



*The Danish Centre  
for Human Rights*



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# **Safe Avenues to Asylum?**

## **The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests**

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A Preliminary Study

**by  
Dr. Gregor Noll,  
with  
Jessica Fagerlund, LL.M.**

A Study Conducted within the Framework of the  
Refugee Research Programme  
at the Danish Centre for Human Rights

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Refugee Research Programme 04/2002, the Danish Centre for Human Rights

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## Executive Summary

Meeting protective demands outside state territory is no new phenomenon. This study is concerned with a particular practice of extending protection, which may be termed “Protected Entry Procedures”. It describes arrangements allowing a non-national

- to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Protected Entry Procedures aim at *complementing the present system of extraterritorial migration control* in the EU with mechanisms allowing for the differentiation between persons in need of protection and other categories of migrants before they reach the border of potential host states. What distinguishes Protected Entry Procedures from traditional resettlement is precisely the fact that *the individual is directly engaging the potential host state* in a procedure aiming at *the securing of physical transfer and legal protection*. In this mechanism, the *individual autonomy* of the protection seeker is accorded a central role. A primary goal of Protected Entry Procedures would be to offer *legal alternatives for migration* to *bona fide* protection seekers. It aims at identifying deserving beneficiaries at the earliest stage possible, which may assist in cutting fiscal, social and other costs both for the potential host country and for the protection seeker. On the other hand, the potential for cost reduction is bought at the price of certain risks for protection seekers and destination states alike, and the real challenge is to find a system that balances the former against the latter.

When formulating Protected Entry Procedures, actors will relate to the following choices:

- *Formal versus informal approaches*: Should the Protected Entry Procedure be law-based and predictable, or policy-based and flexible? Could a mix of both elements be conceived?
- *Definition of beneficiaries*: Is the Protected Entry Procedure mainly used for protection seekers with close links to the destination state, e.g. family ties? Does it merely cater for narrowly defined vulnerable groups? Or, is it inclusively formulated, e.g. by largely replicating those definitions of beneficiaries applicable in territorial processing?
- *Choice of countries*: Is the Protected Entry Procedure used in third countries only, or is it used in countries of origin as well? Are applications from third countries turned down by referring to the protective capacity of that country (i.e. by using a safe third country-argument)?
- *Risk distribution during decision-making*: Is the applicant obliged to wait for the whole length of determination procedures in the country where the diplomatic representation is located, or is an entry visa granted after a preliminary assessment (testing the likelihood that the applicant fulfils definitional criteria)?
- *Aversion of persecutory threats*: Does the diplomatic representation remain passive vis-à-vis persecutory threats during the waiting period, or is there a possibility of extending rudimentary forms of protection *in situ* (e.g. by organising a transfer out of the territory of the state in question)?

This study shows that Protected Entry Procedures are unilaterally made use of by six Member States, with a notable divergence among their practices (Austria, Denmark, France, the Netherlands,

Spain and the UK). Clearly, these states perceive the Protected Entry Procedure as a complement to, and not a replacement of territorial processing. Our analysis also revealed that international law features a mandatory requirement to consider urgent protection claims filed with diplomatic representations and to facilitate legal entry, e.g. by issuing an entry visa, in specific cases. Furthermore, expansion, qualification and harmonisation of Protected Entry Procedures are in no way contrary to the present *acquis*. Quite the opposite: the goal to fight illegal immigration would be accommodated, while the intentions as well as the letter of the Tampere Conclusion would be implemented.

To be a credible alternative to illegal migration and the territorial seeking of protection, Protected Entry Procedures must be utilised widely and function in a predictable and uniform manner. The study concludes that the harmonisation of a unilateral Protected Entry Procedure through a Community instrument setting minimum standards should be considered. In a second, and legislatively much more challenging stage, the development of a truly multilateral system could be discussed, by which Member States would integrate the Protected Entry Procedure into their joint visa policies, and refine it with an allocation mechanism regulating the distribution of protective responsibilities. Maintaining a degree of informality and flexibility is appropriate with regard to Protected Entry Procedures in countries of origin. With regard to third countries, practices should be law-based, predictable, reflecting the refugee definition and categories of subsidiary protection to their full extent, and highly integrated with the territorial processing of protection claims. For claims filed in countries of origin and urgent claims filed in third countries, the representation should be entitled to grant visas based on accelerated *prima facie* assessments. Finally, a demanding reconceptualisation of the ‘safe third country’ notion is necessary, if a Protected Entry Procedure in third countries is intended to offer a realistic alternative to unauthorised entry.

## Table of Contents

1	Introduction .....	12
1.1	Background .....	12
1.2	Objective and Geographical Scope of the Study.....	13
1.3	Methodology .....	14
1.4	Conceptualising and Defining Protected Entry Procedure.....	14
1.5	Risks and Benefits of Protected Entry Procedures.....	17
1.6	Modelling Protected Entry Procedures.....	20
2	Two Historical Case Studies .....	22
2.1	Diplomatic Efforts to Protect European Jews During World War II .....	22
2.2	Denmark and the Protected Entry Procedure of Bosnian Protection Seekers in 1993.....	25
3	Protected Entry Procedures in the Contemporary Practice of States .....	27
3.1	Introduction .....	27
3.2	Practice in EU Member States and Switzerland.....	28
3.2.1	Austria .....	28
3.2.1.1	Legislation.....	28
3.2.1.2	Procedure.....	29
3.2.1.2.1	Submission of an Application .....	29
3.2.1.2.2	Processing.....	29
3.2.1.2.3	Appeal .....	30
3.2.1.3	Statistics.....	30
3.2.1.4	Evaluation of the Austrian Model .....	31
3.2.1.5	The Austrian Model at a Glimpse .....	33
3.2.1.6	Explanation of the Austrian Model .....	33
3.2.2	Denmark .....	34
3.2.2.1	Legislation.....	34
3.2.2.2	Procedure.....	36
3.2.2.2.1	Submission of an Application .....	36
3.2.2.2.2	Processing.....	36
3.2.2.2.3	Close Connection .....	37
3.2.2.2.4	Appeal .....	38
3.2.2.3	No Urgent Evacuation.....	39
3.2.2.4	Statistics.....	39
3.2.2.5	Evaluation of the Danish Model.....	40
3.2.2.6	The Danish Model at a Glimpse.....	41
3.2.2.7	Explanation of the Danish Model.....	41
3.2.3	France .....	42
3.2.3.1	Legislation.....	42
3.2.3.2	Procedure.....	43
3.2.3.2.1	Submission of an Application .....	43
3.2.3.2.2	Processing.....	43
3.2.3.2.3	Appeal .....	44
3.2.3.3	Statistics.....	45
3.2.3.4	Evaluation of the French Model.....	45
3.2.3.5	The French Model at a Glimpse.....	46
3.2.3.6	Explanation of the French Model.....	46

3.2.4	Italy.....	47
3.2.4.1	Legislation.....	48
3.2.4.2	The Proposal.....	48
3.2.4.3	Comments on the Italian Proposal.....	49
3.2.5	The Netherlands .....	49
3.2.5.1	Legislation.....	50
3.2.5.2	Procedure.....	50
3.2.5.2.1	Submission of an Application .....	50
3.2.5.2.2	Processing.....	51
3.2.5.2.3	Appeal .....	52
3.2.5.3	Statistics.....	52
3.2.5.4	Evaluation of the Dutch Procedure .....	52
3.2.5.5	The Dutch Model at a Glimpse .....	54
3.2.5.6	Explanation of the Dutch Model .....	55
3.2.6	Spain.....	55
3.2.6.1	Legislation.....	55
3.2.6.2	Procedure.....	58
3.2.6.2.1	Submission of an Application .....	58
3.2.6.2.2	Processing.....	58
3.2.6.2.3	Advance Transfer of the Applicant .....	58
3.2.6.2.4	Appeal .....	59
3.2.6.3	Statistics.....	59
3.2.6.4	Evaluation of the Spanish Model .....	60
3.2.6.5	The Spanish Model at a Glimpse .....	61
3.2.6.6	Explanation of the Spanish Model .....	61
3.2.7	Switzerland.....	62
3.2.7.1	Legislation.....	62
3.2.7.2	Procedure.....	63
3.2.7.2.1	Submission of an Application .....	63
3.2.7.2.2	Processing.....	63
3.2.7.2.3	Appeal .....	64
3.2.7.3	Statistics.....	64
3.2.7.4	Evaluation of the Swiss Model.....	65
3.2.7.5	The Swiss Model at a Glimpse.....	66
3.2.7.6	Explanation of the Swiss model .....	67
3.2.8	United Kingdom.....	67
3.2.8.1	Legislation.....	68
3.2.8.2	Procedure.....	68
3.2.8.2.1	Submission of an Application .....	68
3.2.8.2.2	Processing.....	68
3.2.8.2.3	Appeal .....	69
3.2.8.3	Statistics.....	70
3.2.8.4	Evaluation of the UK Model .....	70
3.2.8.5	The UK Model at a Glimpse .....	71
3.2.8.6	Explanation of the UK Model .....	71
3.3	Practice in Three Non-EU Resettlement Countries.....	72
3.3.1	Australia .....	72
3.3.1.1	Legislation.....	73

3.3.1.2	Procedure.....	74
3.3.1.2.1	The Australian Programs for Asylum Requests submitted Abroad .....	74
3.3.1.2.2	Submission of an Application .....	75
3.3.1.2.3	Processing.....	76
3.3.1.2.4	Appeal .....	77
3.3.1.3	Statistics.....	77
3.3.1.4	Evaluation of the Australian Resettlement Model .....	78
3.3.1.5	The Australian Model at a Glimpse .....	79
3.3.1.6	Explanation of the Australian Model .....	79
3.3.2	Canada.....	80
3.3.2.1	Legislation.....	80
3.3.2.2	Procedure.....	82
3.3.2.2.1	The Canadian Programs for Asylum Requests submitted Abroad.....	82
3.3.2.2.2	Submission of an Application .....	83
3.3.2.2.3	Processing.....	84
3.3.2.2.4	Appeal .....	86
3.3.2.3	Statistics.....	87
3.3.2.4	Comments on the Canadian Resettlement Model .....	87
3.3.2.5	The Canadian Mode at a Glimpse .....	88
3.3.2.6	Explanation of the Canadian Model.....	88
3.3.3	United States of America .....	89
3.3.3.1	Legislation.....	89
3.3.3.2	Procedure.....	92
3.3.3.2.1	Submission of an Application .....	92
3.3.3.2.2	Processing.....	93
3.3.3.2.3	Appeal .....	94
3.3.3.3	Statistics.....	94
3.3.3.4	Evaluation of the US Resettlement Model.....	95
3.3.3.5	The US Model at a Glimpse .....	96
3.3.3.6	Explanation of the US Model.....	96
3.4	Comparative Analysis .....	97
3.4.1	Overview .....	97
3.4.2	Countries Grouped According to Four Different Models .....	97
4	The Legal Dimensions of Protected Entry Procedures .....	99
4.1	The Relevance of International, Supranational and Domestic Law .....	99
4.2	The Applicability of Protective Norms of International Law .....	99
4.2.1	A ‘Right to Seek Asylum’? .....	100
4.2.2	Explicit Prohibitions of <i>Refoulement</i> .....	101
4.2.3	Jurisdictional Protection Obligations .....	102
4.2.3.1	The ECHR .....	103
4.2.3.2	The CRC.....	107
4.2.4	Interim Conclusion.....	108
4.3	Protected Entry Procedures and the Law of the European Union.....	109
4.3.1	Competence under the TEC .....	109
4.3.2	Coherence with the <i>acquis communautaire</i> .....	111
4.3.2.1	The Migration Dimension .....	111
4.3.2.2	The Protection Dimension.....	113
4.3.2.3	Interim Conclusion.....	113



5	The Development Potential of Protected Entry Procedures .....	113
5.1	Existing Solutions and Future Approaches .....	114
5.1.1	Balancing Formal and Informal Approaches .....	114
5.1.2	Balancing Inclusive and Exclusive Approaches .....	115
5.1.3	Procedural Aspects .....	117
5.1.4	Unilateral or Multilateral Solutions?.....	118
	Annex 1 – Sample Questionnaire.....	125

## Table of Abbreviations

ACHR	American Convention on Human Rights
AWR	Forschungsgesellschaft für das Weltflüchtlingsproblem
BO	Branch Office
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCI	Common Consular Instructions
CEAS	Common European Asylum System
CIAR	Interministerial Eligibility Commission on Asylum and Refuge
CIC	Citizenship and Immigration Canada
CRC	Convention on the Rights of the Child
DIMA	Australian Department of Immigration and Multicultural Affairs
DIMIA	Australian Department of Immigration, Multicultural and Indigenous Affairs
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ERF	European Refugee Fund
EU	European Union
FAO	Federal Asylum Office
FC	Fourth Geneva Convention
FOR	Federal Office for Refugees
GA	General Assembly
GC	Geneva Convention
HCR	High Commissioner for Refugees
ICCPR	International Covenant on Civil and Political Rights
ICD	Integrated Casework Directorate
IGC	Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia
ILPA	Immigration Law Practitioners' Association
IND	Immigration and Naturalisation Service
INS	Immigration and Naturalization Service
JVA	Joint Voluntary Agency
MFA	Ministry of Foreign Affairs
MPG	Migration Policy Group
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OAR	Office of Asylum and Refuge
ODP	Orderly Departure Programme
OFPPRA	French Protection Office for Refugees and Stateless Persons
OJ	Official Journal
OP	Operational Instructions
PAM	Procedures Advice Manual
RO	Regional Office
SAC	Special Assistance Category
SC	Schengen Convention
SHP	Special Humanitarian Program

SOU	Statens Offentliga Utredningar
TEC	Treaty of the European Community
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States of America
USRP	United States Resettlement Program
VTC	Vienna Convention on the Law of Treaties

## **Foreword**

The present study has been prepared within the framework of the Refugee Research Programme at the Danish Centre for Human Rights with the financial support of UNHCR. Research on country practices has been carried out by Ms. Jessica Fagerlund, LL.M, research assistant at the Danish Centre for Human Rights, with the kind assistance of UNHCR offices in Europe and overseas. The country sections in Chapter 3.2 and 3.3 are mainly authored by Ms. Fagerlund, and the analysis in Chapter 3.4 and 5 is based on the results of her work. We would also like to express our gratitude for the valuable contributions provided by a number of individuals and organisations in the course of a consultation process on the theme of this study. This notwithstanding, the responsibility for any errors remains, of course, with the authors.

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# 1 Introduction

## 1.1 Background

For more than a decade now, industrialised states have used considerable resources to exercise their personal sovereignty and to control the arrival and entry of non-nationals on their territory. These policies have been described and analysed elsewhere and their potential negative effects on the interests of persons in need of international protection highlighted.

A common feature of these policies has been a tendency to interdict potential refugees en route on their way to the territory of destination states. By combining visa requirements with carrier sanctions and pre-frontier assistance and training, destination states seek to stop unauthorised entry attempts at the earliest stage possible. As a matter of fact, migration control has been externalised and is now to a significant proportion exercised in states of departure.

In its present form, the externalisation of migration control is problematic. Unlike domestically applicable aliens legislation, it usually does not *differentiate* between persons in need of protection and other categories of migrants. But access to territory of a potential host state is a precious good for persons in need of protection. This is true in a double sense. First, access to territory means at least temporary physical security. Second, such access also enhances legal protection. A number of important protective norms of international law presuppose territorial contact for their applicability.<sup>1</sup> Hence, the lack of differentiation in externalised migration control has far-reaching effects when it comes to the applicability of human rights and refugee law.<sup>2</sup>

As the problem of externalised migration control is the lack of differentiation, it is only natural to inquire whether this lack can be remedied within the framework of existing systems. If border control is pushed into the territories of departure states, it may be asked if refugee determination procedures could – at least in part - follow that move. Historically, such a development would appear logical. The key concepts of migration control have been developed in the Eighties and early Nineties of the past century, in reaction to protection demands by increasing numbers of asylum seekers. Since then, numbers have largely stabilised and even declined, and systems of migration control have gone into a phase of consolidation and refinement. The reactive development of migration control has not been matched by an analogous adaptation of protection systems. In the EU context, the harmonisation process offers new windows of opportunity for introducing refinements in existing asylum and migration policies at comparatively low transactional costs. Thus, it seems appropriate to discuss how the negative effects brought about by externalised

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<sup>1</sup> See e.g. art. 2 (1) of the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976 [henceforth ICCPR].

<sup>2</sup> Apart from downgrading the legal standing of would-be refugees, the externalisation of migration control pushes would-be refugees into criminalisation. First, due to the lack of legal avenues, such persons may resort to the illicit services of the black market (bribes to visa officials, use of counterfeit documents and resort to human smugglers). Second, once they have managed to arrive in a potential host state, the refugee will typically attempt to collude travel itineraries to avoid return to states along the transit routes. This strikes against her overall credibility and may distort the outcome of determination procedures.

migration control could be remedied, thereby increasing both the fairness and efficiency of migration and asylum policies.<sup>3</sup>

## **1.2 Objective and Geographical Scope of the Study**

Meeting protective demands outside state territory is no new phenomenon. The institutions of diplomatic asylum and resettlement, the notion of reception in the region, and the debate on temporary protection all point to the fact that states have already extended the reach of their protective systems outside the limits of their own territorial borders. The named concepts and notions have been analysed in detail elsewhere, and the present study shall not repeat this analysis. Rather, we intend to focus on ways and means *to complement the present system of extraterritorial migration control* in the EU with mechanisms allowing for the differentiation between persons in need of protection and other categories of migrants before they reach the border of potential host states. What sets out Protected Entry Procedures from traditional resettlement is precisely the fact that *the individual is directly engaging the potential host state* in a procedure aiming at *the securing of physical transfer and legal protection*. In this mechanism, the *individual autonomy* of the protection seeker is accorded a central role.

A significant number of EU Member States already operate some form of such a mechanism. Asylum-related entry requests are received, and, to some extent, processed in the country of origin or in a third country, which may lead to an authorised entry of the applicant into the territory of the requested state. Diverse as they may be, these practices give proof of the fact that differentiating forms of migration control are perceived as a natural refinement of the current system. Against this background, the present study will seek to

- take stock of the existing practices of Protected Entry Procedures within EU Member States and a number of important countries not Members of the EU,
- analyse the fairness and efficiency of such practices as well as their relationship to obligations imposed by international law,
- inquire into the potential for harmonising the Protected Entry Procedures on the EU level, looking *inter alia* into their consistency with the existing EU *acquis* in the area of migration and asylum, and to
- draw up possible solutions which Member States and EU institutions could pursue in the establishment of a procedure for processing asylum claims abroad.

With regard to the geographical scope of this study, EU Member States are its primary object. Given the geographical position of Switzerland, its role as one of the important European asylum countries and the fact that its protection system features elements of Protected Entry Procedures, it has been decided to include that country into the scope of this study. For comparative purposes, Australia, Canada and the US will be analysed, as these countries have operated with differentiated models of migration control for a considerable period of time, and their resettlement schemes

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<sup>3</sup> In this context, it is worth mentioning that traditional immigration countries have a long experience with differentiating migration control regimes. EU Member States are now increasingly debating the need for labour immigration, which calls for a number of changes in policy and law. While it must be underscored that economically motivated immigration differs starkly from flight and refuge in a number of respects, EU Member States could seize the opportunity to think over migration control in a comprehensive manner and to look into techniques of differentiation even in the area of forced migration.

contain elements relying on a bilateral relationship between claimant and potential host state. For the sake of presentational clarity, European and Non-European countries will be dealt with in different sub-sections.

### **1.3 Methodology**

In pursuit of the objectives set out above, empirical research, analytical models from political science and legal analysis shall be combined in a multidisciplinary approach. In the remainder of this chapter, definitions for the core concept of the study will be offered, and the place of Protected Entry Procedures in the system of refugee protection will be identified. The second chapter will briefly look into the historical dimensions of Protected Entry Procedures, drawing on one example from World War II and one example from recent European history.

The third chapter will offer a systematic review of state practice, covering the EU Member States and Switzerland. As comparators, the practices of three traditional immigration countries (Australia, Canada and the U.S.) will be scrutinised, which will allow us to clarify similarities and differences between Protected Entry Procedures and resettlement. This chapter offers information on legislation, procedures, statistics and, in select cases, the practice at diplomatic representations. It will conclude with an analysis, synthesizing standard models used by states and sketching the different choices imposed by those.

A legal inquiry will follow the empirical one, and chapter four looks both into the extraterritorial applicability of protective norms in international law and the consistency of Protected Entry Procedures with the existing EU *acquis*. The legal analysis will be followed by reflections on the challenges which states interested in the introduction or development of Protected Entry Procedures face – chapter five is intended to offer both a critique and a normative tool-box to stimulate future debate on the concept.

### **1.4 Conceptualising and Defining Protected Entry Procedure**

Throughout the study, the term “Protected Entry Procedures” will be employed as an overarching concept for arrangements allowing a non-national

- to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.

Each of the two elements of this definition – extension of asylum procedures to third countries or countries of origin and access to a protective territory – reflects a problem dimension. First, the need for asylum or other forms of protection must be assessed in a manner different from ordinary asylum procedures, and, second, the physical entry into the territory of the host state needs to be secured. It is the interplay between substantive decision-making on the merits of a protection claim and the formalities of migration that makes Protected Entry Procedures special, and lets them transgress the compartmentalisation of asylum on one hand, and migration on the other. As our analysis of state practices will show, there are many possible configurations between both elements.

Protected Entry Procedures is a hybrid. It combines features of resettlement regimes (in particular their geographical reach and bypassing of migration control obstacles) with the characteristics of individual asylum procedures conducted within the territory of a potential host state. Protected Entry Procedures cover a broad array of state practices, which are often denoted as ‘in-country processing’ or ‘the granting of humanitarian visas’. The major difference in these practices is the degree to which asylum procedures are placed outside state territory. Some states use their diplomatic representations merely to receive, but not to process, asylum claims. These claims are then sent to relevant authorities placed within state territory, decided on by the latter, and communicated back to the diplomatic representation. On the other extreme of the spectrum, some states send trained staff to selected representations to conduct refugee determination abroad.

‘The grant of a humanitarian visa’ is employed to denote a practice by which destination states authorise their diplomatic representations in third countries to grant an entry visa on protection-related grounds, but where the determination procedure is carried out in the territory of the destination state. Hence, a model based on humanitarian visas is a crossbreed in itself, drawing on a tentative assessment in the third country, and a final assessment in the ordinary determination procedure conducted in the territory of the destination country.

‘Local processing’ is employed to denote a practice by which destination states authorise their diplomatic representations in third countries to receive and to process asylum applications. The whole of the determination procedure is carried out while the applicant waits in the third country. Only a positive decision will lead to the authorisation of a transfer.

Now, it may be objected that the Protected Entry Procedure shares its two definitional elements with a number of other protective practices, such as resettlement, diplomatic asylum, reception in the region or evacuation and dispersal in temporary protection schemes. Hence, there is a need to be more specific in characterising Protected Entry Procedures.

Let us start with a comparison between Protected Entry Procedures and diplomatic asylum, resettlement and evacuation and dispersal. In search for responses, one will find differences of degree, rather than differences of principle. Diplomatic asylum and Protected Entry Procedures typically share a focus on the individual, while resettlement, reception in the region as well as evacuation and dispersal in temporary protection schemes are best characterised as collective instruments, reflected by the fact that fixed quotas are set. This notwithstanding, resettlement as well as evacuation also focus on the individual case in processing. Furthermore, resettlement schemes of traditional immigration countries typically require the individual to actively approach the potential destination state, which is an important similarity to diplomatic asylum and Protective Entry Procedures. Diplomatic asylum and evacuation surface as exceptional practices<sup>4</sup> and are, as a rule, not based on a set-up of rigid legal rules, allowing them to be described as a ‘system’.<sup>5</sup> By

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<sup>4</sup> This is clearly spelt out in art. 2 of the Temporary Protection Directive: “For the purposes of this Directive: (a) ‘temporary protection’ means a procedure of exceptional character [...]”. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 7 August 2001, OJ L 212/12 [hereinafter Temporary Protection Directive].

<sup>5</sup> It should be recalled that the EU Temporary Protection Directive offers a negotiation procedure rather than a predetermined legal obligation to coordinate the reception of a mass influx on the territories of Member States and to share the protective burdens linked thereto. See arts. 24 and 25 of the Temporary Protection Directive.



contrast, Protected Entry Procedures and resettlement cater for normalcy, and typically operate with a fixed normative framework. Finally, the focal points of each practice are perhaps most telling. Diplomatic asylum is characterised by the confrontation between the territorial state (usually the potential persecutor) and the state represented by the embassy. Resettlement is special in that it aims at alleviating limbos in third countries where the quality of protection is insufficient. Evacuation and dispersal in the context of temporary protection is marked by the wish to respond to situations of mass flight and to bring about a form of burden sharing.<sup>6</sup> To a limited degree, Protected Entry Procedures can share the characteristics of all three other responses. However, they are primarily typified by the *desire to offer individual protection seekers legal alternatives to illegal migration channels*.

It might also be helpful to concentrate on the place where claimant and destination country meet, and where critical decisions are made in each of the four protective practices – something we could call their *locus*. In the case of diplomatic asylum and Protected Entry Procedures, it is clearly an *embassy*. The locus of resettlement is usually a *processing centre* or even a *refugee camp* in a third country, visited by a selection committee. Finally, the *refugee camp* in a third country is also pivotal to evacuation and dispersal schemes in the context of temporary protection. Quite naturally, the locus of all systems is placed outside the territory of the destination country. Table 1 offers an overview of the commonalities and differences between all four approaches.

	Diplomatic asylum	Protected Entry Procedures	Resettlement	Evacuation and dispersal
Primary focus	Securing protection <i>in situ</i> against the will of the territorial state	Offering alternatives to illegal migration for protection seekers	Alleviating protection limbos in third countries	Alleviating acute protection crises in situations of mass flight
Typically geared towards	Individuals	Individuals	Individuals as well as Groups	Groups
“Locus”	Embassy	Embassy	Processing centre/ refugee camp	Refugee camp
Normal or exceptional practice?	Exceptional	Normal	Normal	Exceptional
Quantitative limitations?	No	No	Quotas	Quotas

**Table 1 - The Characteristics of Protected Entry Procedures Compared to Other Practices**

<sup>6</sup> The Humanitarian Evacuation Programme operated during the Kosovo crisis offers a good example on the linkage between protection problems arising in the country of first asylum (Macedonia) and the practice of burden sharing (in this case a combination of sharing people and bringing resources to Macedonia) to alleviate these problems. See Barutciski, Michael and Suhrke, Astri, *Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing*, Journal of Refugee Studies, Volume 14, Issue 2: June 2001, pp. 95-134. See also the Temporary Protection Directive.

Protected Entry Procedures should also be distinguished from Orderly Departure Programmes (ODP). While both share the goal of offering alternatives to illegal migration, ODPs represent a collaboration between countries of origin and potential destination countries. Access to asylum presupposes that both countries have given clearance to migration.<sup>7</sup> In practice, this allows countries of origin to veto departure. Different from Protected Entry Procedures, decision-making is left to the cooperating states, and the impact of individual autonomy is low.

How, then, do Protected Entry Procedures relate to the notion of reception in the region? The latter notion is, for the time being, not defined in a precise manner, and its broad usage reveals that it still means different things to different actors.<sup>8</sup> This notwithstanding, reception in the region appears to merge the ideas of extraterritorial procedures, processing centres and a certain degree of burden sharing. It is often used in a manner suggesting that a group of states should cooperate in erecting a processing centre in a region struck by forced displacement and unable to cater for the emerging protection needs by itself, to receive claims there, to evacuate *bona fide* claimants and to disperse them in an equitable manner among the cooperating states.

Protected Entry Procedures could be developed to mean all these things too, but their bottom line is much less ambitious. They make sense already when operated by one state alone, using existing administrative outposts (as its embassies), and drawing to the extent possible on existing administrative structures (as its visa processing system and its asylum procedures). Compared to the grand scheme of reception in the region, it is a *lean solution*, which benefits from international cooperation, but does not depend on it.

## **1.5 Risks and Benefits of Protected Entry Procedures**

A constructive discussion on Protected Entry Procedures presupposes a clear idea of how it may change the distribution of risks and costs between the primary stakeholders of protection systems – protection seekers, countries of destination and third countries. From a state perspective, three determinants impact the overall fiscal, social and political costs of protection systems: the number of beneficiaries, the level of rights accorded to them, and the degree of burden sharing.<sup>9</sup> These three determinants are interdependent – to name but one example, a state experiencing an increase of protection seekers on its territory in the absence of burden sharing-arrangements with other states will usually be inclined to react by diminishing the level of rights enjoyed by beneficiaries. As a minimum level of rights is dictated by international instruments (whose abrogation is politically inexpedient) and as reliable and predictable burden sharing is unavailable today, potential destination states mostly aim to manage their costs through limiting the number of beneficiaries by

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<sup>7</sup> Susan F. Martin, *Global Migration Trends and Asylum*, UNHCR Working Paper No. 41, UNHCR Geneva, April 2001, p. 7, available at <<http://www.unhcr.org/refworld/pubs/pubon.htm>>, accessed on 27 March 2002.

<sup>8</sup> A relevant starting point for unravelling this debate is a draft resolution proposed by Denmark in the UN General Assembly in 1986. In the draft, the burden falling upon the region of origin was appreciated. The need to compensate those countries was emphasized, *inter alia* through the establishment of regional United Nations processing centres administering resettlement. UN General Assembly, *International procedures for the protection of refugees: draft resolution / Denmark*, 12 November 1986, U.N. Doc. A/C.3/41/L.51. The draft failed to attract necessary support.

<sup>9</sup> For a full analysis, see Gregor Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, The Hague 2000, pp. 101-107, and G. Noll, *A Theory of Burden Sharing in the Asylum Field*, paper presented at the January 2002 conference of the Network on burden sharing in the European Union, coordinated by the London School of Economics, and currently under review by the *Journal for Refugee Studies*.

indiscriminate migration control. Evidently, the mechanisms of migration control described in the introductory section (visa requirements, carrier sanctions and the posting of immigration liaison officers in third states) aim at reducing the number of potential protection beneficiaries reaching state territory. Protected Entry Procedures may help states to break free from this vicious circle.

The two elements of a Protected Entry Procedure – legal access to territory after extraterritorial eligibility procedures – can be nicely related to the determinants “number of beneficiaries” and “level of rights”. In addition, some forms of Protected Entry Procedures may open the door to discuss the issue of burden sharing in a new light. For the sake of the argument, let us consider that a number of states decide to set up a joint processing centre. This presupposes agreement on how eligible cases are to be distributed amongst participating states – which brings them right into a constructive debate on burden sharing. In the following, the potential impact of Protected Entry Procedures on each of the determinants (numbers of beneficiaries, level of rights and degree of burden sharing) will be discussed, taking due account of the interests of states as well as those of protection seekers.

Protected Entry Procedures aim at identifying deserving beneficiaries at the earliest stage possible, which may assist in cutting fiscal, social and other costs both for the potential host country and for the protection seeker. On the other hand, the potential for cost reduction is bought at the price of certain risks, and the real challenge is to find a system that balances the former against the latter.

For the protection seeker, the considerable risks and capital destruction entailed by human smuggling can be avoided. For destitute protection seekers unable to pay the human smuggler, a Protected Entry Procedure would be the sole possibility to access protection systems on equal grounds, regardless of income. Also, the considerable amounts paid by protection seekers to human smugglers could be redirected from the black market to more constructive use by the beneficiary, e.g. for her<sup>10</sup> establishment in the new environment. However, waiting for a decision on admission outside the territory of the potential destination country also entails risks for physical security and downgrades the level of international legal protection. A proper and thoughtful design of a Protected Entry Procedure may, however, limit those disadvantages to a certain degree. Finally, another lurking risk is that states might excessively rely on Protected Entry Procedures in the future, and block what has been termed “spontaneous” arrivals altogether. In the worst case, this may entail an aggregated reduction of the prospects of reaching safety for those in need of it, outweighing the benefit of greater precision in the targeting of needy beneficiaries.

For the state, there are multiple facets of cost-reduction involved in Protected Entry Procedures. First, well-established and reliable Protected Entry Procedure programmes undermine segments of the market for illegal migration services. The costs of migration control and the struggle against human smuggling could diminish in proportion to the success with which would-be *bona fide* refugees can be convinced to turn to embassies first instead of making their way to the destination country. As this is a long-term process, a rational state would conceive of Protected Entry Procedures as one alternative among a gamut of possibilities, and not exclude other forms of seeking asylum. After all, international law obliges states to process protection claims made on its territory, regardless of whether the claimant was authorised to enter state territory.

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<sup>10</sup> For the purposes of this study, usage of female pronouns refers to both men and women, unless explicitly stated.

Another advantage is that the ‘right beneficiaries’ can be singled out in a procedure carried out nearer the country of origin, and thus with a closer vicinity to the facts of the case. This could improve the quality of country information used in decision-making, and reduce losses otherwise accrued in the transfer of information from embassies to territorial authorities. It is of interest both for potential host states and the protection seeker herself that the question of the travel itinerary becomes wholly irrelevant for determination procedures. In that sense, Protected Entry Procedures may reorient procedures towards the substance of the case and thus simplify and accelerate procedures.

There are no costs for the reception of applicants during the processing of asylum claims abroad – which contrasts markedly to territorial processing, where waiting periods can be substantial, and amount to one or more years. As with resettlement, Protected Entry Procedures allow for the start of integration measures immediately upon or shortly after arrival on state territory.<sup>11</sup> This has a number of consequences. Typically, the beneficiary may enter the employment market at the earliest possible stage, thus generating income, taxes and remittances. In those countries where asylum seekers are regarded with suspicion, or where deterrence measures are applied to asylum seekers, beneficiaries of Protected Entry Procedures would be spared a precarious social as well as material status. In the long term, the public perception of protection seekers – and even aliens at large – could thus be improved.

On the other hand, rejection decisions do not entail the physical return of the applicant, and the hardships and costs connected therewith. This does not mean, however, that rejection decisions are wholly unproblematic. Where some form of Protected Entry Procedures is practiced in the territory of a third country, the question of return is actually shifted over to that country. The institutionalisation of safe third country policies in Europe has shown that this issue is indeed a thorny one, and that less affluent third countries typically find themselves unable to address it alone. Hence, the design of large-scale programmes of Protected Entry Procedures in third countries should also take the needs and interests of those countries into account.

As it is clear that Protected Entry Procedures have to be practised alongside traditional asylum systems, destination states may fear that the overall number of asylum seekers would increase. Against the backdrop of existing statistics, this is, however, rather questionable. On the aggregate EU level, the total numbers of applications filed at missions and representations is still rather insignificant when compared to the total of territorial applications. As the country analysis will show, the number of positive decisions is generally rather limited. However, if Protected Entry Procedures became a common practice among Member States, or even subject to harmonisation by an instrument of the *acquis*, the picture may change. States may also feel uncomfortable with the initial investments into a new procedure. Generally, such investments may very well pay off, provided that states succeed to establish the Protected Entry Procedure as a credible institution, thus gradually diminishing the necessity to make use of unauthorised channels for seeking access to the territory of asylum states.

The second determinant of protection systems was the level of rights accorded to the applicant. One should be aware that Protected Entry Procedures move decisive parts or the totality of processing outside state territory. Many protective norms of international law presuppose territorial contact –

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<sup>11</sup> The exact start depends on the model chosen by the state practising Positive Interception. Where entry is allowed after a preliminary assessment of protection needs, the would-be beneficiary has to wait for the final decision before integration will start.

the prohibition of *refoulement* in the 1951 Refugee Convention<sup>12</sup> being the most prominent example. Hence, destination states enjoy a considerable freedom in defining beneficiaries of Protected Entry Procedures. In addition, some of the states practising some form of Protected Entry Procedures do not allow negative decisions at diplomatic representations to be appealed. But even where appeals are possible, reliable procedural information, interpretation and legal aid remain difficult to access, which diminishes the prospects for success compared to those enjoyed by a protection seeker filing her claim on the territory of the destination state. In all, Protected Entry Procedures diminish the level of rights enjoyed by the applicant in a quite decisive manner. However, one should not go so far to conclude that Protected Entry Procedures take place in a legal *terra nullius* – diplomatic representations are definitely subject to the *jurisdiction* of the relevant destination country, which in turn triggers a minimum of legal safeguards.

Finally, how does Protected Entry Procedures relate to the sharing of protective responsibilities among states? This brings us to the third determinant, namely burden sharing. There are two dimensions to this determinant in our context. First, destination states in Europe could perceive Protected Entry Procedures as a technique to *share protective responsibilities with the region of crisis*. Second, Protected Entry Procedures could also be put to work as a manner to share protective responsibilities *among extraregional destination states*. With regard to the latter, it is useful to distinguish between *unilateral* and *multilateral* forms of Protected Entry Procedures. As the following analysis of country practices will show, Protected Entry Procedures are presently only practised in a unilateral form, meaning that a destination state runs a self-contained scheme, and does not coordinate reception with other potential destination states. However, in the future, it is fully conceivable that Protected Entry Procedures be used in a multilateral setting, where destination states share their diplomatic representations as a common resource, and agree on a dispersal mechanism. In this context, it should be recalled that EU Member States already cooperate on the grant of Schengen visas through their embassies, and that the Dublin Convention<sup>13</sup> has proven that a rudimentary allocation mechanism can be agreed upon, once the necessary political will has materialised.

## 1.6 Modelling Protected Entry Procedures

What are the choices states are faced with when formulating a Protected Entry Procedure scheme? We stated earlier that Protected Entry Procedures allow for a considerable – although not total – freedom in defining beneficiaries and formulating procedural rights. Furthermore, in the practice of states, the Protected Entry Procedure is seen as a complement to, and not a replacement of, territorial processing. This raises the question of how to calibrate the needle's eye, through which the protection seeker's case has to pass. Obviously, the choice is between more exclusive and more inclusive solutions. The following non-exhaustive list canvasses how this choice articulates itself:

- *Definition of beneficiaries*: Are Protected Entry Procedures mainly used for protection seekers with close links to the destination state, e.g. family ties? Do they merely cater for narrowly defined vulnerable groups? Or, are they inclusively formulated, e.g. by largely replicating those definitions of beneficiaries applicable in territorial processing?

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<sup>12</sup> Convention relating to the Status of Refugees, 189 UNTS 150, entered into force April 22, 1954.

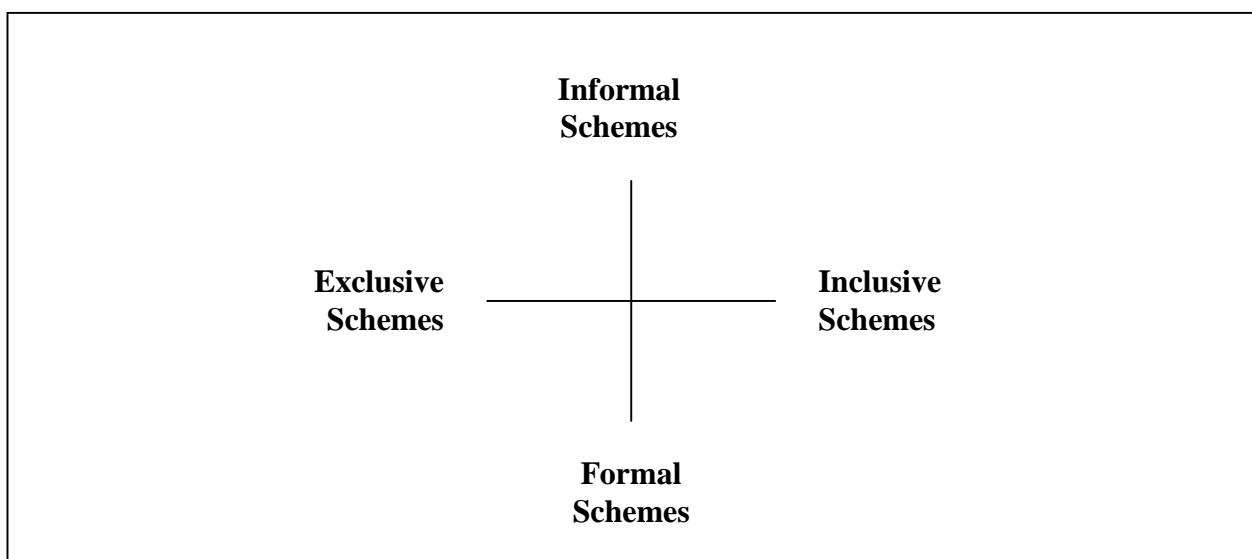
<sup>13</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [Dublin Convention], 19 August 1997, OJ (1997) C 254/1.

- *Choice of countries*: Are Protected Entry Procedures practised in third countries only, or are they practised in countries of origin as well? Are applications from third countries turned down by referring to the protective capacity of that country (i.e. by using a safe third country-argument)?
- *Risk distribution during decision-making*: Is the applicant obliged to wait for the whole length of determination procedures in the country where the diplomatic representation is located, or is an entry visa granted after a preliminary assessment (testing the likelihood that the applicant fulfils definitional criteria)?
- *Aversion of persecutory threats*: Does the diplomatic representation remain passive vis-à-vis persecutory threats during the waiting period, or is there a possibility of extending rudimentary forms of protection *in situ* (e.g. by organising a transfer out of the territory of the state in question)?

The last item in particular puts another range of choices into the limelight: should Protected Entry Procedures be conceived as formal, transparent and predictable procedures, or rather as informal, flexible, discretionary and discrete practices? Opting for a formal procedure might entice states to calibrate the needle's eye narrowly, while resorting to informal practice could open up for a more generous approach in reality. This choice replicates neatly the overarching dichotomy of law and politics, of fixed norms and bureaucratic discretion. Both choices can be graphically represented in a grid chart (Figure 1), which facilitates a comparison of the actual practices of states.

Any state practising a form of Protected Entry Procedure could, theoretically, be linked to a specific point in the chart. However, informal schemes are difficult to research and analyse, as information is scarce, and practice fluctuates much more than in formal schemes. Therefore, an observer will have to make certain allowances before drawing hard conclusions in such cases.

A reminder is in order. It would be improper to conclude on the 'restrictiveness' or 'generosity' of a state based alone on an assessment of its Protected Entry Procedure practices. Those must always be seen in conjunction with its ordinary protection system based on territorial processing, and with the norms and policies regulating access to its territory.



**Figure 1 - Modelling Protected Entry Procedure Schemes**

## 2 Two Historical Case Studies

The idea to reach out beyond state borders to offer protection to individuals is not new. States have practiced it regularly with regard to their nationals abroad, and developed an important normative body of international law dealing with that subject. The gamut of responses has stretched from straightforward legal protection on foreign soil to complex rescue and evacuation actions. In a distinct line of development, we can follow how states increasingly attempt to protect non-nationals, culminating with multiple incidents of enforcement action to avert massive violations of human rights directed against non-nationals. The subject matter of this study is but one single facet in the genealogy of protective ambitions beyond the borders of states. However, it is a focal one. It may very well be that the prism of Protected Entry Procedures allows us to capture the idea behind asylum in a new manner, and to develop different designs for its implementation.

To that effect, two examples have been chosen for illustrative purposes. First, we shall briefly describe how individuals and administrations have struggled to save Jews and other classes of persons threatened by extermination or persecution in the course of the Second World War, thereby using visas and protective documentation as tools. Second, we shall expose how the imposition of visa requirements on Bosnians by Denmark in 1993 lead to the establishment of a compensatory mechanism allowing beneficiaries to seek protection at a representation in Zagreb. To our mind, each of the two examples highlights a different aspect of Protected Entry Procedures. While the first example reflects the risks and potential of embassy-mediated forms of protection in the country of origin and highlights the role of the single decision-taker, the second focuses on institutional responses to the problem of acceding the territory of destination states. We hope that both provide a useful historical background when pondering the present practice and future potential of Protected Entry Procedures.

### 2.1 Diplomatic Efforts to Protect European Jews During World War II

In a number of cases, the extermination of the European Jewry during the Second World War as well as Nazi persecution of political opponents brought about significant counterstrategies by foreign diplomats and embassy staff. Best known is perhaps the example of Swedish diplomat Raoul Wallenberg, who served at the Budapest legation in the critical end phase of the German occupation of Hungary. In collaboration with staff at the embassy and the Swedish foreign ministry, and with the support of the Swedish government, he saved thousands of Hungarian Jews from falling victim to persecution by German occupants and members of the Hungarian Arrow Cross Movement. Recent research has mapped the interaction between actors and structure behind this historical endeavour, launching the concept of “bureaucratic resistance” to describe the role of protectors assumed by civil servants.<sup>14</sup>

Wallenberg and his colleagues issued documents which shielded their holders – at least temporarily – from harm by persecutors. Their protective power rested on the implication that the carrier was a

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<sup>14</sup> Paul A. Levine, *From Indifference to Activism. Swedish Diplomacy and the Holocaust; 1938-1944*, Acta Universitatis Uppsaliensis, Uppsala, 1996.

presumptive Swedish citizen on her way to Sweden.<sup>15</sup> As actual emigration to Sweden was impossible for Hungarians Jews in 1944 due to the effects of war and occupation in Central Europe, the willingness of Sweden to deliver on its promise of presumptive citizenship was never tested in reality. This does, however, in no way detract from its value. At the very least, the Swedish authorities endorsed the use of these novel instruments *although* parts of the domestic debate in Sweden was inimically disposed towards refugees, and an actual immigration of Hungarian Jews in the thousands might have resulted in a refuelling of anti-Semitic sentiment in Sweden. Hence, the diplomats and civil servants involved – including the Foreign Minister – indeed took professional risks when assisting those who sought the protection of the Budapest Embassy. In May 1944, the Hungarian government was considering whether it should allow all “foreign Jews” to be repatriated to the countries claiming them, which raised the question of the actual value of presumptive citizenship. The Swedish Foreign Office was asked by the legation whether it was prepared to accept “Swedish Jews... and also other people with a close connection to Sweden?”<sup>16</sup> It gave an unambiguous positive response.<sup>17</sup>

Did Sweden issue protective documents to anybody asking for them? Most certainly, such a liberal attitude would have quickly depleted respect for the documents. Therefore, the Swedish legation operated a procedure for processing claims, which was based on Wallenberg’s written instructions to the decision-takers. In September 1944, affirmative decisions were limited to applicants proving family relations, business connections or membership in the cultural and administrative elite, on condition that the latter provided “something outstanding for Sweden”.<sup>18</sup> Thus, the beneficiaries were defined in a detailed manner, inspired by both communitarian and utilitarian ideas. It is reported that until 15 October 1944, 8,000 applicants were dealt with under the procedure, and, out of those, “more than 3.500 applicants” received a protective document.<sup>19</sup>

The Swiss legation in Budapest took upon itself a critical role in a similar arrangement. First, Switzerland took over the interests of El Salvador, and, after lengthy negotiations with the Hungarian government, was allowed to grant documents giving its holder the status of “citizen of El Salvador”.<sup>20</sup> Second, in its role as representative of British interests, the Swiss legation had assumed the role of issuing certificates to those Jews who had been granted entry into Palestine. While actual emigration again was blocked by the German occupation, the Swiss consul amplified the protective effect of the certificates by issuing legitimations to its holders, which stipulated that its bearer was under the protection of the Swiss legation until such time that the journey to Palestine could begin.<sup>21</sup> Again, these efforts must be appreciated against the backdrop of Swiss refugee policy before and during the war, which produces an image full of contradictions and incoherence.<sup>22</sup>

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<sup>15</sup> “The passport stated that the holder was to go to Sweden within the framework of repatriation authorized by the Swedish Foreign Office, and until departure, the carrier and his property were under the protection of the Swedish legation.” H. Rosenfeld, *Raoul Wallenberg*, Holmes & Meier, New York 1995, p. 34.

<sup>16</sup> Letter by the Budapest legation to the Swedish Foreign Office, quoted by Levine, *supra* note 14, p. 270, note 96.

<sup>17</sup> Levine, *supra* note 14, p. 270, text accompanying note 97.

<sup>18</sup> The instructions were remarkably detailed and also contained rules on evidence. They are reproduced in Jenö Lévai, *Raoul Wallenberg. His Remarkable Life, Heroic Battles and the Secret of his Mysterious Disappearance*, White Ant Occasional Publishing, Melbourne 1988, p. 81-2.

<sup>19</sup> Lévai, *supra* note 18, p. 83.

<sup>20</sup> *Supra*, note 15, pp. 33-4.

<sup>21</sup> *Ibid.*

<sup>22</sup> In this context, one should recall that the Swiss government had struck a deal with Germany in 1938 to the effect that the passports of German Jews be stamped with a “J”, making it possible for Swiss border police to turn back would-be Jewish refugees, while maintaining visa-free travel for non-Jewish Germans. For an overview with further references, see Noll 2000, pp. 2-4.



Similar protective techniques were used by other diplomatic representations in Hungary.<sup>23</sup> The estimated numbers of persons saved through these efforts are considerable, one quote for the Swedish rescue activities in 1944 being some fifty thousand persons.<sup>24</sup> Levine's detailed study refrains from estimates, and points to the fact that quantification would require a research effort in its own right.<sup>25</sup>

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

However, protection needed not go so far as extending a presumptive citizenship through a protective passport. There are other examples, where the use of visas was sufficient to facilitate emigration. Japanese diplomat Chiune Sugihara issued transit visas to Lithuanian Jews threatened by persecution during the German occupation of the Baltics in 1940. Such visas were a precondition for its holders being able to cross the Lithuanian-Soviet border.<sup>26</sup> In the same year, Portuguese diplomat Aristides de Sousa Mendes issued Portuguese entry or transit visas to Jews and other persecuted persons fleeing the threats of seizure after the French defeat. de Sousa Mendes acted contrary to express instructions by the Salazar government, who ordered his immediate recall and dispatched two emissaries to escort him home. His rescue efforts led to his dismissal. In 1988, he was fully rehabilitated by the Portuguese National Assembly.<sup>27</sup> These examples add another aspect to the mosaic of paperwork protection, giving the term "bureaucratic resistance" a sharper edge. De Sousa Mendes not only resisted the persecutors' project of extermination, he also resisted the insulative policies of his own government.

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

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<sup>23</sup> Rosenfeld, *supra* note 15, p. 37, naming efforts by the Portuguese chargé d'affaires Carlos de Lix-Teixeira Branquinho and by Spanish chargé d'affaires Miguel San-Briz.

<sup>24</sup> Rosenfeld, *supra* note 15, p. 37.

<sup>25</sup> Levine, *supra* note 14, p. 277, note 127.

<sup>26</sup> Dr. David Eagleman, *The Sugihara Project*, available at <http://www.eagleman.com/sugihara/sugimain.html>, accessed on 31 August 2001.

<sup>27</sup> Entry on Aristides de Sousa Mendes, in *Encyclopaedia of the Holocaust*, Macmillan, New York 1990.

Second, the examples show how many lives can be saved through the powers diplomatic representations actually enjoy even in the most desperate of situations. All of the named examples put the role of the decision-taker at the diplomatic representation in the limelight. The Swedish examples especially illustrates that this does not mean complete discretion or arbitrariness. On the contrary: rescue efforts imposed a selection of beneficiaries upon diplomats, and, to that effect, a set of rules and procedures was developed in a very tense and difficult work situation. This heritage would be well administered, if future policies would transform the experience of courageous diplomats into an everyday practice – rule-governed, predictable and transparent to the degree possible. On the other hand, reliance on rules should not collude the fact that the single decision-taker remains central to the process of protection and rescue. Any future scheme for Protected Entry Procedures should take this experience into account, and entrust sufficiently trained and experienced persons with this crucial role.

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

## ***2.2 Denmark and the Protected Entry Procedure of Bosnian Protection Seekers in 1993***

The Bosnian refugee crisis during the early Nineties caused many potential destination states to introduce visa requirements for Bosnian nationals. Denmark merits closer attention in our context, as it introduced a compensation mechanism almost simultaneously with the introduction of visa requirements. Due to its focus on the individual applicant, it may be taken as a relevant example for the practice of Protected Entry Procedures.

While access to Danish territory was largely blocked for Bosnians after the introduction of visa requirements, certain groups determined by narrow criteria could be granted a residence permit by a Danish representation in the capital of neighbouring Croatia. This representation was operational from 1 September 1993 until a Danish embassy was set up 1996 in Sarajevo.

The background and objectives of the Danish mechanism were as follows. A special law on Temporary Protection entered into force on 1 December 1992 in Denmark. Para. 1 provided for the following "invitation order":

Subject to agreement with the United Nations High Commissioner for Refugees (UNHCR) or a similar international organisation, the Government may invite a number of particularly distressed persons from former Yugoslavia to stay in this country for the purpose of receiving medical treatment or other help that cannot be provided in the area where such persons are staying.<sup>28</sup>

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<sup>28</sup> Aliens Consolidated Act No. 563 of 30 June 1995 of the Danish Ministry of the Interior, Indenrigsministeriet, Udlaendigeafd., j.nr. 1994-3701-647.

Parallel to this preferential mechanism for a vulnerable group, protection seekers which already had reached Danish territory could be accorded a temporary residence permit.

In the beginning of 1993, the Danish Aliens Directorate and the Police Board examined the migration moves of a number of 578 spontaneously arriving protection seekers from Bosnia-Herzegovina. The study indicated that the majority had been staying in a third country for longer periods previous to their entrance into Denmark. The average stay outside Bosnian territory lasted 7-8 months. Of those cases whose stay in a third country had lasted more than 7 days, 25 % had been staying in Serbia, 19 % in Croatia, 17 % in Montenegro, 14 % in Macedonia, 17 % in Turkey, 3 % in Hungary and 2 % in Poland. Accordingly, 75 % of all refugees had been fleeing to another part of the former Yugoslavia first. In the ensuing political debate, it was argued that the majority of spontaneously arriving refugees was not anymore in need of protection in Denmark. Accordingly, a new mechanism capable of supporting the most needy categories had to be developed.

This mechanism came into place during the summer of 1993. On 26 June 1993, visa requirements were imposed for citizens of Bosnia-Herzegovina, Serbia-Montenegro and Macedonia. As a consequence, the number of persons entering Denmark dropped from an average of 1,350 per month for the period June 1992 to June 1993 to 366 per month for the period July 1993 to September 1994.<sup>29</sup> Although the Danish Home Office claimed that "the objective of the introduction of visa requirements was not to receive less refugees than before"<sup>30</sup>, the actual effect was precisely a decline in numbers.

By way of compensation, the invitation order was given a broader scope. Its core was the newly introduced art. 15a of the aforementioned law:

(1) A person from former Yugoslavia who is in former Yugoslavia or its close environment can be granted a residence permit pursuant to this Act, if, on the background of information provided in co-operation with the United Nations High Commissioner for Refugees (UNHCR), it must be assumed that owing to acts of war or similar disturbances the person in question has an immediate need for protection.<sup>31</sup>

The consolidated act had entered into force on 30 June 1993, while the representation in Zagreb became operational on 6 September 1993. In part, the eligibility procedure had been moved to the region of origin, as the representation's staff was competent to decide on residence permits for six months (which could be prolonged in Denmark). The individual protection seeker filed his application with the representation, which in turn presented the case to UNHCR for comments. If UNHCR did not affirm an immediate protection need, the application would be turned down. In contradistinction to procedures on Danish territory, no appeal could be lodged against the decision of the representation. As of August 1995, 17,600 persons were staying in Denmark under a temporary residence permit. In 1993 and 1994, a total of 6.043 persons were granted such a permit through the Zagreb representation.<sup>32</sup>

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<sup>29</sup> Source: Information provided by the Danish Refugee Council.

<sup>30</sup> Indenrigsministeriet, *Redegørelse til Folketinget vedrørende ordningen om midlertidig opholdtilladelse til personer fra det tidligere Jugoslavien*, 27 October 1993, p. 21.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* note 29.

While the Danish representation was located in the region of origin, it was certainly not located in the country of origin. Bosnian citizens who wanted to apply for such a visa still had to cross the border to Croatia. Croatia was unwilling to let refugees access its territory who did not produce a document of a third state guaranteeing admittance. While Bosnians inside and outside Bosnia profited from the old order without visa requirements, those profiting from the new order were mainly Bosnians already on Croatian territory. It is open to dispute which threshold is higher - the legal entry into an extraregional country as Denmark or the illegal entry into neighbouring Croatia. Apart from its extraterritoriality, the unique feature of the Danish mechanism was that the protection seeker could apply individually without any quota limitation being set. This is to be compared with the Swedish mechanism, which contained a quota ceiling.

Its focus on the individual and the numerical openness of the Danish practice suggest that it be categorised as an example of a Protected Entry Procedure. However, one should be aware of the deviational traits as well. Denmark did not introduce a general protection system based on representations in crisis regions, but focused on one single group of potential beneficiaries - namely Bosnians in Croatia. Once its mission was regarded as completed, the system was dismantled, and not used in other contexts.

### **3 Protected Entry Procedures in the Contemporary Practice of States**

#### ***3.1 Introduction***

Our exploration of the practices of EU Member States indicated that six states practiced some form of a Protected Entry Procedure on a regular basis:

- Austria,
- Denmark,
- France,
- the Netherlands,
- Spain, and
- the United Kingdom.

A section each has been dedicated to the practices of each of these six Member States. In Italy, interesting draft legislation had been proposed, but not adopted. Therefore, we chose to include a section on Italy, reflecting the content of this proposal. In the remaining eight Member States, no legislation or stable practice exists. This does not preclude, however, that there are single examples of Protected Entry Procedures in those states. However, the goal of this study was not to provide an inventory of single occurrences of Protected Entry Procedures, but rather indications of norm-based state behaviour.

Although not Member of the EU, Switzerland has been included in this study, as it operates a differentiated mechanism of a Protected Entry Procedure and plays an important role in the formation of refugee law in Europe. Even Australia, Canada and the US shall be covered in this chapter, as their practices provide relevant comparative material for our needs.

The sections in this chapter are based on database and literature searches, a questionnaire sent to UNHCR offices covering the 15 EU Member States, Switzerland, Australia, Canada and the US as well as bilateral contacts with experts. Practices vary to a considerable degree, and so does the collection of information by states. Statistics are not always available, and, where they are, they are seldom collected in a format allowing for direct comparison among states. This should be kept in mind when using the information provided by the present chapter.

Each section contains sub-sections on legislation, procedure, and statistics, followed by a brief evaluation. To facilitate access to the sometimes rather complex national systems, a graphic representation of the procedural options is included together with explanatory notes.

## **3.2 Practice in EU Member States and Switzerland**

### **3.2.1 Austria**

Formally, it is possible to submit an asylum application at an Austrian diplomatic or consular representation, both in the country of origin and in a third country. In practice, however, an application submitted in a country of origin will be rejected and the applicant advised to approach the respective authority in a neighbouring country.<sup>33</sup>

An asylum application may be lodged abroad, but it will not be assessed abroad. An entry visa will be issued in case asylum is likely to be granted, and the application will be processed in substance when the applicant has arrived in Austria.

#### **3.2.1.1 Legislation**

The provisions concerning the Austrian Protected Entry Procedure were first introduced through the Federal Law Concerning the Granting of Asylum (1997 Asylum Act), which entered into force 1 January 1998. The provisions of Article 7 and Article 16 of the 1997 Asylum Act<sup>34</sup> are most relevant in our context:

*§ 7. Asyl auf Grund Asylantrages<sup>35</sup>*

Die Behörde hat Asylwerbern auf Antrag mit Bescheid Asyl zu gewähren, wenn glaubhaft ist, daß ihnen im Herkunftsstaat Verfolgung (Art. 1 Abschnitt A Z 2 der Genfer Flüchtlingskonvention) droht und keiner der in Art. 1 Abschnitt C oder F der Genfer Flüchtlingskonvention genannten Endigungs- oder Ausschlußgründe vorliegt.

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<sup>33</sup> Source: Questionnaire response by the UNHCR Branch Office in Vienna, received on 30 August 2001.

<sup>34</sup> Asylgesetz 1997, BGBl. I Nr. 76/1997.

<sup>35</sup> An unofficial translation of the article is available on <<http://www.unhcr.at>>: *Article 7. Asylum granted upon application*: Asylum-seekers shall, upon application, be granted asylum by administrative decision of the authority if it is satisfactorily established that they are in danger of persecution in their country of origin (article 1, section A (2), of the Geneva Convention on Refugees) and none of the grounds set forth in the cessation or exclusion clauses in article 1, section C or F, of the Geneva Convention on Refugees is present.

## § 16. Einreisetitel<sup>36</sup>

1. Asyl- und Asylerstreckungsanträge, die bei einer österreichischen Berufsvertretungsbehörde einlangen, in deren Amtsbereich sich die Antragsteller aufhalten, gelten außerdem als Anträge auf Erteilung eines Einreisetitels.
2. Werden solche Anträge gestellt, hat die Vertretungsbehörde dafür Sorge zu tragen, daß die Fremden ein in einer ihnen verständlichen Sprache gehaltenes Antrags- und Befragungsformular ausfüllen; Gestaltung und Text dieses Formulars hat der Bundesminister für Inneres im Einvernehmen mit dem Bundesminister für auswärtige Angelegenheiten und nach Anhörung des Hochkommissärs der Vereinten Nationen für Flüchtlinge so festzulegen, daß dessen Ausfüllen der Feststellung des maßgeblichen Sachverhaltes dient. Außerdem hat die Vertretungsbehörde den Inhalt der ihr vorgelegten Urkunden aktenkundig zu machen. Der Asylantrag ist unverzüglich dem Bundesasylamt zuzuleiten.
3. Die Vertretungsbehörde hat dem Antragsteller oder der Antragstellerin ohne weiteres ein Visum zur Einreise zu erteilen, wenn ihr das Bundesasylamt mitgeteilt hat, daß die Asylgewährung wahrscheinlich ist.

### 3.2.1.2 Procedure

#### 3.2.1.2.1 Submission of an Application

Article 16 of the Austrian Asylum Act provides a basis for lodging written asylum applications at Austrian diplomatic or consular representations abroad. It follows from the provision that applications for asylum can be filed at any Austrian diplomatic or consular representation. In practice, however, an entry visa will be denied in cases where the applicant is still staying in her country of nationality, as the requirement of being “outside the country of nationality” is not fulfilled. According to the Federal Asylum Office (FAO), the applicant shall be informed about the reason for denial in such cases and advised to file an application at an Austrian representation outside her country of origin.<sup>37</sup>

#### 3.2.1.2.2 Processing

According to Article 16 of the Asylum Act, an asylum application filed with an embassy shall be automatically regarded as an application for entry authorization. The diplomatic or consular representation will provide the applicant with a standard application form and a questionnaire drawn up in a language understandable to her. At this stage, a written procedure is followed.<sup>38</sup> The form filled out by the applicant will be forwarded to the FAO, which assesses whether or not it is likely that asylum will be granted in the specific case. If it is considered “likely” that the applicant

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<sup>36</sup> An unofficial translation of the article is available on <<http://www.unhcr.at>>: *Article 16. Entry authorization*:

1. Asylum applications and asylum extension applications received by an Austrian diplomatic or consular authority in whose sphere of administration the applicants are resident shall be additionally valid as applications for the granting of entry authorization.

2. In cases where such applications are filed, the diplomatic or consular authority shall ensure that the aliens complete an application form and questionnaire drawn up in a language understandable to them; the structure and text of the application form and questionnaire shall be determined by the Federal Minister of the Interior, in agreement with the Federal Minister of Foreign Affairs and after consultation with the United Nations High Commissioner for Refugees, in such a way that the completion thereof serves to establish the material facts of the case. Moreover, the diplomatic or consular authority shall make a written record of the content of the document submitted to it. The asylum application shall be forwarded to the Federal Asylum Agency without delay.

3. The diplomatic or consular authority shall issue an entry visa to the applicant without further formality if the Federal Asylum Agency has notified it that asylum is likely to be granted.

<sup>37</sup> Source: Information provided by UNHCR Bureau for Europe, Geneva.

<sup>38</sup> UNHCR BO Vienna, supra note 33.

will be granted asylum, she will be issued an entry visa (“temporary asylum visa”<sup>39</sup>) by the representation, and the asylum procedure will be further processed, in accordance with the rules for the ordinary asylum procedure.<sup>40</sup>

Article 7 of the Austrian Asylum Act states that asylum shall be granted if it is satisfactorily established that the applicant is a refugee according to Article 1 Section A (2) of the 1951 Refugee Convention. This also applies to the grant of entry visas to asylum seekers who have submitted applications at representations abroad.

The applicant will be informed by the representation about the decision of the FAO orally. As the assessment of the FAO is not regarded as a formal decision, but only as an informal part of the decision concerning the application for the granting of entry authorization, it is not communicated in writing to the applicant.<sup>41</sup>

The applicant will not be protected by the representation while her application is being processed.<sup>42</sup>

### 3.2.1.2.3 Appeal

An appeal cannot be lodged against a negative decision for an entry visa. If the FAO considers that the grant of asylum is not likely, no entry visa will be issued and the asylum procedure will not be pursued any further.<sup>43</sup>

Once an applicant has been granted admission to Austria, the asylum procedure would typically render a positive outcome, as only such applicants are allowed to enter Austria as are considered by the FAO likely to be granted asylum.<sup>44</sup> Should asylum be denied after the applicant has been admitted to Austria, she may follow the ordinary appeals procedure for asylum requests when appealing the negative decision.

### 3.2.1.3 Statistics

Few persons have made use of the Austrian Protected Entry Procedure, and a very limited number of the applications submitted have been successful.<sup>45</sup> The procedure allowing for asylum applications to be lodged at representations abroad is taken advantage of mostly in cases of family reunification. In other cases the probability of being granted an entry visa is very limited due to the required likelihood that asylum will be granted upon entry.<sup>46</sup>

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<sup>39</sup> ECRE, *ECRE Documentation Service*, No. 3, July 2001, p. 7.

<sup>40</sup> Liebaut, F, *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, 2000, Danish Refugee Council, Copenhagen, p. 16.

<sup>41</sup> UNHCR BO Vienna, supra note 33.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Liebaut, F, supra note 40, p. 16.

<sup>46</sup> UNHCR BO Vienna, supra note 33.

The number of applications submitted at representations abroad has been around 250 per year.<sup>47</sup> During the first quarter of 2001 the number of applications submitted abroad increased remarkably, as 2,338 Afghan asylum seekers lodged applications at the Austrian Embassies in Islamabad and Teheran. Furthermore, from April until August 2001, 3,568 more applications were lodged by Afghans at the Austrian Embassies abroad. This sudden rise in the number of Afghans is partly attributable to information that Australia had started a reception programme for Afghan asylum seekers, and Afghans mistook Austria for Australia.<sup>48</sup> Although the number of positive decisions for Afghans who file their application for asylum on Austrian territory is comparably high (pursuant to the official statistics 49%<sup>49</sup> in the first half of 2001) the FAO has been alleged to deny granting the applicants in Islamabad and Teheran access to Austria. Apparently, the FAO has argued that the Afghan applicants are residing in safe third countries – namely Iran and Pakistan. As indicated above, no written decisions are issued in this procedure, meaning that it is difficult to verify the truthfulness of this allegation.<sup>50</sup>

The following numbers have been provided by the UNHCR Branch Office in Vienna:

	<b>1998</b>	<b>1999</b>	<b>2000</b>
<b>Number of entry visas denied to asylum applicants<sup>51</sup></b>	197	353	126

Due to the considerable increase in the number of asylum applications submitted at Austrian representations abroad in 2001,<sup>52</sup> the Austrian government considered abolishing the Protected Entry Procedure. No amendments to the Austrian Asylum Act have, however, been introduced at the time when this study was concluded.<sup>53</sup>

### ***3.2.1.4 Evaluation of the Austrian Model***

The Austrian procedure is based on law and thus formalised to a considerable degree, although representations enjoy a significant margin of discretion. Furthermore, the lack of written communication in decisive stages of the procedure adds another informal element, ultimately making outcomes less predictable for applicants.

How inclusive is the Austrian procedure? To start with, it has to be welcomed that an appeals system is available. There are a number of limitations, though.

<sup>47</sup> ECRE, supra note 39.

<sup>48</sup> Ibid.

<sup>49</sup> This percentage reflects the number of refugees granted Convention status divided by the number of negative decisions. The latter does not include the number of otherwise closed decisions.

<sup>50</sup> UNHCR BO Vienna, supra note 33.

<sup>51</sup> These numbers also include the (reportedly small number of) cases of persons who applied for asylum at the Austrian land border and who were rejected after the assessment of the Federal Asylum Office that it is unlikely that they will be granted asylum upon entry.

<sup>52</sup> Statistics received from the UNHCR Branch Office in Vienna on the number of asylum applications submitted by Afghan nationals at Austrian representations abroad gives an indication of the increase in the total number of applications: from January to September 2001 this number was 5 087.

<sup>53</sup> Source: Information received from the UNHCR Branch Office in Vienna, received on 6 February 2002.



First, the Austrian model extends only to Convention refugees, and solely covers third countries. Second, for issuing an entry visa, a high degree of likelihood that the applicant will be granted asylum is required. In practice, this requirement entails that entry visas are almost exclusively granted to persons having applied for family reunification.<sup>54</sup> In general terms, it would be more proper to speak of a family reunification procedure rather than an extraterritorialised asylum procedure in its own right.

Among the limitative aspects, it should be noted that the procedure is carried out without a hearing of the applicant. Furthermore, in case of a negative decision on the visa application, no possibility to appeal exists.<sup>55</sup>

A reason for the restricted use of the Protected Entry Procedure may be found in the reluctance of the representations both to forward the asylum application to the FAO in Vienna and to issue an entry visa, even after a positive decision from the FAO.<sup>56</sup> In fact, the specific appreciation of the procedure depends to a great extent on the staff at the representation. Some representations have been reported to be very committed whereas others seem to be quite reluctant in regard to this procedure.<sup>57</sup>

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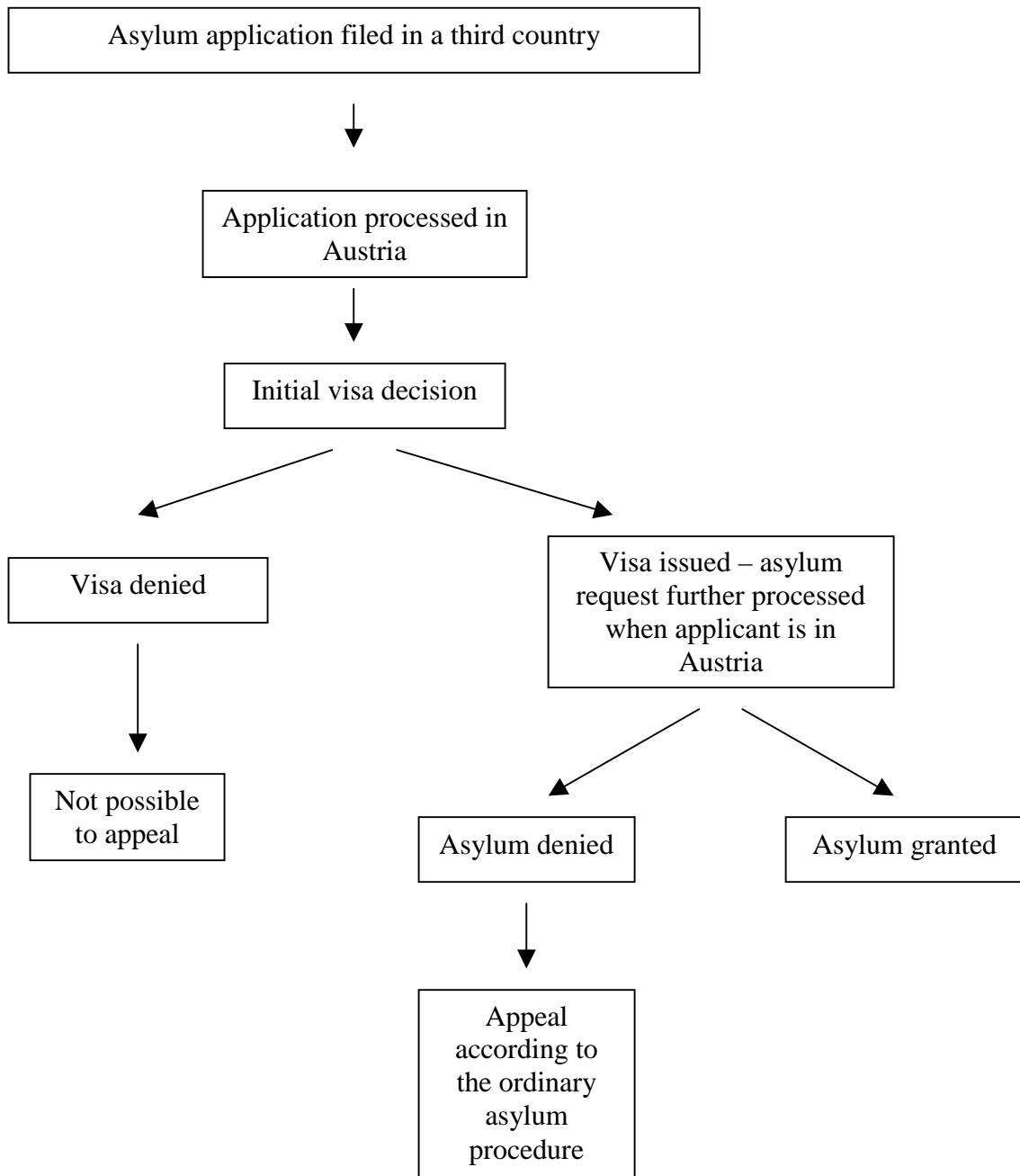
<sup>54</sup> UNHCR BO Vienna, supra note 33.

<sup>55</sup> Ibid.

<sup>56</sup> ECRE, supra note 39, p. 7.

<sup>57</sup> UNHCR BO Vienna, supra note 33.

### 3.2.1.5 *The Austrian Model at a Glimpse*



### 3.2.1.6 *Explanation of the Austrian Model*

1. According to the Austrian model, an asylum application can be filed at a diplomatic or consular representation. In practice, only applications filed in third countries have prospects of success.

2. The application will be forwarded to and processed by the Federal Asylum Office (FAO) in Austria.
3. The FAO will take an initial decision on whether a temporary asylum visa should be issued. Such a visa will be issued in case it is likely that asylum will be granted.

- a) A temporary asylum visa is denied

This entails that the asylum application will no longer be considered. Such a decision is not subject to appeal.

- b) A temporary asylum visa is issued

If a temporary asylum visa is issued, the applicant will be transferred to Austria, and her asylum request will be further processed when she is present in Austria.

It is possible to appeal a negative decision on the asylum request. However, once an entry visa has been issued to the applicant, it is unlikely that her asylum request will be rejected.

### 3.2.2 Denmark

It is possible to apply for asylum at a Danish diplomatic or consular representation abroad, but only in a third country, not in a country of origin. The application will be forwarded to and decided upon by the Immigration Service in Denmark. The representation may, however, refuse an application in case it does not show any connection whatsoever with Denmark. If the applicant receives a positive answer from the Danish Immigration Service she can be transferred to Denmark. An appeal may be lodged against a negative decision, provided that the application is not considered to be manifestly unfounded.

In January 2002, the Danish government announced its intention to abolish this procedure, and to propose a draft law to the parliament to that effect.<sup>58</sup>

#### 3.2.2.1 Legislation

The Danish Protected Entry Procedure was first established in 1983. Section 46 b of the Danish Aliens Act, justifying the immediate rejection of an asylum application by the representation in case of lack of connection with Denmark, was established later through Act No. 482 of 24 June 1992. This law also specified that applications submitted at representations abroad can be dealt with under the procedure for manifestly unfounded applications.

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<sup>58</sup> Presentation of the Danish Government concerning a new immigration policy. Regeringen, *En ny udlændingepolitik*, 17 January 2002. A draft proposal for a new law abolishing this procedure was introduced 15 February 2002, *Udkast: Forslag til Lov om ændring af udlændingeloven og ægteskabsloven med flere love*, J.nr. 2001/7310-81.

Today the relevant provisions for the procedure allowing for asylum applications to be lodged at Danish representations abroad can be found in the Aliens Act, Section 7 (4), 46 b (1) and (2), 53 (4), 53 a and 56 (4) (iii).<sup>59</sup>

#### *Section 7*

(1) Upon application, a residence permit will be issued to an alien if the alien falls within the provisions of the Convention relating to the Status of Refugees, 28 July 1951.

(2) Upon application, a residence permit will also be issued to an alien who does not fall within the provisions of the Convention relating to the Status of Refugees, 28 July 1951, but who, for reasons similar to those listed in the Convention or for other weighty reasons resulting in a well-founded fear of persecution or similar outrages, ought not to be required to return to his country of origin. An application as mentioned in the first sentence hereof is also considered to be an application for a residence permit under subsection (1).

...

(4) Subsections (1) and (2) apply correspondingly to an alien who is not in Denmark, if because of the alien's prolonged lawful stay in Denmark, of close relatives living in Denmark or of other similar attachment, Denmark must be deemed to be the country nearest to affording protection to that alien. The rule in the first sentence hereof does not apply to aliens staying in another EC country.

...

#### *Section 46 b*

(1) An application for a residence permit under section 7(4) will only be examined if the application contains information on the applicant's ties with Denmark.

(2) The Danish diplomatic or consular representatives concerned shall see to it that the application satisfies the condition of subsection (1), and may refuse the application if this is not the case. A decision of refusal cannot be referred to another administrative authority.

#### *Section 53*

(1) The Refugee Board comprises a chairman and a number of deputy chairmen and other members decided by the Minister of the Interior.

(2) When a case is tried before the Refugee Board, the Board consists of the chairman or one of his deputies and 4 other members, among these one member appointed by the Minister of the Interior, one member appointed after nomination by the Danish Refugee Council, one member appointed after nomination by the General Council of the Bar and Law Society, and one member appointed after nomination by the Minister of Foreign Affairs.

...

(4) Cases where the Danish Immigration Service has refused an application for asylum with reference to non-compliance with the conditions in section 7(4), can be considered by the chairman or one of his deputies alone.

...

#### *Section 53 a*

...

(3) The Danish Immigration Service may, after having submitted the case before the Danish Refugee Council, resolve that the decision in a case, including a case concerning a residence permit pursuant to section 7(4), where the application must be considered manifestly unfounded, cannot be appealed to the Refugee Board.

...

#### *Section 56*

The chairman of the Refugee Board or the person authorised by the chairman shall refer a case to be considered under section 53(2) or (4) to (6).

...

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<sup>59</sup> Aliens (Consolidation) Act No. 191 of 20 March 2001 of the Danish Ministry of the Interior.

(4) The chairman of the Refugee Board or a person authorised by the chairman may refer a case to be considered under section 53(2) on the basis of written proceedings, if: -

...

(iii) the case concerns the issue of a residence permit under section 7(4), with reference to the conditions mentioned in section 7(1) or (2);

### 3.2.2.2 Procedure

#### 3.2.2.2.1 Submission of an Application

A person in need of protection may submit an asylum application from abroad via a Danish diplomatic or consular representation. The criteria for the representation to accept such an application are that the asylum seeker must be outside her country of origin and must either have lived for an extended period in Denmark, have close family members living in Denmark, or have other close links with Denmark. If an application contains no indication of a close connection with Denmark, it may be rejected immediately by the diplomatic representation.<sup>60</sup>

An asylum application cannot successfully be submitted at a Danish representation in another EU country. In practice such an application will be forwarded to the Danish Immigration Service, which will normally reject the application.<sup>61</sup> It will only be examined in substance if the Member State where the representation is situated requests Denmark to assume responsibility pursuant to the Dublin Convention.<sup>62</sup> In cases where special humanitarian considerations make it appropriate and the applicant so desires, the Immigration Service may also decide to consider the application despite the fact that it was submitted in another EU Member State.<sup>63</sup>

#### 3.2.2.2.2 Processing

A person requesting asylum will be asked to fill out an application form at the Danish representation. A special application form exists for applicants applying for asylum at Danish representations abroad. No interview of the applicant, with the aim of clarifying the asylum request, will be carried out at the representation. If possible and necessary an interview may, however, be conducted in order to establish the connection of the applicant with Denmark.<sup>64</sup>

An applicant cannot be transferred to Denmark before a decision on the asylum application has been made by the Danish Immigration Service.<sup>65</sup> Nor will the applicant be afforded any protection by the representation while her application is being processed. If the applicant is in immediate danger, the representation does, however, have an obligation to contact the Ministry of Foreign Affairs for instructions. Normally it would be possible to refer the applicant to the local UNHCR office for assistance.<sup>66</sup>

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<sup>60</sup> Section 46 b of the Aliens Act.

<sup>61</sup> See Section 7 (4) last sentence of the Aliens Act, and Section 12 of the Dublin Convention.

<sup>62</sup> Article 9 of the Dublin Convention. See also Danish Immigration Service, *Asylum in Denmark*, 1999, p. 6.

<sup>63</sup> See Section 48 c of the Aliens Act.

<sup>64</sup> Source: Questionnaire response by the Danish Immigration Service, received on 17 October 2001.

<sup>65</sup> Information provided by Dr Kim U. Kjær, 23 August 2001.

<sup>66</sup> Danish Immigration Service, *supra* note 62.

If the application is not immediately rejected by the representation, due to lack of any close connection, it will be sent onwards to the Immigration Service in Denmark and, as with applications submitted within the territory, will be placed in either the procedure for manifestly unfounded applications or the normal procedure, and will be processed according to the same principles as when an application has been filed within Denmark. However, when considering applications submitted from abroad, the Immigration Service takes into account both whether the applicant meets the conditions to be granted refugee or *de facto* status<sup>67</sup> and whether she has sufficiently close connections with Denmark. Both requirements must be met in order for the applicant to obtain an entry visa as a refugee.<sup>68</sup>

### 3.2.2.2.3 Close Connection

Not all applications are forwarded by the embassy to the Danish Immigration Service. Section 46 b sets out the nature of the minimum connection required. In the instructions for the representations abroad more detailed guidelines have been set out.<sup>69</sup> If an application contains no indication of a connection with Denmark, or if the connection referred to in the application is only of a remote character, such as that the applicant would like to live or study in Denmark, it may be rejected immediately by the diplomatic representation. Also, where the connection mentioned in the application seems to be manifestly incorrect ("*åbenbart urigtig*") the representation has a right to immediately reject the application. This could be in cases where a large number of applicants use the same person in Denmark as a reference, or a tourist place as their connection. Another such case is when the name and address of the connection can be found on a product in circulation in the country where the application is lodged. However, if the applicant has already been rejected once at the Danish border and expelled to a safe third country, this should be seen as a connection close enough in order for the Danish representation to forward the application to the Immigration Service.

It is worthy of note that the requirement for a connection is much stricter at the Immigration Service, and far from all applications that are forwarded to it will be accepted. Furthermore, when considering an asylum request lodged at a Danish representation abroad, the Danish Immigration Service will in the first place assess whether the applicant's connection to Denmark is strong enough. Only if such a strong connection is regarded to be present, the Immigration Service will consider whether the applicant fulfils the requirements in Section 7 (4) compared with Section 7 (1) or (2), i.e. if she can be issued a residence permit on refugee or other grounds. The evaluation of the applicant's connection should take into account two aspects, i.e. the applicant's relative connection with Denmark and the possibilities of protection in the third country. As focus in the evaluation has in fact been put on the relative connection, the evaluation of the possibility of protection in the third country has in practice lost its meaning.<sup>70</sup>

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<sup>67</sup> The applicant must either fall under sub-section 7 (1) or (2) in order to fulfil these conditions, i.e. she must either fall under the definition of a refugee in accordance with the Refugee Convention, or have other similar and weighty reasons to fear persecution.

<sup>68</sup> Section 7 (4) of the Aliens Act. For further references, see Christensen and others: *Udlændingeret*, Jurist-og Økonomforbundets Forlag, Copenhagen 2000, pp. 418-19.

<sup>69</sup> Udenrigsministeriet [Ministry of Foreign Affairs], "*Retningslinier*" – *Udtalelser i flygtningesager. Instruks for udenrigstjenesten – Flygtningesager*, available at <<http://www.um.dk>>, accessed on 29 June 2001.

<sup>70</sup> Christensen and others, *supra* note 68, p. 418.

#### 3.2.2.2.4 Appeal

There is no formal procedure to appeal a decision through which the diplomatic representation has rejected an application.<sup>71</sup> However, the representation always states the reasons in its decision, where an application is rejected due to the lack of a close connection. Hence, the applicant can approach the representation again in order to further substantiate his claim with regard to the requirement of a close connection. A second possibility to challenge a rejection by the representation is to address the Ministry of Foreign Affairs. There is no special form or procedure in that regard.<sup>72</sup>

Section 53 a regulates appeals against the rejection of the asylum application by the Immigration Service. Save for cases regarded as manifestly unfounded, it is possible to appeal rejections to the Refugee Appeals Board<sup>73</sup>. In contrast to the ordinary asylum procedure for “spontaneously” arriving applicants, such an appeal is not automatic.<sup>74</sup> If the application is rejected under the procedure for manifestly unfounded applications, and the Danish Refugee Council<sup>75</sup> accepts that the application is manifestly unfounded, an appeal against the decision cannot be made.<sup>76</sup> On the other hand, if the Danish Refugee Council disagrees with the Immigration Service on the qualification of an application as manifestly unfounded, the rejection may be appealed.<sup>77</sup>

While it is not possible for the Refugee Appeals Board to call in the appellant for an interview, the Board occasionally conducts hearings with references of the applicant who are living in Denmark.<sup>78</sup>

The details of the appeals procedure are outlined in Section 56 (4) (iii) and in Section 53 (4). The latter states that if the connection with Denmark is not sufficient, the chairman of the Refugee Appeals Board can decide upon the application alone. Otherwise, the decision will be taken, as in the ordinary asylum procedure, by a Board consisting of the chairman or one of his deputies and four other members appointed or nominated by the Minister of the Interior, The Danish Refugee Council, the General Council of the Bar and Law Society and the Minister of Foreign Affairs.<sup>79</sup> Section 56 (4) (iii) authorises the chairman of the Refugee Appeals Board or a person authorised by the chairman to refer a case to be decided by the Board, in its larger composition, on the basis of written proceedings only.

In most of the cases, which are appealed to the Refugee Appeals Board, the Immigration Service had based its rejection on the ground that the connection between the applicant and Denmark was too weak. If the Refugee Appeals Board revokes this decision and considers that the connection is strong enough, the case will be referred back to the Immigration Service for a decision on whether

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<sup>71</sup> See Section 46 b (2) of the Aliens Act.

<sup>72</sup> Danish Immigration Service, *supra* note 62.

<sup>73</sup> Referred to in the law as the Refugee Board.

<sup>74</sup> This flows from Section 53 a (2) of the Aliens Act, an article considering decisions that are automatically appealed. According to the wording of this article it only concerns aliens “staying in Denmark”.

<sup>75</sup> The Danish Refugee Council is an NGO assisting refugees arriving in Denmark. By virtue of law, the Council has been accorded a limited role in the asylum procedure, through its veto competence and the task to nominate members to the Refugee Appeals Board.

<sup>76</sup> See Section 53 a (3) of the Aliens Act.

<sup>77</sup> Section 53 a of the Aliens Act *e contrario*. See also Christensen and others, *supra* note 68, p. 418.

<sup>78</sup> Danish Immigration Service, *supra* note 62.

<sup>79</sup> See Section 53 (2) of the Aliens Act.

Section 7 (4) compared with Section 7 (1) or (2) is applicable and the applicant therefore should be issued a residence permit. However, if it is manifest that Section 7 (4) compared with Section 7 (1) or (2) is applicable, the Refugee Appeals Board will decide upon the case itself, without referring it back to the Immigration Service.<sup>80</sup>

An asylum application that has been submitted at a Danish representation in another EU country may be appealed to the Ministry of Interior.<sup>81</sup>

### 3.2.2.3 No Urgent Evacuation

It emerged earlier that the applicant has to wait for the outcome in a third country for the whole duration of procedures. Before the provision allowing for asylum applications to be submitted at Danish representations abroad, it was anticipated that visas could be submitted to persons in immediate need of protection due to political persecution.<sup>82</sup> Sources are, however, unaware of any case where a visa has been issued due to such an urgent need.<sup>83</sup> There is no specific humanitarian visa regime allowing for immediate evacuation.

### 3.2.2.4 Statistics

In the year 2000, 2,658 applications were submitted at Danish representations abroad. Of that number, 2,402 applications were lodged by Afghan nationals. The majority of these applications were lodged at the Danish representation in Peshawar in Pakistan. The outcome of the applications were 56 positive decisions and 1,864 negative decisions, with the remaining cases pending.<sup>84</sup> It is fair to conclude from the statistics presented that the Danish Protected Entry Procedure rarely leads to protection actually being extended.

The following statistics concern asylum applications filed abroad:<sup>85</sup>

	Number of applications	Approved applications	%
<b>1994</b>	1,341	90	6.7
<b>1995</b>	4,951	41	0.8
<b>1996</b>	1,498	65	4.3
<b>1997</b>	477	54	1.1
<b>1998</b>	380	34	8.9
<b>1999</b>	562	33	5.9
<b>2000</b>	2,658	56	2.1

<sup>80</sup> Flygtningenævnet [Refugee Appeals Board], Flygtningenævnet, *Formandskabet – 8. beretning 1999, 2000*, Stougaard Jensen/Scantryk A/S, Copenhagen, Chapter 10.1.

<sup>81</sup> See Section 48 d of the Aliens Act.

<sup>82</sup> FT 1986-87 (1. samling), tillæg A, sp.28.

<sup>83</sup> Kim U. Kjær, *Den retlige regulering af modtagelsen af asylansøgere i en europæisk kontekst*; Jurist- og Økonomforbundets Forlag, Copenhagen 2001.

<sup>84</sup> UNHCR Bureau for Europe, supra note 37.

<sup>85</sup> The statistics are found in Udlændingestyrelsen [Danish Immigration Service], *Nøgletal på udlændingeområdet 2000*, available at <<http://www.udlst.dk>>, accessed on 27 July 2001. The number of applications for 1999-2000 are to be found in Udlændingestyrelsen, *Årsberetning 2000, 2001*, Glumsø Bogtrykkeri A/S, København. It should be noted that there is not necessarily correlation between the year when the application was filed and the year when it was decided upon.



The statistics in the table below, which does not appear in the table above, has been provided by the Danish Immigration Service upon request.<sup>86</sup>

	1995	1996	1997	1998	1999	2000
<b>Number of asylum applications sent on by the representation to Danish Immigration Service</b>	4,951	1,498	477	380	562	2,658
<b>Number of applicants whose application was filed abroad and who were granted asylum<sup>87</sup></b>	41	65	54	34	33	56
<b>Number of applicants whose application was filed abroad and who were denied asylum,<sup>88</sup></b>	-	1,716	1,218	1,127	696	1,864
<b>Number of appeals after denial of asylum by the Immigration Service</b>	-	-	184	108	58	33

### 3.2.2.5 *Evaluation of the Danish Model*

The Danish procedure is characterised by a relatively high degree of formalisation. It is based on law, and attempts have been made to interlink it with ordinary asylum procedures, including the special track for manifestly unfounded cases.

Appreciating the inclusive dimension of the Danish procedure, an observer will notice that it could cover Convention refugees as well as de facto refugees. Also, it has to be welcomed that an appeals system is available.

There are a number of limitations, though. First, it will be noted that the Danish Protected Entry Procedure only extends to third countries. Second, the criteria established by the Refugee Appeals Board are very restrictive, in particular concerning the demand for a close connection to Denmark. In practice, only family connections lead to asylum when the application is lodged at an embassy.<sup>89</sup> In practice, the Danish model largely remains seized with family reunification.<sup>90</sup> Third, the

<sup>86</sup> Danish Immigration Service, supra note 62.

<sup>87</sup> The numbers include both applicants granted asylum in the first instance by the Immigration Service, as well as those granted asylum in the second instance by the Refugee Appeals Board.

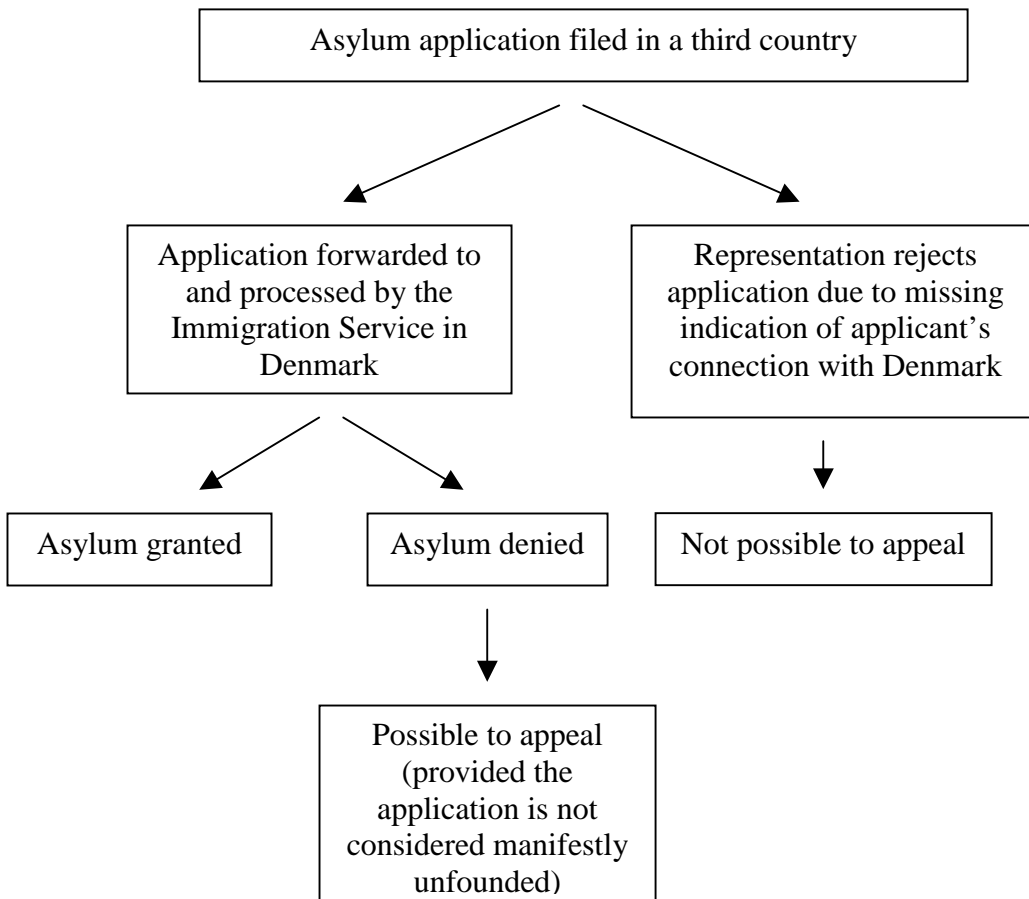
<sup>88</sup> The numbers include asylum seekers rejected both in the normal procedure and in the procedure for manifestly unfounded applications. It also includes rejections both in the first instance and in the second instance.

<sup>89</sup> Dr Kim U. Kjær, supra note 65.

<sup>90</sup> Short summaries of cases can be found in the annual reports. Available at <<http://www.fln.dk/publ>>.

applicant has to wait out the final decision on the territory of the state where the application is filed, which tilts the balance of risk-taking to her detriment.

### 3.2.2.6 *The Danish Model at a Glimpse*



### 3.2.2.7 *Explanation of the Danish Model*

1. According to the Danish model it is only possible to apply for asylum at a diplomatic or consular representation in a third country, not in the country of origin.
2. The representation will make the first assessment of the asylum application.
  - a) The application will be forwarded to and processed by the Immigration Service in Denmark.
  - b) The representation has the authority to immediately reject an asylum application if it contains no indication of a connection with Denmark. Such a decision is not subject to appeal.
3. The Immigration Service will decide upon the asylum application in accordance with the ordinary asylum procedure. In addition to meet the conditions to be granted refugee status,

the applicant must also meet the criteria of having sufficiently close connections with Denmark in order to be granted asylum.

- a) A positive decision on the asylum application will mean that an entry visa and a residence permit will be issued for the applicant.
  - b) A negative decision on the asylum application means that no entry visa or residence permit will be issued.
4. An asylum application rejected by the Immigration Service will not be automatically appealed to the Refugee Appeals Board. The decision of the Board is final.
- a) A positive decision means that an entry visa and a residence permit will be issued.
  - b) A negative decision means that the applicant will be refused entry. No further possibility to appeal exists.

### 3.2.3 France

France provides a possibility for persons in need of protection to apply for asylum at French diplomatic and consular representations abroad, both in countries of origin and in third countries. An initial visa decision will be made, and, if this decision is positive, the applicant will be allowed to enter France where the asylum procedure officially starts. A negative initial visa decision, as well as a rejection of the asylum application may be appealed.

There is no discussion taking place at the moment with a view to changing the current procedure.

#### 3.2.3.1 Legislation

There are no provisions in the French law regulating the procedure allowing for asylum applications to be submitted at French diplomatic or consular representations abroad.<sup>91</sup> In practice, different types of visas, such as long-term or short-term visas, or student visas, are issued to the applicant after a positive initial visa decision has been taken. The type of visa differs depending on the circumstances in the case. One consideration may be the wish not to attract the attention of the authorities in the country where the applicant files her claim.

Little information is available on the legal base determining which type of visa should be used. The “General Visa Instructions” (*Instruction Générale des Visas*) apparently offer some guidance on this matter. However, these instructions, which are issued by the Ministry of Foreign Affairs for the diplomatic and consular representations abroad, are of an internal character and not available to the public.<sup>92</sup> Therefore, the content of the instructions remains unknown to the authors, and no conclusions can be drawn on the precise degree of formalisation.

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<sup>91</sup> This sub-section is based on a Questionnaire response by the UNHCR Branch Office in Paris, received on 17 September 2001.

<sup>92</sup> Ibid.

### 3.2.3.2 Procedure

#### 3.2.3.2.1 Submission of an Application

A person in need of protection may submit an asylum application at a French diplomatic or consular representation abroad, either in her country of origin or in a third country. The competence of the representation is not strictly regulated, and therefore the procedure followed will depend on several factors, such as the characteristics of the specific case and the country in which the application is lodged.<sup>93</sup>

#### 3.2.3.2.2 Processing<sup>94</sup>

An essential feature of the French system is that it operates on two, formally separate tiers. The first tier is the “asylum visa” procedure, by which access to territory is requested. Once this request is granted, and the applicant enters the territory, she formally applies for asylum, and thus enters the second tier. Hence, the “asylum visa” procedure is formally separated from the refugee status request.

With regard to the first tier, the French representations abroad have been given a broad margin of appreciation in the visa field.<sup>95</sup> The competence of the representation is therefore quite extensive. It has the power to decide whether an asylum request should be forwarded to the Ministry of Foreign Affairs in France, as it may also refuse to issue a visa, despite a positive initial visa decision from the French authorities, if circumstances have changed after the initial visa decision was taken.

It is not possible for an applicant to be protected at the French diplomatic or consular representation while her application is being processed. She may, however, be transferred to France before her application has been decided upon, if she is in need of immediate protection. Whether such a transfer should take place will be decided upon by the Ministry of Foreign Affairs.

After a positive initial visa decision has been reached, the French representation will normally issue an “asylum visa” (*visa au titre de l’asile*). The “asylum visa” will usually be in the form of a regular long-term or short-term visa, one reason being not to attract unnecessary attention from the authorities in the country where the application was lodged. In case a long-term visa has been issued, it gives the applicant the right to stay in France even if she does not proceed with the asylum application once in France, or if her asylum application is rejected. The applicant will enjoy precisely the same rights as anyone else in possession of a long-term visa.

Once the applicant has entered France, she can move on to the – formally separate – second tier by filing an asylum application. It will be decided upon either by the French Protection Office for Refugees and Stateless Persons (OFPRA) or by the Ministry of Interior, depending on the kind of protection required. OFPRA decides on the grant of refugee status, while the Ministry of Interior decides on the grant of territorial asylum.

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Statement by the Administrative Judge Ngako Jeuga. CE 28 févr. 1986.

### 3.2.3.2.3 Appeal

An appeal against a negative initial visa decision may be lodged with the Appeal Commission. The procedure applicable differs from the procedure in cases where an asylum application has been submitted within France or at its borders. The appeals procedure is regulated by Decree No 2000-1093 of 10 November 2000, which established an Appeal Commission handling refusals of any kind of visas to enter France. An appeal should be submitted within two months from the time when the applicant was notified of the rejection of her visa application. The decision through which a visa is refused is given orally to the applicant. She may however request to have the decision in writing as well. The fact that a negative visa decision is normally not motivated makes an appeal rather complicated.<sup>96</sup>

The composition of the Appeal Commission and its competences are regulated in Decree n° 2000-1093 of 10 November 2000<sup>97</sup> and in a Statement of 16 November 2000.<sup>98</sup> The Commission is an organ under the Ministry of Foreign Affairs. Its chairman is chosen among former heads of diplomatic and consular representations. Furthermore, the Commission is composed of one member with a judicial background, one member representing the Minister of Foreign Affairs, and one member representing the Minister in charge of issues of population and migration. All members are appointed for a period of three years. The diplomatic and consular representations, as well as the Ministry of Foreign Affairs, are obliged upon request to provide the Commission with all the information necessary in order to reach a decision on the appealed application. The Commission may either reject the appeal or recommend to the Minister of Foreign Affairs that the visa applied for should be issued.<sup>99</sup>

In addition to lodging an appeal with the Appeal Commission, an applicant whose application has been refused may also use the ordinary administrative remedies. One such remedy is that she may approach the head of the representation with a request for reconsidering the decision (*recours gracieux*). Another remedy is to address the Minister of Foreign Affairs in writing with a request to change the decision (*recours hiérarchique*). Finally, it is possible to turn to the State Council, which can assess the decision of the administration (*recours contentieux*).<sup>100</sup>

The ordinary appeals procedure for asylum applications will apply for negative decisions on asylum applications that have been submitted after the applicant arrived in France.<sup>101</sup>

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<sup>96</sup> UNHCR BO Paris, supra note 91. The fact that visa decisions are normally not motivated is an exception to the rule stated in law No 79-587 of 11 July 1979 “relative à la motivation des actes administratifs et à l’amélioration des relations entre l’Administration et le public”. For the following categories this exception does not apply, and a motivation is required: visas sought by persons who have family members that are French citizens, student visas, visas sought by persons registered in the Schengen Information Systems or by a persons for family reunion purposes. In these cases the decisions are motivated. The State Council has concluded that it is not in contradiction with France’s obligations under ECHR not to motivate visa decisions (CE, 13 nov. 1996, No 127301, Rholami).

<sup>97</sup> Décret N° 2000-1093 du 10 novembre 2000, Journal Officiel de la République Française du 11 novembre 2000.

<sup>98</sup> Arrête du 16 novembre 2000, Journal Officiel de la République Française du 19 novembre 2000.

<sup>99</sup> Supra note 97.

<sup>100</sup> UNHCR BO Paris, supra note 91

<sup>101</sup> Source: Information by the UNHCR Branch Office in Paris, received on 9 October 2001.

### 3.2.3.3 *Statistics*

There are no statistics available on the French Protected Entry Procedure. A reason could be that asylum visas are usually given in the form of ordinary long-term or short-term visas.<sup>102</sup>

The UNHCR Branch Office in Paris has requested the French authorities to be more generous in issuing ‘asylum visas’, as it might be a way of preventing unauthorised entry and trafficking in human beings.

### 3.2.3.4 *Evaluation of the French Model*

The French procedure cannot be fully assessed due to the withholding of essential information by the authorities. The emerging picture reflects a relatively informal procedure, allowing for a considerable margin of discretion with the French representations. The lack of transparency also strikes against protection seekers. A consequence of this might be that people in need of protection refrain from submitting an asylum request at a French representation, as it might seem a hopeless project.<sup>103</sup>

A number of inclusive features can be made out, however. First, the procedure extends not only to third countries, but also to countries of origin. Second, the French system diminishes the risks taken by the applicant by allowing her entry before asylum determination has been completed. In fact, the “asylum visa” procedure is formally separated from the refugee status request. This makes the procedure less complicated and accessible to more people in need of protection. The “asylum visa” does not give a right to refugee status, only a right to stay and work<sup>104</sup> (or study) in France, as well as the opportunity to proceed with the asylum application while in France. Third, the fact that visas are not marked out as protection-related visas is a further benefit for the applicant, who might have good reasons to collude the motive of emigration to officials of the country where the representation is situated. Fourth, it remains a positive feature that an appeals procedure is foreseen. However, the fact that decisions are not motivated detracts from the value of the appeals system.

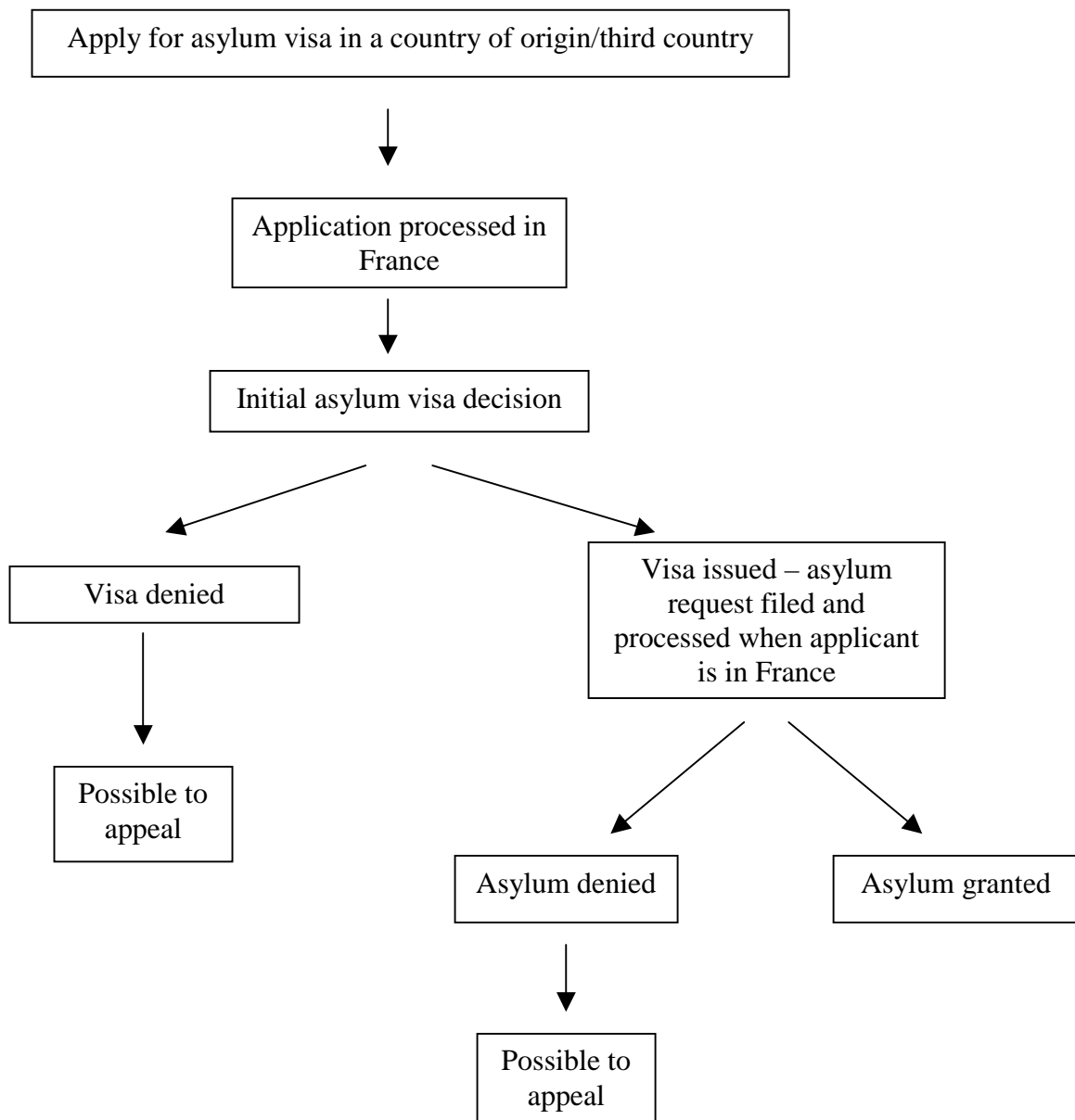
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<sup>102</sup> UNHCR BO Paris, supra note 91.

<sup>103</sup> Ibid.

<sup>104</sup> The right to work only applies to persons in possession of a long-term visa.

### 3.2.3.5 *The French Model at a Glimpse*



### 3.2.3.6 *Explanation of the French Model*

1. According to the French model, an application for asylum visa may be lodged at a French diplomatic or consular representation, both in a country of origin and in a third country.
2. An initial decision will be taken on whether an asylum visa should be issued. If the request for asylum is accepted, an “asylum visa” will be issued.
  - a) An asylum visa is denied

It is possible to appeal a negative decision on an asylum visa.

b) An asylum visa is issued

If an asylum visa is issued, the applicant may enter France.

3. After entering French territory, the applicant files an asylum claim. The application will be forwarded to and processed in France, either by OFPRA (in refugee determination cases) or by the Ministry of Interior (in territorial asylum cases).
4. The applicant may continue the asylum procedure when she has arrived in France. However, if the asylum visa issued for the transfer to France is a long-term visa, the applicant may stay in France on the same conditions as any other holder of such a visa. This means that she does not have an obligation to continue the asylum procedure.

a) Asylum granted

The applicant may stay in France

b) Asylum denied

It is possible to appeal a rejection of an asylum application following the ordinary rules for appeals in asylum cases.

Despite a denial, it is possible for the applicant to stay on in France if the visa she has been issued allows it.

### 3.2.4 Italy

It is not possible to apply for asylum at Italian diplomatic or consular representations abroad.<sup>105</sup> However, a legislative proposal relating to a Protected Entry Procedure has been discussed at some length in parliament, and, therefore, it is of interest to include Italy in the present country analysis.

Apart from the discussions on the proposals reflected below, it should be recalled that applications have been exceptionally received at Italian representations abroad at least on two occasions. The first occasion was reception in the mid-seventies at the Italian Embassy in Chile, and the second occasion was reception in 1990 at the Italian Embassy in Tirana, Albania.<sup>106</sup>

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<sup>105</sup> Liebaut, F, *supra* note 40, p. 169.

<sup>106</sup> IGC, *Report on Asylum Procedures. Overview of Policies and Practices in IGC Participating States*, 1997, p. 219, and Questionnaire response by UNHCR Branch Office in Rome, received on 8 October 2001.



### 3.2.4.1 Legislation

The Italian Aliens Act<sup>107</sup> presently in force does not provide for a possibility to apply for asylum at Italian representations abroad. However, a draft law including a provision on a Protected Entry Procedure was up to discussion in the Italian Parliament during the legislative period that came to an end in March 2001. The text of two slightly different proposals is presented below.

*Proposal 1: Senato – Disegno di legge 203 (testo presentato)*<sup>108</sup>

*Art.3.  
(Procedura)*

1. La domanda d'asilo é presentata:
  - a) ...
  - b) ...
  - c) alla rappresentanza diplomatica o consolare italiana nello Stato di cittadinanza o dimora nonché nello Stato di transito;
  - d) ...

*Proposal 2: Progetto di legge –N. 6018. Proposta di legge.*<sup>109</sup>

*Art. 10.  
(Uffici competenti a ricevere la domanda di asilo)*

1. La domanda di asilo può essere presentata:
  - a) presso la sede diplomatica o consolare italiana;
  - b) ...
  - c) ...

### 3.2.4.2 The Proposal

When first introduced, the draft law on asylum proposed to parliament during the legislative period ending March 2001 provided for a Protected Entry Procedure. Italian diplomatic and consular representations abroad were to be authorised to receive asylum applications from persons in need of protection. Article 3 of *Proposal 1* states that an asylum claim may be submitted at an Italian diplomatic or consular representation in the state of citizenship or residence, as well as in a transit

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<sup>107</sup> Aliens Act of 28 February 1990 (Law no. 39 “Martelli law”). Law of 19 February 1998 on immigration replaces all provisions of the Martelli law, except those on asylum procedure.

<sup>108</sup> *Art. 3. (Procedura):* 1. Asylum claims are submitted: [...] c) at the Italian diplomatic or consular representations in a state of citizenship or residence, as well as in a transit state [Translation commissioned by the authors]. Senato – Disegno di legge 203 (testo presentato); available at <<http://www.parlamento.it/att/ddl/a0203p.htm>>, accessed on 23 July 2001.

<sup>109</sup> *Art. 10. (Offices competent to receive asylum claims):* 1. An asylum claim may be submitted: a) at an Italian diplomatic or consular representation [Translation commissioned by the authors]. Rifugiati News, available at <<http://www.stranieriinitalia.it/rifugiati/ddl.html>>, accessed on 23 July 2001.

state. *Proposal 2* affirms the material content of *Proposal 1*, without, however, specifying in which countries an application may be submitted (country of citizenship, residence and/or transit state). None of the proposed provisions were included in the final version of the new Italian asylum law.

Earlier attempts to introduce a Protected Entry Procedure have been described in literature.<sup>110</sup> One proposal, drafted by a group of experts in the mid-nineties simply allowed for asylum applications to be submitted at Italian diplomatic or consular representations abroad. The representations would have been obliged to transmit records on the applications to the Central Commission for the Determination of the Right to Asylum.<sup>111</sup> In cases where the Central Commission would reject the application, this decision could be appealed to the Administrative Courts, organised in two instances, which would have had to decide upon the asylum application within a time limit of 120 days.

### 3.2.4.3 Comments on the Italian Proposal

As the Italian proposal never received the status of valid law, comments can be limited to a minimum. First, it is of interest that the earlier proposal would have integrated a Protected Entry Procedure into the regular asylum procedure without any far-reaching modifications, retaining the full appeal options to a court of law. Second, the later proposal appeared to embrace an inclusive approach, as it covered both countries of origin and third countries.

### 3.2.5 The Netherlands

Asylum applications in the technical sense can no longer be filed at Dutch diplomatic representations. However, it remains possible to apply for an entry visa (*machtiging tot voorlopig verblijf*) at Dutch diplomatic or consular representations abroad with a view to being admitted to the Netherlands as a refugee (henceforth referred to as an asylum visa). Such applications for asylum visas can be submitted only in third countries, not in countries of origin. Upon arrival in the Netherlands, the applicant will have to pursue her claim within the formal asylum procedure. An appeal may be lodged against a rejection of an application for an asylum visa as well as against a rejection of the formal asylum application pursued in the Netherlands.

One should be aware that a broader political debate on reception in the region is taking place in the Netherlands at the time of writing. One proposal widely supported is to increase the financial support to UNHCR, which would allow the agency to carry out more effective protection in the region. Some political parties go further and propose that UNHCR should also take on the task of screening resettlement candidates. Two parties explicitly suggest that the ultimate goal is to entirely transfer asylum determination procedures to the region.<sup>112</sup>

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<sup>110</sup> Laura Lo Prato, *Present situation of refugees in Italy*, AWR-Bulletin 35 (1997), p. 109.

<sup>111</sup> The Central Commission for the Determination of the Right to Asylum would be the first instance deciding on the applications. It would be composed of three members: one judge, one member of the Civil Service and one representative of an NGO protecting human rights of refugees. *Supra*, p. 109.

<sup>112</sup> *Arguments regarding reception in the region, compiled from Dutch election programmes*, in Working Group on International Refugee Policy, *Reception and Processing in the Region of Origin. Reader*, 22 February 2002, The Hague.

### 3.2.5.1 Legislation

Until 1994, Article 52 of the Dutch Aliens Ordinance explicitly provided for a possibility to lodge an asylum application at a Dutch diplomatic or consular representation abroad. As of 1 January 1994, this provision was abolished. Generally, however, the named provision was not regarded as constitutive of the possibility to apply for asylum at Dutch representations abroad.<sup>113</sup>

Article 3.108 of the Aliens Ordinance prescribes that a request for asylum has to be filed in designated places in the Netherlands, i.e. either within the Netherlands or at its borders. *E contrario*, it is no longer possible to apply for asylum abroad.<sup>114</sup>

The procedure allowing persons in need of protection to submit an application for an asylum visa at a Dutch representation abroad has, however, existed in practice at least since 1990.<sup>115</sup> The provisions governing the ordinary visa procedure are applicable in those cases as well. The Dutch Aliens Act is not used in this procedure. The Dutch Aliens Circular 2000 does, however, include a paragraph explicitly mentioning that an alien who is not in the Netherlands and who is outside her country of origin may submit a visa request at a Dutch representation that will be assessed according to the Refugee Convention and its 1967 Protocol.<sup>116</sup> Although the option to apply for asylum from abroad has been abolished in the Aliens Act, the Protected Entry Procedure is still practiced by granting asylum visas in accordance with the Aliens Circular.

### 3.2.5.2 Procedure

#### 3.2.5.2.1 Submission of an Application

An application for an asylum visa may be lodged at a Dutch diplomatic or consular representation abroad, but only in a third country, not in the country of origin. The request will not be considered in the following three cases:

- The applicant is present in a third country and she is not able to convince the Dutch representation located there that the authorities will not or cannot protect her. This is always considered to be the case if that country is an EU Member State, or if this country is considered a safe country by the Dutch authorities.<sup>117</sup>
- UNHCR or United Nations Development Programme (UNDP) is represented in the third country where the application is lodged. According to the Dutch Ministry of Foreign Affairs, there will be no *refoulement* of the applicant in such cases.<sup>118</sup> It should be noted, though, that UNHCR can request the Dutch government to consider resettlement for the person in question.

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<sup>113</sup> Spijkerboer, T.P. and Vermeulen, B.P., *Vluchtelingenrecht*, Nederlands Centrum Buitenlanders, Utrecht 1995, pp. 346-7.

<sup>114</sup> Information provided by Professor Thomas Spijkerboer, received on 17 December 2001.

<sup>115</sup> Source: Questionnaire response by the UNHCR Office in The Hague, received on 27 August 2001.

<sup>116</sup> Part C, chapter 5, paragraph 25 of the Dutch Aliens Circular 2000; Source: Information by the UNHCR Office in The Hague, received on 5 March 2002.

<sup>117</sup> UNHCR The Hague, supra note 115.

<sup>118</sup> *Ibid.*; See also IGC, supra note 106, p. 245.

- The applicant is not willing to present herself in person to the Dutch diplomatic or consular representation and to explain her reasons for applying for an asylum visa.<sup>119</sup>

### 3.2.5.2.2 Processing

When a request for an asylum visa has been submitted, the Dutch representation concerned will gather the most relevant information from the applicant.<sup>120</sup> No special application form or questionnaire is used for the request. The representation staff will conduct an interview with the applicant. The procedure for the interview differs from the procedure applied in the territorial asylum procedure within the Netherlands. The interview is conducted in Dutch as the official language, and the Dutch representation will not pay for an interpreter. Nor will legal assistance be provided for the applicant. If representation staff feel incapable to ask relevant questions in the interview, the asylum visa application with the available information will normally be sent to the Immigration and Naturalisation Service (IND) in the Netherlands with a request for assistance. The IND will then assist by suggesting what questions should be asked and by giving advice on what information is relevant.<sup>121</sup>

After the interview, the asylum visa application and any additional documentation is sent by the Dutch representation through the Bureau of Asylum Affairs at the Ministry of Foreign Affairs to the IND. The regional IND office ZUID West in Rijswijk examines the application and decides whether the applicant should be admitted to the Netherlands as a refugee. This decision on the asylum visa application will be forwarded to the applicant by the Dutch representation where the application was submitted. The decision will be based on the Geneva Convention and its Protocol, as well as on all other relevant international conventions to which the Netherlands is a party. Where a negative decision is rendered, the applicant will be informed of the possibility to appeal.<sup>122</sup>

A limited degree of protection to the applicant might be afforded by the Dutch representation while her application is being processed. Sometimes the asylum seeker is given the telephone number of the Dutch diplomatic or consular representation for emergency calls. However, there is no information whether this practice is exceptional or part of the normal proceedings.<sup>123</sup>

Where the decision by the IND on the asylum visa application is positive, the Dutch representation will be requested to issue a visa to the applicant.<sup>124</sup> The representation does not have the authority to refuse issuing a visa after it has been requested to do so by the IND. However, if new facts have emerged after the interview, but before the decision has been passed on to the applicant, the representation will have to share these new facts as soon as possible with the IND, and has to ask whether a new decision is necessary.<sup>125</sup>

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<sup>119</sup> UNHCR The Hague, supra note 115.

<sup>120</sup> IGC, supra note 106, p. 245.

<sup>121</sup> UNHCR The Hague, supra note 115.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> IGC, supra note 106, pp. 245-6.

<sup>125</sup> UNHCR The Hague, supra note 115.

The procedural aspects of the asylum request will be dealt with after the applicant's arrival in the Netherlands.<sup>126</sup> This means that the applicant has to sign the asylum request as soon as she has arrived. The applicant will be interviewed and sent to a reception centre, while the asylum application will be sent to the IND for assessment. If nothing has changed in the applicant's situation, she will be granted asylum and allowed to remain in the Netherlands.<sup>127</sup>

### 3.2.5.2.3 Appeal

An appeal may be lodged against a negative decision by the IND on both the asylum visa request and on the formal asylum request. The appeal on the asylum visa decision shall be submitted to the Minister of Foreign Affairs within four weeks after the IND has reached its decision. If the appeal has formal faults (e.g. a missing translation), the applicant shall be informed of these. The Minister of Foreign Affairs will allow the applicant some time, usually two weeks, to amend the faults. After that, the Minister will decide upon the appeal. The decision of the Minister of Foreign Affairs, as well as the decision on the formal asylum request taken by the IND after the applicant has been admitted to the Netherlands may be appealed to a court.<sup>128</sup> Appeals on visa decisions are dealt with under the ordinary administrative law of the Netherlands (*Algemene wet bestuursrecht*).

### 3.2.5.3 Statistics

The number of asylum visa applications lodged at Dutch diplomatic and consular representations is relatively limited.<sup>129</sup>

	1998	1999	2000
<b>Number of asylum visa applications lodged at a Dutch representation abroad</b>	122	139	141
<b>Number of positive decisions</b>	9	8	5

### 3.2.5.4 Evaluation of the Dutch Procedure

At face value, the Dutch approach seems to rest on a clear-cut separation of migration control and refugee protection, as the way to protection is split into a stage of applying for a visa, and a stage of applying for asylum, the latter formally only starting when the applicant sets her foot on Dutch soil. In reality, both are intertwined, and the preponderance of protection considerations is reflected by the fact that the INS handles the material core of the visa application. The degree of formalisation has to be considered as high. This notwithstanding, the move of abrogating the possibility to file asylum claims in the technical sense at embassies must be regarded as a collusive manoeuvre.

<sup>126</sup> IGC, supra note 106, pp. 245-6.

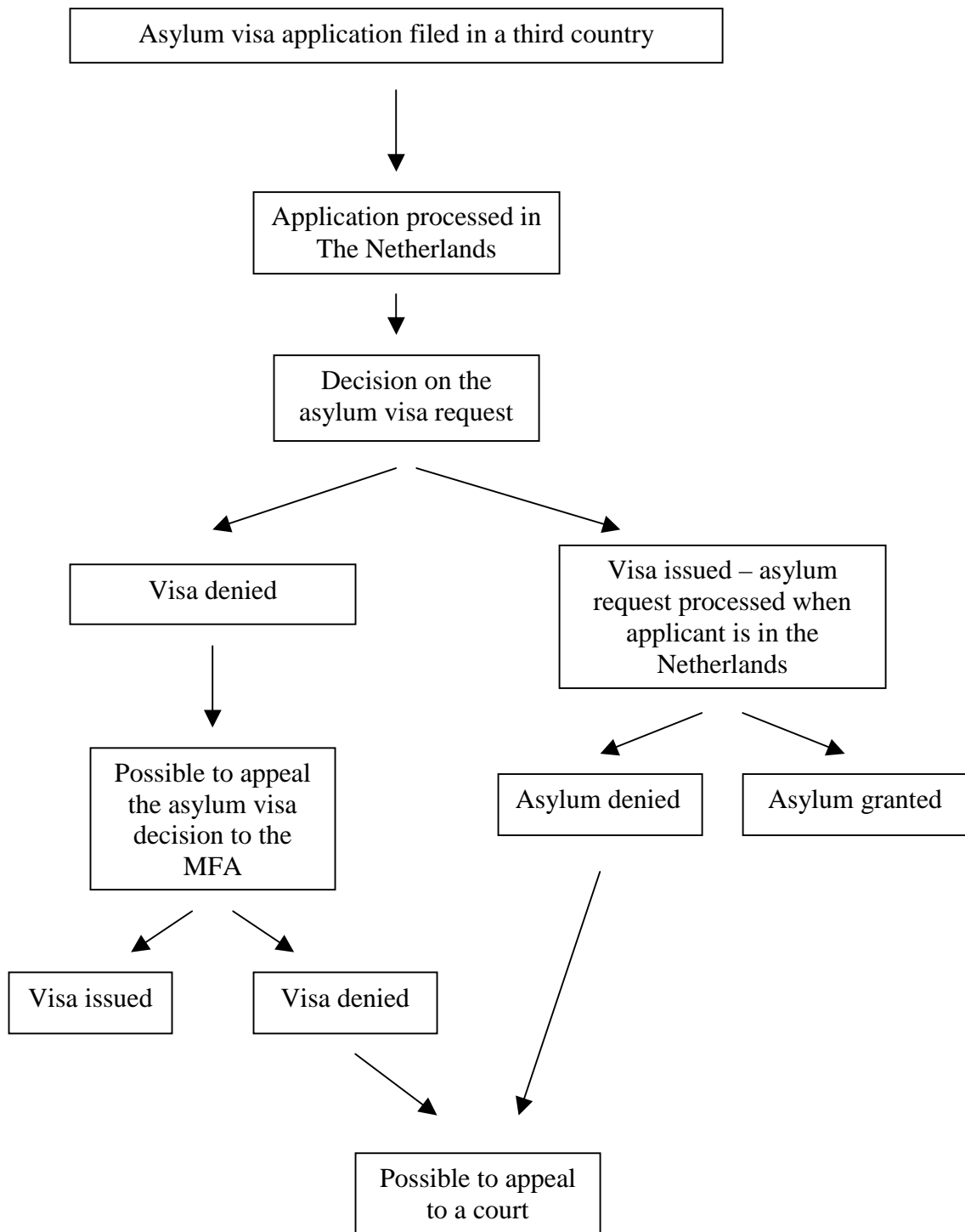
<sup>127</sup> UNHCR The Hague, supra note 115.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid. Numbers before 1998 are not available, because cases under the procedure were not registered in the IND registration system at that time. See also Liebaut, F, supra note 40, p. 210.

Considering the exclusionary features of the Dutch system, the named criteria (no protection available by local authorities or by UNHCR or UNDP, personal presence of the applicant) represent a first filter. While the criterion relating to protection offered by local authorities is not unreasonable, much hinges on how it is handled in concrete cases. The mere presence of UNHCR or UNDP appears to remove protection into a hypothetical domain, as it is commonly known that the protection options of international agencies (e.g. by offering resettlement) are far from meeting the actual demand. On the procedural side, the Dutch practice illustrates the fact that Protected Entry Procedures will not offer the same level of procedural safeguards as territorial procedures (absence of interpretation and legal assistance). On the other hand, it should be noted that a multi-level appeals system is at the disposal of the applicant. As a reflection of exclusive features, it should be noted that the procedure extends to third countries only. At any rate, statistics indicate that the Dutch system is operating in the domain of the exceptional, offering protection only to an elite of applicants.

3.2.5.5 *The Dutch Model at a Glimpse*



### **3.2.5.6 Explanation of the Dutch Model**

1. According to the Dutch model it is possible to apply for an entry visa (asylum visa) with a view to be admitted as a refugee at a diplomatic or consular representation in a third country, but not in the applicant's country of origin.
2. The application will be forwarded to and processed by the Immigration and Naturalisation Service (IND) in the Netherlands.
3. IND will decide whether an asylum visa should be issued. Such a visa will be issued if it is likely that asylum will be granted.

- a) An asylum visa is denied

It is possible to appeal a negative decision on the asylum visa to the Minister of Foreign Affairs (MFA). A negative decision of the MFA may be further appealed to a court.

- b) An asylum visa is issued

If an asylum visa is issued, the applicant will be transferred to the Netherlands. Once she has arrived she will be required to continue with the formal asylum procedure.

It is possible to appeal a negative decision on the asylum request to a court.

### **3.2.6 Spain**

It is possible to apply for asylum at a Spanish diplomatic or consular representation, but only in third countries, not in countries of origin. If the person applying for asylum at the representation is in an extreme risk situation, she may be urgently transferred to Spain while her application is being processed. A negative decision on the asylum request, as well as a negative decision on the transfer request, may be appealed.

During the drafting process of the implementation regulation of the Spanish Aliens Law, UNHCR suggested the inclusion of a provision that would authorise the issuing of visas to persons who are in a risk situation in their country of origin. Such a provision was, however, not included in the implementation regulation finally adopted.<sup>130</sup> Presently, a change of law or practice with regard to the Protected Entry Procedure is not envisaged.

#### **3.2.6.1 Legislation**

The Protected Entry Procedure was first established in 1984 through Law 5/1984 Regulating Refugee Status and the Right to Asylum. The provisions regulating the Spanish procedure allowing

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<sup>130</sup> Source: Questionnaire response by the UNHCR Branch Office in Madrid, received on 4 September 2001.



for asylum applications to be submitted at the diplomatic or consular representations abroad can be found in Law 5/1984 as amended by Law 9/1994, as well as in Implementing Decree of Law 5/1984 as amended by Law 9/1994 and in Royal Decree 864/2001 Approving the Implementation Regulation of Law 4/2000.

***Law 5/1984 as modified by law 9/1994<sup>131</sup>***

*Article 4. Submitting the request for asylum.*

...

4. Requests for asylum submitted before a Spanish Embassy or Consulate are to be processed by the Ministry of Foreign Affairs.

...

***Implementing Decree of Law 5/1984 as amended by Law 9/1994<sup>132</sup>***

*Article 4. Where to submit the request for asylum.*

1. Any alien who wishes to be granted asylum in Spain must submit his request for asylum to any of the following governmental agencies:

...

e) The Diplomatic Missions or Consular Offices of Spain located abroad.

2. When the Representative of the UNHCR in Spain requests that the Spanish Government urgently admit a refugee or refugees recognised under its mandate, because the refugee(s) is in a position of high risk inside a third country, the Ministry of Foreign Affairs, acting through the Spanish Diplomatic Mission, Consular Office or diplomatic mission of another country acting in cooperation with Spain, will avail itself of any means necessary, of visas, official travel documents, safe-conducts or any other arrangements deemed necessary, according to the instructions given by the State Office of Consular Affairs, so as to facilitate the individual's travel to Spain under the terms of article 16 and 29.4 of the Regulation herein.

*Article 6. Sending the request of asylum on to the Office for Asylum and Refuge and informing the organisation and entities concerned.*

...

2. Requests for asylum submitted abroad are to be processed by the Office for Asylum and Refuge through the Ministry of Foreign Affairs, and must be accompanied by the proper report from the Diplomatic Mission or Consular Office.

...

*Article 16. Allowing the asylum-seeker to travel to Spain.*

1. If the individual concerned is at risk and has submitted his request for asylum before a Diplomatic Mission or Consular Office in a third country, or if he falls under the conditions stipulated in section 2 of article 4 herein, the Office for Asylum and Refuge may submit the case to the Interministerial Eligibility Commission on Asylum and Refuge, so as to provide authorization for the asylum-seeker to travel to Spain while his file is being processed. Before doing so, the asylum-seeker must obtain the proper visa, safe-conduct of authorization for entry, which will be processed urgently.

2. The Office for Asylum and Refuge will report the decision of the Interministerial Eligibility Commission to the Ministry of Foreign Affairs and to the Head Office of the Police, which will send the information on to the proper border point.

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<sup>131</sup> English translation as provided by the UNHCR Branch Office in Madrid.

<sup>132</sup> Ibid.

3. The asylum-seeker whose travel to Spain has been authorised because he is in a situation of risk must be informed of the rights he is entitled to under section 2 of chapter I of the Regulation herein, and must be informed that he must exercise these rights within one month of his entry into Spanish territory.

4. The competent office of the Ministry of Social Affairs must adopt the appropriate measures so that the asylum-seeker may be received by the public or private institution appointed for that purpose.

*Article 24. General rules for administrative processing.*

...

4. The maximum time period allowed for administrative processing of the file is six months. If this time period expires without an explicit decision on the request for asylum, it is implied that the request has been rejected, without prejudice to the obligation of the Administration to hand down an explicit decision. If administrative processing is carried out through a Diplomatic Mission or Consular Office, the time period of six months will be counted from the time at which the request is received by the Office for Asylum and Refuge.

...

*Article 28. Notification of the decision.*

...

3. If the request was submitted abroad or if an appeal was made on the request while the asylum-seeker was in another country, he will be notified through the competent Diplomatic Mission or Consular Office.

*Article 29. Consequences of the granting of asylum.*

...

4. If the asylum-seeker requested asylum at a Spanish Mission or Consular Office, this office must issue a visa or authorisation to enter and travel to Spain to the individual concerned, who must also be given a travel document, if necessary, under the terms provided for in article 16 herein.

***Royal Decree 864/2001 Approving the Implementation Regulation of Law 4/2000***<sup>133</sup>

*Art. 8.*

...

5. The Spanish diplomatic missions and consulates can issue an asylum visa:

- for persons whose applications for refugee status filed in Diplomatic missions or consulates have been recognised by the government;
- for refugees recognised by third countries, but for whom Spain has accepted the transfer of responsibility and accepts to provide residence to them;
- for asylum seekers who have applied for refugee status in Spanish Representations abroad, when due to risk situation it is advisable to transfer the asylum seeker on an urgent basis to Spain.

All provisions of the Asylum Law,<sup>134</sup> including provisions applicable in the ordinary asylum procedure which do not explicitly mention asylum applications lodged at Spanish representations abroad, must be observed and applied *mutatis mutandis*. Consequently, provisions concerning issues as legal assistance, translators, time limits for appeals, communication of decisions, and the time limit for additional evidence shall also be applied in cases where the applications were submitted abroad.<sup>135</sup>

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<sup>133</sup> Ibid.

<sup>134</sup> Law 5/84, Law 9/94 and Royal Decree 203/1995 approving the implementation regulation of law 5/1984 Regulating Refugee Status and the Right to Asylum, and Royal Decree 864/2001.

<sup>135</sup> UNHCR BO Madrid, supra note 130.

### 3.2.6.2 Procedure

#### 3.2.6.2.1 Submission of an Application

Asylum applications may be submitted at Spanish diplomatic or consular representations abroad, provided that the applicant is in a third country. The asylum legislation in force is based on a principle of extraterritoriality. Hence, an asylum application submitted at a Spanish diplomatic or consular representation in the applicant's country of origin would not be accepted.<sup>136</sup> Asylum applications are accepted in a country of origin only for family reunification purposes.<sup>137</sup>

#### 3.2.6.2.2 Processing

Normally an application for asylum lodged in the Protected Entry Procedure is sent to the Spanish Ministry of Foreign Affairs (MFA) together with a report from the representation concerned. The MFA then forwards the case to the Office of Asylum and Refuge (OAR) of the Ministry of Interior.<sup>138</sup> The application will be processed by the OAR according to the rules applied in the traditional asylum procedure. A decision on the application shall be reached within six months from the moment the application was received by the OAR.<sup>139</sup>

The applicant shall be given asylum information translated into a language she understands, as well as an asylum application form, which will be identical to that provided to protection seekers applying within Spain. The applicant may not always be interviewed. The decision will mainly be based on the application form and the report forwarded by the representation to the OAR. The Spanish representation does not offer protection for the applicant while her application is being processed and she is awaiting the decision of the OAR.<sup>140</sup>

#### 3.2.6.2.3 Advance Transfer of the Applicant

Persons applying for asylum at Spanish representations abroad are normally not allowed to travel to Spain before they have been granted asylum. Exceptions can be made if the applicant is in a risk situation requiring an urgent transfer to Spain.<sup>141</sup> According to the practice of the Interministerial Eligibility Commission on Asylum and Refuge (CIAR), a risk situation may occur when agents of persecution from the applicant's country of origin are in the third country and that country is unable to protect the applicant. As a consequence, her life and security may be in danger.<sup>142</sup>

Hence, under exceptional circumstances, the CIAR at the request of the OAR may authorize the protection seeker to travel to Spain while her application is being processed. In such cases, the applicant will be interviewed by staff from the Spanish representation. After receiving the documentation from the Ministry of Foreign Affairs, the OAR will assess the case and submit it to

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<sup>136</sup> IGC, *supra* note 106, pp. 291-2.

<sup>137</sup> UNHCR BO Madrid, *supra* note 130.

<sup>138</sup> See Royal Decree 203/1995, Article 6.2.

<sup>139</sup> UNHCR BO Madrid, *supra* note 130.

<sup>140</sup> *Ibid.*

<sup>141</sup> Liebaut, F, *supra* note 40, p. 265.

<sup>142</sup> UNHCR BO Madrid, *supra* note 130.

the CIAR. If it is concluded that the case is one of extreme urgency, the CIAR will authorize the transfer of the person concerned to Spain. Transfer will take place as soon as possible, and the processing of the application will continue after the applicant has been transferred.<sup>143</sup>

When the OAR considers that a case does not deserve an urgent transfer to Spain, the OAR will present it to the CIAR, indicating its views on the issue of transfer. The decision on advance transfer will then be taken by the CIAR.<sup>144</sup>

It is worth noting that the procedure deciding whether the applicant shall be transferred in advance is a parallel procedure, and will neither halt nor impact on the asylum determination procedure. Hence, even if the final decision on the transfer in advance is negative, the assessment of the asylum application will continue at the OAR, while the applicant remains in the third country. Therefore, a negative decision on the transfer issue does not mean that asylum will be denied as well.

#### 3.2.6.2.4 Appeal

Appeals can be lodged at a Spanish diplomatic or consular representation if a negative decision is reached on the asylum request.<sup>145</sup> For such appeals, the same procedure as in the ordinary asylum procedure will apply. This possibility was introduced as a safeguard in order to ensure that persons under the accelerated asylum procedure (conducted at the border or in-country) have the right to appeal or be communicated results of their proceedings even after expulsion.<sup>146</sup>

#### 3.2.6.3 Statistics

From 1998 to 2000, the number of persons who asked for asylum at Spanish diplomatic or consular representations was around 120 per year.<sup>147</sup> Approximately half of these applications were related to requests of family reunification. The number of applications lodged on family reunification grounds in countries of origin is not known.<sup>148</sup> The second half of the applications, not submitted on family reunification grounds, were submitted in third countries. Out of this second half of the applications, around eight persons finally received refugee status.

The option of advance transfer cannot be properly assessed due to lack of statistics.

In the past, most applications were lodged at representations in Cuba, Peru, Iraq, Iran and Vietnam. The Spanish representations currently receiving most applications are located in Colombia (for family reunion purposes) and Ecuador (mainly for Colombian and a few Peruvian asylum seekers). A few applications have also been lodged at representations in Buenos Aires, Ankara (some years

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> IGC, supra note 106, pp. 291-2.

<sup>147</sup> This section is based on information provided by UNHCR Bureau for Europe, Geneva.

<sup>148</sup> According to the UNHCR Branch Office in Madrid, some of them were submitted in countries of origin and others in third countries.

ago) and Yaoundé. Generally the recognition rate for applications lodged at Spanish representations is said to be high. In the present statistical environment, it is hard to substantiate this claim.

#### ***3.2.6.4 Evaluation of the Spanish Model***

The Spanish practice is thoroughly formalised and rests on a quite detailed normative basis and distribution of competencies. It is interesting to note that the emergence of the Protected Entry Procedure is partly based on the introduction of non-suspensive appeals in cases referred to safe third countries.

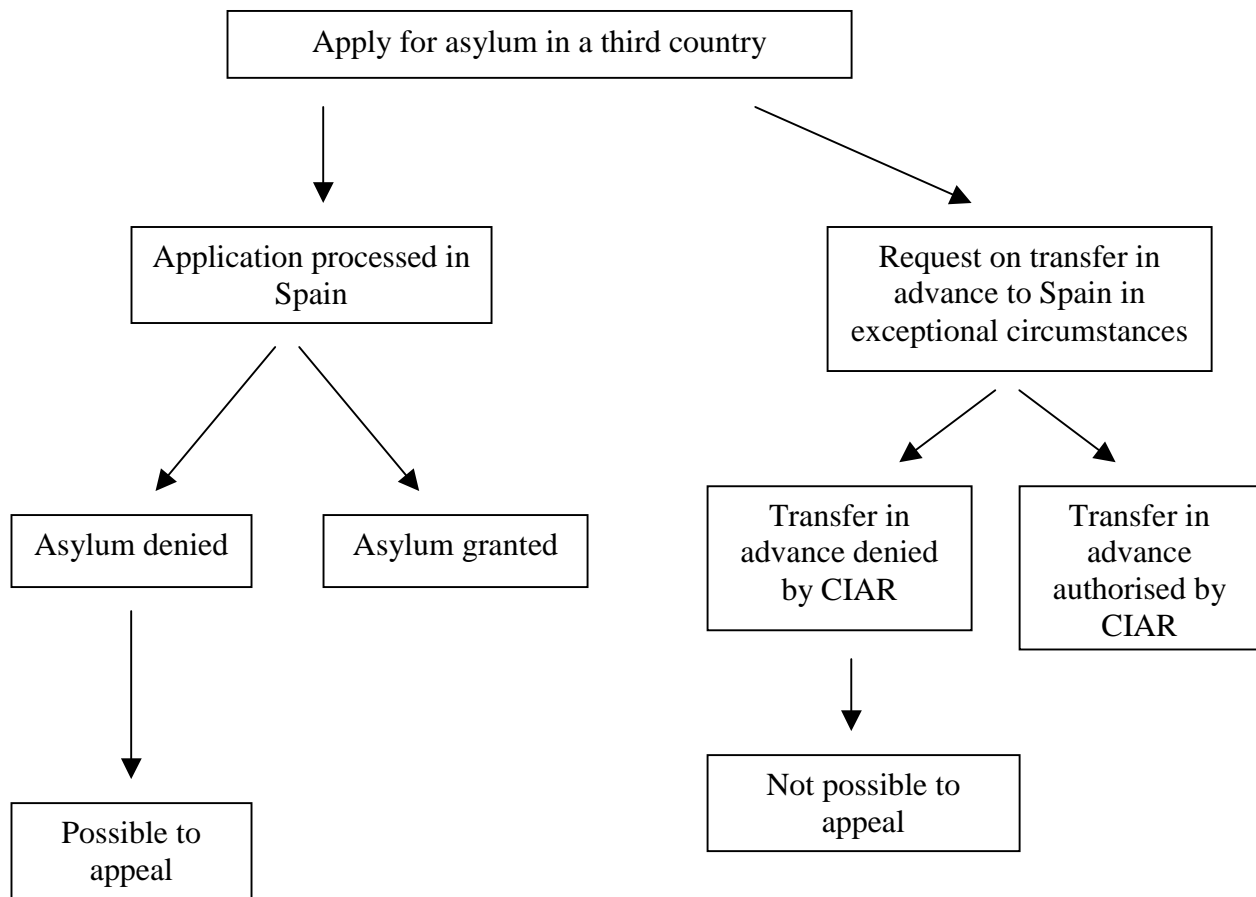
One exclusionary feature is that the Spanish model caters only for persons located in third countries. On the inclusionary side, the Protected Entry Procedure is fully integrated into the ordinary asylum procedure, and shares its characteristics. An appeal option is provided for the material decision on protection. In practice, lengthy processing appears to hamper the effectiveness of the Protected Entry Procedure through Spanish authorities. While UNHCR considers its involvement to be a positive feature, the protraction of single cases also drains its resources.<sup>149</sup>

The fast-track option for applicants at risk is an interesting feature of the Spanish model, which merits further study. The criteria (continued persecution and non-available local protection) appear to be legitimate, but this aspect of the model cannot be fully appreciated unless detailed information is made available.

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<sup>149</sup> UNHCR BO Madrid, supra note 130.

### 3.2.6.5 *The Spanish Model at a Glimpse*



### 3.2.6.6 *Explanation of the Spanish Model*

1. According to the Spanish model it is only possible to apply for asylum at a diplomatic or consular representation in a third country. In a country of origin, an application may be submitted for family reunification purposes only.
2. The application will be forwarded to and processed by the Office of Asylum and Refuge (OAR) in Spain. It will be processed under the ordinary asylum determination procedure.

In exceptional circumstances, an applicant may be transferred to Spain before CIAR has reached a decision on the asylum request. Decision-taking on this issue will not halt or impact on the asylum determination procedure.

The OAR will assess the request for transfer in advance of the applicant, and recommend a decision to the CIAR. The decision taken by the CIAR is not subject to appeal.

3. OAR will decide whether asylum should be granted to the applicant.
  - a) Asylum is granted

If asylum is granted, the applicant will be allowed to enter Spain (if the applicant has not been transferred already).

b) Asylum is denied

It is possible to appeal a negative decision on the asylum request. Such appeals may be filed at the Spanish representation abroad.

### 3.2.7 Switzerland

Asylum applications may be submitted at Swiss diplomatic or consular representations, both in countries of origin and in third countries. The applicant may be transferred to Switzerland before her application has been decided upon if she is in a risk situation. A rejection of the asylum application may be appealed.

A change of the present procedure allowing for asylum applications to be submitted at Swiss diplomatic or consular representations abroad is not discussed.<sup>150</sup>

#### 3.2.7.1 Legislation

The Swiss Protected Entry Procedure was formally established through the Swiss Asylum Law of 5 October 1979. In practice, however, the procedure had already been established in 1969, when a circular letter from the Federal Department of Justice and Police, containing principles and guidelines for the reception of refugees and for the asylum procedure, was communicated to the cantonal police and to the Swiss representations abroad. This circular letter also outlined the procedure applicable when an asylum application was submitted at a Swiss representation.<sup>151</sup>

The applicable provisions today are Article 20 of the Swiss Asylum Law of 26 June 1998 and Article 10 of Ordinance 1 of the Asylum Law. The latter regulates the procedure to be followed in cases when an asylum application has been submitted at a Swiss diplomatic or consular representation abroad. The former states that the asylum application and a report shall be transferred by the representation to the authorities in Switzerland. It also outlines the possibility to transfer the applicant to Switzerland before a decision has been reached on her asylum request.

#### *Asylum Law of 26 June 1998*

##### *Article 20*

##### *Asylgesuch aus dem Ausland und Einreisebewilligung*

- 1) Die schweizerische Vertretung überweist das Asylgesuch mit einem Bericht dem Bundesamt.
- 2) Das Bundesamt bewilligt Asylsuchenden die Einreise zur Abklärung des Sachverhalts, wenn ihnen nicht zugemutet werden kann, im Wohnsitz- oder Aufenthaltsstaat zu bleiben oder in ein anderes Land auszureisen.

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<sup>150</sup> Source: Questionnaire response by the UNHCR Liaison Office for Switzerland and Liechtenstein, received on 30 October 2001.

<sup>151</sup> Ibid.

- 3) Das Eidgenössische Justiz- und Polizeidepartement (Departement) kann schweizerische Vertretungen ermächtigen, Asylsuchenden die Einreise zu bewilligen, die glaubhaft machen, dass eine unmittelbare Gefahr für Leib und Leben oder für die Freiheit aus einem Grund nach Artikel 3 Absatz 1 besteht.

#### ***Ordinance 1 of the Asylum Law of 11 August 1999***

##### *Art. 10*

##### *Verfahren bei der schweizerischen Vertretung im Ausland*

- 1) Die schweizerische Vertretung im Ausland führt mit der asylsuchenden Person in der Regel eine Befragung durch.
- 2) Das Bundesamt bewilligt Asylsuchenden die Einreise zur Abklärung des Sachverhalts, wenn ihnen nicht zugemutet werden kann, im Wohnsitz- oder Aufenthaltsstaat zu bleiben oder in ein anderes Land auszureisen.
- 3) Die schweizerische Vertretung überweist dem Bundesamt das Befragungsprotokoll oder das schriftliche Asylgesuch sowie weitere zweckdienliche Unterlagen und einen ergänzenden Bericht, der ihre Beurteilung des Asylgesuchs enthält.

### **3.2.7.2 Procedure**

#### 3.2.7.2.1 Submission of an Application

Article 20 of the Swiss Asylum Law offers the possibility to apply for asylum at a Swiss diplomatic or consular representation both in a country of origin and in a third country.

#### 3.2.7.2.2 Processing

When an asylum application is submitted at a Swiss representation abroad, the staff at the representation will carry out an interview with the applicant. According to Article 10 of Ordinance 1 of the Asylum Law, the Swiss representation abroad shall transmit the records of the interview, the written asylum application, any other useful documentation, as well as a complementary report with the opinion of the representation on the asylum claim to the Federal Office for Refugees (FOR) in Bern.

FOR will then initially decide whether the applicant should be admitted to Switzerland and the asylum procedure continued thereafter. For admittance the applicant has to fulfil two criteria: she must be able to state convincing reasons for leaving her country of origin and she must be able to demonstrate previous ties to Switzerland.<sup>152</sup> If an applicant is at great risk FOR may allow her admission to Switzerland in advance provided that she neither can remain in her country of residence or presence, nor emigrate to another country.<sup>153</sup> After the applicant has been admitted to Switzerland, the ordinary asylum procedure will be followed.<sup>154</sup>

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<sup>152</sup> Liebaut, F, supra note 40, p. 295.

<sup>153</sup> See Article 20 (2) of the Asylum Law.

<sup>154</sup> Liebaut, F, supra note 40, p. 295.



In many cases, it might be dangerous for a person in need of protection to approach a foreign diplomatic or consular representation. Therefore discreet access to a Swiss representation may be facilitated by UNHCR or other organisations in situations when the asylum seeker feels that her life may be in danger if the authorities in the country find out that she has visited the embassy.<sup>155</sup>

Finally, it should be noted that the Swiss Ministry for Justice and Police can entitle Swiss representations to allow entry to applicants making credible claims that they are under an immediate threat to life and limb for a reason stated in the refugee definition.<sup>156</sup>

### 3.2.7.2.3 Appeal

A refusal of admission to Switzerland implies a concurrent rejection of the asylum application. An appeal may be lodged against such a refusal. The appeal shall be submitted to the Asylum Appeals Commission within 30 days after the applicant was notified of the rejection of her application.<sup>157</sup> The applicant may also lodge an appeal against a rejection of her asylum application once she is within Switzerland. In this case as well, the appeal should be directed to the Asylum Appeals Commission within 30 days.<sup>158</sup> The Commission has taken a number of decisions in Protected Entry Procedure cases that have been published.<sup>159</sup>

### 3.2.7.3 Statistics

The various stages of the Swiss procedure can be tracked by means of detailed statistics covering the period from 1995 to 2000.<sup>160</sup>

	1995	1996	1997	1998	1999	2000
<b>Number of asylum applications filed at representations abroad</b>	390	303	418	607	844	601
<b>Number of positive initial decisions on admission to Switzerland</b>	62	79	69	100	144	92
<b>Number of negative initial decisions on admission to Switzerland</b>	291	181	307	429	600	430
<b>Number of actual entries and subsequent asylum requests</b>	44	50	57	81	95	50
<b>Number of applications on admission to Switzerland pending</b>	0	0	5	17	39	61

<sup>155</sup> UNHCR LO Switzerland and Liechtenstein, supra note 150.

<sup>156</sup> See Article 20 (3) of the Asylum Law.

<sup>157</sup> IGC, supra note 106, p. 328.

<sup>158</sup> Source: Information by the UNHCR Liaison Office for Switzerland and Liechtenstein, received on 13 November 2001.

<sup>159</sup> These cases are available at the website of the Asylum Appeals Commission: <<http://www.ark-cra.ch>>. There the decisions are sorted by chronology or by subject.

<sup>160</sup> UNHCR LO Switzerland and Liechtenstein, supra notes 150 and 158.

	1995	1996	1997	1998	1999	2000
<b>Number of applications on admission to Switzerland written off</b>	37	43	37	61	61	18
<b>Number of applicants granted asylum after admission</b>	39	49	51	68	40	41

The emergent picture for 2000 is that roughly one in six applicants is permitted access to Swiss territory to pursue her claim. Of this group, only each second actually manages to reach Switzerland. Once this difficult threshold is passed, however, the vast majority of entrants succeed in the asylum procedure conducted on Swiss territory and are granted protection.

This mismatch between positive decisions on admission and actual arrivals highlights a problematic feature of Protected Entry Procedures. A person threatened by persecution might experience difficulties to leave her country of origin, even if she has a valid Swiss visa.<sup>161</sup> This might be one reason for the named mismatch.

### 3.2.7.4 *Evaluation of the Swiss Model*

The Swiss Protected Entry Procedure has a long track record and is characterised by a high degree of formalisation and functional differentiation. On the inclusionary side, its openness to applicants from third countries and countries of origin must be noted. Furthermore, it is well integrated into the framework of the territorial asylum procedure, while offering a fast-track mechanism for speeding up entry in urgent cases.

The Swiss authorities themselves point out one specific advantage linked to the usage of representations as outposts of the asylum system. The whole Protected Entry Procedure can be seen as part of an information system: a person wishing to leave her country of residence or presence may approach the Swiss representation with a request for information about whether she would be granted asylum in Switzerland if she applied. The representation will consider the circumstances in the specific case of the person in question before answering her request. This feature offers the asylum seeker an opportunity to clarify her real chances of being granted asylum, before she uses her often limited financial resources for the journey to Switzerland.<sup>162</sup>

On a number of occasions, it has emerged that access to a Swiss representation was obstructed by the representation's locally hired guards. In some countries, these guards ask the protection seeker for payment in order to let her enter the premises of the representation. During the Kosovo crisis, this happened at diplomatic representations in Albania. Furthermore, diplomatic representations in countries such as Iran, Kenya, Lebanon and Syria have experienced the same problem according to UNHCR reports.<sup>163</sup> This informal filtering mechanism reintroduces some of the negative elements otherwise linked to human smuggling – namely that wealthy persons have better prospects of access to protection than destitute persons. Moreover, intricate questions of state responsibility are raised:

<sup>161</sup> UNHCR LO Switzerland and Liechtenstein, supra note 150.

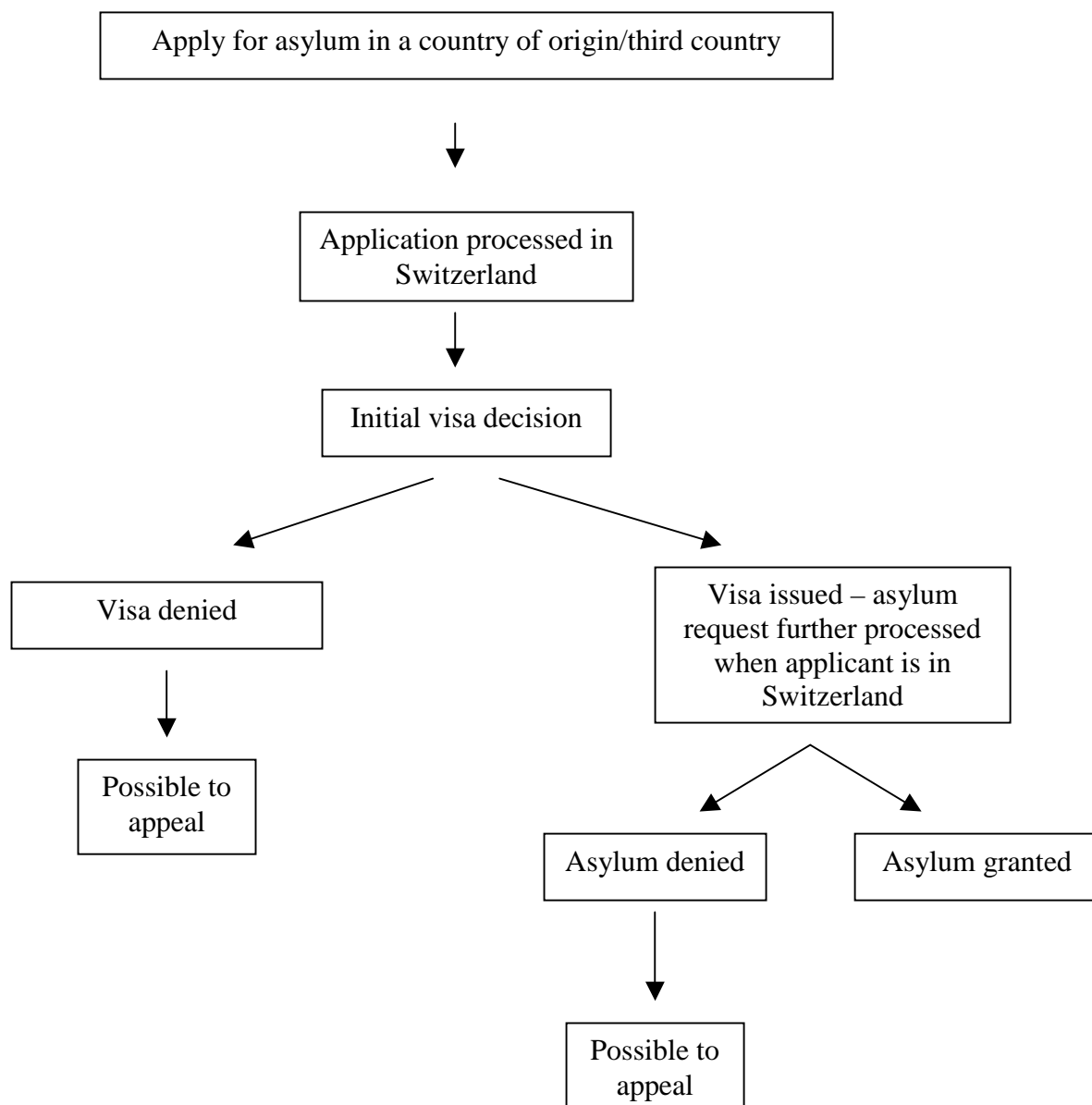
<sup>162</sup> Bundesamt für Flüchtlinge, *Admission and reception*, available at <<http://www.asyl.admin.ch/englisch/asy12re.htm>>, accessed on 24 July 2001.

<sup>163</sup> UNHCR LO Switzerland and Liechtenstein, supra note 150.

is the behaviour of local guards attributable to the Swiss authorities, or is it within the private domain?

Given its degree of differentiation and transparency, the Swiss model is recommended for an in-depth study to provide a backdrop for the harmonisation of Protected Entry Procedures. The fact that Switzerland is not a Member of the EU does not detract from its value as a test case in this specific context.

### 3.2.7.5 *The Swiss Model at a Glimpse*



### ***3.2.7.6 Explanation of the Swiss model***

1. Under the Swiss model, asylum applications may be lodged at diplomatic or consular representations both in countries of origin and in third countries.
2. The application will be forwarded to and processed by the Federal Office for Refugees (FOR) in Switzerland.
3. FOR will take an initial decision on whether admission to Switzerland should be granted. An application filed abroad will only be considered if the applicant is able to state convincing reasons for leaving her country of origin and to demonstrate previous ties to Switzerland.

- a. Admission to Switzerland is denied

A rejection of admission into Switzerland implies a rejection of the asylum application.

It is possible to appeal a negative decision on admission to the Asylum Appeals Commission.

- b. Applicant is admitted to Switzerland.

If a temporary asylum visa is issued, the applicant may travel to Switzerland, and her asylum request will be further processed when she is in Switzerland.

It is possible to lodge an appeal against a negative decision on the asylum request to the Asylum Appeals Commission.

### **3.2.8 United Kingdom**

It is possible to apply for asylum at a British diplomatic or consular representation abroad, however only in a third country and not in the applicant's country of origin. The appropriate form is to file an application for entry clearance for the purpose of seeking asylum in the United Kingdom. This procedure is not regulated by British legislation, but has its foundation in practice. The representation will decide whether the asylum application fulfils the requirements and should be sent to the Home Office in the United Kingdom for a decision. A positive decision by the Home Office will authorise, however not oblige, the representation to issue an entry clearance as a refugee for the applicant. A negative decision in this procedure may be appealed to the Immigration Appellate Authorities.

### 3.2.8.1 Legislation

There is no provision in the Immigration Rules for persons who are overseas to be granted entry clearance to come to the UK as refugees.<sup>164</sup> The procedure is regulated in the Immigration Instructions to Caseworkers.<sup>165</sup>

### 3.2.8.2 Procedure

#### 3.2.8.2.1 Submission of an Application

Technically, the 1951 Refugee Convention rules out that a person in need of protection could submit an asylum application at a British representation in the applicant's country of origin or in the country where she has her habitual residence. Therefore, an application may only be submitted at a British diplomatic or consular representation in a third country by the person wishing to request asylum.<sup>166</sup>

While there is no formal procedure for submitting an asylum request at a British representation abroad, applications are often refused on the basis that there are no rules in the Immigration Rules allowing for entry clearance to be granted in order for the applicant to be able to request asylum when arriving in the U.K.<sup>167</sup> Normally such an applicant would be referred to the local authorities with her request for asylum or to the local representatives of the UNHCR.<sup>168</sup>

#### 3.2.8.2.2 Processing

According to Chapter 2, Section 1 of the Immigration Instructions to Caseworkers "Entry Clearance Officers have discretion to accept, outside the Immigration rules, an application for entry clearance for the UK". This implies that the Officer at the representation has far-reaching discretion whether or not to accept the application and send it onwards for a decision. Three conditions shall, however, be fulfilled before an Officer accepts an application. Firstly the applicant must demonstrate a *prima facie* case that she meets the definition of the 1951 Refugee Convention. Secondly the applicant must be able to show that she has close ties with the UK. Finally the UK must be considered to be the most appropriate country for the applicant to take refuge in. If these three conditions are met, the Officer may forward the application to the Home Office for a decision.<sup>169</sup>

Close family connections (such as children under 18 years of age, parents or grandparents over 65 years of age) and periods spent in the UK as a student, are considered to constitute "close ties" with the UK. In exceptional circumstances, children not considered to be minors anymore and a parent or

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<sup>164</sup> Source: Questionnaire response by the UNHCR Branch Office in London, based on information provided by the UK Home Office, received on 29 October 2001.

<sup>165</sup> Immigration & Nationality Directorate, *Asylum Policy Instructions*, available at <<http://www.ind.homeoffice.gov.uk/default.asp?pageid=798>>, accessed on 19 June 2001.

<sup>166</sup> UNHCR BO London, supra note 164.

<sup>167</sup> Liebaut, F, supra note 40, p. 311.

<sup>168</sup> Immigration & Nationality Directorate, supra note 165, chapter 2.

<sup>169</sup> Ibid.

grandparent under the age of 65 can be considered to meet the “close tie” requirement as well. Other family members, such as sisters, brothers, aunts and uncles might also be granted entry clearance if exceptional circumstances are present.<sup>170</sup>

The applicant will first be asked to fill out a visa application form. After that she will be heard on her asylum request. The questions asked during this interview are at the Entry Clearance Officer’s discretion. It is the Officer’s responsibility, as stated above, to decide whether the visa application form and the records of the interview shall be accepted by the representation and forwarded to the Home Office.<sup>171</sup>

If an application for entry clearance is accepted by the representation, it shall be referred to the Integrated Casework Directorate within the Home Office, which will decide whether the applicant should be granted entry clearance as a refugee.<sup>172</sup> The British representation abroad has the authority to refuse issuing an entry clearance visa despite a positive decision by the Integrated Casework Directorate, if it has concerns about the applicant.<sup>173</sup>

An asylum seeker will not be protected by the representation while her application is being processed. According to the Home Office, the UK government has no responsibility for ensuring the safety of persons applying for asylum from abroad. Normally, an asylum seeker who is at risk would be referred to the UNHCR by the representation.<sup>174</sup>

### 3.2.8.2.3 Appeal

An appeal may be lodged against a refusal by the Integrated Casework Directorate to grant entry clearance. This right of appeal may be exercised from abroad to the independent Immigration Appellate Authorities.<sup>175</sup> Such an appeal will normally be dismissed without the case being examined on the merits. However, an adjudicator in immigration appeal cases has the possibility to make a recommendation that the applicant should be granted entry clearance to the UK if the applicant has strong connections with the UK, or if “particularly compelling compassionate circumstances” can be attached to the case.<sup>176</sup> The appeal procedure is outlined in the Immigration and Asylum Act 1999 Part IV paragraph 59(2), which states that the applicant may also lodge an appeal against the decision of the representation not to accept and forward her application to the Home Office.<sup>177</sup>

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> UNHCR BO London, supra note 164.

<sup>174</sup> Ibid.

<sup>175</sup> IGC, supra note 106, p. 349.

<sup>176</sup> Liebaut, F, supra note 40, p. 311.

<sup>177</sup> “A person who, on an application duly made, is refused a certificate of entitlement or an entry clearance may appeal to an adjudicator against the refusal.”

### 3.2.8.3 *Statistics*

There are no statistics available documenting UK practices in the domain of Protected Entry Procedures. According to the Stonewall Immigration group, such applications are, however, invariably unsuccessful.<sup>178</sup>

### 3.2.8.4 *Evaluation of the UK Model*

The UK model is characterised by a relatively low degree of formalisation, as it is not regulated by law. The representation enjoys a fairly large discretion – remarkably, it is under no obligation to follow the assessment made by the Home Office.

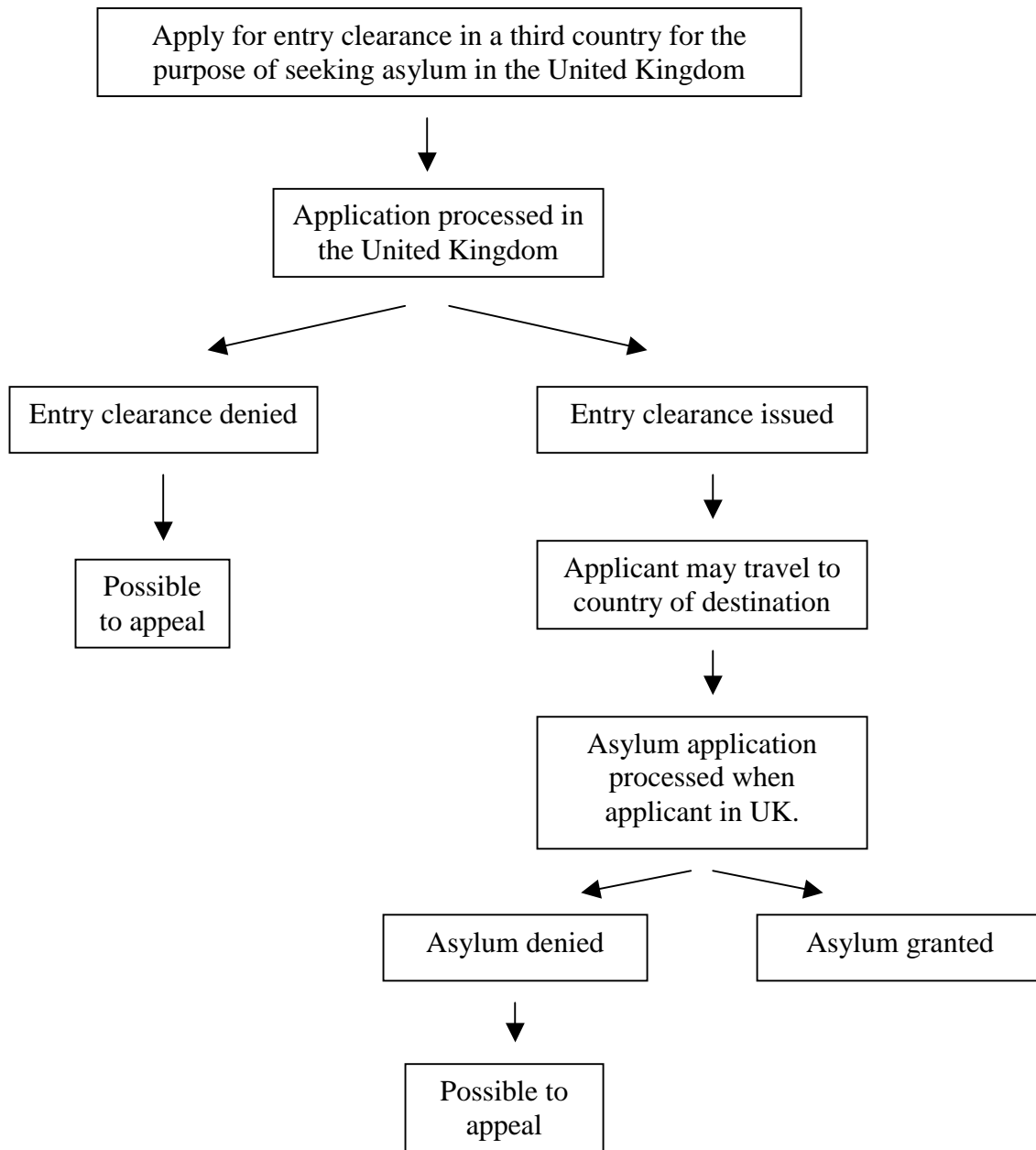
On the exclusionary side, it will be noted that the UK model caters for applicants in third countries only, and is limited to the refugee category. The model features *inter alia* a close tie requirement, which is a further threshold to be passed by the applicant. On the inclusionary side, mention should be made of the possibility to appeal negative decisions.

The absence of statistics makes it difficult to evaluate practice in the UK.

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<sup>178</sup> Stonewall Immigration Group, *Applying for Asylum as a Refugee*, available at <<http://www.stonewall-immigration.org.uk/Asylum.htm>>, accessed on 24 July 2001.

### 3.2.8.5 *The UK Model at a Glimpse*



### 3.2.8.6 *Explanation of the UK Model*

1. According to the UK model, an application for an entry clearance for the purpose of seeking asylum in the UK may be lodged at a UK diplomatic or consular representation in a third country, but not in a country of origin.



2. The application will be forwarded to and processed by the Integrated Casework Directorate (ICD) within the Immigration and Nationality Directorate of the Home Office in the United Kingdom.
3. The ICD will take a decision on the entry clearance application.

- a. Entry clearance is denied

If entry clearance is denied, the applicant cannot travel to the UK in order to seek asylum there.

It is possible to appeal a negative decision on the entry clearance to the independent Immigration Appellate Authorities.

- b. Entry clearance is issued

If an entry clearance is issued, the applicant can travel to the UK and apply for asylum there.

4. The asylum application is processed by the ICD.

A rejection of the asylum application may be appealed by the applicant to the Immigration Appellate Authority.

### **3.3 Practice in Three Non-EU Resettlement Countries**

We have earlier outlined the differences between Protected Entry Procedures and resettlement in Chapter 1.4. As both protective arrangements converge in some areas, it appears legitimate to provide examples from the practice of typical resettlement states for comparative purposes. As the resettlement programmes operated by Australia, Canada and the U.S. feature elements of individual autonomy worth considering in the context of Protected Entry Procedures, we chose to include country sections on each of the named countries.

#### **3.3.1 Australia**

The Australian policy for refugee protection is inspired by what could be described as a queue model. The Australian government is attempting to discourage “spontaneous” protection seekers from entering Australia without a permit, i.e. to use illegal means of migration.<sup>179</sup> The rather differentiated resettlement policy must be seen in this context – namely as an entry point to a queue system, which attempts to style resettlement as an exclusive way into the asylum procedure. This

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<sup>179</sup> One attempt to achieve this goal is the dissemination of information pamphlets by the Australian authorities in Indonesian hostels typically hosting transiting protection seekers on their way to Australia. This leaflet is illustrated with an octagonal stop-sign and contains *inter alia* the following information in English, Arabic and Indonesian versions: “New Australian laws ensure that those attempting to enter Australia illegally by boat will never live in Australia. Illegal boat arrivals will have no right to apply for asylum under the Australian system.” The leaflet contains no information on the contents or effects of the prohibition of *refoulement* binding the Australian government.

approach differs starkly from that taken by European countries, which regard Protected Entry Procedures as a complement to, and not a replacement for a system based on territorial applications for asylum.

In line with its policy, asylum applications can be filed at Australian diplomatic and consular representations abroad, both in the country of origin and in a third country. Australia operates an offshore resettlement program to help those for whom resettlement in Australia is the only durable solution. There are currently two categories of offshore visas. Most refugees in Australia are today resettled through this offshore resettlement program. The program features a numerical ceiling set for each year.

### **3.3.1.1 Legislation**

Australia has resettled refugees since the 1930s. In the early 1980s, case by case refugee selection was introduced at Australian diplomatic and consular representations abroad, and the Special Humanitarian Program was set up.<sup>180</sup>

The 1958 Migration Act sets out general provisions relating to visas. However the primary body of legislation dealing with the offshore component of the Humanitarian program is found in the 1994 Migration Regulations. Apart from the Act and the Regulations, Australian Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) also provides advice to decision-makers regarding the application of the main body of legislation to particular cases. This is generally referred to as policy advice. Such advice for the offshore Humanitarian program is provided though the DIMIA Procedures Advice Manual (PAM3).

The relevant sections are as follows:

#### **Migration Act 1958**

- Sections 39 and 85, which set out the powers of the Minister to cap visa grants in a particular class
- 499, which provides the Minister with the power to give instructions regarding the priority which cases should be given in processing.

#### **Migration Regulations 1994**

- Part 1, Division 1.2 - Interpretation - Interpretation
  - Regulation 1.03 - 'home country'
  - Regulation 1.03 - 'permanent humanitarian visa'
  - Regulation 1.1 2AA - 'member of the immediate family'
- Schedule 1: Classes of Visas (Permanent visas)
  - Item 1127 - Refugee and Humanitarian (Migrant) (Class BA)
- Schedule 2: provisions with Respect to the Grant of Subclasses of Visas
  - Subclass 200 - Refugee
  - Subclass 201 - In Country Special
  - Subclass 202 - Global Special Humanitarian
  - Subclass 203 - Emergency Rescue
  - Subclass 204 - Woman at Risk

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<sup>180</sup> Source for this sub-section: Questionnaire response by the UNHCR Regional Office in Canberra, received on 16 August 2001. The laws involved are to be found on the home page of DIMIA <<http://www.immi.gov.au>> under 'legislation'.

## DIMA Procedures Advice Manual

- 1.03 'permanent humanitarian visa'
- 1.I 2AA "member of the Immediate Family'
  
- Schedule 2
  - Refugee - Visa 200
  - In Country Special Humanitarian - Visa 201
  - Global Special Humanitarian - Visa 202
  - Emergency Rescue - Visa 203
  - Woman at Risk - Visa 204
  
- Generic Guidelines
  - Generic Guidelines B2 - Offshore Humanitarian Visas

### 3.3.1.2 Procedure

#### 3.3.1.2.1 The Australian Programs for Asylum Requests submitted Abroad

Australia has today two programs for processing asylum claims abroad for people in need of protection, the Refugee Program and the Special Humanitarian Program. The Refugee Program comprises three subsets, namely the Women at Risk Program, the In-country Special Humanitarian Program and the Emergency Rescue Program. The Special Humanitarian Program comprises no subsets. Immediate family of onshore refugees in need of resettlement are eligible for consideration under the Special Humanitarian Program or the regular migration spouse visa. Immediate family of offshore refugees and special humanitarian entrants, are eligible for consideration under the same program as the principal applicant.<sup>181</sup>

The *Refugee* category assists persons who are subject to persecution in their home country, who are living outside their home country and who are in need of resettlement. UNHCR assesses the applicants and advises the Australian Government on their need for resettlement. Medical examination and travel costs to Australia are usually paid by the Australian government.<sup>182</sup>

The *Women at Risk Program* of the Refugee category comprises women who are subject to persecution in their home country or registered as being 'of concern' to UNHCR, who are living outside their home country and are without the protection of a male relative, and who are in danger of victimisation, harassment or serious abuse because they are female.<sup>183</sup> It is required that the applicants under this subset whenever possible provide evidence that they have been registered as refugees with or are of concern to UNHCR.<sup>184</sup>

The *In-country Special Humanitarian Program* comprises persons who are subject to persecution in their country of origin and who are still within that country. Only a few places are available under

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<sup>181</sup> Department of Immigration and Multicultural Affairs [henceforth DIMA], *Refugee and Humanitarian Issues – Australia's Response*, October 2000, pp. 15-16.

<sup>182</sup> *Ibid.*, p 15.

<sup>183</sup> DIMA, *Form 964i, Refugee and Special Humanitarian Programs*, 2001, McMillan Print, Canberra.

<sup>184</sup> DIMA, *supra* note 181, p. 15.

this subset.<sup>185</sup> Persons in need of resettlement due to persecution in their home country are usually referred to the Australian representation by UNHCR or some other major human rights organisation.<sup>186</sup>

The *Emergency Rescue* subset comprises persons who are subject to persecution in their country of origin, and who are in urgent need of resettlement as their life or freedom is in immediate danger. Both persons in their country of origin and persons in a third country are admissible under this subset. Generally a person would need UNHCR to request urgent assistance on her behalf under this subclass.<sup>187</sup> Cases under the Emergency Rescue Program are approved by DIMIA in Canberra following submission by UNHCR via the UNHCR Regional Office in Canberra.<sup>188</sup>

The *Special Humanitarian Program* comprises persons who are subject to substantial discrimination amounting to gross violations of human rights in their country of origin, and who are outside that country. This program is open for persons who do not qualify as refugees, but who are still in need of resettlement due to humanitarian reasons. A further requirement in order to be resettled under this subclass is that the person in question must have some kind of connection to Australia. Hence, the applicant must include a special form in her application (681 Refugee and Special Humanitarian Proposal) with a proposal from an Australian citizen, permanent resident or community organisation willing to support the application of the person in need of protection.<sup>189</sup> This form is available free from DIMIA offices.<sup>190</sup>

A third programme, the *Special Assistance Category*, was phased out in the 2000/2001-program year. This category was set up for people who did not meet the criteria for the other two programs, but who were in a vulnerable situation and had close family or community links to Australia. This programme has been closed in order to focus the overall Australian Humanitarian Program on people in the greatest need of resettlement.<sup>191</sup>

### 3.3.1.2.2 Submission of an Application

It is possible to apply for resettlement in Australia under any of the outlined programs at any Australian diplomatic or consular representation. The applicant does not have to specify under which program she is applying, as the application is automatically considered against the two categories and the three subsets of the Refugee Program. However, a person wishing to be considered under the Special Humanitarian Program must include Form 681, mentioned above, in the application.<sup>192</sup>

In order to migrate under one of the described programs a person must complete form 842 *Application for a Permanent Visa on Refugee or Humanitarian Grounds*, which is available at the Australian diplomatic and consular representation and at the DIMIA offices in Australia. The

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<sup>185</sup> DIMA, supra note 183.

<sup>186</sup> DIMA, supra note 181, p. 15.

<sup>187</sup> DIMA, supra note 183.

<sup>188</sup> UNHCR RO Canberra, supra note 180.

<sup>189</sup> DIMA, supra note 181, p. 16.

<sup>190</sup> DIMA, supra note 183.

<sup>191</sup> DIMA, supra note 181, p. 16.

<sup>192</sup> UNHCR RO Canberra, supra note 180.

application should be lodged at the nearest representation together with the supporting documents, listed in the form. No fee is charged for the application.<sup>193</sup>

### 3.3.1.2.3 Processing

The application submitted at an Australian diplomatic or consular representation abroad will be considered individually on its merits by the staff at the representation.<sup>194</sup> An officer of the Australian representation examines and approves or rejects the applications. An interview of the applicant might be requested but is not required in order to make a decision on the application.<sup>195</sup>

Every applicant who is granted an offshore humanitarian visa must meet health requirements designed to protect Australians from public health risks, such as tuberculosis, and to maintain access to health resources for people already in Australia. The medical examination includes a mandatory X-Ray for every person aged 16 years and over. Furthermore Hepatitis B testing is required for pregnant women and unaccompanied refugee minors, as well as HIV testing for all applicants aged 15 years and older. There are no named health problems that would disqualify a person from resettlement. However, people must be tuberculosis free and those who have signs of old treated tuberculosis will require follow-up in Australia to make sure that the infection has not reactivated.<sup>196</sup>

Furthermore, health requirements demand that the applicant's standard of health neither results in significant cost to the Australian community in the areas of health care and community services, nor prejudices the access of an Australian citizen or permanent resident to health or community service. If a person has a health condition, a cost analysis is therefore undertaken in order to ascertain whether the health requirement is met. A waiver is available for applicants under the Refugee and Special Humanitarian Program. When considering a waiver, the delegated officer at the representation weighs compelling circumstances of the applicant's case against the requirements outlined above.<sup>197</sup>

As part of the assessment process, the Australian Government conducts character checks on all adult applicants' periods of residence over the last ten years.<sup>198</sup>

If an application is approved, a visa will be issued. The Australian Government pays the travel expenses for applicants under all subclasses except for those under the Special Humanitarian Program subclass, who have to pay their expenses themselves or be sponsored by their proposers in Australia.<sup>199</sup>

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<sup>193</sup> DIMA, supra note 183.

<sup>194</sup> DIMA, supra note 181, p. 15.

<sup>195</sup> UNHCR RO Canberra, supra note 180.

<sup>196</sup> Ibid. pp. 19-20.

<sup>197</sup> UNHCR RO Canberra, supra note 180.

<sup>198</sup> DIMA, supra note 183.

<sup>199</sup> Ibid.

#### 3.3.1.2.4 Appeal

Negative decisions on applications for resettlement cannot be appealed. The application is not eligible for review under the Migration Review Tribunal or Refugee Review Tribunal. The latter is available only to those seeking asylum on Australian territory.<sup>200</sup> However, repeat applications can be made to the Australian representation overseas.<sup>201</sup>

#### 3.3.1.3 Statistics

The majority of refugees in Australia have been resettled there from other countries after undergoing assessment overseas.<sup>202</sup> Over 50,000 persons apply under the refugee and humanitarian programs each year. Processing times are lengthy and not all applications are approved.<sup>203</sup>

The available places for migration under the refugee and humanitarian programs are limited. The Australian Government decides each year the number of places, taking into consideration the views of UNHCR, the views of the Australian community, and Australia's ability to resettle refugees and people in humanitarian need.<sup>204</sup> Unused places may be carried over to the next program year for use in addition to the annual allocation. It also includes places for those who were granted visas but did not arrive in Australia. A number of visas remain unallocated for use in unforeseen cases. This gives the government greater flexibility in responding to emerging humanitarian crises.<sup>205</sup>

The following table<sup>206</sup> describes in numbers the places granted by the Australian authorities to persons in need of protection.<sup>207</sup>

	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01 <sup>208</sup>
<b>Refugee</b>	4,643	3,334	4,010	3,988	3,802	3,997
<b>SHP</b>	3,499	2,583	4,636	4,348	3,051	3,116
<b>SAC</b>	6,910	3,735	1,821	1,190	649	879
<b>Total program</b>	<b>15,052</b>	<b>9,652</b>	<b>10,467</b>	<b>9,526</b>	<b>7,502</b>	<b>7,992</b>

<sup>200</sup> Ibid.

<sup>201</sup> UNHCR RO Canberra, supra note 180.

<sup>202</sup> DIMA Fact Sheet 41, *Seeking Asylum within Australia*, available at <<http://www.immi.gov.au/facts/41asylum.htm>>, accessed on 25 July 2001.

<sup>203</sup> DIMA, supra note 183.

<sup>204</sup> Ibid.

<sup>205</sup> UNHCR RO Canberra, supra note 180. See also DIMA Fact Sheet 40, *Australia's Refugee and Humanitarian Program*, available at <<http://www.immi.gov.au/facts/40human.htm>>, accessed on 25 July 2001.

<sup>206</sup> Both tables can be found in DIMA, *Australian Immigration Statistics*, available on <<http://www.immi.gov.au/statistics/refugee.htm>>, accessed on 3 July 2001 and 6 March 2002.

<sup>207</sup> In the table *Refugee* comprises applicants submitted under the Refugee Program, including its three subclasses: Women at Risk, In-Country Special Humanitarian Program and Emergency Rescue. SHP stands for *Special Humanitarian Program*. *Special Assistance Category* (SAC) includes people not falling under the two other categories, mainly people aiming for family reunification.

<sup>208</sup> UNHCR RO Canberra, supra note 180.

The following table describes in numbers the actual arrivals under the Refugee, SHP and SAC Categories:

	<b>1994-95</b>	<b>1995-96</b>	<b>1996-97</b>	<b>1997-98</b>	<b>1998-99</b>	<b>1999-00</b>
<b>Refugee</b>	4,006	4,060	3,372	3,553	3,269	3,429
<b>SHP</b>	3,774	3,617	2,120	3,033	4,614	3,022
<b>SAC</b>	5,852	6,147	4,394	2,193	907	816
<b>Total</b>	<b>13,632</b>	<b>13,824</b>	<b>9,886</b>	<b>8,779</b>	<b>8,790</b>	<b>7,267</b>

### ***3.3.1.4 Evaluation of the Australian Resettlement Model***

While not having the characteristics of a Protected Entry Procedure, the Australian refugee program, categorised as a resettlement program, possesses a number of features that might inspire the design of Protected Entry Procedures in the future. The differences are clear: resettlement is limited by a quota limitation, and UNHCR or private sponsors play a role, bringing an intermediary actor into the system, and detracting from the focus on individual autonomy.

First, the differentiation into visa subsets might prove valuable to develop the discourse on Protected Entry Procedures. The Australian model clearly distinguishes between resettlement applications filed in countries of origin and in third countries. Furthermore, it also caters for protection seekers not corresponding to the relevant elements of the refugee definition, but fearing other forms of grave harm. For all programs save for one, the government pays travel costs, which offers a helping hand to destitute protection seekers.

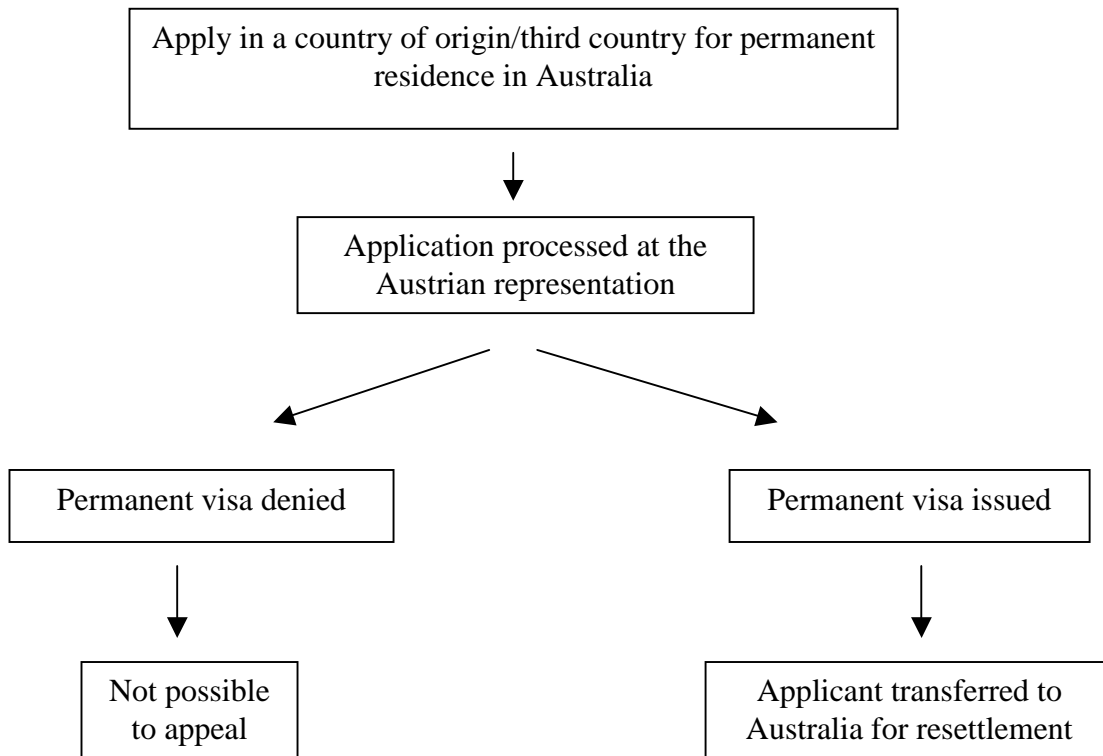
The exclusionary features also stand out clearly. There is no appeals option for rejected cases, and the numerical ceiling of the quotas cuts off access to protection in a manner that will appear haphazard to the single protection seeker outside the quota. One program features a close link requirement, another brings in an element of privatisation by allowing private sponsors to facilitate the entry of an applicant by financial guarantees.<sup>209</sup> Finally, the utilitarian approach to healthcare and related expenses should be noted.

DIMIA is currently reviewing the legislation relating to the offshore component of the Humanitarian Program and the written policy advice guiding its application. A discussion paper has been prepared in this regard by DIMIA, for which the views of NGOs and UNHCR were sought.<sup>210</sup>

<sup>209</sup> However, it is open to discussion whether the last element should be seen as an extension or a limitation of the program.

<sup>210</sup> UNHCR RO Canberra, supra note 180. The title of the paper is *Australia's humanitarian resettlement program - A review of legislation and policy advice*.

### 3.3.1.5 *The Australian Model at a Glimpse*



### 3.3.1.6 *Explanation of the Australian Model*

1. According to the Australian model, an application for a permanent visa on refugee or humanitarian grounds may be lodged at an Australian diplomatic or consular representation, both in third countries and in countries of origin.
2. The permanent visa application is processed by the staff at the Australian representation.
3. A decision will be taken by the staff at the representation on whether a permanent visa on refugee or humanitarian grounds should be issued.
  - a. Permanent visa is denied  
It is not possible to lodge an appeal against a negative visa decision.
  - b. Permanent visa is issued  
If a permanent visa is issued, the applicant will be transferred to Australia for resettlement.



### 3.3.2 Canada

Canada allows for persons in need of protection to submit resettlement applications at Canadian diplomatic and consular representations, both in countries of origin and in third countries. Processing of such resettlement applications abroad is a major part of Canada's overall refugee program. However, the country-of-origin option is only open for applicants in countries listed as Source Countries.

#### 3.3.2.1 Legislation

While the Canadian procedure for processing resettlement applications abroad dates back at least to the Hungarian crisis of 1956, resettlement was first codified in the Immigration Act of 1978. The applicable law now is the Immigration Act and Regulations, 1978. A new Immigration and Refugee Protection Act<sup>211</sup> was tabled in Parliament in early 2001. This Act is expected to become law and enter into force sometime in 2002, and it will change the current procedure to some extent.

The current Immigration Act provides that persons may be granted landing (i.e. permanent residency) in Canada as "Convention refugees or members of a designated class of persons the admission of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted".<sup>212</sup> Furthermore the Immigration Regulations set out the admission requirements for Convention refugees seeking resettlement.

#### Immigration Regulations, 1978

*Section 2 (1). Interpretation (abstract only):*

"Convention refugee seeking resettlement" means a person, other than a person whose case has been rejected in accordance with the Comprehensive Plan of Action adopted by the International Conference on Indo-Chinese Refugees on June 14, 1989, who is a Convention refugee

(a) who is outside Canada,

(b) who is seeking admission to Canada for the purpose of resettling in Canada, and

(c) in respect of whom there is no possibility, within a reasonable period of time, of a durable solution; (*réfugié au sens de la Convention cherchant à se réinstaller*)

The Humanitarian Designated Class Regulation delimits the two other classes under which persons can be resettled in Canada, i.e. the Country of Asylum Class and the Source Country Class.

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<sup>211</sup> Immigration and Refugee Protection Act, Statutes of Canada 2001, Chapter 27, assented to 1 November 2001.

<sup>212</sup> Sections 6(1) and (3) of the Immigration Act of 1978.

## Humanitarian Designated Classes Regulation

### Section 1. Interpretation (abstracts only):

"member of the country of asylum class" means an immigrant, other than a person whose case has been rejected in accordance with the Comprehensive Plan of Action adopted by the International Conference on Indo-Chinese Refugees on June 14, 1989,

- (a) who has left the immigrant's country of citizenship or of habitual residence;
- (b) who has been and continues to be seriously and personally affected by civil war or armed conflict or a massive violation of human rights in the immigrant's country of citizenship or of habitual residence;
- (c) in respect of whom there is no possibility, within a reasonable period, of a durable solution;
- (d) in respect of whom a determination has been made under paragraph 4(1)(b); and
- (e) who is outside Canada and is seeking admission to Canada for the purpose of resettling in Canada. (*personne de pays d'accueil*)

"member of the source country class" means an immigrant

- (a) who is residing in the immigrant's country of citizenship or of habitual residence, where the immigrant's country of citizenship or of habitual residence is a source country set out in the schedule;
- (b) who
  - (i) is being seriously and personally affected by civil war or armed conflict in the immigrant's country of citizenship or of habitual residence,
  - (ii) as a direct result of acts committed outside Canada that in Canada would be considered a legitimate expression of free thought or a legitimate exercise of civil rights pertaining to dissent or to trade union activity,
    - (A) is being or has been detained or imprisoned in that country with or without charge, or
    - (B) is being or has been subjected to some other recurring form of penal control, or
  - (iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group is unable or, by reason of such fear, unwilling to avail himself of the protection of the immigrant's country of citizenship or of habitual residence;
- (c) in respect of whom there is no possibility, within a reasonable period, of a durable solution;
- (d) in respect of whom a determination has been made under paragraph 4(1)(b); and
- (e) who is seeking admission to Canada for the purpose of resettling in Canada. (*personne de pays source*)

### 3.3.2.2 Procedure

#### 3.3.2.2.1 The Canadian Programs for Asylum Requests submitted Abroad<sup>213</sup>

To qualify as a *Convention Refugee* seeking resettlement in Canada the applicant must:

- (a) have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, *and*
  - be outside her country of nationality and unable or, by reason of that fear, unwilling to avail herself of the protection of that country, *or*
  - not having a country of nationality, be outside her country of former habitual residence and unable, or by reason of that fear, unwilling to return to that country, *and*
- (b) have not ceased to be a refugee, *and*
- (c) there must be no possibility, within a reasonable period of time, of a durable solution.

To qualify as a member of the *Country of Asylum Class* an applicant must:

- (a) be outside Canada and outside her country of nationality or habitual residence, *and*
  - have received a private sponsorship for herself and her dependents, *or*
  - be able to establish, to a visa officer's satisfaction, that she has sufficient financial resources to provide for the lodging, care and maintenance and resettlement in Canada of herself and her dependents, *and*
- (b) have been, and continue to be seriously and personally affected by civil or armed conflict or a massive violation of human rights in her country of nationality or habitual residence, *and*
- (c) there must be no possibility, within a reasonable period of time, of a durable solution.

The Country of Asylum Class is Canada's response to the needs of people in refugee-like situations who do not qualify as Convention refugees.

To qualify as a member of the *Source Country Class* the applicant must:

- (a) be a national or habitual resident of a country listed as a source country on the Schedule of Countries, *and*
- (b) be residing in that country, *and*
- (c) be seriously and personally affected by civil or armed conflict in her country, *and*
- (d) be, or have been,
  - detained or imprisoned in that country, *or*
  - subjected to some other recurring form of penal control (e.g. jail, house arrest, constraints on normal activities) as a direct result of acts which, if committed in Canada, would be considered legitimate expression of free thought or legitimate exercise of civil rights pertaining to dissent or trade union activity, *or*
- (e) meet the Convention refugee definition with the exception that she is residing in her country of nationality or habitual residence, *and*
- (f) there must be no possibility, within a reasonable period of time, of a durable solution.

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<sup>213</sup> This outline is based on CIC, *Application for permanent residence in Canada – Convention refugees seeking resettlement and/or members of the Humanitarian Designated Classes. Application Kit*, KIT IMM 6000E (06-2001), 2000, Ottawa [henceforth the Application Kit].

The Source Country Class addresses the protection and resettlement needs of people who are residing in their country of nationality or habitual residence. The countries enlisted in the Source Country Schedule, which is valid from June 29, 2001, until December 31, 2002, are: Colombia, Democratic Republic of the Congo, El Salvador, Guatemala, Sierra Leone, and Sudan.

The Governor in Council has the authority to designate and define the Source Country Class.<sup>214</sup> In practice, these countries are proposed by the Refugees Branch of the Ministry of Citizenship and Immigration Canada (CIC), after consultations with NGOs and UNHCR.

When deciding whether a country should be listed as a Source Country, the following aspects are taken into consideration:

- the situation in the country warrants an entry into the list,
- processing can be conducted reasonably safely,
- the Ministry of Foreign Affairs agrees on the inclusion of the country on the list (bilateral relations have to be taken into consideration), and
- it must be a country where a Canadian officer works or makes routine visits.<sup>215</sup>

The process determining the Source Countries will most likely be subject to certain changes under the new Immigration and Refugee Protection Act.<sup>216</sup>

#### 3.3.2.2.2 Submission of an Application

A person in need of protection may apply for resettlement in Canada as a Convention Refugee or as a member of one of the Humanitarian Designated Classes, i.e. the Country of Asylum Class or the Source Country Class. The applicant does not have to specify under which class she is applying.<sup>217</sup>

Applications may be submitted in person or by post to any Canadian diplomatic or consular representation. However, they will only be processed by a limited number of designated visa processing posts.<sup>218</sup>

A person who is still in her country of origin if that country is not on the Source Country list cannot be resettled to Canada as a refugee or on humanitarian grounds. However, the Minister of Foreign Affairs can decide to issue a visa or Minister's Permit on an exceptional basis.<sup>219</sup>

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<sup>214</sup> Section 6(3) of the Immigration Act.

<sup>215</sup> Source: Questionnaire response by the UNHCR Branch Office in Ottawa, received on 6 September 2001.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Appendix C of the Application Kit contains the list of addresses for these visa offices, supra note 213, page 10 and appendix C. The offices in Africa and the Middle East are located in Ivory Coast, Ghana, Egypt, Syria, Kenya and South Africa. The offices in the Americas are in Columbia, Cuba and Guatemala. European offices are in Turkey, UK, Russia, Italy and Austria and Asian offices are in Thailand, India, Pakistan and Singapore.

<sup>219</sup> UNHCR BO Ottawa, supra note 215.

### 3.3.2.2.3 Processing

Persons in need of protection may apply for resettlement if they are referred to the Canadian representation by the UNHCR or another agency, if they are named by sponsors in Canada or if they inquire at the representation directly on their own initiative. The Regulations to the new Immigration and Refugee Protection Act will allow referrals to the Canadian resettlement program by UNHCR or designated “referral organizations”.<sup>220</sup> Visa officers are advised not to refuse to provide an application form to persons seeking resettlement in Canada.<sup>221</sup> Concerned visa officers are required to deal openly with all applicants, and give them all pertinent information on how to apply, even if they believe that the application will not be successful.<sup>222</sup>

Applications are considered and decided upon by visa officers at the processing post who have received prior training by Citizenship and Immigration Canada for this task. The visa officer must follow the Immigration Act and the Immigration Regulations. She has a duty to act fairly and to be reasonable. The visa officer is responsible for making the assessment whether a person qualifies as a member of one of the Humanitarian Designated Classes or as a Convention Refugee, as well as for taking the final decision on the application.<sup>223</sup> A negative decision requires the concurrence of the manager of the Immigration Section at the processing post.<sup>224</sup>

First, a clerk will screen applications, to make sure that the paperwork is complete and that the application is not entirely frivolous. Visa posts that conduct large numbers of refugee interviews usually develop and follow a standard application form. All complete and apparently bona fide applications are forwarded to the visa officer. The visa officer will then decide whether or not to proceed to interview. The visa officer may refuse applications on paper. If an interview is conducted, the visa officer will determine in the interview whether the person qualifies as a Convention Refugee or as a member of one of the Humanitarian Designated Classes.<sup>225</sup> The visa officer may seek guidance in the Operational Instructions OP4.<sup>226</sup> They give an outline of Canada’s refugee policy, define basic terms and provide guidelines for processing applications from Convention Refugees seeking resettlement and members of the Humanitarian Designated Classes overseas.

The visa officers have to keep detailed notes of the interviews. They should include a conclusion with a summary of their decision and a clear statement on how the applicant meets or does not meet the definition of a Convention refugee or a member of the Country of Asylum or Source Country Class.<sup>227</sup>

In order to qualify for resettlement in Canada, the applicant must meet the eligibility criteria outlined above, as well as the admissibility criteria meaning that the applicant must pass medical,

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<sup>220</sup> Source: Information by the UNHCR Branch Office in Ottawa, received on 4 March 2002.

<sup>221</sup> See *Min Su Choi v. Canada (The Minister of Citizenship and Immigration)*, Federal Court of Canada, [2000] IMM-975-99.

<sup>222</sup> UNHCR BO Ottawa, supra note 215.

<sup>223</sup> Section 9 of the Immigration Act.

<sup>224</sup> UNHCR BO Ottawa, supra note 215.

<sup>225</sup> Ibid.

<sup>226</sup> CIC, *Chapter OP4. Overseas Selection and Processing of Convention Refugees Seeking Resettlement and Members of the Humanitarian Designated Classes*, in CIC, *Overseas Processing*, 2000, Ottawa.

<sup>227</sup> UNHCR BO Ottawa, supra note 215.

security and criminality checks. An applicant with serious medical conditions might not be admitted for resettlement. Also the ability of the applicant to resettle successfully in Canada will be assessed. Consequently, the visa officer will consider the applicant's ability to speak English and/or French, and her education, skills and work experience.<sup>228</sup>

Another admissibility criteria concerns financial aspects of the applicant's resettlement in Canada. Persons resettled as Convention Refugees or under the Humanitarian Designated Class may be sponsored either by the government or by a private person or organisation. The target year 2002 for government-sponsored admissions was 7,500. For these persons, there are no financial requirements, as the Federal government provides financial support for one year after arrival. There is in principle no numerical restriction to the admission of privately sponsored refugees/Humanitarian Designated Class cases, as financial commitment on the part of the sponsor(s) is required.<sup>229</sup> The working target for these admissions during target year 2002 is however in the range of 2,900 to 4,200.<sup>230</sup>

There is no formal arrangement to protect or shelter an applicant at the Canadian representation abroad while the application is being processed. Nevertheless, the Canadian authorities may establish contact with non-governmental organisations, and sometimes even with the government, which will take measures to protect the applicant while her application is being processed. As useful as they may be, these measures are of course not necessarily totally effective.<sup>231</sup>

While the Canadian authorities are not in a position to give examples of government agents physically hindering access to their representations abroad, it is clear that this does happen. Government agents may well impede access of persons in need of protection to the Canadian representations, if not openly, then through other forms of harassment or intimidation. Certainly in deciding on which countries should be on the Source Country list, the Canadian government considers whether access is possible and reasonably safe, both for the applicant and the Canadian side.<sup>232</sup>

If the application process cannot be completed abroad, e.g. because medical assessment of the applicant cannot be finished, the applicant may be transferred in advance to Canada, if she is in immediate need of protection. In this case the visa officer responsible for examining the application may decide to send the person to Canada on a Minister's Permit for compelling protection reasons. Some parts of the application process will then be concluded after the applicant's arrival in Canada, however, a decision on the applicant's eligibility as a Convention refugee, member of the Source Country Class or member of the Country of Asylum Class will always be made before a transfer to Canada. It is also worth noting that in many cases departure will depend on obtaining an exit permit, and this may impede resolution of a case.<sup>233</sup>

The Operational Instructions OP4 state that in circumstances involving emergency protection, such as an immediate threat to life, concerned visa officers are strongly encouraged to waive an interview if interviewing would delay processing in any way. It is considered to be essential to deal with

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<sup>228</sup> Application Kit, supra note 213.

<sup>229</sup> UNHCR BO Ottawa, supra note 215.

<sup>230</sup> UNHCR BO Ottawa, supra note 220.

<sup>231</sup> UNHCR BO Ottawa, supra note 215.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

applications as quickly as possible and move the applicant immediately. Written information in support of the application must, however, be sufficient to support a positive determination of eligibility and admissibility.<sup>234</sup>

#### 3.3.2.2.4 Appeal

The Canadian procedure provides two different appeal possibilities. Firstly, in the case of a resettlement applicant falling within the Family Class it is possible for the sponsor in Canada to appeal a negative decision to the Immigration and Refugee Board's Immigration Appeals Division.<sup>235</sup>

Secondly, in all cases where decisions of visa officers overseas are concerned, there is a possibility to appeal to the Federal Court of Canada, but only on points of law, not on the merits.<sup>236</sup> This is largely a theoretical possibility for refugees seeking resettlement, since they would have to hire legal counsel in Canada to bring the case. Although rejected applications for entry to Canada as independent immigrants commonly lead to such appeals, they are fairly unknown in refugee resettlement cases.<sup>237</sup>

Another possibility of review of a case is to submit a second or further application. In order to get a change of the decision if a new application is made, evidence of significant change of circumstances must be provided.<sup>238</sup>

Although it is not an appeal, applicants whose cases have been refused often write to the visa officer, the Refugee Branch at the Ministry of Citizenship and Immigration, to the Minister of Foreign Affairs and to UNHCR requesting review of the refusal decision.<sup>239</sup>

The appeal procedure that applies for applications submitted abroad differs from the procedure that is applicable when the application was lodged within Canada. Presently, leave (permission) must be granted by a Federal Court justice on appeals concerning decisions on applications submitted within Canada. Leave is not required to make an application for judicial review of visa officer decisions abroad. In other words, there is one less step to pass to have an application heard. This will be changed with the new Immigration and Refugee Protection Act, through which both procedures will be put on an equal footing, and leave be required also for appeals submitted abroad.<sup>240</sup>

Due to the possibility to appeal and the availability of the appeal system, there is case law concerning resettlement applications submitted at Canadian representations abroad, both at the level of the Immigration Appeal Division of the Immigration and Refugee Board and at the level of the Federal Court. The principal precedent-setting case is *Choi v. Canada*<sup>241</sup>, concerning the

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> The new Immigration and Refugee Protection Act will restrict this possibility by introducing a leave requirement.

<sup>237</sup> UNHCR BO Ottawa, supra note 215.

<sup>238</sup> Application Kit, supra note 213.

<sup>239</sup> UNHCR BO Ottawa, supra note 215.

<sup>240</sup> Ibid.

<sup>241</sup> *Min Su Choi v. Canada*, supra note 221.

competence of the visa officer and questions of proof. Two other relevant cases are *Bayat v. Canada*<sup>242</sup> and *Anglican Church Diocese of Montreal v. Canada*<sup>243</sup>.

### 3.3.2.3 Statistics

Below is a table on the actual number of applicants that arrived in Canada within the Source Country Class and the Country of Asylum Class.<sup>244</sup>

	1997	1998	1999	2000	2001
<b>Source Country Class</b>	242	797	1,341	1,521	1,443
<b>Country of Asylum Class</b>	26	148	907	1,464	2,035
<b>Convention Refugees abroad</b>	10,101	8,700	7,401	7,298	7,396
<b>Total</b>	268	945	2,248	2,985	10,874

### 3.3.2.4 Comments on the Canadian Resettlement Model

The degree of formalisation and differentiation of the Canadian model is striking. At all levels of the procedure, detailed rules govern the decisions taken, and the system operates under rather clear-cut delimitations. In contrast to the Australian system, Canada attempts to put applications filed abroad and on its territory on the same footing. The training of decision-takers abroad and the organisation of specific processing centres are further elements pointing to a high degree of normative steering of the system.

While inclusionary with exclusionary features, one would note that access from countries of origin is limited to a number of enumerated countries, and the criteria for this selection feature both protection-related and pragmatic elements. As stated above, this is likely to change with the new Immigration and Refugee Protection Act. The exclusionary effects of a numerical ceiling imposed on government-sponsored beneficiaries are somewhat softened by the fact that privately sponsored beneficiaries are not subject to a quota limitation. This blends a public good approach with market elements. On the inclusionary side, one might wish to note the fast-track procedures for urgent cases, as well as the multi-level appeals procedure.

The Canadian model allows Canadian citizens to be involved in the Resettlement Programme through the elements of sponsoring. Furthermore, the procedure enables Canada to cooperate with UNHCR in providing durable solutions to refugees. The Canadian society at large, government officials and politicians support this resettlement procedure for people in need of protection. However, there is a flip side of the coin to be taken into account: generally, media and the public consider resettled refugees to be ‘real’ refugees, as contrasted with spontaneously arriving asylum seekers who are often seen as ‘bogus’.<sup>245</sup>

<sup>242</sup> *Bayat v. Canada (The Minister of Citizenship and Immigration)*, Canadian Court of Appeal, [1999] A-338-95.

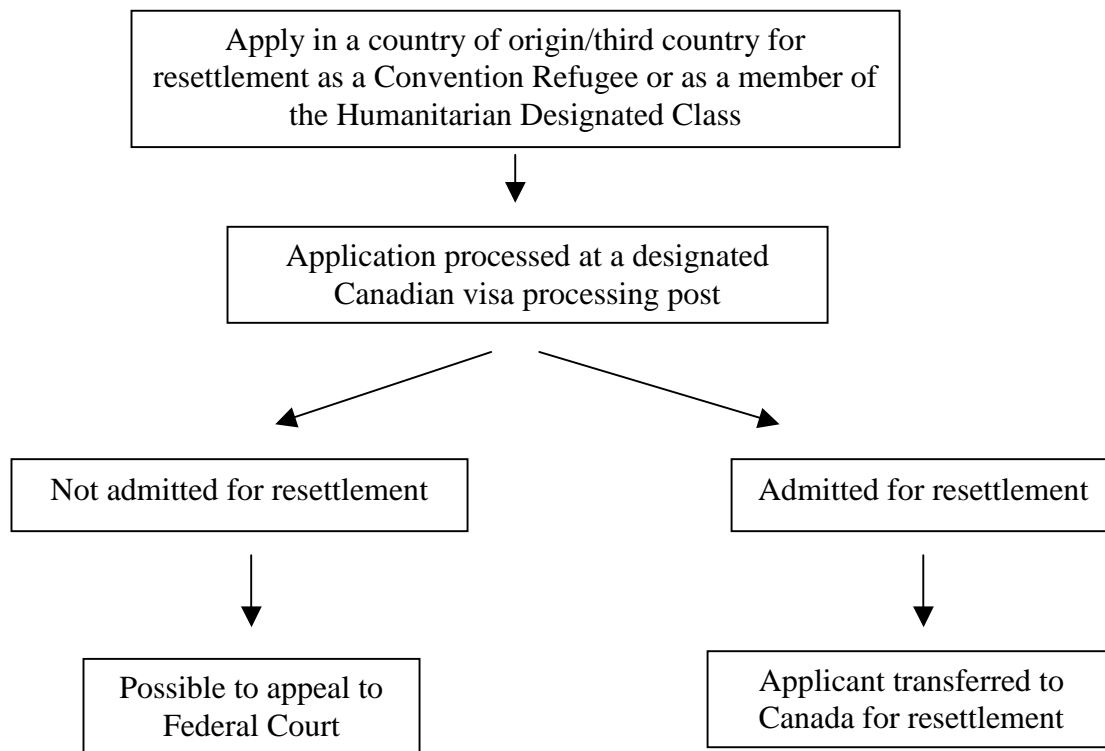
<sup>243</sup> *Anglican Church Diocese of Montreal v. Canada (The Minister of Citizenship and Immigration)*, Federal Court of Canada, [1997] IMM-4413-96.

<sup>244</sup> Source: Information by the UNHCR Branch Office in Ottawa, received on 15 October 2001; UNHCR Branch Office in Ottawa, supra note 220.

<sup>245</sup> UNHCR BO Ottawa, supra note 215.



### 3.3.2.5 *The Canadian Mode at a Glimpse*



### 3.3.2.6 *Explanation of the Canadian Model*

1. According to the Canadian model, an application for resettlement as a Convention Refugee or as a member of the Humanitarian Designated Class may be lodged at a Canadian diplomatic or consular representation in the country of origin or in a third country. However, it is only possible to submit an application in the country of origin if the country is listed as a Source Country.
2. The resettlement application will be processed at one of the designated Canadian visa processing posts.
3. A decision will be taken on whether the applicant will be admitted for resettlement as a Convention Refugee or as a member of one of the Humanitarian Designated Classes.

- a. Applicant is not admitted for resettlement.

It is possible to appeal a negative decision on the asylum application to the Federal Court, but only on points of law, not on merits.

- b. Applicant is admitted for resettlement in Canada.

If an applicant is admitted, she will be transferred to Canada for resettlement.

### 3.3.3 United States of America

The US operates a resettlement programme where the processing of applications is conducted at Immigration and Naturalization Service (INS) Offices abroad. The in-country processing program, limited to a few countries where applicants may submit their application for refugee status at a representation in their country of origin, is the US program with most similarities with Protected Entry Procedures. The US does not offer a possibility to lodge an appeal against a refusal of refugee status when the application was submitted abroad.

#### 3.3.3.1 Legislation

The US resettlement program was first established through the Refugee Act of 1980. Today the relevant provisions can be found in the Immigration and Nationality Act, Section 101(a)(42)(B) and 207(e). Provisions concerning overseas processing are contained in Section 207 of the Refugee Act.<sup>246</sup>

#### Immigration and Nationality Act

##### *Section 101: Definitions*

42) The term "refugee" means:

- (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
- (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

##### *Section 207: Annual admission of refugees and admission of emergency situation refugees*

- a) (1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.
- (2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the

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<sup>246</sup> Source: Questionnaire response by the UNHCR Branch Office in Washington, received on 14 January 2002.

fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(5) For any fiscal year, not more than a total of 1,000 refugees may be admitted under this subsection or granted asylum under section 208 pursuant to a determination under the third sentence of section 101(a)(42) (relating to persecution for resistance to coercive population control methods).

(b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) (1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act.

(2) A spouse or child (as defined in section 101 (b)(1) (A), (B), (C), (D), or (E)) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 101 (a)(42), be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 101(a)(42) at the time of the alien's admission.

(d) (1) Before the start of each fiscal year the President shall report to the Committee on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) or with respect to the admission of refugees in response to an

emergency refugee situation under subsection (b), the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3) (A) After the President initiates appropriate consultation prior to making a determination under subsection (a), a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b), that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

(f) (1) The Attorney General, in consultation with the Secretary of State, shall provide all United States officials adjudicating refugee cases under this section with the same training as that provided to officers adjudicating asylum cases under section 208.

(2) Such training shall include country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country between the nature of and treatment of various religious practices and believers.

### 3.3.3.2 Procedure

#### 3.3.3.2.1 Submission of an Application

The US does not operate a Protected Entry Procedure. The provisions in US law concerning asylum are limited to applicants *physically present* in the US or who have *arrived* in the US.<sup>247</sup> Through the resettlement program, however, an applicant can submit an application at a US representation abroad for resettlement in the US.<sup>248</sup> This is quite a rare feature, as it is only possible to approach some representations in this regard where no other entity has been designated to refer refugees under the United States Resettlement Program (USRP). Normally, UNHCR would be the entity referring an individual to the INS under the USRP.<sup>249</sup>

A person in need of protection may approach a US diplomatic or consular representation in any country where such a representation is situated. However, it is entirely within the discretionary power of the representation to decide whether the person should be referred to INS for a resettlement interview. The person has no right to require that her case be heard. As stated above referrals from representations are not that common, while UNHCR referrals are the ordinary procedure. In most cases therefore, the officer at the representation would advise the person to approach UNHCR instead, provided that UNHCR is represented in that area.<sup>250</sup>

INS conducts refugee processing in the district offices in Mexico City, Rome and Bangkok, as well as in its sub-offices in New Delhi, Islamabad, Accra, Nairobi, Moscow, Vienna, Athens and Frankfurt. Officers from INS travel periodically on “circuit rides” to other locations, for interviewing applicants that cannot travel to one of the processing offices.<sup>251</sup>

According to US asylum law, the refugee definition can include persons with a well-founded fear of persecution who are still in their country of origin. This provision only applies to certain designated countries of origin provided that a presidential directive is authorising resettlement from these countries. Currently the only designated countries are Cuba, Russia (former Soviet Union), and Vietnam.<sup>252</sup> Furthermore, the beneficiaries eligible to apply have been restricted to certain categories. E.g. in Cuba, the procedure has been restricted to applications by former political prisoners.<sup>253</sup> Simply said, this procedure, called in-country processing, allows certain categories of persons in Cuba, Russia and Vietnam to approach US representations in their country of origin in order to request resettlement in the US. During the US fiscal year 1997 more than 50% of the refugees authorised to stay in the US were admitted through this procedure.<sup>254</sup>

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<sup>247</sup> Immigration and Nationality Act, Section 208(a)(1).

<sup>248</sup> Such applications would be considered as "P-1 referrals" under the U.S. Resettlement Program (USRP).

<sup>249</sup> UNHCR BO Washington, *supra* note 246.

<sup>250</sup> *Ibid.* See also Immigration and Naturalization Service, *Case Presentation to the INC*, available at <<http://www.ins.usdoj.gov/graphics/services/refugees/INSAuthority.htm>>, accessed on 29 July 2001.

<sup>251</sup> UNHCR BO Washington, *supra* note 246.

<sup>252</sup> As of 14 January 2002.

<sup>253</sup> UNHCR BO Washington, *supra* note 246.

<sup>254</sup> IGC, *supra* note 106, p. 374.

### 3.3.3.2.2 Processing

All decisions on refugee applications submitted abroad, either at a diplomatic or consular representation or at another entity referring refugees to the US (e.g. UNHCR), are taken by INS. The decision on the resettlement application will be taken by one INS officer, who is the same that conducts the refugee interview. The decision will be completely within the discretionary power of this officer, who is the only person that can approve or deny the application.<sup>255</sup> Her decision will not be reviewed by any other officer at INS, nor by anyone else within the US judicial system. If the officer approves an applicant for resettlement while she finds that the applicant fulfils the criteria for refugee status, the Department of State may not refuse to issue an entry visa for the applicant.<sup>256</sup>

In the in-country processing procedure the representations do not have a discretionary power to refuse forwarding applications for consideration to INS in case the applicant satisfies the basic application criteria, such as being a former political prisoner if applying at the US representation<sup>257</sup> in Havana, Cuba. However, it does fall within the discretion of the officer at the representation to decide whether the applicant fulfils the basic application criteria.<sup>258</sup>

Whether a person will be admitted for resettlement in the US is decided on a case-by-case basis. The applicant will be interviewed by an INS officer. The purpose of the interview is to clarify the applicant's claim for refugee status. Through this interview the INS officer should find out whether the applicant has suffered past persecution, or has a well-founded fear of future persecution, on the basis of political opinion, religion, nationality, race, or membership in a particular social group.<sup>259</sup> All applicants, both those applying abroad and within the U.S. territory, must meet the definition of refugee, as set out in the US law.<sup>260</sup>

In the case of in-country processing, some impediments to seeking asylum attributable to the country in which the representation is situated might be encountered. The authorities in that country may limit the access to the resettlement procedure for certain persons, and they may hinder persons from leaving the country even if these have been approved for resettlement in the US. In order to avoid intervention of this kind from the local authorities, the US has approached the authorities in the countries where they wish to do in-country processing, for bilateral agreements in this regard. A graphic example of difficulties that may arise can be found in the early 1990s when some Haitians out of fear for government identification and consequent reprisals did not approach the US representation for refugee assessment.<sup>261</sup>

An applicant will neither be protected by the US representation while her application is being processed, nor by INS. Physical protection as such is considered to be the responsibility of the first country of asylum or UNHCR as long as the applicant has not been transferred to the territory of the US.<sup>262</sup>

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<sup>255</sup> Ibid.

<sup>256</sup> UNHCR BO Washington, *supra* note 246.

<sup>257</sup> In Cuba the US is represented by the US Interests Section of the Embassy of Switzerland, Havana, Cuba.

<sup>258</sup> UNHCR BO Washington, *supra* note 246.

<sup>259</sup> Immigration and Naturalization Service, *supra* note 250.

<sup>260</sup> IGC, *supra* note 106, p. 374.

<sup>261</sup> UNHCR BO Washington, *supra* note 246.

<sup>262</sup> Ibid.

Normally an applicant will not be transferred to the US before her application has been decided upon, even if she is in immediate need of protection. The Kosovo crisis represents the exception, where the INS interview was completed abroad, but the assessment of admissibility, i.e. health and security screening, was completed after the arrival in the US.<sup>263</sup>

Persons in immediate need of protection, which are not already determined to be refugees, may be brought to the US under “humanitarian parole”. This is an exceptional form of relief, used extremely sparingly, for which no procedure has been established neither as part of US resettlement, nor for in-country processing.<sup>264</sup>

In addition to fulfilling the criteria for refugee definition, an applicant shall also fulfil a number of admissibility criteria in order to be approved for resettlement in the US. The admissibility criteria to be met in order for approval are the same as apply for ordinary immigrants, i.e. they must show that they do not have a criminal history, are free of serious contagious diseases of public health significance such as tuberculosis, and are not affiliated with certain political movements (e.g. a Nazi organisation).<sup>265</sup> If these criteria are not fulfilled, the applicant will not be admitted to the US. However, refugees are not subject to the criterion demanding that beneficiaries will not become public charges, as they are eligible for federal welfare and medical aid for the first eight months after arrival.<sup>266</sup>

Normally, voluntary agencies or the Joint Voluntary Agency (JVA)<sup>267</sup> assists INS by conducting pre-screening interviews and by preparing cases to be submitted to INS. In the in-country processing programs, applicants normally submit their application for refugee resettlement by mailing completed preliminary questionnaires to the appropriate processing entity.<sup>268</sup>

#### 3.3.3.2.3 Appeal

A denial of refugee status by an INS officer on an application submitted abroad is not subject to appeal, nor to review. It is possible, though, to approach the adjudicating INS officer with a request for reconsideration of the decision.<sup>269</sup>

#### 3.3.3.3 Statistics

Each year the President, in consultation with the Congress, determines the number of refugees that will be admitted to the US during the fiscal year.<sup>270</sup> For fiscal year 2002, admission of up to 70,000

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<sup>263</sup> Ibid.

<sup>264</sup> UNHCR BO Washington, supra note 246.

<sup>265</sup> See Immigration and Nationality Act, Section 212(a).

<sup>266</sup> UNHCR BO Washington, supra note 246.

<sup>267</sup> The Joint Voluntary Agency (JVA) works with refugees both before and after the final determination interview with the INS. JVA staff receive, research and pre-screen the refugee applicants, as well as conduct pre-interviews with them. They prepare a case file in English for the interview conducted by the INS officer. Furthermore JVA works together with other organisations, coordinating the journey to the US. See <<http://www.jva-ope-nairobi.org/jva-ope-nairobi/>> for more information on their assistance. Accessed on 11 February 2002.

<sup>268</sup> Immigration and Naturalization Service, supra note 250.

<sup>269</sup> IGC, supra note 106, p. 374.

refugees to the United States was decided to be justified by humanitarian concerns or otherwise in the national interest. This number was to be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations:<sup>271</sup>

Region	Admissions for 2001
Africa	22,000
Eastern Europe	9,000
Latin America / Caribbean	3,000
East Asia	4,000
Former Soviet Union	17,000
Near East / South Asia	15,000

INS acceptance rate for applicants that have been interviewed by INS abroad is normally above 80%. This varies somewhat according to the number of cases and the nationality of the applicants. Only about 5% of the cases are referred for reconsideration, and of these about 10% of the applicants have their decisions reversed.<sup>272</sup>

Below are the statistics for Refugee-Status applications for the years 1994 – 1998.<sup>273</sup>

Year	Applications pending beginning of year	Applications filed during year	Applications approved during year	Applications denied during year	Applications otherwise closed during year	Applications pending end of year
1995	12,471	143,223	78,936	32,412	34,251	10,095
1996	10,095	155,868	74,491	26,317	59,589	5,566
1997	5,566	122,741	77,600	22,725	17,270	10,712
1998	10,712	124,777	73,198	31,001	6,768	24,522
1999	24,522	111,576	85,592	19,094	6,358	25,054

### 3.3.3.4 Evaluation of the US Resettlement Model

The US resettlement model is a highly formalised part of the overall protection system. In line with other non-European resettlement countries, its degree of differentiation is high, which is also expressed in the specific targeting of certain countries (e.g. Cuba) and even certain groups within those (e.g. former political prisoners). Whether or not this differentiation always corresponds to the primacy of protection needs cannot be assessed here.

The outstanding benefit of the procedure is that processing takes place close to the applicant, and that INS officers travel to certain countries where no INS office is located in order to interview applicants. This makes the procedure more available to the applicants. On the exclusionary side, however, the absence of appeal options should be noted. The effects are aggravated by the fact that the determination procedure is the responsibility of one determination officer alone.

<sup>270</sup> Ibid.

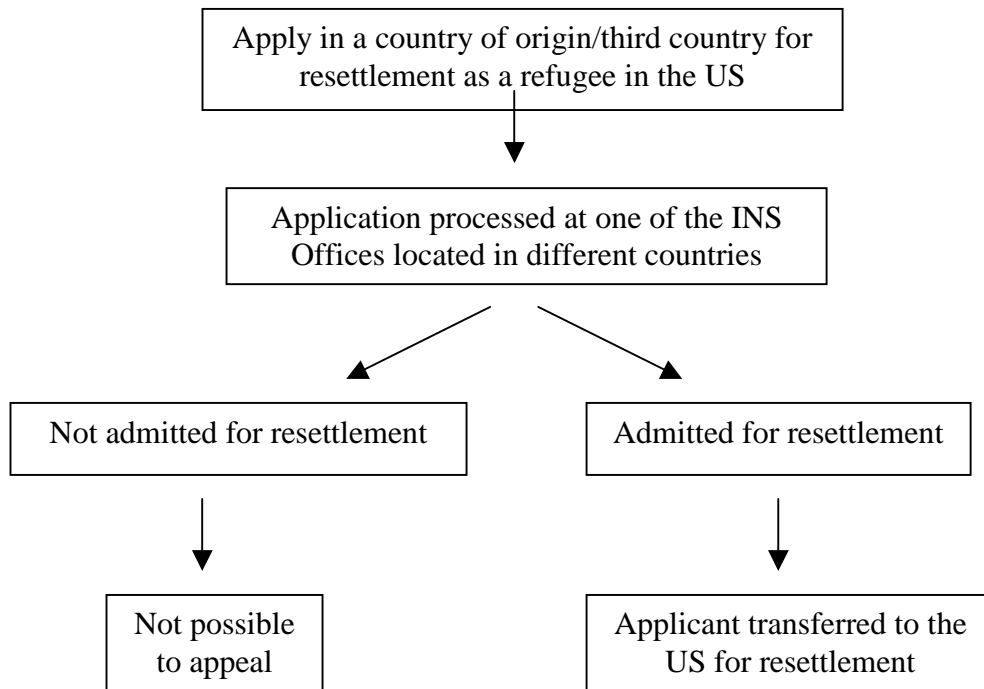
<sup>271</sup> Washington File, *Presidential Declaration on Refugees and Migration*, available at <<http://usembassy.org.uk/forpo468.html>>, accessed on 7 March 2002.

<sup>272</sup> UNHCR BO Washington, supra note 246.

<sup>273</sup> Immigration and Naturalization Service, *1998 Statistical Yearbook of the Immigration and Naturalization Service*, 1999, Immigration and Naturalization Service, Washington DC.



### 3.3.3.5 *The US Model at a Glimpse*



### 3.3.3.6 *Explanation of the US Model*

1. According to the US model, an application for resettlement may be submitted at any US representation for referral to an INS Office. The procedure allowing for applications to be submitted in the country of origin is, however, limited to a number of designated countries.
2. The application will be referred to an INS Office and processed by an INS officer. For certain countries where the US does not have an INS Office, officers from INS will make periodical visits in order to conduct interviews with applicants.
3. The INS officer will decide whether the applicant should be admitted for resettlement to the US.

- a. Applicant is not admitted for resettlement.

It is not possible to file a petition for review of the decision or to appeal a negative decision.

- b. Applicant is admitted for resettlement in the US.

If an applicant is admitted, she will be transferred to the US for resettlement.

## 3.4 Comparative Analysis

### 3.4.1 Overview

To facilitate comparison on a number of selected features, a comparative table is inserted below. The reader is also referred to Chapter 5, where critical features in the practices of countries are discussed further.

Country	Application from		Family reunion only?	“Close ties” requirement?	Urgent transfer?	Appeal possible?
	Country of Origin	Third Country				
Austria	Yes	Yes	Yes (in practice)	No	No	No
Denmark	No	Yes	Yes (in practice)	Yes	No	Yes/No
France	Yes	Yes	No	No	Yes	Yes
Italy (draft law)	Yes	Yes	-	-	-	-
Netherlands	No	Yes	No	No	No	Yes
Spain	No	Yes	No	No	Yes	Yes
Switzerland	Yes	Yes	No	Yes	Yes	Yes
United Kingdom	No	Yes	No	Yes	No	Yes
Australia	Yes	Yes	No	No	No	No
Canada	Yes	Yes	No	No	Yes	Yes
United States	Yes	Yes	No	No	No	No

### 3.4.2 Countries Grouped According to Four Different Models

As earlier explorations revealed, there are no standard models for the Protected Entry Procedure. Each country has developed its own criteria for its procedure with the common features that it allows non-nationals to approach the potential host state outside its territory with a claim for asylum or other forms of international protection, and it allows non-nationals to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.<sup>274</sup>

In order to structure the Protected Entry Procedure mechanism, countries could be organised under four different models taking into account the following questions:

- May the applicant apply for asylum only in a third country or both in a third country and her country of origin?
- Will there be an initial decision authorising the transfer of the applicant to the country of destination where the asylum procedure will continue, or will the asylum decision be taken while the applicant awaits the decision in the country where she applied?

<sup>274</sup> See Chapter 1.4.

	Third Country only	Third Country and Country of Origin	Initial Visa Decision	No Initial Visa Decision
Austria		X	X	
Denmark	X			X
France		X	X	
Italy		X		X
Netherlands	X		X	
Spain	X			X
Switzerland		X	X	
UK	X		X	
Australia		X		X
Canada		X		X
US		X		X

#### **Model A – Third Country and Country of Origin Applications; Initial Visa Decision**

In countries operating their systems according to Model A, an applicant may apply for asylum either in her country of origin or in a third country. Furthermore, countries applying Model A use a two-step procedure, where there will be an initial visa decision, which if it is positive will authorise the applicant to travel to the country of destination. The asylum procedure will continue after the applicant has arrived in the country of destination. The procedure followed after arrival will be the same as in the traditional asylum procedure. Austria, France and Switzerland fall under Model A.

#### **Model B – Third Country and Country of Origin Applications; No Initial Visa Decision**

Model B describes practices where an asylum application may be submitted either in a third country or in a country of origin, and under which the applicant has to remain in the country where she applied until a final decision has been reached on her application. The countries belonging to this category are Australia, Canada and the United States. From the information available concerning the provision on a Protected Entry Procedure in the Italian draft proposal, one may conclude that Italy would also have qualified under this category.

The three countries actually operating this model have another major feature in common – they are all resettlement countries. As their practices are starkly different from countries operating Protected Entry Procedure schemes in the proper sense, they are not fully comparable. By way of example, the Protected Entry Procedure countries always process the substantial asylum requests in the country of destination, while Australia, Canada and the United States process the requests either at the representation or at a processing centre abroad. In this regard, these three non-European countries are of interest, as processing centres or processing at the representations could be an interesting feature to adopt for example in a future harmonised Protected Entry Procedure at the EU level.

### **Model C – Third Country only; Initial Visa Decision**

Model C describes a practice according to which an asylum request can only be submitted in a third country, and not in the applicant's country of origin. Furthermore, an initial visa decision will be taken in this procedure, allowing for the applicant to travel to the country of destination where the asylum procedure will continue. Two countries, namely the Netherlands and the United Kingdom, fulfil the criteria for Model C.

### **Model D – Third Country only; No Initial Visa Decision**

The final model to be described here is Model D, applied by Denmark and Spain. The criteria for this model are, first, that asylum applications can only be submitted in third countries, and, second, that there will not be an initial visa decision. It follows that the asylum applicant cannot apply in a country of origin, and that she has to await the decision on her asylum request in the third country where she applied, before she is allowed to travel to the country of destination.

In exceptional circumstances the applicant may be transferred in advance to the country of destination. This is, however, an exception and not the rule as in Models A and C. It is furthermore a parallel process, meaning that the processing of the applicant's asylum request will continue while her request for an urgent transfer is assessed. Finally, only Spain authorises such urgent transfers, while Denmark does not.

## **4 The Legal Dimensions of Protected Entry Procedures**

### ***4.1 The Relevance of International, Supranational and Domestic Law***

Are practices of Protected Entry Procedures a mere expression of the political benevolence of states vis-à-vis protection seekers, or do they flow from legal obligations of potential host states? In quest for an answer, obligations can be sought in international law, in supranational law (i.e. EC law) and in domestic law. In the area of international law, it is especially relevant to scrutinise protective norms of refugee law and human rights law.

With regard to the law of the European Union (EU and EC law respectively), it is relevant to ask to what extent possible international obligations have been received in it, and are thus opposable to Member States (and, eventually, institutions). But it is perhaps more relevant to inquire into the potential of Protected Entry Procedures to be integrated into the existing EU *acquis* in the area of asylum and migration.

At the domestic level constitutional provisions, aliens legislation and administrative law are relevant objects of study.

### ***4.2 The Applicability of Protective Norms of International Law***

In this section, we shall first explore whether a legally binding right to seek asylum exists, and, if so, whether it has any implications on the practice of Protected Entry Procedures. Second, we shall

scrutinise the relevance of explicit prohibitions of *refoulement* in our context, to then move on to take a closer look at norms of human rights law, which may be construed to apply extraterritorially. In the latter category, we shall in particular focus on the ECHR<sup>275</sup> and the CRC<sup>276</sup>.

#### 4.2.1 A 'Right to Seek Asylum'?

At first sight, two formally non-binding instruments appear to be of the utmost relevance for the questions asked in this chapter, namely the 1948 Universal Declaration of Human Rights<sup>277</sup> (henceforth UDHR) and the 2000 EU Charter of Fundamental Rights of the European Union<sup>278</sup> (henceforth the EU Charter).

Article 14 UDHR reads as follows:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

There is no identically or similarly worded successor to Article 14 UDHR in treaty law with a universal scope.<sup>279</sup> The prohibitions of *refoulement* to be presented below are all less sweepingly worded, and none makes allusion to the right to *seek and to enjoy asylum*. If this provision turned out to be binding, it might, at best, provide refugee lawyers with raw material to argue for a broader scope of protection than that available under the prohibitions of *refoulement* dealt with below.<sup>280</sup> This would probably not only be of importance for protection obligations, but also for obligations to allow access to the territory of potential host states. Article 14 UDHR could certainly play a role in countering the indiscriminate exclusion effectuated by pre-entry measures such as visa requirements and carrier sanctions, and thus provide a basis for arguing that states are obliged to practice some form of Protected Entry Procedure to counterbalance pre-entry migration control. Given the

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<sup>275</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force Sept. 3, 1953.

<sup>276</sup> Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

<sup>277</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>278</sup> OJ C 364 of 18.12.2000, p.1.

<sup>279</sup> On a regional level, a right similar to Art. 14 UDHR can be found in Art. 22.7 of the American Convention on Human Rights ('Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.') and Art. 12.3 of the African Charter on Human and Peoples' Rights ('Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.').

<sup>280</sup> However, such universalist arguments could be met with powerful particularist ones, claiming that the UDHR laid down a state obligation to respect the grant of asylum by other states. See, e.g., Holmbäck, Å, *Förenta nationerna och asylrätten*, in 1949 års utlänningskommitté, SOU 1951:42. *Betänkande med förslag till Utlänningslag m.m.*, 1951, Stockholm, p. 292, arguing on the basis of the travaux. There would be no point in exploring the value of these arguments within the framework of our inquiry, if the UDHR turned out to be non-binding. Hence, the question of bindingness must be dealt with first.

singularity of the norm enshrined in Article 14 UDHR on the universal level and its potential for the universalist cause, it is reasonable to inquire into its character as binding international law.<sup>281</sup>

Has Article 14 UDHR turned into customary international law? Elsewhere, we have been compelled to conclude that the content of Article 14 UDHR is not legally binding upon states.<sup>282</sup> On the understanding that Article 14 UDHR is something else than just a positive formulation of Article 33 GC and exceeds the normative content of the latter, there is no basis for a different conclusion. Neither a homogeneous state practice nor a corresponding *opinio juris* can be made out to support a right to access territory in order to seek asylum.

In this context, it should also be addressed whether or not the EU Charter adduces any element of obligation when it comes to Protected Entry Procedures. Article 18 of the EU Charter reads as follows:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

The EU Charter is, at least for the time being, not a binding instrument. But even if it were binding, the formulation of Article 19 raises a number of intricate questions. To begin with, there is no clear-cut definition on the exact implications of a ‘right to asylum’ in the EU Charter or in international law. It should be recalled that the term ‘asylum’ has no operative significance in the 1951 Refugee Convention. It is at the very least open to debate whether or not a right to asylum also implies a dimension of access to territory, overriding the personal sovereignty of states. In line with their mandate, the drafters of the EU Charter cannot be assumed to have created new protection obligations, but rather to translate pre-existing ones into the context of the EU discourse on fundamental rights.<sup>283</sup> Second, proponents of a restrictive reading might argue that the express reference to the 1951 Refugee Convention and the 1967 Protocol implies that Protected Entry Procedures are clearly outside the scope of the EU Charter. As we will show below, the latter instruments do not encompass a right to territorial access from abroad.

Hence, neither Article 14 UDHR nor Article 19 of the EU Charter entail any legal obligations to provide for a Protected Entry Procedure.

#### **4.2.2 Explicit Prohibitions of *Refoulement***

A prohibition of *refoulement* may be merely taken as a state obligation not to remove a certain group of persons present on its territory to the country of persecution. However, the question is whether such prohibitions shall be interpreted as implying an additional obligation. The question is whether states are bound to admit persons applying for protection from outside state territory. While

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<sup>281</sup> For a detailed overview of the positions taken by different doctrinal writers, see Gandhi, P R, The Universal Declaration of Human Rights at Fifty Years, 41 German Yearbook of International Law 206 (1999) pp. 234–50. Gandhi himself holds that certain provisions of the UDHR have acquired binding force as customary law.

<sup>282</sup> Noll 2000, *supra* note 9, pp. 357–362.

<sup>283</sup> The Drafters of the Charter were given a mandate to consolidate the existing fundamental rights in EU law, not to amend them. See Annex IV of the Conclusions of the Presidency of the Cologne European Council, 3–4 June 1999, European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union.

non-removal entails a right to transgress an administrative border (namely to be admitted to the state community, although in a minimalist sense), non-rejection would entail a right to transgress a physical border as well. If non-rejection is a legal corollary of the prohibition of *refoulement*, Article 33 GC, Article 3 CAT<sup>284</sup> and Article 45 of the 1949 Fourth Geneva Convention<sup>285</sup> (henceforth FC) would contain an implicit right to entry for their beneficiaries.

It is clear, though, that the wording of all three provisions does not allow for deducing a right to entry in the absence of territorial contact with the potential host state. In other words, a person demanding an entry visa at the embassy of a Contracting Party cannot invoke the said norms. In such cases, one cannot speak of expulsion, return, *refoulement* or transfer “to the frontier of territories”<sup>286</sup> or “to another State”<sup>287</sup> or “to a country”<sup>288</sup> from which the specified threats originate. Accordingly, there is no obligation to provide for a Protected Entry Procedure inherent in these norms.

### 4.2.3 Jurisdictional Protection Obligations

To be triggered, prohibitions of *refoulement* presuppose territorial contact. Now, it may be asked whether norms of human rights law protect a claimant not only inside the territory, but also at the borders of a Contracting State. In contrast to both Article 3 CAT and Article 33 GC, nothing in the wording of Article 3 ECHR, Article 7 ICCPR and art. 37 CRC precludes an interpretation to the effect that persons wishing to avert the risk of ill-treatment by demanding an entry visa at the embassy of a Contracting Party may come under their ambit. If one concedes that the latter provisions indeed represent an individual entitlement to extraterritorial protection, it is fully arguable that they imply a right to entry as well.

A closer look reveals that the ICCPR does not provide for such claims. This flows from a contextual argumentation. Article 2 (1) ICCPR expressly requires that the individual claimant be “within its territory and subject to its jurisdiction”.<sup>289</sup> This contextual argument clarifies the matter: Article 7 ICCPR cannot be invoked if the claimant lacks territorial contact with the potential host state. Hence, it offers no basis to argue the existence of a state obligation to provide for a Protected Entry Procedure.

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<sup>284</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>285</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force Oct. 21, 1950.

<sup>286</sup> Art. 33 GC.

<sup>287</sup> Art. 3 CAT.

<sup>288</sup> Art. 45 FC.

<sup>289</sup> Nowak first affirms that presence on state territory and subjugation to state jurisdiction are crucial for individual protection under the ICCPR. However, Nowak also points at the contradictions inherent in this cumulative requirement (e.g. that a state would not be responsible for denying the right to entry to a citizen *outside* its territory) and suggests a teleological interpretation to resolve them. Moreover, he suggests that recourse should be taken to the extent of state responsibility when determining the precise meaning of Art. 2 (1) ICCPR. Nowak, M, *UNO-Pakt über bürgerliches und politische Rechte und Fakultativprotokoll. CCPR-Kommentar*, 1989, N.P. Engel Verlag, Kehl am Rhein, p. 45. At first sight, his argumentation could be taken to support a state responsibility to allow access to protection seekers outside its territory. In the opinion of this author, Art. 31 (4) VTC must be taken into account, which would provide a powerful counter-argument to such an extensive reading. See also Goodwin-Gill, G S, *The Refugee in International Law*, 1996, Clarendon Press, Oxford, p. 142, invoking dicta of the Human Rights Committee in support of an extraterritorial application of the ICCPR.

#### 4.2.3.1 *The ECHR*

The case of the ECHR is a different one. Elsewhere, it has been shown that an interpretation of art. 3 ECHR along the lines of arts. 31 and 32 VTC entails that this article obliges states in certain situations to grant an entry visa through their diplomatic representations.<sup>290</sup> Such situations are characterised by a pressing need of protection in the state from which an entry visa is requested; reasonably, there would be no other options of protection accessible to the claimant. The goal state may be obliged to grant an entry visa, because the processing of visa requests at embassies is within the jurisdiction of the sending state, and thus subject to the obligations flowing from the ECHR.

Why is that so? The ECHR requests in art. 1 that Contracting Parties “secure” the rights and freedoms enshrined in its Section I. This obligation is a positive one. Given a sufficiently large risk that a protection seeker would be subjected to treatment contrary to art. 3 ECHR, if denied a visa and thus the possibility to enter the state at question, the latter is under an obligation to allow entry. Yet, this argument does not contend that visa requirements are illegal per se. Rather, it maintains that denying visas to a class of persons protected under positive obligations flowing from art. 3 ECHR is illegal. It should be noted that the above line of argument is applicable not only to art. 3 ECHR, but in principle to all rights guaranteed by the ECHR and its protocols. The limitative element is the scope of the positive obligations under a specific right – which can be assessed only *in casu*.<sup>291</sup> It must be underscored that the grant of an entry visa is not equivalent to the grant of protection. The purpose of the entry visa is solely to avert the imminent risk, and to allow the conduct of a proper determination procedure in a safe place – i.e. the goal country. Clearly, where there are no sufficient reasons for protection emerge during such determination procedures, the goal state is free to remove the applicant from its territory within due respect to other norms of international law.

Does this imply a limitless responsibility of Contracting Parties, extending to the protection of rights and freedoms guaranteed in the ECHR throughout the world? The answer is a clear “no”, and a closer look at art. 1 ECHR lets the boundaries of responsibility emerge. When delimiting the scope of the ECHR, its drafters discarded the criterion of territorial presence and resorted only to the criterion of jurisdiction. Article 1 ECHR is worded as follows:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

In 1981, the European Commission delimited the scope of Article 1 ECHR in some detail. Its pertinent reasoning, drawing on the case law of the Court as well as its own earlier decisions, merits quoting at some length.

The Commission recalls that, in this provision, the High Contracting Parties undertake to secure the rights and freedoms defined in Section I to everyone “within their jurisdiction” (in the French text: “relevant de leur juridiction”). This term is not equivalent to or limited to the national territory of the High Contracting Party concerned. It emerges from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the

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<sup>290</sup> Noll 2000, supra note 9, pp. 441-446.

<sup>291</sup> Ibid., pp. 467-474.



High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad. [...] As stated by the Commission in Application Nos. 6780/74 and 6950/75, the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. In so far as, by their acts or omissions, they affect such line with persons or property, the responsibility of the State is engaged.<sup>292</sup>

In the decades following this explanation, the ECtHR was given a number of opportunities to affirm the principle behind the Commission’s delimitation, while working out its borderlines in greater detail. In the landmark case of *Bankovic and Others*<sup>293</sup>, the Court reiterated its earlier dicta in order to conclude whether or not the bombing of a radio and television station in Belgrade during the NATO air campaign 1999 violated the obligations of those NATO Members who were signatories to the ECHR. The Court concluded that the applicants, all victims of the bombing or close relatives to victims, indeed came under the jurisdiction of Contracting Parties in the meaning of art. 1 ECHR and found the application inadmissible.

After establishing the “ordinary meaning” of the term “within their jurisdiction” in Article 1 of the Convention, analysing state practice and seeking confirmation of its interpretation in the *travaux*,<sup>294</sup> the Court was “satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial”.<sup>295</sup> It goes on to identify the exceptions to this principle.<sup>296</sup> In its explicit enumeration, “the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.”<sup>297</sup>

The Court then went on to analyse whether the applicants came under the jurisdiction of the respondent states, which the applicants claimed to be the case, supporting this assertion with an analogy to the *Loizidou Case*.<sup>298</sup> The Court rejected the applicants’ assertion that the positive obligation to protect in Article 1 of the Convention applies proportionately to the control exercised.<sup>299</sup> The Court further underscored that the Convention was operating in “an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States”.<sup>300</sup> However, this rejection must be correctly understood: it concerned the issue whether jurisdiction,

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<sup>292</sup> *W v. Ireland*, Decision of 28 February 1983, European Commission of Human Rights, Appl. No. 9360/81, D&R 32 (1981) p. 211 (214-216), para 14. To support its reasoning in this passage, the Commission refers back to a number of earlier decisions.

<sup>293</sup> *Banković and Others v. Belgium and Others*, ECtHR, Decision of 12 December 2001, Appl. No. 52207/99

<sup>294</sup> *Ibid.*, paras 59-66.

<sup>295</sup> *Ibid.*, para. 59.

<sup>296</sup> “In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.” *Bankovic and Others*, supra note 293, para. 67.

<sup>297</sup> *Bankovic and Others*, supra note 293, para. 73.

<sup>298</sup> *Loizidou v. Turkey*, ECtHR, Judgment of 18 December 1996 (*Merits*), *Reports of Judgments and Decisions* 1996-VI, no. 26.

<sup>299</sup> *Bankovic and Others*, supra note 293, para. 75.

<sup>300</sup> *Ibid.*, para. 80.

and hence obligations under the ECHR, are derivative of the amount of control a state exercises over foreign territory. This rejection does not affect the relevance and applicability of the ECHR based on the Soering doctrine.

The message is clear: the term “within the jurisdiction” does not refer to a geographical, but to an administrative boundary, and the administrative reach of a state exceeds its territorial borders.<sup>301</sup> In tracking these administrative boundaries, international law provides the benchmarks. In the case of Protected Entry Procedures, the exercise of the sending state’s jurisdiction is based on treaty law and custom. First, the Vienna Convention on Diplomatic Relations<sup>302</sup> and the Vienna Convention on Consular Relations<sup>303</sup> provide an explicit base. Second, the pivotal norms of both conventions are reflections of customary law. Therewith, it should be established beyond doubt that the grant or denial of an entry visa at a diplomatic representation forms part of the exercise of jurisdiction in the meaning of art. 1 ECHR, as construed by the ECtHR in *Bankovic and Others*. In this context, a caveat is in order: where the grant of visas is relegated to ‘processing centres’, operated unilaterally or multilaterally outside embassy premises, a separate assessment of whether their activities fulfil the requirements of art. 1 ECHR is called for.<sup>304</sup>

In the second step, it may be asked whether other rights than art. 3 are covered by this responsibility. The answer is straightforward. A close reading of the texts entails the conclusion that there is no hierarchy among the rights guaranteed in Section I ECHR and in the Protocols.<sup>305</sup> So far,

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<sup>301</sup> In parentheses, it is worth recalling that the ECHR is not the only instrument whose scope is limited only by a requirement of the exercise of jurisdiction. Indeed, the ACHR is constructed in the same fashion, and needs to be construed along the same lines. Its Article 1 (1) spells out that States Parties undertake “to ensure to all persons subject to their jurisdiction the free and full exercise of ... rights and freedoms” recognized in the ACHR. Among these rights, we find *inter alia* a prohibition of torture, inhuman or degrading punishment or treatment in art. 5 (2) ACHR. In the Coard case (Inter-American Commission of Human Rights, Coard et al. v. the United States, Case No. 10.951, 29 September 1999, Report No. 109/99), the Inter-American Commission of Human Rights examined complaints about the applicants’ detention and treatment by United States’ forces in the first days of the military operation in Grenada, and explained the limits of extraterritorial responsibility as follows:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. ... Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

Hence, the ACHR is constructed in an analogous manner, and the extent of extraterritorial obligations hinges, again, on the extent of positive obligations inherent in a relevant right and the facts of the case.

<sup>302</sup> Vienna Convention on Diplomatic Relations and Optional Protocols, 500 UNTS 95, entered into force 24 April 1964.

<sup>303</sup> Vienna Convention on Consular Relations, 596 UNTS 262, entered into force 19 March 1967.

<sup>304</sup> Where processing centres are operated multilaterally, it must be sorted out who is to assume responsibility under the ECHR. In the *Bankovic and Others* case, the French Government argued that the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States (para. 32). A similar issue could arise if a visa denial by an EU-operated processing centre would be challenged as a violation of a right contained in Section I ECHR.

<sup>305</sup> For a full argumentation, with further references, see Noll 2000, *supra* note 9, pp. 458-461, and Zühlke S and Pastille J-C, *Extradition and the European Convention – Soering Revisited*, 59 *Zeitschrift für ausländisches öffentliches Recht*

it has to be concluded that *all* human rights in the ECHR *may* impact the legality of removal. Whether they actually will, depends on other factors, most notably the wording of each specific right.

First, it should be recalled that the ECtHR has repeatedly stressed the exceptional character of extraterritorial protection under the Convention. It has underscored that its Article 1 ECHR “cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.”<sup>306</sup>

Why is that so? The actor *ultimately* inflicting the harm onto the individual is by definition not the State at whose embassy protection is sought, but a third party outside State territory. For the destination state to be responsible for the infliction of harm, there *must be a sufficient causal link between its actions or omissions and the infliction of harm*. Causality is a matter of degree, and the precise degree needed for the triggering of protection obligations can only be stated after analysing the precise wording of a relevant human rights provision. This brings us to the next step.

Second, and with a certain degree of generalisation, human rights provisions are a composite of negative and positive obligations.<sup>307</sup> Taking the example of torture under the ECHR, it is clear from the wording of art. 3 ECHR that no one shall “be subjected” to torture, and that Contracting Parties are under an obligation to “secure” that right according to art. 1 ECHR. Art. 3 ECHR is an example of a predominantly negative right, backed up by the positive obligation in art. 1 ECHR. Moving on to art. 8 ECHR, we note that Contracting Parties are obliged to “respect” private and family life – which covers negative as well as positive obligations. Finally, looking at art. 37 (a) CRC, it emerges that Contracting Parties take upon themselves to “ensure” that no child “shall be subjected” to torture, which provides another example for the combining of negative and positive elements in the construction of human rights. Thus, the degree of positive obligations inherent in the formulation of a right determines the existence and reach of an implicit prohibition of *refoulement*. The more predominant positive obligations are in the formulation of a right, the stronger a claim for non-*refoulement* under that right is.

Third, the concept of positive obligations is an elusive one, and their precise reach can only be assessed in *casu*. Thus, it would be impossible to lay down an exhaustive definition of such obligations *ratione personae* in a future Directive. In assessing whether or not removal is permitted under the ECHR or under other human rights instruments, it has to be determined to what extent the facts of the case fall within the extent of positive obligations. The facts of the case are a composite of two elements. The first relates to the degree to which the invoked right is violated upon return, while the second consists of the degree of predictability that this intrusion will materialise.

As rights guaranteed under the ECHR may be engaged in situations where protection seekers approach the diplomatic representations of destination countries, the right to a remedy guaranteed in art. 13 ECHR needs to be taken into account. Where a denial of an entry visa would entail a

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und Völkerrecht 3 (1999). Lamentably, art. 7 of the ILPA/MPG Proposed directive 2000/01f on complementary protection contains a reference to “fundamental human rights” entailing subsidiary protection. This begs the question which rights are fundamental, and exactly how such a separation is supported by the text of relevant instruments.

<sup>306</sup> *Soering v. United Kingdom*, ECtHR, Judgment of 7 July 1989, Series A, No. 161, [henceforth *Soering*], para. 86.

<sup>307</sup> Positive obligations usually come together with considerable restriction options.

violation of e.g. art. 3 ECHR, the applicant must be allowed to challenge the decision. Some destination states allow for a renewed application for a visa, others offer the possibility of appealing the denial of a visa. There are numerous ways of complying with this obligation, as long as the remedy offered is an effective one, and provides for a material scrutiny of the protection-related issues of the claim.

#### 4.2.3.2 *The CRC*

The CRC provides a further example. Its art. 2 (1) states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction [...]”. Thus, there is no requirement that a child wishing to benefit from the positive obligations enshrined in the CRC is present on the territory of a State Party from which these benefits are sought. To exemplify the source of such obligations, one may resort to art. 37 CRC, which contains *inter alia* a prohibition of torture and other forms of ill-treatment.

For children seeking an entry visa from the destination state’s diplomatic representation located in a *third* country, art. 22 (1) CRC may also be of relevance.<sup>308</sup> This provision reads as follows:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Thus, the minor visa claimant would benefit from a state obligation to “take appropriate measures to ensure” that he or she “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights”. Among these rights, we find e.g. the protection of torture and ill-treatment in art. 37 CRC, mentioned earlier. An appropriate measure to ensure freedom from torture or other forms of ill-treatment in an imminent case of non-protection from such risks in the third country could be to grant an entry visa into the goal country.

It should be noted that the UK as well as Singapore introduced reservations upon ratification, which may make the interpretation expounded above inapplicable to them.<sup>309</sup> Germany introduced a

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<sup>308</sup> A child seeking an entry visa at a diplomatic representation located in the country of origin would fall outside the scope of art. 22, as such a child is not outside its country of origin, it is not to be regarded as a refugee in the sense of art. 1 A. (2) GC.

<sup>309</sup> The United Kingdom introduced the following reservation:

“The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.”

Singapore introduced the following reservation:

“Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such legislation and conditions concerning the entry into, stay in and departure from the Republic of Singapore of those who do not or who no longer have the right under the laws of the Republic of Singapore, to enter and remain in the Republic of Singapore, and to the acquisition and possession of citizenship, as it may deem necessary from time to time and in accordance with the laws of the Republic of Singapore.”

declaration upon ratification, mirroring its intention to safeguard the area of immigration control from being affected by the CRC.<sup>310</sup> However, both Germany and the U.K. would still be obliged under the ECHR, which offers an analogous protection not only to children, but to adults as well.

#### 4.2.4 Interim Conclusion

In exceptional situations, the obligations of Contracting Parties to the ECHR and the CRC may be engaged when an entry visa is sought to evade harm relevant under convention provisions. Although the obligation to protect is abstract and lacks specification in case law, a number of criteria emerge from analogies to the Soering doctrine:

- the harm feared must relate to a human right protected by the Convention in question
- the harm feared must be attributable to the destination state, i.e. there must be a causal chain linking the rejection of a visa request to future convention-relevant harm
  - in particular, it must emerge that there is no other protection alternative which the protection seeker can be reasonably demanded to utilise in the concrete situation she finds herself in
- the harm feared must be sufficiently intrusive and the likelihood of its materialisation sufficiently high to engage the elements of positive obligation inherent in the right invoked.

It may be objected that the Soering doctrine relates to situations where the claimant is present on the territory of the state to which the protection claim is opposed. Territorial presence is no absolute prerequisite for the existence of protection obligations, as shown above and affirmed by the ECtHR in *Bankovic and Others*.

How far, then, do positive obligations extend in the context of Protected Entry Procedures? Can the last criterion be formulated more precisely? We have earlier spoken of rights as composites of negative and positive obligations. When a state refrains from removing a person in compliance with its obligations under art. 3 ECHR, one may describe this as compliance with a negative obligation. The state refrains from action. Turning the tables, one could also observe that the state is actually doing something – namely extending a very rudimentary form of protection to a non-citizen. At least when seen in conjunction with other robust entitlements (e.g. basic health care and other subsistence benefits), one may safely speak of the compliance of a positive obligation.

Does this mean that speaking of negative or positive obligations is merely a matter of taste? Not so. But rather than a simple binary opposition (either an obligation is positive, or it is negative), we should construct obligations as being positioned on a scale with two poles – one demarcating

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Portugal and Sweden objected to the reservations by the Republic of Singapore, as both objecting countries considered that “reservations by which a State limits its responsibilities under the Convention by invoking general principles of national law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international law.”

It could, of course, be asked why analogous objections have not been presented against the reservation by the U.K., whose reference to domestic law is not less sweeping than that utilised in Singapore’s reservation.

<sup>310</sup> Germany made the following declaration upon ratification:

“Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.”

inertia, another maximized action. Now, a certain action or omission can be placed on this scale, and the least we can do is to relate it to another action or omission. Clearly, organising an evacuation and perhaps even paying the airfare of a person in need of protection must take a place closer to the positive end of the scale than the mere issuing of a visa (which we could choose to describe as the de facto waiver of entry control in the individual case). This implies that it is comparably more difficult to argue for the existence of an obligation to organise evacuation of a claimant. A legal obligation to issue an entry visa in a pertinent case does not automatically imply an obligation to protect the claimant from interference by local authorities when leaving the country.

Hence, compared to the obligation of a state to see to that its police officers do not torture a person in the course of interrogation at a police station, the obligation to provide for a Protected Entry Procedure is a much weaker one. However feeble it may be, it nevertheless obliges states to be observant about the aggregate outcome of their migration and asylum policies. The more efficient states are in blocking access to territory, and the scarcer the protection offer in the region of origin is, the more convincing is an argument to the effect that the grant of a humanitarian visa remains the sole avenue to avoid torture.

### **4.3 Protected Entry Procedures and the Law of the European Union**

While single Member States have provided for Protected Entry Procedures unilaterally, there is presently no instrument promoting or regulating such practices in the European Union. Nonetheless, Protected Entry Procedures could be a relevant item of consideration in the ambitious programme of harmonisation which Member States have set themselves, and which is referred to as the Common European Asylum System (CEAS). This programme is pursued within the framework of the European Community (EC), which represents the supranational layer of cooperation among Member States, and which has been entrusted with far-reaching competencies to harmonise domestic legislation.

With the Temporary Protection Directive, a binding instrument has been created, which features a coordination mechanism for evacuation and dispersal decisions Member States may wish to take in imminent situations of mass influx. It would certainly be in line with the development of a comprehensive multilateral regime covering asylum and immigration, if Member States now considered resettlement and Protected Entry Procedures as possible items for harmonisation. However, this raises a number of questions. First, it must be established whether the EC has been given competence to deal with Protected Entry Procedures. Secondly, we need to address how a legal regulation of a Protected Entry Procedure would fit into the existing *acquis communautaire* in the area of asylum and immigration.

#### **4.3.1 Competence under the TEC**

In search of an EC competency to legislate in the area of Protected Entry Procedures, it is relevant to take a closer look at Title IV of the EC Treaty, which aims at progressively establishing an area

of freedom, security and justice.<sup>311</sup> Recalling that Protected Entry Procedures relate to migration control, in particular the granting of visas, as well as the area of asylum, we find that art. 62 and 63 TEC precisely cover these issues. However, Community competencies under Title IV are not all-embracing.<sup>312</sup> Articles 62 and 63 TEC enumerate the issues within EC competence in an exhaustive manner. Those issues not specified in Articles 62 and 63 TEC remain within the competence of the Member States. As long as the Community has not made use of its competence, Member States remain free to legislate. The competence of Member States is also retained in areas where the Community has adopted measures setting out minimum standards, as long as domestic legislation accommodates those standards.<sup>313</sup> Hence, it is advisable to take a closer look at the components of the Protected Entry Procedures under these premises.

First, the protection aspects of the Protected Entry Procedures can be accommodated under a number of competencies. Let us first look at the *definitional* aspects. Art. 63 (1) (c) TEC allows for the adoption of minimum standards with respect to the qualification of nationals of third countries<sup>314</sup> as refugees. This competency could be used to cover Protected Entry Procedures in third states, but excludes beneficiaries still in their countries of origin, as these are not refugees in the technical sense. The competency to adopt “minimum standards ... for persons who otherwise need international protection” in art. 63 (2) (a) TEC could then be used to legislate on Protected Entry Procedures of beneficiaries in countries of origin, as well as for beneficiaries solely threatened by harm engaging Member States’ obligations under the ECHR and CRC. As the latter provision is rather broad in its wording, it could also offer a basis to draw up adequate Protected Entry Procedures. Otherwise, it should be recalled that art. 63 (1) (d) TEC allows for the adoption of “minimum standards on procedures in Member States for granting or withdrawing refugee status”. This competency is expressly limited to “procedures *in* Member States” (emphasis added). Hence, this provision can only serve to harmonise those parts of the decision-making process in the Protected Entry Procedure that take place on the territory of Member States. Partially, this limitation can be bypassed by switching to the broader procedural competency in art. 63 (2) (a) TEC. In conclusion, procedural competency is lacking in a very limited area, namely to legislate on the Protected Entry Procedure with regard to persons who are refugees only, and not concurrently within the protective scope of the ECHR and the CRC. As we will see, this rather technical *lacuna* can be compensated for by shifting over to the competencies in the area of migration control.

In that area, the grant of an entry visa is central, and, for reasons of migration control, the primary focus is on short-term visas. The EC is competent to legislate on the granting of short-term visas according to article 62 (2) (b) (ii) TEC. It entitles the Council to legislate on “procedures and conditions for issuing visas by Member States”. This entitlement offers a basis for EC institutions if

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<sup>311</sup> Art. 61 TEC. The Tampere Conclusions have clarified that this area is not an exclusive privilege of Union citizens. European Council, Presidency Conclusions, Tampere European Council. 15/16 October 1999 [hereinafter Tampere Conclusions], paras. 2 and 3. It should be recalled that the Conclusions are not legally binding, while the TEC is.

<sup>312</sup> Hailbronner, K, *Die Neuregelung der Bereiche Freier Personenverkehr, Asylrecht und Einwanderung*, in Hummer, W, *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, Manz, Vienna, p. 180

<sup>313</sup> Art. 63 TEC specifies this repartition of competencies further. Measures on immigration policy and measures defining the rights and conditions under which nationals of third countries which are legally resident in one Member State may reside in other Member States do not prevent any Member State from maintaining or introducing national provisions which are compatible with the TEC and with international agreements.

<sup>314</sup> The term “nationals of third countries” in the EC Treaty alludes to persons not being nationals of a Member State.

they wish to launch a common procedure for granting humanitarian entry visas in the course of a coordinated Protected Entry Procedure.<sup>315</sup>

The Tampere Conclusions affirm the outcome of our analysis. For those whose circumstances lead them justifiably to seek access to the territory of the European Union, the Union is required to develop common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related crimes.<sup>316</sup> This understanding reflects a holistic perspective, which does not fall foul of the separation of asylum and migration as two unrelated issues, and supports the development of protection-minded migration legislation – *inter alia* through the development of a Protected Entry Procedure.

In line with the approach taken by the European Council in the Tampere Conclusion, the European Commission has proposed that “requests for asylum made outside the European Union and resettlement” be considered in the second stage of developing common procedural standards.<sup>317</sup> The rationale would be to offer an alternative to unauthorised entry for bona fide protection seekers, but the Commission also underlines that Protected Entry Procedures and resettlement are complements to, and not replacements for, the ‘spontaneous’ seeking of asylum on the territory of Member States.<sup>318</sup>

At present, EC competencies in the area of Protected Entry Procedures have not been made use of. Hence, Member States are still fully competent to devise unilateral solutions, as long as these do not encroach on binding instruments of EC law in other competency areas.

## 4.3.2 Coherence with the *acquis communautaire*

### 4.3.2.1 *The Migration Dimension*

The Community has fully harmonised its visa requirements by means of Council Regulation No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.<sup>319</sup> Regulations are the most interventionist form of Community law-making: they leave no discretion whatsoever to Member States as to the transposition of norms into domestic

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<sup>315</sup> The short validity of such a visa does not pose a problem. Once an asylum application has been filed on the territory of the destination state, it will provide for an independent and sufficient base for a provisional stay during its processing.

<sup>316</sup> Tampere Conclusions, *supra* note 311, Conclusion 3.

<sup>317</sup> European Commission, Communication from the Commission to the Council and the European Parliament, *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM (2000) 755 final, Brussels 22 November 2000, p. 8.

<sup>318</sup> “Processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme are ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or trafficking gangs or having to wait years for recognition of their status. Only four Union Member States currently operate resettlement schemes, in conjunction with the HCR. The USA has a typical two-tier asylum procedure: one for spontaneous arrivals and one, very different, based on a resettlement scheme, based on tight internal coordination between the various public authorities involved and cooperation with NGOs and the HCR. This option, as the Commission sees it, must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals.” *Ibid.*

<sup>319</sup> OJ 81/1, 21.3.2001.



legal systems. The regulation leaves no room for exempting persons in need of protection from visa requirements, as this category is not contained in the exhaustive listing in its art. 4. It follows that the only conceivable way to provide for a Protected Entry Procedure would be to grant humanitarian visas in cases where the nationality of the protection seeker is subject to visa requirements under the Regulation. The Regulation does not address the reasons on which a visa is granted.

How do these conditions link to the right to entry? To start with, the possession of a visa does not entitle its holder to entry. It merely entitles the holder to *seek* entry or transit at a border post, and the border post may still reject the alien in possession of a visa.<sup>320</sup> On the other hand, entry to the territories of the Contracting Parties must be refused to any alien who does not fulfil all these conditions and, where required, is in possession of a visa.<sup>321</sup> Nonetheless, there is an opening for protection-related cases in Article 5 (2) of the Schengen Convention<sup>322</sup> [henceforth SC]: where a Contracting Party considers it necessary, it may derogate from that principle on humanitarian grounds or in the national interest or because of international obligations. In such cases permission to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.<sup>323</sup> Article 15 SC states explicitly that these rules shall not preclude the application of special provisions concerning the right of asylum.

For the three exceptional reasons enumerated in Article 5 (2) SC, a Contracting Party may not only allow entry to its territory, it may also issue a visa. However, in cases where a Contracting Party makes use of its right to exceptional derogation, it shall restrict the validity of the visa issued to its own territory and inform the other Contracting Parties of its decision.<sup>324</sup>

Can a Schengen state be represented by the diplomatic representation of another Schengen state when it comes to visa application on protection grounds? In principle, this should be possible according to the relevant procedures laid down in the Common Consular Instructions. Due to the fact that core documents remain confidential, it is at present not possible to give a full account of how the grant of humanitarian visas by proxy could work out in practice.<sup>325</sup>

For protection seekers, the message boils down to the following. Provided that ‘international obligations’ flowing from refugee law or human rights law enshrine a right to entry or, at least, a right to non-rejection for protection-related grounds, this right shall override exclusionary rules of the Schengen Convention. If such obligations can be shown to exist in international law, the Contracting Party concerned *must* allow entry in such cases. Beyond that, a Contracting Party *may* allow entry on humanitarian grounds or in the national interest.

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<sup>320</sup> Common Consular Instructions to the Diplomatic Missions and the Consular Posts of the Contracting Parties to the Schengen Convention, which are Headed by Career Consular Officers [hereinafter CCI], para. I.2.1.

<sup>321</sup> Article 15 SC.

<sup>322</sup> Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, OJ L 239, 22.9.2000, p. 1

<sup>323</sup> Ibid.

<sup>324</sup> Article 16 SC.

<sup>325</sup> Annex 5 to the Common Consular Instructions (*List of visa applications requiring prior consultation with the central authorities, in accordance with Article 17(2)*) is a confidential document. Therefore, it cannot be concluded whether protection-motivated visa applications come under the ambit of the consultation procedure according to paras. V.2. CCI.

#### 4.3.2.2 *The Protection Dimension*

With regard to protection, the *acquis* is still very much in a stage of development, and the present normative framework remains incomplete. A multilateral system worthy of being classified as a Protected Entry Procedure does not exist.

To start with, there is no binding instrument on asylum procedures as of yet. The proposed Draft Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>326</sup> places practices of Protected Entry Procedures outside its scope. Its article 3 (2) states that “[t]his Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States”. An identical provision has been included in the Draft Directive on reception conditions.<sup>327</sup>

Applications outside the territory of Member States are also excluded from the scope of the draft instrument defining the beneficiaries of protection in the Union (Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection).<sup>328</sup> Its article 3 reads: “This Directive shall apply to all third country nationals and stateless persons who make an application for international protection at the border or on the territory of a Member State and to their accompanying family members and to all those who receive such protection.”

#### 4.3.2.3 *Interim Conclusion*

To be sure, nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. From a technical perspective, it is a good thing that the draft directives mentioned above exclude Protected Entry Procedures. First, Member States can continue with unilateral practices in that area, although territorial asylum procedures are harmonized multilaterally. Second, if Protected Entry Procedures were to be the subject of future harmonization, legislation could be concentrated to a single instrument, and other directives need not be amended.

## 5 The Development Potential of Protected Entry Procedures

This study has indicated that Protected Entry Procedures are unilaterally practiced by six Member States, with a notable divergence among their practices. Our analysis also illustrated that international law features a mandatory requirement to consider urgent protection claims filed with diplomatic representations and to facilitate legal entry, e.g. by issuing an entry visa, in specific

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<sup>326</sup> European Commission, *Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM (2000) 578 final, Brussels 20 September 2000.

<sup>327</sup> European Commission, *Proposal for a Council directive laying down minimum standards on the reception of applicants for asylum in Member States*, COM (2001) 181 final, Brussels 3 April 2001, art. 3 (2).

<sup>328</sup> European Commission, *Proposal for a Council directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection*, COM (2001) 510, Brussels 12 September 2001.

cases. Furthermore, an expansion, qualification and harmonisation of Protected Entry Procedure practices is in no way contrary to the present *acquis*. Quite the opposite: the goal to fight illegal immigration would be accommodated, while the intentions as well as the letter of the Tampere Conclusion would be implemented. In the present section, the experience gathered by pioneering Member States as well as states outside the EU shall provide the backdrop for an analysis of future options, the aim being to distil a set of recommendations for the way ahead.

## **5.1 Existing Solutions and Future Approaches**

From the outset, it should be recalled that the Protected Entry Procedure is a practice still in its formative stage. The institution is generally little known among potential beneficiaries, whose legal and procedural standing is less favourable than in territorially conducted procedures. Therefore, it is premature to assess whether the overarching goal to provide an alternative to illegal migration for *bona fide* protection seekers is indeed achievable within the framework of present solutions. Such an assessment would appear reasonable at a stage where the Protected Entry Procedure has been stabilised as a practice among a substantial number of recipient states, and where potential beneficiaries have developed a basic trust in the protection offer available under the relevant schemes. Reaching *bona fide* protection seekers with such a confidence-building message is no easy task, and it certainly takes more than setting up a well-functioning website or spreading a few print-runs of leaflets.

Attempts to switch over protection *exclusively* to extraterritorial solutions as Protected Entry Procedures, resettlement or reception in the region, and to dismantle systems for territorial applications are doomed to fail both in legal and practical terms. There should be no illusions on this point, and the European discussion should acknowledge the fact that land borders in particular will always be permeable for persons seeking protection. Governments need to face the fact that they compete with human smugglers on a market where they have no information privileges, and where deeds count more than words. Protected Entry Procedures may offer a testing ground for governments on how to regain the initiative in this field and to establish direct communication channels with would-be refugees.

### **5.1.1 Balancing Formal and Informal Approaches**

In general terms, the example of the three resettlement countries suggests that Protected Entry Procedures could be formalised to a much higher degree in European states without missing out on flexibility and control. While states may appreciate discretion, they should be aware that excessive fluctuation as well as opacity of schemes strikes against their credibility and attractiveness. At the same time, the crucial role of the decision-taker should be acknowledged through the allocation of sufficient resources, in particular training in the specifics of handling visa applications in an environment of protection claims.

In two areas, a degree of informality appears defensible, or indeed advantageous from a protection perspective.

First, as the comparative tables in Chapter 3.5 indicated, it is by no means self-evident that states practising some form of a Protected Entry Procedure extend its benefits to persons approaching

their representations in countries of origin. It should be underscored that such a limitation cannot be justified merely by referring to the letter of the refugee definition, as the Refugee Convention was never designed to regulate the extension of protection by potential asylum states in countries of origin. A better argument might lie in the very practical difficulties that embassies encounter in organising efficient access to its premises and to secure, within the realm of the feasible, unimpeded departure. Protected Entry Procedures in countries of origin are indeed a difficult endeavour, but this alone is not a reason not to take on the challenge. In this domain, it is motivated to accord a substantial degree of flexibility to well-trained decision-takers at representations and to maintain a discrete profile vis-à-vis the authorities of the territorial state.

Second, on an overarching level, the degree of formalisation brings us back to the issue of burden sharing. States shy away from overly rigid schemes where they do not control the source of obligation, and the preservation of a certain degree of flexibility may keep doors open which would be shut under detailed and specific agreements.

States should consider the development of Protected Entry Procedure schemes, which feature, first, a high degree of formalisation, transparency and predictability with regard to beneficiaries applying from third countries. These elements should be law-based and well integrated into ordinary territorial asylum procedures and subject to review by appellate bodies. Second, such schemes should contain a less formalised and discrete mechanism for accommodating protection claims in countries of origin. Training of key actors at embassies will be central to the success of this element of the Protected Entry Procedure, a payoff being that such actors may provide territorial asylum authorities with fresh and relevant country information.

### **5.1.2 Balancing Inclusive and Exclusive Approaches**

The gauging of its openness remains a decisive question in the development of Protected Entry Procedure schemes. Our survey showed that the choices are manifold. Countries of origin can be outright excluded, or only select countries of origin included. Protection can be limited to persons fearing persecution in the sense of the refugee definition, or extended to other categories, e.g. subsidiary protection.

If the logic of offering alternatives to human smuggling is taken seriously, protection categories in Protected Entry Procedure schemes have to be identical with those utilised in territorial systems.

Hence, in the EU context, the refugee definition and a category of persons falling under a definition of subsidiary protection based on international legal obligations would provide a rather self-evident base for gauging openness. But any system would need to tackle at least two further issues: the question of close ties, and the safety of third countries in which applicants approach representations.

With regard to Protected Entry Procedures in third countries, many states add layers of requirements to those already inherent in the refugee definition or in other categorisations of beneficiaries. Demanding that “close ties” to the destination country be shown is not unusual among the scrutinised states. Historically, a requirement of family or other ties figures already in Wallenberg’s protection activities in Hungary. The thinking appears to be the same and accords protection to persons showing family linkages, previous work or study in the destination country, or forming part of a political-cultural elite. Such requirements reduce some schemes to mere family

reunification mechanisms, valuable as such, but uninteresting for those who happen not to have close relatives in destination countries, and thereby pushing them back into the hands of the smugglers.

However, the *prima facie* legitimacy of requiring close ties should not be denied. The requirement is partly grounded in the international human rights law of family reunification, partly motivated by states' desire to facilitate integration (where family ties, previous studies or work experience in the destination country is of relevance). The underlying idea would be one of automatic dispersal - all states take their fair share of protection seekers, as the latter have close ties to different states. For the time being, this idea is counterfactual. First, not all states operate Protected Entry Procedure schemes, which makes the base of dispersal meagre. Second, the idea of close ties favours persons and families with a track record in international mobility, and hence strikes differently against various strata in crisis-stricken societies. In that respect, requesting close ties risks affirming an elitist approach to protection, which all too easily collides with the egalitarian logic of human rights.

Overly rigid close ties requirements risk undermining the competitive edge of Protected Entry Procedure schemes. For states wishing to phase in a Protected Entry Procedure in a cautious manner, requiring close ties and interpreting the closeness of such ties flexibly might appear to be an alternative. However, requirements of "close ties" should be reassessed after an initial testing period, and, where the situation allows, gradually loosened and abolished.

Resettlement states employ utilitarian elements as health requirements in their schemes, which add a taint to protection unknown to systems based on territorial application. Although states' desire to calculate costs is understandable, this type of accountant thinking cannot be reconciled with the definition of Protected Entry Procedures. While resettlement typically features a numerical limitation, which perforce will be determined also with the dimension of fiscal costs in mind, Protected Entry Procedures compete with the numerically unlimited seeking of territorial asylum. Hence, it makes no sense to employ economic data in the formulation of the regime, unless one wishes to build a protection alternative for elites only. For the same reasons, the availability of private sponsoring cannot determine the openness of Protected Entry Procedure schemes.

Utilitarian elements as health requirements, the availability of private sponsorship etc. cannot be used in Protected Entry Procedure schemes without undermining their rationale. This would collide with their open-ended nature.

In practice, the dominating element of Protected Entry Procedures will be the reception of claims at representations in third countries. This might entice destination states to declare third countries to be 'safe' for protection seekers in order to dissuade protection demands at their embassies. A gradual expansion of Protected Entry Procedures might risk overstretching the notion of a 'safe third country' beyond what is deemed acceptable today. This is a risk that should be taken most serious at the present stage. Turning the tables, Protected Entry Procedures will demand a greater engagement in the quality of regional protection, and the assumption of responsibility where such protection is sub-standard. The practice of referring protection seekers to safe third countries varies widely among states in the North, and the predictability of outcomes is deplorably low. Credible Protected Entry Procedure schemes demand the development of a coherent set of binding norms on such referrals, which allow individuals to argue their case although a third country is generally assessed to be safe.

One of the first steps towards a more uniform and predictable practice of Protected Entry Procedure schemes is the harmonisation of how to evaluate the safety of third countries as protection alternatives open to the applicant. Earlier codification attempts are of limited value in this context, as they were intended for use in territorial systems.

### 5.1.3 Procedural Aspects

In framing procedural aspects of Protected Entry Procedure schemes, states actually determine the risk distribution between them and the protection seeker. Where protection seekers have to wait for extended periods for an entry permit, they will consider human smuggling as an alternative, as it offers an immediate way out of the situation experienced as untenable. On the other hand, if states were to grant entry visas to a large group of applicants, this would reproduce problems experienced in systems based on territorial applications – namely the return of rejected protection seekers.

The need to strike this balance should lead to two considerations. First, procedures in countries of origin must be prioritised and executed in very brief delays as not to endanger bona fide applicants. The rather informal character of such procedures recommended above will be helpful in this regard, and an outright authorisation of specialised staff at the embassy to grant entry permits without lengthy communication with territorial authorities should be considered. Initial visa decisions, already practiced by a number of states, are recommended in these procedures, allowing the applicant to leave the country of origin before her protection claim is fully assessed, and to await the outcome in the country of destination.

Second, a priority order should be introduced in third country applications, allowing representations to handle urgent cases in a fast track procedure, making an initial visa decision available even in such cases. For ordinary cases not featuring elements of immediate risk and with a secured subsistence, a system obliging the protection seeker to await the outcome of material determination in the third country could be considered. This would approximate a fair balance between individual interests and state interests.

Beyond the temporal aspects, a number of differences between territorial procedures and Protected Entry Procedures have emerged. Together with a downgraded legal standing under international law, protection seekers applying at embassies often miss out on valuable formal and informal assistance (e.g. interpretation, legal aid, counselling and support by NGOs). While the provision of interpretation services could be considered by states, legal aid remains much more problematic. International networking by NGOs could to a certain extent compensate for this shortfall, but it must be recalled that NGOs in relevant third countries do not necessarily possess the necessary resources and expertise. In countries of origin, such forms of support are even more problematic.

This risk of downgrading militates for a solution embracing initial visa decisions, as the defects caused by the unavailability of legal expertise can be mended – at least to a certain extent - by lawyers and NGOs upon arrival on the territory of the destination state.

The training and resources of staff working with Protected Entry Procedures at representations remains a major concern. States should be aware that a considerable investment is required, so as not to overburden existing staff and foster an inimical attitude towards protection seekers. Here, the

experience of resettlement countries comes well in. The payoff of improved information flows on the situation in countries of origin and regions of crisis should be considered, when such investments are pondered.

#### **5.1.4 Unilateral or Multilateral Solutions?**

As border control as well as responsibility for territorial asylum claims have become a multilateral issue in the EU, it is reasonable to discuss Protected Entry Procedures beyond the unilateral practices existing today. At first sight, many of the tools appear to be in place. Already today, Member States share their embassies as joint resources in the grant of Schengen visas. The Dublin Convention has spawned an ongoing debate on how to cooperate on the distribution of responsibility for asylum claims. And, finally, a protracted debate on burden sharing has been meandering through intergovernmental and supranational cooperation since the early Nineties. On the horizon, some actors anticipate joint EU processing centres in regions of crisis, merging a multitude of functions: material determination of claims, allocation of beneficiaries to Member States on equitable grounds, and the grant of entry visas. Questions of state responsibility as well as the simple fact that such grand schemes require long periods for their implementation impose themselves on the realistic observer. The risk prevails that the promotion of grand schemes suppresses simpler and quicker experimental solutions on the domestic level. Therefore, ambitions should be pegged at a modest level initially, and expand gradually.

1. The six Member States currently operating Protected Entry Procedure schemes should develop them further along the recommendations set out in this study, and monitor outcomes closely, making data available to other Member States as well as to independent research. An in-depth study of practices in those states, as well as in Switzerland, should be undertaken.
2. Other Member States should consider introducing Protected Entry Procedure schemes, taking into account the recommendations set out in this study.
3. Parallel to these two processes, first steps towards regulation should be taken at the EU level. Such steps should feature a process of consensus building on the goals and elements of Protected Entry Procedures in a multilateral framework as well as the initiation of a drafting process for a future instrument harmonising practices at a minimum level.
4. When deliberating on the Draft Directive on asylum procedures, Member States should test the draft provisions with a view to their viability in a context of Protected Entry Procedures, so as to facilitate the harmonisation of the latter.
5. After an independent evaluation of unilateral practices, which could be jointly financed through the ERF, the first step in harmonisation could be taken by adopting a binding instrument setting out minimum material and procedural standards for a unilateral practice of Protected Entry Procedures by all Member States.
6. In the second step of harmonisation, a binding instrument could regulate the integration of the Protected Entry Procedure into a system of representation sharing in the grant of visas,

of allocation of responsibility and of solidarity. Realistically, this step presupposes that the first phase of harmonisation at EU level is completed.



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*Information Providers*

Danish Immigration Service

Danish Refugee Council

Dr. Kim U. Kjær, The Danish Centre for Human Rights, Copenhagen, Denmark

Prof. Thomas Spijkerboer, Free University of Amsterdam, the Netherlands,

Prof. Jens Vedsted-Hansen, University of Aarhus, Denmark

United Nations High Commissioner for Refugees

## Annex 1 – Sample Questionnaire

*Note by the authors: This questionnaire has been used in the initial stage of information collection. Together with the questionnaire, background material has been sent out, with a request for comments on that material. Answers have been followed up by e-mail or via telephone.*

### ***Law provisions***

- 1) Are there any provisions in the Dutch law regulating the procedure concerning asylum applications lodged at Dutch diplomatic or consular representations abroad?

Yes    No

If yes, please specify (name of law and number of article):

### ***Procedure***

- 2) Is it possible to apply for asylum at *any* Dutch diplomatic or consular representation (and not only in certain specified countries)?

Yes    No

If no, please specify to which representations this possibility is restricted and why such a restriction exists:

- 3) Is it only in cases where UNHCR and UNDP representations are not available that an asylum request can be made at a Dutch representation in a third country?

Yes    No

If no, please specify under what other circumstances an asylum request can be made at a Dutch representation in a third country:

- 4) What is the competence of the staff at the diplomatic or consular representation? Are they conducting an asylum interview at the representation?

Yes    No

Please specify the competence of the staff with regard to the interview of the applicant (is there an interview or is the procedure at this stage only in writing, how is the interview recorded, who is evaluating the interview and is the staff deciding what questions will be posed or is there a standard formula for questions to be asked?):

5) In the background material it is stated that the embassy makes the first decision on the asylum application. Please explain what kind of decision it is that the embassy makes, and on what the decision shall be based:

6) Is it possible to appeal the decision that is made by the embassy?

Yes No

If yes, please specify the law and procedure to be followed:

7) Is the positive decision, mentioned in the last paragraph of the background material, referring to an initial decision to transfer the applicant or to a final decision whether the applicant will be granted asylum?

Please specify:

8) Does the representation abroad have some kind of discretionary power whether to forward the asylum request to the Immigration and Naturalisation Service or not?

Yes No

If yes, please explain the content of this discretionary power:

9) Does the Dutch representation abroad have the power to refuse issuing a visa to an asylum seeker even though they have been requested to issue one by the Immigration and Naturalisation Service?

Yes No

If yes, is it possible to appeal such a decision?

Yes No

If yes, please specify the law provisions and procedure to be followed:

10) What about practical arrangements at the representation? Will the applicant be protected somehow while his application is being processed and he is awaiting the initial decision concerning an entry visa (if such a need for immediate protection would occur)?

Yes No

Please specify:

11) Are there any impediments to seeking asylum that are attributable to the country in which the representation is situated (for example government agents physically hindering the access to the representation for persons in need of protection):

Yes No

If yes, please specify:

12) Will the asylum procedure follow the same rules as the ordinary asylum procedure in the Netherlands, even though the application was filed at a representation abroad?

Yes No

If no, please outline the procedure that will be followed:

13) In the last paragraph of the background material it is stated that the procedural aspects of the asylum request will be dealt with after the asylum-seeker's arrival in the Netherlands. Please explain what is implied with *procedural aspects*:

14) Is it possible for the applicant to be transferred to the Netherlands before the Immigration and Naturalisation Service has reached a decision on her/his asylum request, if she/he is in immediate need of protection?

Yes No

If yes, please specify who decides whether the applicant should be transferred:

15) Is it possible to appeal a negative decision on the asylum request?

Yes No

If yes, is it the same procedure as for the ordinary asylum procedure that applies to the appeal?

Yes No

If no, please outline the procedure that will be followed and specify the relevant law provisions:

16) Is there a special application form and questionnaire for applicants that apply for asylum at a Dutch representation abroad?

Yes No



If yes, please attach the application form and questionnaire to the answers.

17) How old is this procedure allowing for asylum applications to be lodged at Dutch representations abroad? Please specify the year when, and the law through which this procedure was first established.

Year:

Law:

***Case Law***

18) Is there any case law concerning asylum applications that were initially lodged at a diplomatic or consular representation?

Yes No

If there is, please attach the case/s to your answers to this questionnaire. The case/s may be attached in Dutch, if an English version is not available. However, we would appreciate a short summary in English if the case is only available in Dutch.

***Statistics***

- 19) What are the statistical numbers for the years 1995 through 2000?
- a. How many persons have applied for asylum at a Dutch diplomatic or consular representation?
  - b. How many applicants were transferred to the Netherlands before the Immigration and Naturalisation Service (INS) had reached a decision on the asylum request?
  - c. How many of the applicants, applying at a representation, were granted asylum in this procedure?

Please answer the questions outlined above by filling in the table, to the extent that you have available information. Feel free to include additional statistics that might be of interest in the empty rows:

	1995	1996	1997	1998	1999	2000
<b>Number of asylum applications filed at a representation abroad</b>						
<b>Number of positive first decisions by the representations abroad</b>						
<b>Number of appeals on the first decisions made by the representations abroad</b>						
<b>Number of applicants transferred to the Netherlands before the INS had reached</b>						

<b>a decision on the asylum request</b>						
	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>
<b>Number of applicants granted asylum, when the application was filed abroad</b>						
<b>Number of applicants denied asylum, when the application was filed abroad</b>						
<b>Number of appeals after denial of asylum by the INS</b>						

Additional comments on statistical issues:

***Benefits, drawbacks and current discussions***

20) What are the benefits/drawbacks of this procedure? How is this procedure perceived within the diplomatic and consular representations, the Immigration and Naturalisation Service, the state organs and the UNHCR?

Benefits:

Drawbacks:

21) Is there a discussion going on at the moment with a view to changing current law/practice in this field?

Yes No

If, yes, please specify what the discussion exactly concerns and if possible include relevant excerpts from the discussion:

22) Comments on the background material: