of the external border, provide assistance in training of national border guards, carrying out risk analysis, rendering assistance to Member States confronted with circumstances requiring increased assistance at the external borders). As a new task the Agency is responsible for the co-ordination of operational co-operation between Member States on removal of third-country nationals illegally residing in Member States[163]. Naval patrolling and interception will still be carried out by Member States on an ad hoc basis and they will now enjoy the co-ordinating assistance of the Border Agency[164]. With the Regulation, a basis for a long term development of an EU border police is created.

The Other who threatens EU identity is constituted both by the criminal who exploits the immigrants desperateness and by the illegal immigrant residing inside the EU without legal status. The naval patrolling and the policies that aim at preventing the departure of boats with emigrants from third countries are expressions of a sovereign governmentality technique that seeks to deter and exclude illegal immigrants AND asylum seekers from EU territory. The prevention of immigrants' departure from transit countries and countries of origin also affects asylum seekers possibility for entering the EU in order to apply for asylum. In this way it is difficult to avoid that the explicit deterrence policy (cf. quote above) will not affect asylum seekers[165]. As was seen in the accidents that occurred during the Operation Ulysses, the sovereign logic can even result in elimination of illegal immigrants when these people as a result of the interception drown.

---

[161] Idem paras. 7 and 27.

[162] *Brussels Presidency Conclusions* 2004, para. 9.

[163] European Commission, *Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders*, Brussels, COM(2003)XXX, pp. 5-6.

[164] The Border Agency Regulation has not yet entered into force, but the practice is already existing in ad hoc form.

[165] As such the measures are in contradiction with GC article 31.

The recent developments within the EU's border policy reveal the importance of borders in relation to EU security, identity and order. The interconnection between databases on asylum seekers and criminals, and naval patrolling are practices that securitise immigration, including asylum seekers, at the external borders of the EU. The external borders are constructed as a place of *criminalisation* and are therefore controlled by the police in order to avoid criminal activities at the borders (e.g. prevention of the arrival of terrorist and illegal immigrants). And furthermore, the borders are constructed as a place that is potentially *invaded*, which require the presence and action of the military to defend and protect EU's security.

All the practices analysed in this section 3 are revealing a merging of external and internal security:

> "So the merging between internal and external security is ...a question posed by the police, and military forces as well as the politicians and often the journalists. *Uncertainty is at the core of fears (imaginary or not) and of the practices of surveillance and coercion*"[166].

4. Detention of asylum seekers

The perspective of the paper now shifts from the EU level to the Member State level but keeps within the second research question in focusing on a specific practice which is captured by the logic of desperateness.

There is widespread consensus among refugee advocates and as well in UNHCR, that detention of asylum seekers should be viewed as a measure to be applied in exceptional circumstances[167]. Nonetheless, detention of asylum seekers is a practice used by European states to an extent where detention is becoming a routine, it is becoming the normal even though it is not[168]. As such, detention of asylum seekers is a policy emerging from the logic of desperateness, in which the asylum seeker is seen as the criminal Other. The measure of detention is applied to arriving asylum seekers, persons who have their asylum claim examined, and rejected asylum seekers expecting deportation (i.e. illegal immigrants).

---

[166] Bigo, *The Möbius Ribbon of Internal and External Security(ies)*, in Albert et al. *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001, p. 93 – my italics.

[167] Chimni, *International Refugee Law. A reader*, London, Sage Publications, 2000, p. 162. Detention of asylum seekers is a huge topic involving many problematic aspects, see for example UNHCR, Manual On Refugee Protection and the ECHR Fact Sheet on article 5; UNHCR guidelines on the detention of asylum seekers; Amnesty International, 2000: Detention of asylum seekers in the European Union. The analysis in this section will not deal with all the aspects but merely outline the main points of the practice of detention of asylum seekers in Europe. By making this delimitation the analysis primarily focus on the practice of detention and not the discourses surrounding the practice. This is due to the fact that Member States of the EU have different systems of detention of asylum seekers (AI, 2000) and therefore, presumably, different justifications of the detention as well.

[168] Bigo, *Detention of foreigners, State of exception, and the social practices of control of the Ban-opticon*, 2004, p. 16.

The Refugee Convention permits the detention of asylum seekers under certain circumstances. Article 9 provides that "in time of war or other grave and exceptional circumstances" a state may take "provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination...that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security". Furthermore, article 31 (2) allows restrictions on the freedom of movement of those refugees "unlawfully in the country of refuge" but these restrictions must be "those which are necessary" and "shall only be applied until their status in the country of refuge is regularised or they obtain admission into another country"[169].

Regarding asylum seekers, the European Convention on Human Rights article 5 provides, that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". Moreover, while detention of asylum seekers is inherently undesirable under normal circumstances[170], article 5(2) – 5(5) provide essential procedural guarantees.

In principle, policies at EU level do not encourage detention of asylum seekers. Article 17 of the Procedures Directive reads "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum". On the other hand, the practice of detention is explicitly allowed in the Reception Directive[171] article 7(3), which provides: "When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law".

In reality, detention of asylum seekers takes place in three different situations: first, with a view to enforce return, especially deportation; second, in order to facilitate processing of asylum claims and third, in order to prevent unauthorised entry into the country[172]. The first mentioned form of practice is legal under the ECHR article 5(1)(f), but is not mentioned under the GC. The second form of detention, i.e. with the aim of facilitating processing, is legal under the GC in "grave and exceptional circumstances". This requirement is much lessened in the EU Reception Directive article 7(3): "when it proves necessary, for example

[169] GC article 31(1) deals with "refugees who, coming directly from a territory where their life...", i.e. arriving asylum seekers; article 31(2) refer to the same kind of refugees: "such refugees".
[170] cf. UNHCR Guidelines on Detention of Asylum Seekers
[171] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Official Journal of the European Union, 6.2.2003.
[172] See Amnesty International, *Detention of asylum seekers in the European Union*, December 2000.

for legal reasons or reasons of public order". Detention of asylum seekers aiming at preventing the unauthorised entry into the country is also legal under the GC article 31(2) and the ECHR article 5(1)(f) given certain procedural guarantees. Such detention, however, shall as the European Court of Human Rights has stated in the Amuur case not prevent the person from the possibility of seeking asylum: "Above all, such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status"[173]. Central to this case is the French practice of establishing "waiting zones" in airports, which has been subject to critique from both Courts and NGOs. Asylum seekers are detained in a so-called international zone at the airport which means that they are not yet on French territory. The French authorities are therefore not under a legal obligation to examine the request as they would be if a claim was made by someone already on French territory. The practice of "waiting zones" excise part of French territory, but only regarding asylum matters, and as such the asylum seeker is placed in a zone of non-law[174]. French Courts has called the "waiting zone" a legal fiction[175], which explicates the state of exception implied in the "waiting zone". As in the virtual border concept applied in the border policy of naval patrolling, sovereignty is in the creation of "waiting zones" aw well used as an a la carte tool, where elements of sovereignty are used for certain purposes while not for others.

Detention of individuals is normally a practice applying to criminals (under criminal law) and that through disciplinary techniques seek to regulate the individuals' deviant behaviour in order to normalise her and bring her back into the fold. The asylum seeker is not a criminal and is not confined under a criminal procedure, but is in administrative detention without trial. Even though the three forms of detention in principle are legal it is still a criminalisation of the asylum seeker. When detention of asylum seekers becomes a routinised and normalised practice, it is approaching a violation of GC. Article 9 of the GC allows for detention pending determination of refugee status in "grave and exceptional circumstances". In reality the circumstances are rarely "grave and exceptional" but normal[176]. As such, it is a violation of article 31(1). Detention of asylum seekers in general is a measure where the asylum seeker is placed both inside and outside: "Hence imprisonment is a means of enduring incapacitation of

[173] European Court of Human Rights, *Amuur v. France*, Judgement of 25 June 1996, Appl. No. 19776/92, para. 43.

[174] The situation is parallel to the Australian practice of offshore processing on islands far away from Australian territory. Excision of territory in asylum and immigration matters is done here as well in order to avoid certain legal obligations. See section 5.

[175] Amuur Judgement, para. 22.

[176] Moreover, in practice many problems exist with providing the procedural safeguards as well as the conditions in the detention place can amount to a violation of the ECHR art 3 (see Amnesty International, Detention of asylum seekers in the European Union, December 2000).

those who present a significant risk"[177]. It is a governmentality technique of control that seeks to prevent rejected asylum seekers from staying unlawfully in the country; that seeks to facilitate the processing of the claimants application for asylum, and finally that seeks to prevent the unauthorised arrival in the country. The practice in "waiting zones" is a state of exception, where both arrival and potentially the possibility of processing refugee status determination are prevented.

Whereas detention centres for asylum seekers are closed camps within EU territory the next section deals, inter alia, with closed camps outside EU territory.

5. "New approaches" – Offshore processing and protection in the region

The following section will form the final sub answer to research question number two. Among the practices analysed in the paper, the UK proposal of offshore processing and regional protection is the most evident illustration of the logic of desperateness. The territorial element is here of crucial importance as will be illustrated.

For a long time, a wide and comprehensive approach to asylum and immigration issues has been advocated amongst the European countries (cf. section 3.2.), both in the sense of involving and cooperating with the refugee producing and transiting countries in the management of migration flows, and in the sense of interlinking policy realms in the management of irregular immigration and the fight against illegal immigration[178].

In spring 2003, faced with a (perceived) very high pressure on their asylum systems, the United Kingdom government put forward proposals of "new approaches" to asylum and protection with strong support from the Danish and Dutch Governments, and the centre of gravity in the hitherto debate somehow moved drastically[179]. In short, the proposal deploys two concepts – "Regional Protection Zones/Areas" and "Transit processing Centres". Whereas the former are located in the source region of refugee crisis, and seeks to contribute to a strengthening of the reception capacities there, the latter are closer to the external borders

[177] Rose, supra note 58, p. 236.

[178] Firstly, through the positioning of immigration liasson officers abroad, visa restrictions, naval patrolling etc,; and secondly, through the root cause terminology which imply a targeting of development assistance and trade policies to the emigration policies of the countries of origin. In this way the policy realms of asylum, development assistance, security policy become intertwined.

[179] For further information on the UK proposal on off-shore processing and protection in the region, see Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, in "European Journal of Migration and Law", vol. 5, issue 3, 2003, and Loescher and Milner, *The missing link: the need for comprehensive engagement in regions of refugee origin*, in "International Affairs", vol. 79, no. 3, 2003. Particularly the text of Noll gives a thorough overview of the development of the UK proposal and the legal problems implied in the proposal.

of the EU, and symbolize a deterrent for unwanted immigration, including that of asylum seekers. The proposal is a *continuous* development insofar as it is an expression of the regional focus also present in Tampere and Seville, seeking to restrict and manage the immigration by measures which circumvent the refugee regime. The crucially *new* aspect of the proposal in a European context is the move of the protection issue to locations outside EU territory. Up until now, despite the deterrent affect of visa restrictions, liaison officers positioned abroad, etc., asylum seekers arriving spontaneously have been processed and if assessed eligible for refugee status, have been given protection on EU territory. By placing both processing and protection outside EU territory, the possibility of achieving assistance from the legal system (courts and lawyers) and civil society (media and NGOs) is considerably weakened. The resistance of refugees has in such a framework much worse conditions.

In the beginning of February 2003, the UK's original proposal – "A new Vision for Refugees" - was leaked as a draft to The Guardian, the British Daily[180]. The background of the proposal was the inequitable distribution of protection resources under the current asylum system and a highlighting of the idea that much of the expenditure on asylum procedures in the North could be better spent on refugee protection in the South. It was proposed that a more just protection system would be composed of, firstly intervention, including by military means, into countries producing refugees, to stop the flow of refugees and to facilitate returns; and secondly, creation of a "global network of safe havens"[181]. The draft furthermore suggested an amendment of the Refugee Convention to allow for the return to safe havens and the introduction of an exclusion practice under article 3 of the ECHR[182]. The ultimate goal pursued through this "Global vision" was said to be **"protection but not migration"**[183].
In a later, more elaborated version the proposal presents itself as a "global vision that meets both our international obligations and is responsive to domestic political and economic concerns". The suggested strategy is characterised as **"pro-refugee but anti-asylum"**[184]. The background of the proposal is continuously a critique of the current asylum system, because this system is failing due to the North-South inequality, because the system requires illegal

[180] As most documents are not accessible, the analysis of the original proposal is primarily based on the text of Noll, 2003, which quotes the relevant documents extensively.
[181] Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, in "European Journal of Migration and Law", vol. 5, issue 3, 2003, pp. 314-15.
[182] UK used the rhetoric that the GC was "outdated".
[183] Noll, supra note 181, p. 315.
[184] Idem at p. 316.

immigration and favours human smuggling, because most of those claiming asylum in the EU do not meet the criteria of refugee status while the majority of genuine refugees do not make their way to the EU but stay in their region of origin; and finally, because the difficulties in removing rejected asylum seekers undermine public confidence in the system and make it more attractive to "economic migrants". The proposal is still based on Regional Protection Areas (RPA) and intervention; a new element is managed resettlement schemes which imply limited resettlements of refugees from the RPA in order "to share the refugee burden in a managed way"[185].

In March 2003, Prime Minister Blair wrote to the Greek EU Presidency asking to put a discussion on "better management of the asylum process globally" on the agenda of the 2003 European Council in Brussels on 23 March 2003. Attached to the letter was a document proposing a system for improved regional management of asylum and protection and the creation of transit processing centres (TPC) placed close to the external borders of the EU. The introduction of the distinction between RPAs in the region of origin and TPCs close to the external borders of the EU, emphasised more evidently the migration control element than earlier documents. Except for certain vulnerable groups of asylum seekers (e.g. disabled, minors), spontaneous arrivals in the EU would be transferred to TPCs located outside the EU and have their claims processed there. The main function of TPCs is expressed to be "a deterrent to abuse of the asylum system"[186].

By the end of April 2003, a memorandum produced by the Danish Ministry of Refugees, Immigration, and Integration Affairs documented the outcome of informal discussions throughout the spring between the Danish, Dutch and UK governments. The memorandum reflected a move from *general* issues to *operational* questions focusing on legal, practical and financial aspects of the concepts hereby preparing the ground for the planning of pilot projects. A pre-screening procedure upon arrival in destination countries will merely deal with the question where material processing will take place or where effective protection will be provided for eligible cases. Screening will be based on objective criteria such as nationality, undocumented arrival or possible place of application, and it should be very fast: "Ideally, if appeal in the screening procedure is necessary, it should not have suspensive effect"[187]. The objective of Protection Zones (a new word for RPA) is to provide "effective protection" which as a minimum entails "a non-refoulement guarantee, physical protection and an

[185] Idem at pp. 316-18.
[186] Idem pp. 306, 319-20.
[187] Idem pp. 320-21.

appropriate level of social protection". In this context the memorandum refers to the EU directive on Asylum Procedures (Annex 1, now 2), and paragraph 15 of the Summary Conclusions of the Lisbon Expert Roundtable[188], but it also states the importance of agreeing on a level "that can be implemented in practice"[189]. Resettlement programmes are perceived as necessary for the implementation of the Protection Zones as a way of developing legal routes by which genuine refugees, if the situation requires, can come to Europe[190].

The closed TPCs are to deal with manifestly unfounded applications, which are defined to include nationalities in general with a very high rejection rate, e.g. more than 90 percent. In the memorandum the three avantgarde states envisage a downgrading of legal safeguards in the refugee status determination procedures at TPCs and perceive processing as unconstrained by norms that are applicable in the jurisdictions of destination states:

> "The refugee status determination-procedure at the Transit Processing Centres need not be absolutely identical with present national procedure as long as it is in accordance with standards accepted by UNHCR. As such, in the case of the Australian offshore processing programme, Australian jurisdiction would not apply to the refugee status determination of the claims of the transferred asylum seekers and a quicker system based on administrative review was established and implemented"[191].

Regarding both Protection Zones and TPCs, the establishment of readmission agreements between destination state and host country, as well as between host country and country of origin (when repatriation is possible) is a prerequisite for the implementation. The responsibility for delivering care and maintenance to the Protection Zone and TPC inhabitants would be shared by the destination state, the host country, the UNHCR and IOM, but the memorandum does not include an analysis of the allocation of legal responsibility under international law between the destination state and the host country[192].

The problem within the discourse of regional protection and offshore processing implied in the UK proposal is perceived to be firstly, that EU member states receive an enormous amount of unfounded claims for asylum which is extremely expensive and furthermore undermine the public confidence in the system because of the difficulties in returning rejected asylum seekers; and secondly, the majority of the genuine refugees stay put in their region of

---

[188] See below for a discussion on effective protection. Paragraph 15 of the Lisbon Expert Roundtable is attached in Annex 1.

[189] What an "appropriate level of social protection" includes is left for the reader to assess. What this definition of "effective protection" means in addition to an ECHR article 3 standard (including a non-refoulement guarantee) is very unclear.

[190] Noll, supra note 181, pp. 321-322.

[191] The Danish Memorandum quoted in Noll, supra note 181, p. 324.

[192] Noll, supra note 181, p. 323-24.

origin without any possibility of achieving sufficient protection. The primary problem for EU member states is the amount of irregular immigrants, including asylum seekers, who come to Europe; and thus the primary objective of the proposal is a reduction in numbers. Both explicitly and implicitly, the discourse identifies the Other as the illegal immigrant (economic migrant) and the spontaneously arriving asylum seeker, because this non-managed entry threatens EU order and therefore in the long run the internal security of Europe[193]. EU identity is in the discourse fixed as a non-immigration area, which is evident in the formulations "pro-refugee, anti-asylum" and "protection but not migration" – EU member states are willing to protect those in need, but not inside Europe.

At the outset, the proposal consisted of regional protection and processing AND humanitarian intervention in order to prevent outflows of refugees. This indicates a clear move in the discourse away from "cooperation with countries of origin in preventing outflows" to firstly, a definitive one-sided approach, in which prevention of outflows is the ultimate goal, not depending on the support from the source countries; and secondly "protection in the region" achieved by European states through readmission agreements[194]. Despite the fact that the proposal in later versions do not mention military intervention and underscores capacity building in regions of origin (humanitarianism and responsibility sharing), the first proposal reveals the real balance of the relationship imagined by the UK between destination states and host states. The UK proposal represents a relationship determined on the premises of the destination states. And even though humanitarian intervention was soon off the agenda, the concepts of RPA and TPC still indeed affect the sovereignty of the host states. The language throughout all versions of the proposal is more an expression of migration control and prevention (keep migrants outside Europe) than helping the source regions in taking care of refugees:

> "Behind our initial consideration of the idea of the zones of protection and transit processing centres was the question of whether we could do something about the often illegal trafficking of people across continents to the European Union"[195].

---

[193] In the case of TPCs, the making of lists of countries *automatically* qualifying an asylum application as unfounded is a way of drawing the antagonistic line between Self and the Other being the false asylum seeker.

[194] Even though it is not explicit in the UK proposal, one could assume that these readmission agreements would be connected to trade and aid agreements as it otherwise would be difficult to make the host countries sign up to it. In this way it would contribute to a merging of asylum, security and aid policy.

[195] UK Minister Caroline Flint, United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004.

In this quote, the fact that the original idea behind the proposal was a reduction in numbers of immigrants is obvious. Observable is moreover the total merging of asylum and illegal immigration, which was appearing in the analysis of EU policies as well.

The proposal indicates an acknowledgement of the necessity of resettlement in European states. "Protection but not migration" implies that for the refugees originating from protracted conflicts and who are therefore not able to return, and who pursue no possibility of local integration, resettlement is the only solution. In addition, resettlement is a way of orderly and managed (legal) entry – through the logic of difference resettlement makes refugees into moments of an EU-discourse of order. In the avantgarde states' perspective, refugee protection is hence perceived to equalise "protection in the region" and resettlement, but not asylum (cf. "pro-refugee, but anti-asylum"). In this way, the discourse is revealing a perspective in which asylum is *substituted* by resettlement and protection in region. But resettlement is not an immigration control programme, it is a humanitarian activity provided at the discretion of states. Protection in the region and resettlement have nothing to do with asylum[196].

The governmentality technique entailed in the UK proposal's preventive "pro-refugee but anti asylum"-measures (if it were implemented) is a mixture of the sovereign logic of exclusion and preventive logic of control, to which both refugees and other kinds of irregular immigrants are exposed. All kinds of immigrants are excluded from EU territory, while it at the same type is an expression of a preventive control technique, in which the Enemy is not constant. The exception would be the few refugees who would end up being resettled and thus exposed to a disciplinary technique.

The idea of protection in the region and offshore processing is not a new idea even though the language of "new approaches" employed by the UK and Denmark implies just that. In 1986, transit processing centres was proposed by Denmark in a draft resolution in the UN General Assembly; and the Netherlands put the topic of reception in the region on the agenda in 1994[197]. Furthermore, a proposal implying a change of the Geneva Convention (as in the UK proposal) was given in the Austrian Presidency strategy paper in 1998. The strategy paper questioned the continued relevance of the GC in proposing a "new approach" to refugee

[196] In the UK proposal, the link between stating protection need and actual protection offer is broken. The combination of the fact that resettlement is not a right under international law, and that reception and processing centres are closed, may result in confinement of refugees and asylum seekers in indefinite detention (Noll, supra note 181, p. 334). Providing asylum is not an obligation under international law, but when a person seek asylum, there is an obligation of non-refoulement.

[197] Noll, supra note 181, pp. 311-12.

protection that could include "initial steps harking back to the beginnings of the development of asylum law when the affording of protection was not seen as a subjective individual right but rather a political offer on the part of the host country" (point 103)[198]. By suggesting to leave it up to states' discretionary power to offer protection and thereby not considering it to be a legal obligation, the same perspective as in the UK proposal is advocated: Refugee protection is to be provided through resettlement, not asylum.

While multilateral initiatives have regularly failed, "Transit Processing Centres" have been used unilaterally by resettlement countries as the United States and Australia. The US reacted to the outflows from Haiti and Cuba by letting the US Coast Guard and the US Navy interdict refugees coming by boat and redirect them to Jamaica or Cuba for processing of their claims. A contemporary example is the "Pacific solution" implemented by Australia: Boat arrivals are systematically intercepted and removed outside Australian territory to third countries (Nauru and Manus) where claims for asylum are processed. Successful applicants are resettled to Australia. The UK proposal and the debate between the avantgarde countries throughout the spring 2003 tell that the "Pacific solution" constituted a source of inspiration for the UK and Danish governments[199], while the earlier proposals and debates in Europe are left out:

> "The unawareness of existing analysis, the selective approach to precedents and the avoidance of a broad and transparent debate reflects a desire to skip the burden of connecting to earlier arguments and problematic experiences. Such a strategy subscribes to power, not to knowledge. It prefers the gesture of decision to the ratio of discourse"[200].

The UK proposal supported by Denmark and to a lesser degree the Netherlands triggered very different reactions revealing very dissimilar positions on the content of the proposal. With reservations of simplifying, five groups can be identified: EU 'hardliners' (UK, Denmark, the Netherlands), EU 'softliners' (especially Sweden), UNHCR, the European Commission, and the NGO community[201]. What is of crucial importance in separating these groups is the

---

[198] FECL, *EU Strategy paper on asylum and immigration: Show of "Political Muscle"?,* FECL 56 (December 1998).

[199] Noll, supra note 181, pp. 312-13.

[200] Idem at p. 314.

[201] The human rights and refugee NGO network was in general very critical towards both the UK and the UNHCR proposals and the critique followed very much the same lines. Although very important, the NGO critique will not be dealt with in detail here as the perspective of thesis focuses on the European States' policies towards asylum seekers. Amnesty International commented that "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" (Amnesty International, *The EU's Common*

concept of "effective protection". "Effective protection" is a floating signifier and the discourses of the different groups fix the signifier with different content of meaning. The continuum of meanings of "effective protection" starts from full refugee status under the Geneva Convention (holistic protection offer) and ends at non-refoulement (minimalistic protection offer)[202]. In between are a whole range of different protection offers, as for example access to the most basic human needs, food, water, shelter, etc. UNHCR has stated that in order for protection to be effective, it must be based on refugee and human rights law, with humanitarian objectives in fore, in a manner consistent with the spirit and the letter of the refugee protection regime[203].

The 'hardliners' fix the meaning of "effective" protection in their discourse as not necessarily meaning the same level of protection as in the EU. Concerning TPCs the status determination-procedure needs not be absolutely identical with present national procedures as long as it is in accordance with standards accepted by UNHCR. In other words, different norms apply to jurisdiction in on-shore processing (national territory) and in offshore processing centres. Regarding regional protection - in referring to the Lisbon Summary Conclusions on effective protection, the 'hardliners' adhere to human rights and refugee protection standards, but this commitment remains theoretical[204]. Because by stating the importance of agreeing on a level "that can be implemented in practice"[205], a pragmatic approach which is open for interpretation and thereby gradual slithering, is adopted.

The UK proposal has been criticised from many holds. The critique and comments have been extensive and imply legal, ethical, financial and practical aspects[206]. In the context of this

---

Asylum Policy. Open letter from Amnesty International to EU Heads of State and Government Thessaloniki European Council, Brussels, 18 June 2003).

[202] For this conceptual distinction – see Noll, *Formalism v. Empiricism: Some reflections on the Dublin Convention on the Occasion of Recent European Case Law*, in "Nordic Journal of International Law, vol. 70, 2001.

[203] van Selm, Joanne, *The EU as a Global Player in the Refugee Protection Regime*, AMID Working Paper Series 35/2004, p. 12.

[204] Furthermore, the Danish memorandum use the word "inspiration" which modifies the intended use of the Lisbon conclusions in a definition of effective protection. I am indebted to Dr. Gregor Noll for this information.

[205] At the IGC Workshop on Protection in the Region, May 2003, Australia noted in the context of "effective protection" that there was a need to focus on core standards, while additional elements could be considered "aspirations". A number of countries agreed that western standards should not apply everywhere. I am indebted to Dr. Gregor Noll for this information.

[206] See inter alia Noll, supra note 181, Amnesty International, *UK/EU/UNHCR. Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims,* Refugee Council UK, *Unsafe havens, unworkable solutions. Refugee Council position paper on the UK proposals for transit processing centres for refugees and regional management of asylum*, May 2003. The critique touches, inter alia, on elements as state responsibility, the right to a remedy (ECHR article 13 in conjunction with for example article 3), detention, collective expulsion and discrimination.

paper it will, however, be relevant to focus only on the main points of the critique in order to see how it has affected further developments of the proposal.

Sweden, as an exponent of the 'softliners', categorically dismissed the UK proposal: "You cannot deport people to specially arranged camps in this manner. We reject this, we do not believe in it, and we have informed the UN High Commissioner for Refugees, Ruud Lubbers, that I am surprised that anyone can declare his support for such a proposal...We are against any sort of system that would deny people the right to apply for asylum in the country that they have sought refugee in"[207].

By the end of February 2003, UNHCR gave its preliminary comments on the UK proposal[208]. In general, the UNHCR endorsed the proposal of regional arrangements except for a few problematic points; and the organisation moreover remarked that it was an idea the UNHCR itself had been working on. The weaker aspects identified by UNHCR in the comments was firstly, that in general, the proposal could focus less on reducing numbers of spontaneous arrivals of asylum seekers and more on the actual problems creating the pressures on the asylum system in the UK. Secondly, the anti-asylym approach[209] adopted in the UK proposal was said to be incompatible with the objects and purposes of the 1951 Convention and international human rights law. The idea of substituting asylum with regional protection was hereby dismissed. Thirdly, the UK proposal's interpretation of the criteria of 'effective protection' was too limited and any extra-territorial arrangements should respect the summary conclusions of the Lisbon Expert Roundtable. Fourthly, the comments mentioned that in order for the protection zones and TPCs to function effectively, they would have to be closed. In this context, UNHCR noted that prolonged detention of asylum seekers solely because of being in an asylum process is inherently undesirable and should be avoided. Fifthly, the UNHCR accepted that a presumption of manifest unfoundedness arises, but this presumption had to be rebutable on an individual case basis and deportation is not appropriate unless this is in place. This was a critique of the UK perspective that the pre-screening should preferably not be subject to appeal, but if necessary there should be no suspensive affect. Finally, the UNHCR elaborated on the state responsibility framework. It noted that both regional protection zones and TPCs are locations that would fall under the sovereign jurisdiction of another State, and the question of devolution of State responsibility to another State is an

---

[207] Swedish Migration Minister Karlsson in Svenska Dagbladet, *Jan O. Karlsson criticises the EU proposal of asylum camps*, 6 June 2003.

[208] UNHCR, Non-paper. *UNHCR's preliminary comments on UK proposals on regional protection and off territory processing zones*. February 2003.

[209] "Any absolute ban on so-called spontanous arrivals, coupled with their subsequent removal to 'regional protection zones' is in danger of being in compatible with..." Idem at p.3.

issue that needs to be addressed both in term of its legality and its feasibility. The comments, though, underscored that the State presented with an asylum request at its borders or in its territory has and retains the immediate refugee protection responsibilities, i.e. a new agreement between states cannot dissolve a state from its obligations under international refugee law[210]. As a side comment, the preliminary comments quote the original UK proposal for stating that UNHCR's endorsement is necessary. It would be "helpful to defeating legal challenges to the process and to securing international acceptance", as well as "for fairness and legitimacy"[211].

A month later in an informal meeting at the European JHA Council[212], the High Commissioner for Refugees, Ruud Lubbers, endorsed the components of the UK proposal in a less critical way than the Preliminary Comments Document. The HCR noted that the UK proposal was very much in line with his Convention Plus initiative, which is fundamentally about global burden-sharing and responsibility-sharing. In this context, he presented a counter proposal to the UK proposal - the UNHCR's comprehensive three-prong approach which entails first, an EU prong setting out closed off-shore joint processing centres within the EU but close to the external borders for the processing of unfounded claims. Second, a regional prong in which the idea is to prevent secondary movements of asylum seekers from their regions of origin to Europe by strengthening protection capacities in first countries of asylum and to ensure greater access to durable solutions in regions of origin. This will also "open up new possibilities for the return of refugees to countries of first asylum". Resettlement and development assistance are part and parcel of this comprehensive approach. Third, a domestic prong entailing improved national asylum systems of destination states[213]. The HCR thus made clear that regional protection, TPCs and resettlement do not substitute asylum provided within Europe, and a comprehensive approach needs to take all three prongs into account. It is here obvious that the HCR seeks to occupy the field of discursivity as much as he can in order to hegemonise the discourse of offshore processing and protection in the region as much as possible[214].

---

[210] Idem at pp. 1-5.
[211] Idem at p.2.
[212] UNHCR, Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council, 28 March 2003.
[213] Idem.
[214] This is the only possible way of acting for the HCR in order not to be lost out in the game of hegemony. It is a failure to perceive the UNHCR as some kind of NGO type of organ. Although UNHCR was set up to promote the interest of the world's refugees, the dependency on donor countries for survival very much creates the path of the organisation (cf. Loescher, Gil, *The UNHCR and World Politics. A Perilous Path*, Oxford, New York, 2001).

In June 2003, the European Commission worked out a Communication titled "Towards more accessible, equitable and managed asylum systems" as a response to article 61 of the Brussels Presidency Conclusions 20 and 21 March 2003, in which the Council noted the proposal from the UK and invited the Commission to explore the ideas further. In this Communication[215], the Commission accepted the UK's diagnosis of the asylum problem in Europe but rejected the most radical elements of its proposal, preferring instead to further explore the ideas in the UNHCR three-prong counter proposal. The Communication, though, recognises a number of legal, practical and financial obstacles to the implementation of such an initiative. In particular, it raises questions about the legality of transfer of persons who "have not transited through or otherwise stayed in" relevant protection areas or countries, recognising that this represents a significant departure from the concept of "safe third country". Moreover, the definition of "effective protection" is elaborated throughout the Communication which concludes with a definition very much in line with the Lisbon Expert Roundtable. The Communication ends by underpinning three policy objectives: orderly and managed arrival of persons in need of international protection in the EU, burden- and responsibility sharing within the EU as well as with regions of origin enabling them to provide effective protection as soon as possible and as closely as possible to the persons in need of international protection; and the development of an integrated approach to efficient and enforceable asylum decision-making and return procedures. At the Thessaloniki Summit, the Council responded to the Communication in article 26:

> "The European Council takes note of the Communication ... and invites the Commission to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine ways and means to enhance the protection capacity of regions of origin with a view to presenting to the Council, before June 2004 a comprehensive report suggesting measures to be taken, including legal implications. As part of this process the European Council notes that a number of Member States plan to explore ways of providing better protection for the refugees in their region of origin, in conjunction with the UNHCR. This work will be carried out in full partnership with the countries concerned on the basis of recommendations from the UNHCR"[216].

Finally, but not least important, what do the countries of origin and potential host governments of regional protection arrangements and TPCs think about the proposal?[217] The potential host states identified in the UK proposals already host huge refugee populations.

---

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

[216] Thessaloniki Presidency Conclusions, para. 26. See below for an analysis of the most important elements in this comprehensive report that was released a short while ago.

[217] The UK proposal focused on countries and regions that account for the largest flow of immigrants to Europe, e.g. Iran, Afghanistan, Iraq, Turkey, Kenya, Tanzania, Pakistan, Thailand.

Iran alone hosted around two million refugees from Afghanistan and Iraq, many of whom have stayed for almost two decades; Kenya and Tanzania have together hosted around 500.000 refugees over a decade to pick just a few examples. The long presence of refugees in these countries have resulted in severe social, economic, and environmental strains and furthermore in threats to domestic and regional stability. In response, many of the host states have made significant restrictions on their asylum offer. There is therefore very little incentive for them to cooperate with proposals of regionalising asylum. At an intergovernmental meeting at UNHCR in March 2003, several refugee-hosting states reacted negatively to the UK and UNHCR proposals. They all expressed concern that regionalisation would turn into "burden-shifting" and called in stead for "fair burden- and responsibility-sharing"[218]. It is very important to keep in mind that regionalisation indeed could have a positive potential of burden sharing, but the original UK proposal's non-asylum agenda does not, regrettably, point in that direction.

As of today the content of the UK proposal on offshore processing and regionalisation of protection has been modified as a result of the critique and numerous discussions between all relevant actors throughout the past year. Transit processing centres for the processing of unfounded asylum claims are not on the UK agenda anymore[219].

The regionalisation agenda is on the other hand very much "alive". Regionalisation of refugee protection is being promoted at three levels, of which I will focus on the two first: bilaterally, at EU level, and in the UNHCR. Bilaterally, the UK has been conducting discussions with relevant countries and the new buzzword is "migration partnerships":

> "(we) are now looking to develop migration partnerships with third countries in the region of origin. The aim of such partnerships is to *reduce* the pressure on our asylum system *while* facilitating UK assistance with refugee caseloads in the partner country...We must also examine the migration partnerships idea, working with countries to help them with their refugee load and to identify nationals from those countries who are in the UK so that we can better work to remove them to their original country...Migration partnerships will be a more formal arrangement, which in some ways matches the ethos of our original paper"[220].

It is clear from the formulation what constitutes the primary respectively the secondary objective of "migration partnerships". The idea is explicitly "to prevent the secondary

---

[218] Loescher and Milner, *The missing link: the need for comprehensive engagement in regions of refugee origin, in "International Affairs"*, vol. 79, no. 3, 2003, p. 604.

[219] Minister Flint, United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004. The UNHCR, though, still promotes the EU prong with TPCs within the EU in their comprehensive approach initiative.

[220] Minister Flint, United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004 – my italics.

movements that occur because people are tempted by the thought that they might have a better life elsewhere"[221]. The UK has already conducted such a partnership with Tanzania: "We are working with Tanzania to look at both Tanzanians and Tanzanians posing as other nationals with a view to effecting their return to that country. We have talked about how we might assist Tanzania with the processing and protection of its caseload of refugees"[222].

At EU level the Commission presented its expected Communication entitled "*On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – Improving access to durable solutions*" in June 2004 as a response to paragraph 26 of the Thessaloniki Presidency Conclusions. Important in this Communication is an adoption of a comprehensive approach which emphasise strengthening of the reception capacity in regions of origin AND more managed entry procedures[223]. In stressing both elements, the Communication emphasises that new approaches should focus more sharply on action that could be taken outside the EU within a framework of "genuine burden- and responsibility sharing" (paragraph 38). Moreover, the Communication states that the quality of protection in third countries heavily impacts on the possibilities to reduce, and eventually remove, the need for onward irregular secondary movement (paragraph 44). The benchmark of effective protection towards which host countries, with the help and partnership of the EU, should aim, is proposed to be based on:

> "(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and (c) the right to freedom from torture and cruel, inhuman or degrading treatment is respected as well as the prohibition of removal to such treatment; and (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention; and (e) the possibility exists to live a safe and dignified life *taking into consideration the relevant socio-economic conditions prevailing in the host country*"[224].

This definition of "effective protection" is in accordance with the Lisbon Expert Roundtable's summary conclusions, except for the last point which exactly opens up for a slithering of the concept of "*effective* protection". This is also the point to which both refugee NGOs and the host countries themselves have expressed concern. The example of the extensive repatriation

---

[221] Idem.
[222] Idem.
[223] In this sense the Communication is also advocating offshore processing of asylum claims, but in contrast to the UK proposal it will not exclusively apply to unfounded applications and it will not take place in closed centres or camps.
[224] European Commission, *Communication to the Council and the European Parliament. On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin. "Improving access to durable solutions".* Brussels, 4.6.2004, COM(2004) 410 final, para. 45 – my italics.

of refugees to Afghanistan last year, because it was considered by EU member states to be safe and capable of offering effective protection, shows how the concepts of "safe" and "effective protection" in practice quickly can achieve a slithering meaning compared to the theoretical definition.

In addition, the Communication deals with managed and legal entry into the EU of persons in need of international protection. While it dismisses Protected Entry Procedures due to a lack of "perspective and confidence among the Member States" (paragraph 35), it suggests setting up an EU Resettlement Scheme. In terms of who will be selected for resettlement the Communication says: "There are two issues to be considered in deciding whether or not a person is suitable for resettlement under a possible EU scheme. Do they qualify for international protection? Are they part of the target group deemed suitable for selection?" (paragraph 30). To be suitable does not any longer *necessarily* mean to belong to the most vulnerable groups (paragraph 29):

> "The setting up of tailor made integration programmes for specific categories of refugees would also be much more easily devised, if a country knew in advance who was arriving on its territory to stay. *Resettling and allowing physical access to the territory of the EU of persons whose identity and history has been screened in advance would also be preferable from a security perspective*"[225].

How one is supposed to interpret this formulation remains unclear but it could mean an opening up for a system where risk profiling could play a crucial role in the selection of refugees for resettlement. This concern was confirmed by the Danish Minister for Refugees and Integration, Bertel Haarder, when he explicitly made an expansion of the Danish resettlement quota dependent on a change of the criteria for selection: "If we are to consider (an expansion of) resettlement, then we have to pick those who can take care of themselves, not those who just cannot take care of themselves and never become integrated. Criteria of selection have to be based on who can take care of themselves"[226]. Who will set the criteria for selection if a scheme is to be implemented remains to be figured out, but one could hope that the UNHCR has a role to play in this process. The Communication concludes by proposing to set up "EU Regional Protection Programmes" which, inter alia, comprise measures as action to enhance protection capacity in the region (processing, receiving and integrating), an EU-wide Resettlement Scheme, and action on migration management and

[225] Idem para. 17 – my italics.
[226] Minister Haarder in Danish Radio, Channel P1, *Svigter vi flygtningene?*, 15 April 2004 – my translation.

return[227]. Moreover, the Commission envisage taking charge of the drawing up of a pilot EU Regional Protection Programme in relation to a protracted refugee situation identified by the Commission in close cooperation with UNHCR[228].

Finally, at UNHCR level, the UK and Denmark are partially financing two UNHCR projects which are in line with the regional prong of the HCR's proposal. One project is looking at preparatory actions towards a comprehensive plan of action for Somali refugees. The other project is an analysis of the gaps in effective protection in Kenya, Tanzania, and two other African countries[229]. Again one is left with the question of *which* and *whose* definition of effective protection is to be used in regionalisation of protection.

Regionalisation as understood in the original UK proposal and which is further developed on three levels as just mentioned, involves a shield against the flows of immigrants to Europe hereby potentially dissolving European states from their responsibility in dealing with the worlds' refugees. The introduction of 'temporary protection' in the 1990s was a regime that allowed states to opt out of ordinary asylum protection. At that time, European states endowed UNHCR with the task to conceptualise and legitimise this state of exception[230]. The exact same thing is now happening in regard to regionalisation of protection through the UNHCR's three prong proposal and the European Commission's "EU Regional Protection Programmes". Temporary protection was ***reactive***. Regionalisation is ***proactive*** and implies a preemptive control technique:

> "The basis of the original idea still stands: we cannot deal with those issues just nationally or on a European basis; we must work globally to address them in order to prevent those secondary movements into the European Union"[231].

The aim is to prevent the risk from developing into a manifest danger within the EU – i.e. to prevent the (illegal) immigrant from leaving to go Europe. The combination of the sovereign exclusion logic and the preventive control technique results in exclusion of the refugee and asylum seeker from EU territory, and from legal assistance from Courts and lawyers. The logic of control focuses on managing different degrees of deviance by preventively altering

---

[227] "Return could be aimed at the third country's own nationals, as well as other third country nationals for whom the third country has been or could have been a country of first asylum, if this country offers effective protection" (paragraph 51).

[228] Communication, 2004, supra note 224, para. 51.

[229] Minister Haarder in Danish Radio, Channel P1, *Svigter vi flygtningene?*, 15 April 2004, Minister Flint, United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004.

[230] Noll, supra note 181, p. 340.

[231] Minister Flint, United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004.

the physical and social *structures* in which the individuals behave[232]. It is no longer possible to differentiate between self and the Other, between inside and outside, because every element, every potential immigrant constitutes a risk.

Even though it is not all the aspects of the original UK proposal that have been developed further at this stage, and even though most real actions up until now are at the preliminary 'pilot project stage', the ideas imply a huge potential of spill-over into the EU when a window of opportunity appears or as other states will join the "coalition of the willing"[233]:

> The proposal involves "ideas for the future. It will take years before we can actually change the system. That's one of the problems with asylum and immigration. You have an idea and then you have to spend a lot of time trying to get the practicalities sorted"[234].

6. The European Refugee Regime – Towards a Permanent State of Exception?

The following section is with a point of departure in the analysis of the policies emerging from the logic of desperateness carried out in section 3, 4 and 5, asking what the legal and practical implications of these measures are for the European Refugee Regime, and on this background it is analysed whether the regime is moving towards a permanent state of exception.

Immigrants, refugees and asylum seekers are governed through a mix of governmentality techniques. An increased security focus at the locus of European governments immigration discourse has as shown in the analysis of 'safe countries', general non-arrival policies, Eurodac, naval interception, detention of asylum seekers and the UK proposal, resulted in not only significant removal policies, but also a growing attempt to prevent immigrants from reaching physical contact with European territory, and in case they actually succeed in arriving, the profiling together with criminals and confinement in closed centres as if they were criminals.

Through the logic of desperateness states are increasingly inventing new forms of "exceptional" policies. The sense of unease is not as evident in the migration discourse as in the discourse of "fight against terrorism". But in the merging of the instruments of crime fighting and asylum policy, refugees are also governed through a governmentality reflecting

---

[232] Cf. Rose, supra note 58 and Castel, supra note 71.

[233] The fact that the proposal has appeared several times shows that the logic of desperateness is not new. This time the proposal went much further than for example in 1993 and 1998 because the UK succeeded in hegemonising the discourse to an enormous extent and other agents followed the agenda.

[234] Minister David Blunkett, quoted in Migration News Sheet, April 2003, p.9.

ontological insecurity. When the Enemy in general is not any longer defined because of the break down of the Soviet Union[235], the global emergence of terrorism, the crisis of the welfare states, etc., when the limit between friend-enemy and between normal-deviant is no longer constant and defined, then the picture of the Enemy becomes reflexive: "The Other that might delimit a modern sovereign Self has become fractured and indistinct, and there is no longer an outside that can bound the place of sovereignty"[236]. The enemy threatening the EU is not identifiable because she is both outside and inside; the Refugee and the Asylum seeker is both the Other potentially threatening the order and security of the EU (outside - because she is either a potential terrorist and/or an illegal immigrant who the Member States are not able to return and is therefore present inside without legal status); and she is the person who needs protection and potentially through resettlement is part of the EU order (inside). This picture of the enemy creates a process of uncertainty and exceptional policies. Governments govern ontological insecurity primarily through technologies of control and sovereignty as expressions of management of the unmanageable. Risk profiling and risk strategies are a way of organising the social whereby the uncontrollable is made controllable[237]. The risk logic works as control of the irrational by rational means[238]. Databases on asylum seekers and immigrants, detention and protection in the region are devices to control and monitor the future by a preventive logic. When the future is characterised by chaos it is necessary to act now in order not to allow the potential threat develop into a manifest danger. Moreover, the public is in the Alien finding a frame in which it can allocate all its ontological sense of unease – the Alien being the refugee, the illegal immigrant and the criminal. In this way the categories are both in the official and in the public discourse blurred. However, the strategy of resettlement, although applied reluctantly by states, is a way of desecuritising migration and refugees by making them part of an EU identity of order.

The legal implications of the policies emerging from the governmentality of unease are a potential circumvention of the principles and standards laid down in the Refugee Convention and international human rights law. Article 31 GC, which states that it is not allowed to punish an asylum seeker for illegal entry into a destination state, is potentially violated by implementing the concepts of 'safe countries', the expanded use of Eurodac, prolonged and normalised detention and offshore processing. The principle of non-refoulement in article 33

[235] See for example Bigo, supra note 15, p. 109.
[236] Hardt and Negri, *Empire,* First Harvard University Press, United States, 2000, p. 189.
[237] Lupton, *Risk*, New York and London, Routledge, 1999, p. 102.
[238] Ericsson and Haggerty, *Policing the Risk Society*, Oxford, Clarendon Press, 1997, p. 86.

EUROPEAN UNIVERSITY CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

GC and furthermore stated in article 3 CAT and article 3 ECHR is potentially breached in the application of 'safe countries' in cases of a slithering of the concept of "effective protection", and in naval interception. The non-discrimination principle laid down by article 3 GC is possibly violated in the making of list of 'safe countries' automatically stating some asylum claims as unfounded, and if we are to believe the Danish minister Haarder, in a future Danish practice of resettlement. Most of the analysed policies are in breach of the fundamental principle of the GC, namely the obligation that each asylum application must be considered on its own merits[239]. The level of protection implied in "effective protection", which particularly is relevant in the context of removal to 'safe' countries and regional protection, has recently and is still being discussed extensively among the relevant parties. The Geneva Convention does not explicitly indicate what "effective protection" means, only that some articles are not possible to derogate from (cf. article 42). The summary conclusions from the Lisbon Expert Roundtable surely represent a level of protection which would be in accordance with the spirit and purpose of the GC. But the fact that some states do not agree to this level of protection, and assert that the standards of regional protection do not need to be as high as within the EU, indicates that in practice the level of protection is quickly open to a slithering. The idea behind the UK proposal and potentially also in "Regional Protection Programmes" is to substitute asylum with protection in the region and resettlement. This is not in violation of any specific article, but it is in breach of the spirit, objective and purpose of the Refugee Convention.

Finally, the right to seek asylum provided for in the (non- binding) UDHR article 14 and in the (not yet binding) EU Charter for Human Rights article 18, is violated by the non-arrival policies of strict visa requirements, carrier sanctions, immigration liaison officers, naval interception and detention in waiting zones. The fact that no monitoring body exists under the 1951 Convention, and that the European Court of Human Rights and the monitoring bodies of human rights treaties as for example the Human Rights Committee solely are capable of guarding the non-refoulement principle which is a minimalist protection offer, leaves huge discretion for states in protecting the world's refugees[240].

---

[239] The Procedures Directive opens up for that unfounded applications can be examined through an "accelerated procedure", but this is merely a label and can be interpreted in restrictive ways by states which make immediate return without examination possible.

[240] Moreover, the lack of sanctions leaves the international Courts and monitoring institutions with asymmetrical power compared to states. The UK, for example, considered at some point during the offshore discussions to redraw from the ECHR.

What are the practical implications of the policies emerging from the logic of desperateness? Do they result in a reduction of the numbers of asylum seekers and other immigrants coming to Europe? According to UNHCR the numbers of asylum seekers coming to Europe have declined over the last years[241]. But is this caused by legal restrictions? This is a very multifaceted question and will not be dealt with here; suffice to say is that the reduction has a complex pattern of explanations and is not merely caused by legal restrictions[242]. A reservation, moreover, has to be made as not all consequences of the analysed policies are known yet due to the very recent adoption of some of the measures. The UK proposal has been amended since its original form, but undoubtedly it would have been the best deterrence strategy if it had been implemented. As to the illegal immigrants, no statistics is available to confirm whether the restrictive policies have worked. Finally, the other side of the practical implication question is to ask how many genuine refugees have been amongst the illegal immigrants who have been detected, returned, drowned?

Turning to the immigrant side of the logic of desperateness - what would happen if all the Member States of the EU restricted their asylum and immigration policy to Australian standards? Observing the current behaviour of immigrants, one could assume that they will not stay away from the EU, but the result in stead being that the market of human trafficking will have more difficult conditions which higher the price, the immigrants and traffickers will find other entry routes which are more dangerous, and the number of illegal immigrants inside the EU will increase.

The paper began by asking whether the UK proposal is an indication of the European Refugee Regime developing towards a permanent state of exception[243]. In not merely focusing on the UK proposal, but by including other measures emerging from the logic of desperateness in the analysis, the question can be answered affirmatively as the new European policies legalise violations of international refugee law hereby making violence and law indistinct.

---

[241] See UNHCR statistical reports at www.unhcr.ch.

[242] Some scholars mean that legal restrictions have not resulted in reduction of numbers of asylum seekers (see e.g. Thieleman, *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration*, EI Working paper, May 20032003). On the other hand Denmark is an example of an enormous reduction in the number of asylum seekers following the adoption of a very restrictive Aliens Act in 2002. This indicates that restrictive policies have a symbolic deterrent effect. One could assume that restrictive policies aim to depreciate the image of Denmark at the stock exchange of rumours guiding human smugglers (see Noll, supra note 181, p. 331). But the reduction is also a reflection of reality in that major conflicts on the Balkans and Afghanistan have declined.

[243] In his analysis of the UK proposal, Noll asserted that EU states are "creating a state of exception in the refugee regime in which legal and factual protection of certain classes of individuals is gradually done away with" and where "the injustice of the global refugee regime...is addressed by locating the refugee beyond the domain of justice" (Noll, supra note 181, pp. 304, 338).

Refugees are in this permanent state of exception simultaneously included and excluded from protection. Most obvious is the state of exception in the attempt to substitute asylum with protection in the region, in which the standards of protection are open to slithering; and with resettlement which is not a legal obligation but a political protection offer based on the discretion of states. The analysed policies are not new developments on a global scale, only in the European context. As more and more states are circumventing the rule of law implied in the refugee regime, and given the export value of the policies, the state of exception becomes permanent.

Nevertheless, given our definition of a regime, which has a dynamic perspective on the law, it is necessary to have both the critique of the exception AND the productivity of the exception in mind, without necessarily seeing the productive side as a normatively good thing. A conduct can, when it is not in conformity with international law, be a violation of international law, justified by exceptional circumstances and finally a nascent norm[244]. Or it can be all three at the same time. What is of crucial importance is the relationship between the normal and the exception. The state of normalcy and the state of exception is in the regime perspective not seen as a dualism. The analysis should therefore not exclusively focus on the exception but as well on the normalisation and routinisation of the exception. What is the normal and how did it come to exist? This has been the endeavour of the paper by analysing how the insistence on freedom, security and order (in the EU explicitly the imperative of freedom of movement) has resulted in policies of desperateness seeking to exclude the immigrant and the asylum seeker. The merging of external and internal security is expressed in a governmentality of unease[245]. In the state of exception emerging from the governmentality of unease, September 11 2001 is not of extraordinary importance but it has accelerated a process that started before[246].

Hence, the full answer to the title question of the paper is that the policies materialising from the logic of desperateness constitute both a *violation* of the refugee regime (state of exception) and a *change* of the regime (normalisation of the exception).

---

[244] I am indebted to Dr. Gregor Noll and Prof. Didier Bigo for this inspiration, given at the Nordic Human Rights Research Course: Human Rights and the Exceptional, Lund, June 2004.

[245] For an elaboration on the governmentality of unease, see Bigo, *Globalised-in-security: the Field and the Ban-opticon*, 2004. Inhere he is developing the dispositif of the BAN-opticon described by first, the state of exception as indefinite; second, the need to monitor the future through risk profiling; and third, the imperative of free movement.

[246] September 11 2001, however, also increased the possibility of criticising the normalisation of the exception.

To conclude, the perspective shifts from the desperateness of states and the implied relation to the refugee to the perspective of the desperateness of immigrants and its relation to states. Refugees form the test case of human rights – as was mentioned in the introduction. Regrettably, the conclusion of the paper is in essence a return to Hannah Arendt's argument that, refugees because they are not citizens, but stateless, have no rights[247], and the conception of human rights based on the supposed existence of a human being as such, proves to be untenable when we are confronted with the refugee[248]. As such the refugee represents the crisis of the principles of the nation-state and clears the way for a renewal of categories:

> "What is new in our time is that growing sections of humankind are no longer representable inside the nation-state and this novelty threatens the very foundations of the latter. Inasmuch as the refugee, an apparently marginal figure, unhinges the old trinity of state-nation-territory, it deserves instead to be regarded as the central figure of our political history"[249].

Meanwhile, a considerable proportion of illegal immigrants have entered European states, which today are faced with a permanently resident mass of non-citizens who cannot and do not want to be repatriated and is therefore de facto stateless. This shows that the concept of "citizen" is no longer adequate for describing the social-political reality of modern states[250]. Immigrants and asylum seekers are continuously showing resistance by breaking the hermetically closed shell of the EU. When European states are closing off legal entry possibilities, the group of illegal immigrants increase. This group of illegal immigrants consists of many different categories: clandestine immigrants (both asylum seekers who have been deterred from using the asylum system and voluntary immigrants who have no legal entrance opportunity), refugees who have been in EU under temporal protection but who have no possibility of prolonging the permit of residence, persons who entered legally e.g. via student visa and who have stayed after the expiring date, etc. And all these people are non-citizens and have no rights. In this sense both the refugee and the illegal immigrant are challenging the categories of citizen, nation-state and human rights.

---

[247] With fifty years of existence of the Refugee Convention (and the emergence of several human rights treaties), the conclusion of the paper is of course modified compared to Arendt's conclusion. Refugees have rights but states are continuously trying to circumvent them, and the conclusion that refugees do not have human rights to the extent citizens have, is therefore highly tenable.

[248] Agamben, *Means without End.* Minneapolis. University of Minnesota Press, 2000, pp. 15-19.

[249] Idem at pp. 21-22.

[250] See also Dillon, *The Scandal of the Refugee: Some reflections on the "Inter" of Internation Relations and Continental Thought,* in Campbell, D. and M. Shapiro (eds), *Moral Spaces, Rethinking Ethics and World Politics*, London, University of Minnesota Press, 1999.

The negation of the sovereign nation-state is the refugee who in desperation seeks the way out of an unbearable life by using a human smuggler (who exploits the refugee's desperateness) hereby putting his own life at a genuine risk. The more people who will have to choose this destiny the more apparent will be the crisis of the sovereign nation state. People who are coming to Europe, a lot dying on their way and even more ending up living a life without any forms of rights within Europe, are beyond the bio-political control of states, no matter how desperately the latter try to close off their borders and in a sense of fear and unease have databases on everybody. The continuous outcome of this parallel logic of desperateness is a production of more and more security and insecurity for the immigrants, for the European native citizens and for the politicians.

7. Conclusion

The paper has with a point of departure in discourse analysis combined with a Foucauldian governmentality perspective on power, analysed selected policies within European Immigration and Asylum policy, with the aim of examining whether the European refugee regime is moving towards a permanent state of exception. It has been written through the paradigm of the parallel logic of desperateness, which I find to be the concept which captures and explains most accurately the current exceptional developments within European refugee politics. The analysed immigration and asylum practices emerging from the logic of desperateness reveal, that immigrants, refugees and asylum seekers are governed through a mix of governmentality techniques, most evidently an excluding logic of sovereignty and a preventing logic of control that both seek to exclude the immigrant and the asylum seeker from EU territory. An increased security focus at the locus of European governments' immigration discourse has as shown in the analysis of 'safe countries', general non-arrival policies, Eurodac, naval interception, detention of asylum seekers and the UK proposal of offshore processing and regional protection, resulted in not only significant removal policies, but also a growing attempt to prevent immigrants from reaching physical contact with European territory, and in case they actually succeed in arriving, the result is profiling together with criminals and confinement in closed centres as if they were criminals. As such, several aspects of the analysed policies are in violation of international refugee law (and human rights law). Given the regime perspective of the paper, it is concluded that the policies materialising from the logic of desperateness constitute both a *violation* of the refugee regime (state of exception) and a *change* of the regime (normalisation of the exception).

The added value of analysing European refugee politics through a combined regime-, discourse analytical and governmentality perspective is the ***critical*** understanding of what is actually happening. It is not sufficient to merely state that conduct X and Y is in contradiction with the law, and that policy X and Y is exceptional. It is necessary as well to understand how it came about, to understand the forces at work, in order for us to be able to critically analyse political reason and the silent conditions under which we think and act politically. That is the essence of studying governmentality. From this ground we can use the achieved knowledge to try to establish a desecuritising discourse, that does not see the immigrant and the asylum seeker as the Other constituting a threat to our society and identity; use the knowledge to break down the barriers and distances between critical NGOs and the "monster" states; use the knowledge to affect civil society, to affect states, to affect bureaucracies, and to affect the immigrants – that is the shortest way to security and 'perpetual peace'. Naturally, this is not a naïve propagation to open the fortress of EU to all who wishes to come at once. This would most probably result in insecurity and anarchy. But a genuine commitment on the part of European states is crucial in handling the state of flux and unease. By perceiving the refugee and the immigrant as a threat that has to be excluded from EU territory through preventive control policies, the result is an increasing securitisation and insecuritisation of all society and not only its demarcation to the outside. A genuine commitment and cooperation with countries of origin, the setting up of extensive resettlement schemes (and protected entry procedures) and other forms of legal entry into the EU, while at the same time having an effective onshore asylum system, is the way for European states to break this securitisation of society.

It is of uttermost importance for all parties to acknowledge that asylum and immigration are very political issues, and not technical problems demanding technocratic solutions. The challenges of asylum and immigration require political solutions and political responsibility. It is all about ethics.

8. Litterature

- Agamben, Giorgio, *Homo Sacer. Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1998.
- Agamben, Giorgio, *Means without End.* Minneapolis. University of Minnesota Press, 2000.
- Albert, Mathias, David Jacobson and Yosef Lapid (eds), *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001.
- Andersen, Niels Åkerstrøm, *Ernesto Laclaus diskursanalyse,* in Andersen, Niels Å. *Diskursive analysestrategier. Foucault, Koselleck, Laclau, Luhman.* København, Nyt fra Samfundsvidenskaberne, 1999, pp. 87-106.
- Beck, Ulrich, *Risk Society. Towards a New Modernity*, London, Sage, 1992.
- Berger, P.L. and T. Luckmann, *The Social Construction of Reality*, New York, Doubleday Anchor, 1967.
- Bigo, Didier, *When two become one: internal and external securitisations in Europe*, in Kelstrup, Morten and Michael C. Williams (eds.) *International Relations Theory and the Politics of European Integration – Power, Security and Community.* New York, Routledge, 2000, pp. 171-205.
- Bigo, Didier, *The Möbius Ribbon of Internal and External Security(ies)*, in Albert, Mathias, David Jacobson and Yosef Lapid (eds), *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001, pp. 91-117.
- Bigo, Didier, *Toward a Critique of the Governmentality of Unease*, in "Alternatives", vol. 27 Special Issue, February 2002, pp. 63-92.
- Bigo, Didier, *Detention of foreigners, State of exception, and the social practices of control of the Ban-opticon*, 2004, paper given at the Nordic Human Rights Training Course: Human Rights and the Exceptional, Lund, June 2004.
- Bigo, Didier, *Globalised-in-security: the Field and the Ban-opticon*, 2004, paper given at the Nordic Human Rights Training Course: Human Rights and the Exceptional, Lund, June 2004.
- Brouwer, E.R., *Eurodac: Its Limitations and Temptations*, in "European Journal of Migration and Law", vol. 4, 2002, pp. 231-247.
- Buzan, Barry, Ole Wæver and Jaap H. de Wilde, *Security. A New Framework for Analysis.* London, Lynne Rienner, 1998.
- Castel, Robert, *From Dangerousness to Risk*, in Burchell, Graham, Colin Gordon og Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality.* Chicago, The University of Chicago Press, 1991, pp. 281-298.
- Ceyhan, Ayse and Anastassia Tsoukala, *The Securitisation of Migration in Western Societies: Ambivalent Discourses and Policies*, in "Alternatives", vol. 27, February 2002, pp. 21-41.
- Chimni, B.S., *International Refugee Law. A reader*, London, Sage Publications, 2000.
- Crisp, Jeff, *A new Asylum Paradigm? Globalisation, Migration and the Uncertain Future of the International Refugee Regime*, UNHCR Working Paper no. 100, Dec. 2003. www.unhcr.ch
- Dauvergne, Catherine, *Challenges to Sovereignty: Migration Laws for the 21st Century*, UNHCR Working Paper no. 92, July 2003, www.unhcr.ch
- Dean, Mitchell, *Governmentality*, London, Sage Publications, 1999.
- Deleuze, Gilles, *Negotiations – 1972-1990*, New York, Columbia University Press, 1995.
- Diken, Bülent og Carsten Bagge Laustsen, *Indistinktion*, in "Distinktion", no.. 4, 2002, pp. 93-111.
- Diken, Bülent & Carsten Bagge Laustsen, *Camping" as a Contemporary Strategy – From Refugee Camps to Gated Communities,* AMID Working Paper Series 32/2003.
- Dillon, Michael, *The Scandal of the Refugee: Some reflections on the "Inter" of Internation Relations and Continental Thought*, in Campbell, D. and M. Shapiro (eds), *Moral Spaces, Rethinking Ethics and World Politics*, London, University of Minnesota Press, 1999, pp. 92-125.
- Ericsson, Richard V. and Kevin D. Haggerty, Policing the Risk Society, Oxford, Clarendon Press, 1997.
- Ewald, Francois, *Insurance and Risk*, in Burchell, Graham, Colin Gordon og Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality.* Chicago, The University of Chicago Press, 1991, pp. 197-211.
- Faist, Thomas, *"Extension du domaine de la lutte": International migration and security before and after September 11, 2001*, in "International Migration Review, Spring 2002, vol. 36, issue 1.
- Foucault, Michel, *Politics and the Study of Discourse*, in Burchell, Graham, Colin Gordon and Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality,* Chicago, The University of Chicago Press, 1991a, pp. 53-72.
- Foucault, Michel, *Questions of Method*, in Burchell, Graham, Colin Gordon og Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality.* Chicago, The University of Chicago Press, 1991b, pp. 73-86.

- Foucault, Michel, *Governmentality*, in Burchell, Graham, Colin Gordon og Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991c, pp. 87-104.
- Gordon, Colin, *Governmental Rationality: An Introduction*, in Burchell, Graham, Colin Gordon og Peter Miller (eds.), *The Foucault Effect. Studies in Governmentality*. Chicago, The University of Chicago Press, 1991, pp. 1-53.
- Hardt, Michael and Antonio Negri, *Empire,* First Harvard University Press, United States, 2000.
- Heisler, Martin O., *Now and Then, Here and There: Migration and the Transformation of Identities, Borders and Orders*, in Albert, Mathias, David Jacobson and Yosef Lapid (eds), *Identities, Borders, Orders. Rethinking International Relations Theory*, London, University of Minnesota Press, 2001, pp. 225-249.
- Howarth, David, *Discourse Theory and Political Analysis* in Scarborough, Elinor and Eric Tanenbaum (eds.), *Research Strategies in the Social Sciences. A Guide to New Approaches,* Oxford, Oxford University Press, 1998, pp. 268-293.
- Howarth, David and Yannis Stavrakakis, *Introducing Discourse Theory and Political Analysis,* in Howarth, David, Aletta J. Norval and Yannis Stavrakakis (eds.). *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change*. Manchester, Manchester University Press, 2000, pp. 1-23.
- Huysmans, Jef, *Migrants as a Security Problem: Dangers of 'Securitizing' Societal Issues*, in R. Miles and D. Thränhardt (eds.), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, London, Pinter, 1995, pp. 53-72.
- Huysmans, Jef, *Contested community: migration and the question of the political in the EU*, in Kelstrup, Morten and Michael C. Williams (eds.), *International Relations Theory and the Politics of European Integration – Power, Security and Community*. New York, Routledge, 2000, pp. 149-171.
- Huysmans, Jef, *The European Union and the Securitisation of migration*, in "Journal of Common Market Studies", Oxford, Dec. 2000, vol. 38, no. 5. pp. 751-77.
- Jensen, Carsten og Allan Dreyer Hansen, *Indledning*, in Laclau, Ernesto & Chantal Mouffe, *Det radikale demokrati – diskursteoriens politiske perspektiv,* København, Roskilde Universitetsforlag, pp. 11-37.
- Johansen, Kenneth Møller, *Sikkerhedens politik: Clinton, Kongressen og kampen om missilforsvar*, in "Politica", 35. årg., no. 1, 2003, pp. 22-38.
- Kjærum, Morten, *Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?*, in "Human Rights Quarterly", vol. 24, pp. 513- 536).
- Laclau, Ernesto, *New Reflections on the Revolutions of Our Time*, London, Verso, 1990.
- Laclau, Ernesto, *Emancipations*, London, Verso, 1996.
- Laclau, Ernesto and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, London, Verso, 2001.
- Little, Richard, *International Regimes*, in: Baylis, John and Steve Smith, *The Globalisation of World Politics. An Introduction to International Relations*, Chapter 12, Oxford, New York, 1997.
- Loescher, Gil and James Milner, *The missing link: the need for comprehensive engagement in regions of refugee origin*, in "International Affairs", vol. 79, no. 3, 2003, pp. 595-617.
- Loescher, Gil, *The UNHCR and World Politics. A Perilous Path*, Oxford, New York, 2001.
- Lupton, Deborah, *Risk*, New York and London, Routledge, 1999.
- Manne, Robert & David Corlett, *Sending them home. Refugees and the new politics of indifference*, "Quarterly Essay", vol. 13, Melbourne, Black Inc.
- Milliken, Jennifer, *The Study of Discourse in International Relations: A Critique of Research and Methods*, in "European Journal of International Relation", vol. 5(2), 1999, pp. 225-254.
- Mitchell, Dean, *Governmentality,* London. SAGE Publications, 1999.
- Noll, Gregor, *Formalism v. Empiricism: Some reflections on the Dublin Convention on the Occasion of Recent European Case Law*, in "Nordic Journal of International Law, vol. 70, 2001, pp.161-182.
- Noll, Gregor, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, in "European Journal of Migration and Law", vol. 5, issue 3, 2003, pp. 303-341.
- Nyers, Peter, *Emergency or Emerging Identities? Refugees and Transformations in World Order*, in "Millennium", vol. 28, no.1, 1999, pp.1-27.
- Rasmussen, Mikkel Vedby, *'A Parallel Globalization of Terror': 9-11, Security and Globalization,* in "Cooperation and Conflict", vol. 37 (3), 2002, pp. 323-349.
- Rose, Nikolas, *Powers of Freedom*, Cambridge, Cambridge University Press, 1999.
- Thielemann, Eiko, *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration*, EI Working paper, May 2003. London School of Economics, European Institute.

- Van Selm, Joanne, *Refugee Protection in Europe and the U.S. after 9/11*, in Steiner, Niklaus, Mark Gibney and Gil Loescher (eds), *Problems of protection: the UNHCR, refugees, and human rights*, London/New York, Routledge, 2003, pp. 237-263.
- van Selm, Joanne, *The EU as a Global Player in the Refugee Protection Regime*, AMID Working Paper Series 35/2004.
- van Selm, Joanne, *The Enlargement of an "Area of Freedom, Security and Justice": Managing Migration in the European Union of 25 Members*, Policy Brief, May 2004, Migration Policy Institute.
- van Selm, Joanne, *Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and Their Countries of Origin*, in van Selm, *Migration and the Externalities of European Integration*, Lexington Books, 2002, chapter 8. available at www.migrationpolicy.org/research/refugee.php
- Vogel-Jørgensen, T., *Bevingede Ord*, Copenhagen, Gads Forlag, p. 119.
- Wacquant, Loic, *Suitable Enemies: Foreigners and Immigrants in the Prisons of Europe*, in "Punishment & Society", vol. 1(2), 1999, pp. 215-222.
- Walt, Stephen M., *The Renaissance of Security Studies*, in "International Studies Quarterly", vol. 35(2), 1991, pp. 211-239.
- Wæver, Ole, *Securitisation and Desecuritisation*, in Lipschultz, Ronnie D. (ed), *On Security*. New York, Columbia University Press, 1995.

Documents:

- Amnesty International, *Detention of asylum seekers in the European Union*, December 2000. available at www.aieu.org
- Amnesty International, *The EU's Common Asylum Policy. Open letter from Amnesty International to EU Heads of State and Government Thessaloniki European Council*, Brussels, 18 June 2003. available at www.aieu.org
- Amnesty International, *UK/EU/UNHCR. Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims*, AI Index: IOR 61/004/2003. available at www.aieu.org
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Official Journal of the European Union, 6.2.2003.
- Council Directive (draft) on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Council of the European Union, Brussels, 31 March 2004, 7944/04.
- Council Directive (amended proposal) on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 30 April 2004, 8771/04.
- Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprint for the effective application of the Dublin Convention, No 2725/2000 of 11 December 2000.
- Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, Council of the European Union, Brussels, 21 January 2003, 15408/02.
- Council of the European Union (Justice and Home Affairs). *Council Conclusions*, Brussels 20 September 2001. Doc. No. SN 3926/6/01.
- Council of the European Union, *Feasibility study on the control of the European Union's maritime borders – Final report*, Brussels, 19 September 2003, Doc. No. 11490/1/03.
- Council of the European Union, *Draft Council conclusions on migration and development*, Brussels, 5 May 2003. Doc. No. 8927/03.
- Council of the European Union, *Programme of measures to combat illegal immigration across the maritime borders of the European Union*, Brussels, 21 October 2003, Doc. No. 13791/03.
- Davidsen, Lisbeth et al., *Illegal immigration: Fiasko for fælles havpoliti*, in Politiken 28 July 2003.
- European Commission, *Communication to the Council and the European Parliament. On a Community Immigration Policy*, Brussels, 22.11.2000. COM(2000) 757 final.
- European Commission, *Communication to the Council and the European Parliament. Towards integrated management of the external borders of the Member States og the European Union*, Brussels, 7.5.2002, COM(2002) 233 final.
- European Commission, *Communication to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM(2003)315 final.
- European Commission, *Communication to the Council and the European Parliament. Area of Freedom, Security and Justice: Assesssment of the Tampere Programme and Future Orientations*. Brussels 2.6.2004. COM(2204) 4002 final.

- European Commission, *Communication to the Council and the European Parliament. On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin. "Improving access to durable solutions".* Brussels, 4.6.2004, COM(2004) 410 final.
- European Commission, *Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders*, Brussels, COM(2003)XXX.
- European Commission, *Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas, Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals*, Brussels, 24.09.2003, COM(2003) 558 final.
- European Commission, *Commission Working Document. The relationship between safeguarding internal security and complying with internal protection obligations and instruments*, Brussels, 05.12.2001, COM(2001) 743 final.
- European Council, *Presidency Conclusions, Tampere European Council*, 15 and 16 October 1999.
- European Council, *Presidency Conclusions, Laeken European Council*, 14 and 15 December 2001.
- European Council, *Presidency Conclusions, Seville European Council*, 21 and 22 June 2002.
- European Council, *Presidency Conclusions, Brussels European Council*, 20 and 21 March 2003.
- European Council, *Presidency Conclusions, Thessaloniki European Council*, 19 and 20 June 2003.
- European Council, *Presidency Conclusions, Brussels European Council*, 17 and 18 June 2004.
- European Court of Human Rights, *Amuur v. France*, Judgement of 25 June 1996, Appl. No. 19776/92.
- European Court of Human Rights, *Chahal v UK*, Judgement of 25 October 1996, No. 70/1995/576/662.
- FECL, *EU Strategy paper on asylum and immigration: Show of "Political Muscle"?*, FECL 56 (December 1998). http://www.fecl.org/circular/5601.htm
- Fekete, Liz, *Canary Islands tragedy: did the RAF put border security before human safety?*, 2 October 2003, available at www.irr.org.uk/cgi-bin/news - entered at 24 June 2004.
- Garton Ash, Timothy, *Is this Europe's 9/11?*, in The Guardian, 13 March 2004.
- Haarder, Bertel, in Danish Radio Channel P1, *Svigter vi flygtningene?*, 15 April 2004, available at www.dr.dk
- Migration News Sheet, April 2003.
- Refugee Council UK, *Unsafe havens, unworkable solutions. Refugee Council position paper on the UK proposals for transit processing centres for refugees and regional management of asylum*, May 2003.
- Ruuda, Marit, *Joint EU operation against illegal immigration by sea*, in EUobserver, 29 January 2003.
- Statewatch Analysis, EU law on asylum procedures: An assault on human rights?, 2003, available at www.statewatch.org – entered 10 June 2004.
- Statewatch Analysis, *Implementing the Amsterdam Treaty: Cementing Fortresss Europe*, May 2004, available at www.statewatch.org – entered 10 June 2004.
- Statewatch Analysis, *Cover-up! Proposed Regulation on European Border Guard hides unaccountable, operational bodies*, 2004, available at www.statewatch.org – entered at 20 June 2004.
- Statewatch Analysis, *Killing me softly? "Improving access to durable solutions": doublespeak and the dismantling of refugee protection in the EU*, July 2004, available at www.statewatch.org – entered at 5 July 2004.
- Svenska Dagbladet, *Jan O. Karlsson criticises the EU proposal of asylum camps*, 6 June 2003.
- UNHCR, *Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, February 1999.
- UNHCR, Non-paper. *UNHCR's preliminary comments on UK proposals on regional protection and off territory processing zones*. February 2003.
- UNHCR Manual on Refugee Protection and the ECHR. Part 2.2 – Fact Sheet on Article 5.
- UNHCR, Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council, 28 March 2003. available at www.unhcr.ch
- UNHCR, *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.
- United Kingdom Parliament, European Standing Committee B, 21 April 2004, Session 2003-2004.

Treaties and conventions:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
- Convention relating to the Status of Refugees, 28 July 1951.
- Charter of Fundamental Rights of the European Union, 2000.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951.

- International Covenant on Civil and Political Rights, 1966.
- Protocol relating to the Status of Refugees, 31 January 1967.
- Universal Declaration of Human Rights, 1948.
- TEC - Treaty of Amsterdam, 1997.

Annex 1.

Lisbon Expert Roundtable
9 and 10 December 2002

organised by the United Nations High Commissioner for Refugees
and the Migration Policy Institute
hosted by the Luso-American Foundation for Development

Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary
Movements of Refugees and Asylum-Seekers

Paragraph 15.

Critical factors for the appreciation of "effective protection" in the context of return to third
States

15. The following elements, while not exhaustive, are critical factors for the appreciation of "effective protection" in the context of return to third countries:
a) The person has no well-founded fear of persecution in the third State on any of the 1951 Convention grounds.
b) There will be respect for fundamental human rights in the third State in accordance with applicable international standards, including but not limited to the following:
♦ there is no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State;
♦ there is no real risk to the life of the person in the third State;
♦ there is no real risk that the person would be deprived of his or her liberty in the third State without due process.
c) There is no real risk that the person would be sent by the third State to another State in which he or she would not receive effective protection or would be at risk of being sent from there on to any other State where such protection would not be available.
d) While respecting data protection principles during the notification process, the third State has explicitly agreed to readmit the person as an asylum-seeker or, as the case may be, a refugee.
e) While accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of States and their compliance with these instruments is key to the assessment of the effectiveness of protection. Where the return of an asylumseeker to a third State is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.
f) The third State grants the person access to fair and efficient procedures for the determination of refugee status, which includes – as the basis of recognition of refugee status – grounds that would be recognised in the destination country. In cases, however, where the

third State provides *prima facie* recognition of refugee status, the examination must establish that the person can avail him- or herself of such recognition and the ensuing protection.
g) The person has access to means of subsistence sufficient to maintain an adequate standard of living. Following recognition as a refugee, steps are undertaken by the third State to enable the progressive achievement of self-reliance, pending the realisation of durable solutions.
h) The third State takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his or her family.
i) If the person is recognised as a refugee, effective protection will remain available until a durable solution can be found.

Department of International Protection
Office of the United Nations High Commissioner for Refugees (UNHCR)
February 2003