

## EU Protection Scheme for Refugees in the Region of Origin: Problems of Conditionality and Coherence

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### 1. Introduction

During the next five years, European action in the area of migration and asylum will take on a distinct ad extra nature. The European Commission already announced, in its June 2004 Communication, that new possible approaches to asylum should focus ‘more sharply’ on action that could be taken outside the EU.<sup>1</sup> Thus, a new paradigm, which we can call the *externalization of the burden of territorial admission*, may become the core aspect of EU action in this field under the Hague Programme – also called *Tampere II*. This programme was endorsed by the European Council in November 2004 and will be the reference for completing the Area of Freedom, Security and Justice before 2010.<sup>2</sup>

Once the harmonization phase in matters relating to asylum is completed – as scheduled in the Tampere Programme adopted in 1999 – the main objective of European policy on migration and asylum appears to be the ‘management of migratory flows’ beyond EU borders. Efforts are currently directed at making third states capable of single-handedly controlling the flows of refugees and irregular migrations, whose potential destination is the EU.<sup>3</sup> The Commission is preparing the first European Regional Protection Programmes (ERPPs), which are destined to become the key instrument of this new strategy.

This new exterior dimension of European action is to some extent inspired by the proposal that Tony Blair sent to the European Council of Brussels in March 2003. With the objective to dramatically reduce and even cut by half the number of asylum seekers in the UK and, consequently, the cost of assisting them and processing their claims, two kinds of ‘safe havens’ for refugees would have to be created outside the Union’s borders, called *Regional Protection Areas* and *Transit Processing Centres*. Refugees, at these sites, would receive

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<sup>1</sup> *Improving Access to Durable Solutions*, COM(2004) 410 final, para. 38.

<sup>2</sup> The EU’s new agenda for completing the construction of an Area of Freedom, Security and Justice substitutes the 1999 Tampere Programme for the next five years (*Strengthening Freedom, Security and Justice in the European Union*, <http://www.statewatch.org/news/2004/nov/hague-programme-final.pdf>, accessed on 20 August 2005).

<sup>3</sup> One of the main features of Tampere II is to reinforce partnerships with third countries to improve their asylum systems, improve how they deal with illegal immigration and implement resettlement programmes. The proposed and yet unsuccessful European Constitution also makes explicit reference to this partnership, whose ultimate objective is to ‘manage an influx of people applying for asylum or subsidiary protection’ and thus avert a mass influx of people to EU territory (Article III-266, 2, g).

protection and assistance, particularly from UNHCR.<sup>4</sup> Military intervention in order to reduce flows of genuine refugees and enable them to return home was not discarded as a last resort.<sup>5</sup>

However the principal aim of the proposal was the transfer of asylum seekers in countries supporting the scheme, without even first having their claims processed, to one of the areas in the corresponding region: '[r]eturning asylum seekers to Regional Protection Areas should have a deterrent effect on economic migrants and others, including potential terrorists, using the asylum system to enter the UK'. The British proposal gained initial support from Denmark and the Netherlands, which were joined by Italy, Spain and, after a year of strong opposition, Germany.<sup>6</sup>

The current analysis addresses the background and instruments of the action of the exterior dimension of European policy on migration and asylum, and seeks to identify the main limits, both practical and legal, of the imminent implementation of the ERPPs. In the first place, the consequences are considered that these programmes could have on the field of development co-operation. The core part of the analysis, which is strictly legal, deals with the application of the EU Treaty obligation of coherence to the ad intra and ad extra dimensions of the asylum policy, particularly in mass influx situations.

## 2. Origins and Features of the European Regional Protection Programmes

A new budgetary line was created in the EU General Budget in 2001 (Article B7-667), which for the first time permitted the funding of projects within the external dimension of migration and asylum policy.<sup>7</sup> Funding priority was initially given to projects related to management of

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<sup>4</sup> A document titled 'A New Vision for Refugees' was leaked to leading newspapers and NGOs by the British government in February 2003. It was subsequently shortened and forwarded to the European Council held in Brussels on 23 March 2003 under the title of 'New International Approaches to Asylum Processing and Protection' (Letter dated 10 March 2003 from the UK prime minister to Costas Simitis, with the attached document (<http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>, accessed 10 April 2005).

<sup>5</sup> The Netherlands had raised the topic some ten years before within the *Intergovernmental Consultations on Asylum Refugee and Migration policies in Europe, North America and Australia* (ICG). The Dutch state secretary for justice at the time, Aad Kosto, had outlined in 1993 the possibility of establishing a system where all asylum seekers would be sent back to reception centres in their own region of origin. See *Working Paper on Reception in the Region of Origin*, Geneva, 1994; and *Reception in the Region of Origin. Draft Follow-up to the 1994 Working Paper*, Secretariat of the ICG, Geneva, 1995. For an analysis of the links between humanitarian assistance, the use of force and mass exodus, both in main UN documents and in practice, see Luis Peral, *Éxodos masivos, supervivencia y mantenimiento de la paz*, Madrid, Trotta, 2001.

<sup>6</sup> For a detailed chronology of the discussion involving Member States, EU organs and UNHCR, including the intent of the UK government to introduce the new vision within the Draft Constitutional Treaty, see Gregor Noll: *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*. ICAR Working Paper, 2003, pp. 3-6. The 'revised' approach of German Minister Otto Schily appeared in *Frankfurter Allgemeine Zeitung*, 23 July 2004.

<sup>7</sup> For the first time ever, the Budget Authority entered appropriations of the General Budget of the EU to fund specific preparatory actions for co-operation with third countries in the field of migration: 10 million euros in 2001, 12,5 million euros in 2001 and 20 million euros in 2003.

migratory flows, voluntary return, efficient fulfilment of obligations arising from readmission, and the fight against illegal immigration, to be implemented in those countries for which the High Level Working Group on Asylum and Migration (HLWG) had developed an Action Plan, including Albania, Morocco and Iraq.<sup>8</sup> But the approach quickly lost its geographic specificity and Article B7-667 thus became a horizontal programme, which can be considered the origin of the present AENEAS Programme for financial and technical assistance to third countries in the field of migration and asylum, as well as the precedent of the purported ERPPs.<sup>9</sup>

While the content of the action plans was subjected to criticism,<sup>10</sup> the report that the HLWG sent to the European Council of Nice, in December 2000, acknowledged the slow progress of their implementation. The main underlying idea was to use measures that would normally be adopted within development policy as an instrument to prevent and reduce migration. However, the report stressed that the priorities of aid policy ‘make it possible to cover a certain number but not all measures contained in the Action Plans’,<sup>11</sup> thus assuming that those priorities are to a great extent incompatible with the new priority of preventing migration. The creation of a specific funding tool was the obvious proposal, which led to the creation of Article B7-667. Finally, considering that the Action Plans’ most visible measures were directed at the effective implementation of readmission agreements, the HLWG report also referred to the

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Priority was given to projects in association with third countries and regions for which the Council had agreed upon action plans on migration, as long as there was assurance of adequate political security in the countries concerned. See *Communication du Commissaire Vitorino à la Commission sur le Cadre d’actions préparatoires. Ligne budgétaire ‘Coopération avec les pays tiers dans le domaine de la migration’* ([http://europa.eu.int/comm/justice\\_home/project/cooper\\_pays\\_tiers/cadre\\_act\\_fr.pdf](http://europa.eu.int/comm/justice_home/project/cooper_pays_tiers/cadre_act_fr.pdf)).

<sup>8</sup> The HLWG was set up by the General Affairs Council on 7 and 8 December 1998 in response to an initiative from the Netherlands. The Council approved its terms of reference in its meeting on 25 and 26 January 1999, and asked the HLWG to begin with Afghanistan, Albania –including respective neighbouring regions in both cases –, Morocco, Somalia, Sri Lanka and Iraq. The Action Plans were endorsed by the General Affairs Council of October 1999, except for the Plan for Albania, which was endorsed in June 2000.

<sup>9</sup> Taking also into account that the focus did not lead to the expected results, in 2002 it was agreed to explore the possibilities of co-operation with geographical regions other than the countries of origin covered by the HLWG Action Plans. Four areas were identified for this second year of financial allocations: projects in the context of immigration action plans for which Community funding was still needed; aid to help Afghanistan and neighbouring countries manage immigration and the return of skilled Afghans under the overall Community policy for that country; analysis of the structural development features linked to migratory flows; and pilot projects to design border measures to reduce clandestine migration.

<sup>10</sup> See a complete and systematic overview of such critics in Saskia Gent, *The Root Causes of Migration: Criticising the Approach and Finding a Way Forward*, Sussex Migration Working Paper 11, September 2002.

<sup>11</sup> The report explained the reasons for failure, including the difficulties of working across numerous policy areas; the difficulties of reconciling the priorities of national administrations; and the difficulties of trying to divert resources from the budget of other departments rather than having an autonomous allocation (*High Level Working Group on Asylum and Migration, Adoption of the Report to the European Council in Nice*, 13993/00, JAI 152, AG 76, November 2000, paras 51-60; and quote in para. 51).

sentiment held by beneficiary states that they are the ‘target of unilateral [security] policy by the Union focusing on repressive action’.<sup>12</sup>

In any event, perhaps because this perspective hardly contributes anything new to the traditional operatives of development co-operation and therefore did not produce immediate stunning results in the area of migration control, some governments began to show their impatience. A specific proposal put forth during the European Council of Seville in June 2002, by Spain and the United Kingdom, was intended to penalize – with cuts in development assistance – any non-co-operation with the European Union on matters relating to readmission. This form of *negative conditionality* was opposed to by Sweden, France and Luxembourg and has not yet become – although the possibility can never be discarded – an official EU policy.

The Council of Seville clearly stressed the ‘importance of ensuring the co-operation of countries of origin and transit in the areas of joint management and border control as well as readmission’. The Commission subsequently released a Communication on 3 December with the very explicit title of *Integrating Migration Issues in the EU’s Relations with Third Countries*.<sup>13</sup> The purpose of the Communication was to reinforce the inclusion of migration management into political dialogue with third countries and to justify the creation of specific funding instruments to help them manage migration; however, in practice, its reach was not that broad. The subsequent proposal establishing the AENEAS Programme, adopted by the Commission in June 2003, was particularly intended for those countries actively engaged in the preparation or in the implementation of readmission agreements.

The new multi-annual programme, enacted as a Regulation of the European Parliament and Council, is designed to cover financial years 2004 to 2008, with an overall expenditure of 250 million euros.<sup>14</sup> It presumably includes all of the objectives that stem from illegal migration, and remarkably also includes as a priority the ‘development of third countries’ legislation and national practices relating to international protection’, with explicit mention of the Geneva Convention of 1951 and the Protocol of 1967. This mention is indeed an opportunity, although adequate means have yet to be identified, to revitalize International Refugee Law (IRL) from – but not within – the European Union.<sup>15</sup>

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<sup>12</sup> Ibid, para. 53.

<sup>13</sup> COM (2002) 703 final, 3 December 2002.

<sup>14</sup> Regulation (EC) no. 491/2004 of the European Parliament and Council, 10 March 2004 *establishing a programme for financial and technical assistance to third countries in the field of migration and asylum (AENEAS)*, Art. 2.1, b ([http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l\\_080/l\\_08020040318en00010005.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_080/l_08020040318en00010005.pdf)).

<sup>15</sup> AENEAS relevant allocations will specially focus on ensuring observance of the principle of ‘non-refoulement’ by any third developing country and improving their capacity to receive asylum seekers and refugees, covering aspects such as registration and documentation, but without making explicit mention to the reintegration of refugees within the EU. Applicants must be non profit-making and belong to one of the following categories: regional and international organizations and their agencies; non-governmental organizations or other non-state actors; federal, national, provincial and local governments and their departments or agencies; and institutes, associations and public or private operators (*AENEAS Programme. Financial and technical assistance to third countries in the field of migration and asylum. Guidelines for grant applicants responding to the Call for proposals for 2004. Budget line 19.02.03*, [http://europa.eu.int/comm/europeaid/projects/eidhr/calls-for-proposals/cfp2004-aeneas-guidelines\\_en.pdf](http://europa.eu.int/comm/europeaid/projects/eidhr/calls-for-proposals/cfp2004-aeneas-guidelines_en.pdf)).

The ERPPs, which are based upon positive conditionality in a broad sense, constitute the most recent proposal from the European Commission in this regard. According to the Commission Communication of July 2004, these Programmes are meant to become a key policy toolbox to address protracted global refugee situations in a regional context. It also seems that UNHCR will become the main implementing agent of this European strategy, with the aim of ensuring international legitimacy.<sup>16</sup>

Therefore, the strategic partnership endorsed this year on 15 February by Benita Ferrero-Waldner, European Commission Member in charge of external relations and Ruud Lubbers, former UN High Commissioner of Refugees, is very clear: there will only be financial co-operation – without any allocation of new funds – where there is ‘added value in regard to Community action, relevant impact, common interest and adequate capacities’.<sup>17</sup> One could say that the expected relevant impact will only be of common interest if the EU domestic asylum systems are no longer under pressure from asylum seekers coming precisely from the ‘outside world’ region in which this new form of co-operation is taking place. Moreover, the Commission seems to be determined, and thus feels legitimized, to directly influence the agency in charge of defending the IRL *acquis* on behalf of the international community, particularly in situations of mass displacement.<sup>18</sup>

In this context, the Commission is designing the specific content of the first ERPPs, at least two pilot version of which should be implemented before the end of the year.<sup>19</sup> The Programmes will comprise measures already in existence with others that are still in the process of being developed as well as some – mainly resettlement schemes – that are still to be proposed. The Commission has stressed the need to adapt the mechanisms of the ‘toolbox’ to the third

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<sup>16</sup> ERPPs are distinct from previous governmental proposals in that the Commission has omitted the idea of off-shore processing of asylum applications, which was indeed problematic from a human rights perspective and would have prevented the further involvement of UNHCR. In this sense, ERPPs could be seen to be similar to, or at least in synergy with, UNHCR steered Comprehensive Plans of Action that are currently being developed from the *Agenda for Protection* (Doc. A/AC.96/965/Add. 1) and UNHCR’s *Convention Plus* initiatives. But it should also be kept in mind that the European Commission is a much needed primary financial source for UNHCR.

<sup>17</sup> *Memorandum concerning the establishment of a strategic partnership between the Office of the United Nations High Commissioner for Refugees and the Commission of the European Communities in the field of protection and assistance to refugees and other people of concern to UNHCR in third countries*, Brussels, 15 February 2005, Art. 4.c). It is also stated that this financial co-operation will be offered within the framework of Community instruments and with due regard to the relevant implementing procedures.

<sup>18</sup> The most striking objective of the new *strategic* partnership is ‘to co-operate in the identification of durable solutions for refugees and other people of concern to the UNHCR in third countries’ (Art. 3, d). The former High Commissioner thus accepted to foster ‘political dialogue’ and to enhance the ‘regular and timely exchange of information, analysis and strategic assessment’, as well as ‘information on planned action’, regarding mass displacement in any region of the world (Art. 3, a) and 3, b).

<sup>19</sup> The Plan of Action that was scheduled to be completed by July 2005 (*Improving Access to Durable Solutions*, COM(2004) 410 final, para. 57) was not released by the time of this paper’s completion (last week of August 2005).

country concerned, so that ERPP are flexible, tailor-made and situation specific,<sup>20</sup> which is also a means to enhance its capacity to impose implicit European goals on third states. In this regard, only general characteristics have been made public of the proposed toolbox. The possibilities that can be combined by the Commission as the situation requires are:

- assisting third countries in regions of origin of asylum seekers and refugees to become ‘robust providers of effective protection’;
- developing and implementing the UNHCR registration scheme profile –including biometric technology – to better manage those who require protection;
- designing an EU-wide Resettlement Scheme;
- improving local infrastructure with the active involvement of host communities so that refugees do not strain available resources;
- offering specific assistance for local integration in the third country of people in need of international protection;
- making arrangements to support the response of third countries and countries of transit to mixed migratory flows, as well as their response to combat illegal immigration and organized crime;
- encouraging the return of migrants, whether they are nationals of the third country or people for whom the third country has been or could have been a country of first asylum, if this country offers effective protection; and
- promoting active co-operation and dialogue in the area of legal migration, including the identification of legal migration possibilities for nationals of the third country involved in the partnership negotiation, and the negotiation of visa facilitation for certain categories of people.<sup>21</sup>

The precise content of the ERPPs is still not clear. Meanwhile, expectations for the pilot programmes have dropped as the moment of truth approaches. It seems as though everyone is afraid to take on the responsibility to launch programmes that might not have any impact on the reduction of forced migration demanded by governments.<sup>22</sup> Many questions are still on the table for the Justice and Home Affairs Council, which held an informal meeting in January on the issue, for example: do Member States wish to delegate implementation of these programmes to international organizations, mainly to UNHCR, or do they wish to directly undertake implementation by equipping the EU with increased expertise?; to what extent should the pilot programme be financed by Community funds or by existing instruments such as AENEAS?;

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<sup>20</sup> ERPPs would be devised after a systematic analysis of the refugee crisis in the region concerned, including a gap analysis of the protection situation that could use the Monitoring and Evaluation Mechanism requested by the Thessaloniki and Seville European Councils. The aim of that mechanism is *to monitor the migratory situation in the third countries concerned and also their administrative and institutional capacity to manage asylum and migration (Improving Access to Durable Solutions, COM(2004) 410 final, para. 52).*

<sup>21</sup> *Improving Access to Durable Solutions, COM(2004) 410 final, para. 51.* This last and newest tool, which is normally considered an expression of the concept of co-development, may also have a preventative impact on illegal migration flows according to the conclusions of the *Study on the links between legal and illegal immigration*, on the basis of which the Commission delivered COM (2004) 412 final. The goal of preventing migration and refugee influx is thus common to all components of the toolbox.

<sup>22</sup> The regions in which this first attempt will be implemented have already been identified in confidential meetings in Brussels, and it is informally said that they are not especially troubled or unstable regions. Thus, the message is that the pilot programmes will be of a limited scale.

would it be appropriate to include measures from other areas of co-operation between the EU and the countries in question (e.g. development co-operation) in the pilot programmes?<sup>23</sup>

These pending dilemmas show that the Union does not have a clear model for IRL, apart from the assumption that ‘protection-in-regions-of-origin’ is substitutable for the spontaneous arrival of asylum seekers.<sup>24</sup> The underlying question about how to assign responsibilities in terms of providing protection to a large number of people while not reducing protection standards has no easy answer. Moreover, any attempt to make policy proposals in this regard should take into account that states are not generally willing to uphold their obligations under IRL, although the intent to overcome this obstacle may imply detaching asylum seekers from the realm of law and consign them to the realm of political bargaining.<sup>25</sup> In spite of the difficulties, the long-lasting crisis of the refugee regime that was declared at the very end of the eighties has stimulated authors to become involved in the necessary search for a model. This is not the place to carry out a review of such proposals,<sup>26</sup> or even to analyse ERPPs outside of the scope of European Law, but it should be remembered that models based on ad hoc responses, like those for ERPPs, are more easily subjected to political bargaining. The predictability of the model, which entails an ex ante allocation of responsibilities among states, thus seems essential in terms of maintaining the adequate balance between the need for solutions and human rights requirements.<sup>27</sup>

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<sup>23</sup> *Determining an Approach for the External Dimension of the European Asylum Policy*. Working Document, Informal Meeting of the Justice and Home Affairs Ministers, Luxembourg, 27-29 January, 2005, p. 3 ([http://www.eu2005.lu/en/actualites/documents\\_travail/2005/01/2701docstravailinfojai/infojaifr1.pdf](http://www.eu2005.lu/en/actualites/documents_travail/2005/01/2701docstravailinfojai/infojaifr1.pdf); accessed 25 April 2005)

<sup>24</sup> According to Alexander Betts, the assumption is at the centre of the current ‘efficiency’ discourse, but these two approaches are not perfectly substitutable since ‘a spontaneous arrival system will also cater to those fleeing individual persecution rather than merely those from protracted refugee situations or those fleeing insecurity in the global south’ (*What does ‘efficiency’ mean in the context of the global refugee regime?*, Centre on Migration, Policy and Society, Working Paper no. 9, University of Oxford, 2005, p. 30).

<sup>25</sup> The expression has been used by Deborah Anker, Joan Fitzpatrick and Andrew Shacknove (‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ (*Harvard Human Rights Law Journal*, vol. 11, 1998, p. 305) in reference to Peter H. Schuck’s proposal of establishing a ‘refugee crisis insurance’ (‘Refugee Burden-Sharing: A Modest Proposal’, *Yale Journal of International Law*, vol. 22, 1997, p. 243 et seq.).

<sup>26</sup> Among the more relevant ones, see those of Eve Burton, ‘Leasing Rights: a New International Instrument for Protecting Refugees and Compensating Host Countries’, *Columbia Human Rights Law Review*, vol. 19, no. 2, 1988; James C. Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’, *Harvard International Law Journal*, vol. 31, no. 3, Winter 1990; Paul Freedman, ‘International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons’, *Georgetown Immigration Law Journal*, vol. 9, no. 565, 1995; Peter Schuck, ‘Refugee Burden-Sharing: A Modest Proposal’, *Yale Journal of International Law*, vol. 22, 1997; Ahilan Arulanantham, ‘Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System’, *Human Rights Quarterly*, vol. 22, no. 1, February 2000.

<sup>27</sup> See in particular the proposal based on the principle of ‘common but differentiated responsibility’ made by James C. Hathaway and Alexander Neve (‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ in *Harvard*

### 3. Migration Management as a New Form of Conditionality

Along with the risk of conditioning human rights demands to security demands, as regularly done by states, another consequence of emphasizing control over population flows is the development of instruments and mechanisms of positive and negative conditionality in the framework of development co-operation policies. Among the different accepted terms for management, for purposes of this analysis, it can be said that the term refers to the act of broadening the scope of EU political action by rewarding or penalizing third states, according to their willingness, or lack thereof, to fulfil a function in the framework of the Union's strategy. The EU's explicit attempt, even when the means used generate issues of great importance, to make states capable of complying with IRL and to ensure that they indeed do so, is commendable. At least in this regard, the Union's implicit attempt to help third countries so that it is not obliged itself to fulfil the demands that come from the principle of non-refoulement should not be deemed relevant.

The ideas that the Commission has under consideration at this time can be classified as positive conditionality, which is based on offering incentives to third countries that the EU seeks to influence. Although a reinforcement of positive conditionality has been planned by the Commission, it is doubtful whether additional funding will manage to increase allocations to technical projects under the AENEAS Programme. Thus, the Commission has subtly adhered to the efficiency discourse suggesting that funds be diverted from the existing asylum systems: 'if *substantial parts* of the current EU financial resources spent on the domestic asylum system could ultimately become available for enhancing the protection capacity in the region, more people could be offered effective protection than the current case'.<sup>28</sup>

The second part of this conditional statement is not necessarily dependent on an unlikely decrease in expenditures in national asylum systems when taking into consideration the enormous needs in terms of integrating the refugees and migrants currently in the EU. Nevertheless, the Commission seems determined to link external financial co-operation with the easing of migratory pressures, an intention that may lead to a redistribution of development funds according to spurious aims and to specific constraints in international co-operation.

Moreover, and particularly in case no extra funds are located or directly diverted from those benchmarked for the Millennium Development Goals (MDGs), the scope of the overall trend is still based on the old hope of improving co-ordination and systematization with regard to the objective of migration management. Hence it is not surprising that EU Regional Protection Programmes are merged into the current EU development framework, to the extent that they will be updated in line with the midterm reviews of the Country and Regional Strategy Papers, which are currently key instruments of EU development co-operation action.<sup>29</sup> Along this same line, after the JHA Informal Meeting, in which Ruud Lubbers also participated, Nicolas Schmit, on

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*Human Rights Journal*, vol. 10, 1997, pp. 115-211). In this model, solution-oriented protection of refugees for the duration of risk – thus emphasizing the temporary nature of asylum – would be the result of criteria established in advance by 'interest convergence groups of states' prepared to make a binding commitment to convene, whenever a Member State finds itself unable to deal with a refugee influx. In sharp contrast, ERPPs are meant to deal with existing protracted refugee situations selected by the EU according to its exclusive interest.

<sup>28</sup> *Towards more Accessible, Equitable and Managed Asylum Systems*, (COM (2003) 315 final), p. 16.

<sup>29</sup> *Improving Access to Durable Solutions*, COM(2004) 410 final, para. 53.

behalf of the Luxembourg Presidency, stated: '[r]ather than reacting to the flow of immigrants that have already reached its territory, the European Union should aid, in close co-operation with the UNHCR, the countries where immigration originates in order to ensure adequate protection for the refugees, who are very vulnerable'.<sup>30</sup>

According to this perspective, the new form of positive conditionality will nevertheless entail a diversion of funds that are and should be allocated in relation to the goal of fighting poverty. Even the allocation of new funds to this external dimension of the migration and asylum policy will compromise a solemn commitment that has yet to be honoured, that is, reaching the internationally agreed level of Official Development Assistance (0.7 % of GNP). If poverty reduction – an expression that to a great extent synthesizes the MDGs – should be the ultimate goal of development co-operation policies, then rewarding funds to a third state should be ruled out if it is done simply because the country accepts an elevated number of refugees or with the aim of encouraging it to do so. Positive conditionality based upon the availability of funds that were serving other goals and more genuine intentions becomes, in this sense, a kind of negative conditionality towards the least developed countries that choose not to admit large numbers of refugees into its territory in order to attend the plight of their own populations.

But negative conditionality is not only present in such concealed forms. It can also find an embryonic expression with the migration clause included in Article 13 of the Cotonou Agreement with ACP Countries, by which the latter accept 'the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the European Union at that Member State's request and without further formalities'. This could serve, according to the Commission, as a model for migration clauses to be negotiated in future agreements with other third countries, with the extended obligation of also covering third country nationals. The Commission recalls in this sense that one of the main problems with illegal residents is the lack of identification documents, which makes it often impossible to establish the nationalities of the people in question.<sup>31</sup>

The growing preoccupation for averting migration from the EU could thus lead to the suspension of aid to countries that do not fulfil the readmission agreements signed in accordance with Article 13. There is, in fact, no other clear reason for such provision to be an integral part of a development co-operation agreement. The approach provides very little room for those countries that want to continue to be beneficiaries of EU development policy; however, the Commission should not forget that the aim of alleviating poverty of populations in need cannot be dependent on the willingness of their governments to sign and comply with readmission agreements. This exercise of enhancing leverage, by and large, contradicts the principles governing development co-operation in the EU Treaty.

However, the current explicit approach gives incentives for the signing and completion of these agreements, with the AENEAS Programme being the most visible horizontal European instrument in this regard. Positive conditionality is, therefore, principally limited to technical assistance projects, and thus should have little impact on the reallocation of funds that serve development goals. The risks, however, should not be underestimated. The Commission has incidentally revealed these risks when reacting to third states' perception that bilateral

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<sup>30</sup> <http://www.eu2005.lu/en/actualites/communiqués/2005/01/2901asile/index.html>, accessed 25 April 2005.

<sup>31</sup> *Integrating Migration Issues in the European Union's Relations with Third Countries*, Communication from the Commission to the Council and the European Parliament, COM (2002) 703 final, 31 December, p. 25.

negotiations on readmission are in the sole interest of the Union. The solution would then be a dangerous merger of these negotiations into the broader co-operation agenda: ‘the issue of “leverage” – that is, providing incentives to secure the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis, in the context of the global policy, co-operation and programming dialogues with the third countries concerned’.<sup>32</sup>

Hence, in order to avoid criticism of positive conditionality, the Commission has opted for a sort of vague conditionality that, in reality, is of much more importance. Therefore, it is of no surprise, but it is indeed worrisome, that ERPPs as an integral part of development co-operation policy, are updated in line with the midterm reviews of the Country and Regional Strategy Papers.<sup>33</sup>

#### **4. Problems of Coherence/Consistency with the EU Acquis: the Case of Mass Influx**

The nature of the effective protection of human rights, while not excluded, can be classified as subsidiary in this perspective of migratory management. The recent emphasis on *management*, a business term that is now applied to politics, and especially to high politics, appears to naturally detach itself from analyses on migration and exoduses based on push and pull factors. The Commission has expressly adhered to this economic-based analysis of reality since, in December 2002, it presented its Communication on the inclusion of migration issues into the EU’s exterior relations.<sup>34</sup>

The ERPPs, above all, are an attempt to confront the problems of migratory pressure felt by European governments and the Commission, but they also provide an opportunity to revitalize IRL. The key rests on how fundamental matters are resolved regarding their funding – mentioned previously – and on the content of the statute of their beneficiaries. In order to address the latter, the obligation of coherence, in my opinion, allows the correspondent European law *acquis* on refugee rights to be connected with the rights of the refugees which the EU would contribute to guaranteeing beyond its borders. The greatest fears that the migratory pressure from a certain region will suddenly increase in Europe are associated with the hypothesis of a mass

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<sup>32</sup> *Integrating Migration Issues in the European Union’s Relations with Third Countries*, Communication from the Commission to the Council and the European Parliament, COM (2002) 703 final, 31 December, pp. 25-26.

<sup>33</sup> *Improving Access to Durable Solutions*, COM(2004) 410 final, para. 53.

<sup>34</sup> *Integrating Migration Issues in the European Union’s Relations with Third Countries*, Communication from the Commission to the Council and the European Parliament, COM (2002) 703 final, 31 December, pp. 10-11. The list of factors contained in the Commission’s Communication come from the study: *Migration-Development Nexus, State of the Art Overview*, prepared by the Centre for Development Research de Copenhagen, February 2002. But in this case the Commission was not a precursor. In 1981, S. Aga Khan brought to the UN Human Rights Commission, a stark analysis of push and pull factors of the mass exoduses, which, for example, attributed the fictitious increase in the number of refugees to the improvement of temporary reception conditions (*Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories. Study on Human Rights and Massive Exoduses*, Doc. NU E/CN.4/1503\*, 1981, the specific reference in para. 87).

exodus from one of the countries of this region. It is from this hypothesis, that we base our legal arguments.

### ***A. Obligation of Coherence between the Internal and External Dimensions of EU Policies***

Although it is not easy to determine what the obligation of coherence exactly consists of as established in the EU Treaty, Article III-293, 3 of the proposed European Constitution can be considered the most direct formulation of such obligation: '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies'. This provision clearly endeavours to establish a legal obligation, even though jurisdictional control over compliance is, for the moment, improbable. According to its objective and purpose, the obligation of coherence seems to be an obligation of conduct rather than one that focuses on the result to be achieved. Nevertheless, the identification of a flagrantly contradictory result between or within policies could be considered in itself an irrefutable test of the violation of such an obligation. In the case at hand, the relevant *acquis communautaire* in the 'internal' legal order must be identified in order to apply the test of consistency in relation to actions taken or proposed in the external dimension of EU action. The test should be applied with flexibility, bearing in mind that a certain degree of contradiction is inevitable in a complex system based on democracy and political pluralism. Prior to this, however, some consideration must be made on the obligation of consistency/coherency upon which this test should be based.

Coherence is a complex legal and political principle applicable in distinct forms and dimensions, both in institutional and material terms, as well as in both the external sphere and internal action of the Union. The principle emerged in response to a problem in the process of European integration, which the Preamble of the Single European Act of 1987 first managed to circumvent: regarding foreign policy, Member States 'will speak ever increasingly with one voice and... act with consistency and solidarity'. The original principle referred to the consistency between the external policies of the European Community and the policies adopted by European Political Co-operation (the precedent of the Common Foreign and Security Policy (CFSP)) as well as to the goal of the effectiveness of Member States acting as a 'consistent force in international relations and within international organizations'.<sup>35</sup>

Consistency/coherence should be attained vertically between the CFSP and Member States' national action, while it should also be attained horizontally between the different pillars of the EU itself. The concept of horizontal coherence, or inter-pillar coherence, can be defined, according to Pascal Gauthier, as the absence of contradictions between the policies of the European Community and the CFSP on the one hand, and the achievement of synergies between these policies, on the other. The author draws on the two words used in the English versions of the Treaties as opposed to the single words used in German (*kohärenz*), Italian (*coerenza*), Spanish (*coherencia*), and Portuguese versions (*coerência*). Thus, the absence of contradictions is consistency, while coherence requires synergy.<sup>36</sup> For the purposes of this analysis, the former concept will be used notwithstanding the word.

Coherence is not limited in scope – and this is a more important aspect for our purposes – to the external sphere of action. The text of the proposed EU Constitution includes, as we have just seen, a clear-cut reference to consistency between the different areas of EU external action

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<sup>35</sup> Arts 30.5 and 30.2,d.

<sup>36</sup> 'Horizontal Coherence and the External Competences of the European Union', *European Law Journal*, vol. 10-1, 2004, p. 25.

and its other (internal or ad intra) policies. This perspective is generally disregarded, although it was already present in Article C of the Maastricht Treaty, now Article 3: '[t]he Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*'. The reference to the *acquis communautaire* allows for the test of consistency to be applied between the internal and external dimensions of EU action. It should also be noted that this Article further states that '[t]he Union shall *in particular*<sup>37</sup> ensure the consistency of its external activities as a whole in the context of its external relations, security, economic, and development policies'. This does not exclude the need to guarantee the absence of contradictions between ad intra and ad extra aspects of EU policies. While the said article entrusts the Council and the Commission with the responsibility of ensuring such (external) coherence, Article 13 holds the Council accountable for ensuring the 'unity, consistency and effectiveness of action by the Union'.

The meaning of the word 'unity', especially as applied to the internal and external aspects of EU policies, will very likely take us further than that of the word 'consistency'. But let us simply restrict the reasoning to the first and most basic meaning of the principle of coherence, that of the absence of contradictions, considering that it permeates the Treaty as a whole and can be considered one of its fundamental principles.<sup>38</sup> The two-fold question pending now is which is the relevant ad intra *acquis communautaire* that corresponds to the proposed external actions in the field of asylum in mass influx situations, and whether the latter are consistent and coherent with the former.

### ***B. Directive 55/2001 as Internal Acquis Communautaire on Protection of Populations in Need***

Directive 55/2001 is the relevant contribution to the *acquis communautaire* regarding a potential mass influx to EU territory,<sup>39</sup> since previous legal instruments had a clearly ad hoc nature.<sup>40</sup> The

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<sup>37</sup> Emphasis added.

<sup>38</sup> Ramses A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', *Common Market Law Review*, vol. 37-5, 2000, p. 1149.

<sup>39</sup> *Directive 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*, adopted by the Council on 26 June 2001 (DO n° L 212, 7 August 2001, p. 12). The broad EU human rights *acquis* is also applicable, including the provisions of the *European Human Rights Charter* contained in the proposed European Constitution to the extent that they reflect that *acquis* (See Agustín José Menéndez: 'Human Rights: The European Charter of Fundamental Rights', en Walter Carlsnaes, Helene Sjursen, y Brian White: *Contemporary European Foreign Policy*, Londres, Sage Publications, 2004, p. 239-252).

<sup>40</sup> In fact, only some specific measures had been previously adopted by the European Union with regards to the influx of persons from former Yugoslavia, in spite of the fact that in 1993, on November 30<sup>th</sup>, the Council had already given priority to the need of examining the question of burden-sharing in relation to the admission and residence of these refugees. The initiative implied at least a first general reference to the existence of *categories of persons* deserving temporary territorial protection, including provisions on the assistance needed for their survival. Regarding relevant legislative precedents, the Council adopted in 1995 a *Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis*

Directive establishes categories of beneficiaries of temporary protection, in a similar manner to historic IRL instruments; however, they are now organized in an abstract and ex ante fashion.<sup>41</sup> Thus, the *displaced persons from a third country* are those who ‘have had to leave their country or region of origin, or have been evacuated, particularly in response to an appeal by international organizations, and are unable to return in safe and durable conditions because of the situation prevailing in that country’. The inability to return is legitimate in the event of ‘armed conflict or endemic violence’ or ‘serious risk of systematic or generalized violation of human rights’. The standard is applicable, if needed, in a broader sense, regarding persons ‘who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection’.<sup>42</sup>

The Directive confers a significant number of rights and other benefits upon admission, although the right to stay within EU territory and, therefore, residence status, depend on a political decision made by the Council and are in any case subject to time limits. The Council’s decision must include ‘information from Member States on their reception capacity’, and shall be based upon such information – Arts 5.3, c) and 5.4, c). Moreover, the Council shall take into account, but not necessarily decide upon, the information collected by UNHCR and other relevant international organizations – Arts 5.3, d) and 5.4, c). The condition for applying the Directive is, indeed, the ‘arrival in the Community of a large number of displaced persons’ according to the Council’s discretionary criteria, though a decision would be adopted by a qualified majority.<sup>43</sup> However, the final Council decision will essentially depend, in practice, on the ‘assessment of the *advisability*’<sup>44</sup> of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures’ (Art. 5.4, b).

The key to the new community framework of temporary protection lies, therefore, in the particular balance the Council must attain between the need for territorial admission and its own perception of the ‘efficiency’ of instruments and foreign policy measures, including sanctions, aimed at reverting or alleviating the situation that led to the mass influx. The Directive appears to establish an inverse relationship between collective territorial protection of refugees and external assistance to victims.<sup>45</sup> Thus, the application of the Directive shall include consideration

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(Resolution of September 25<sup>th</sup>; DO n° C 95/262, p. 11), complemented in 1996 by the *Decision on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis* (Decision 96/198/JAI, en DC n° L 96/63, p. 10).

<sup>41</sup> See the survey on *collective protection* of refugees: Ivor C. Jackson, *The Refugee Concept in Group Situations*, Martinus Nijhoff, 1999.

<sup>42</sup> Cf. Arts 1 & 2, c), and see Article 28 on the individualized exclusion of the protection statute.

<sup>43</sup> The proposal for the decision is submitted by the Commission, which also has the responsibility to examine the request of a proposal submitted by any Member State – Art. 5 in relation to Art. 2, d).

<sup>44</sup> Emphasis added.

<sup>45</sup> This idea, which is in my view crucial to understand the relationship between International Refugee Law and the use of force during the last fifteen years, was clearly expressed in the 1995 Council Resolution on burden sharing, in which temporary admission was only considered a last resort when faced with the impossibility of preventing the situation of danger affecting a foreign population, including civil war and other contexts in which assistance in situ was appropriate, ‘particularly through the creation of security areas and corridors’. See also: Council Decision

by Member States in the Council on the *convenience* and/or *adequacy* of the international response to the crisis in the state of origin. Considering that the European Security and Defence Policy is now fully operative, as well as EU influence on UN Security Council decisions – especially when the means for intervention are provided –, the *opportunity* and *extent* of that international response rest largely on EU Member States.

In the case of a positive decision by the Council, all Member States in whose territory the Directive is applicable, are bound to admit the so-called displaced persons on a prima facie basis; that is, grant asylum to those people who belong to a given population group that is defined with respect to their situation in the non-Member State of origin (art. 5.3).<sup>46</sup> And, upon admission, the Directive grants these people a very protective statute that includes adequate shelter, access to the job market, medical assistance, social and food aid, and education and training.<sup>47</sup> However the enjoyment of the statute has a time limit. A stay longer than three years in territory of EU

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96/198/JIA, 4 March 1996 (DO no. L 063, 13 March), on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis; in particular, the eventual urgent meeting of the Committee K. 4 would analyse ‘other possibilities, including possible *actions in situ*’ (Art. 2, para. 3; emphasis added).

<sup>46</sup> This prima facie admission does not exclude the screening of beneficiaries, since Art. 25 does not extend the protection regime to those who can be considered dangerous on specific grounds. Also, the 2001 Directive does not prevent Member States from offering admission to categories of persons not identified by the Council (Art. 7.1), although it may discourage them from doing so.

<sup>47</sup> The European status of a displaced person, which is established in the Directive in the form of binding obligations of Member States, contemplates: residence permits and visas, including transit visas, which are granted promptly and free of charge or at a minimum cost (Art. 8); work permits for employed or self-employed activities, subject to general labour regulations, and the right to participate in adult education, vocational training and practical workplace experience – although priority in the labour market may be given to European citizens, citizens from states belonging to the European Economic Area and legal residents receiving unemployment benefits - (Art. 12); suitable accommodation or the means to obtain it, medical care – including specific assistance to vulnerable groups -, and social welfare and means of subsistence associated with the absence of or scarcity of resources (Art. 13); education for individuals under 18 years of age, under the same conditions as nationals, at least in the state education system (Art. 14); special measures for unaccompanied minors (Art. 16); and rights of *intra*community and *extra*community family reunification (Arts 15 & 16). A person who enjoys temporary protection also has the right to request asylum at any time, (Arts 17, 18 & 19), and a *right to be readmitted* in case the person is found within the territory of another Member State, or seeks to enter into such territory, without authorization (Art. 11, the application of which may be excluded by bilateral agreements). The beneficiaries have a right to obtain information on the provisions of temporary protection and conditions thereof, in writing and in a language they understand, and also with due respect for the confidentiality of personal data included by the states in a specific register (Art. 9). The issue of transfer of residence and thus of responsibility to grant temporary protection within the Union implies that if the Member State in which the beneficiaries remain, and providing that the beneficiaries’ consent is established, presents a request to the other Member States, they will in turn inform on their capacity for receiving transferees that will also be notified to the Commission and UNHCR (Art. 26).

Member States is not contemplated – hence the expression *temporary protection* – even when there has been no change in the circumstances of the state of origin which motivated the flight.<sup>48</sup>

### ***C. Consequences of the Test of Coherence to the Proposed Regional European Programmes***

Consideration of these shortcomings does not alter the fact that the content of the Directive must be seen as part of the EU human rights acquis, which affects EU external policy as a consequence of the principle of coherence presiding over the Union's legal framework. Two sets of considerations appear in this respect. On the one hand, the fact that the European Commission launches an ERPP, albeit a pilot, in the region of origin of a mass influx of refugees should be considered in most situations inconsistent with the absence of a Council decision to create a category of protected persons under Directive 55/2001. The establishment of the ERPP implies recognition by the EU that the refugee influx, covered by the programme, is legitimate according to international standards. For the sake of consistency, and even for the sake of unity in the Union's legal order, Directive 55/2001 should be fully applied to those potential beneficiaries of such a programme who manage to reach the Union's territory.

Furthermore, the intervention of any national judge acting as a judge of the law of the Union could and should consider that this category of displaced persons has been implicitly created while implementing the ERPP, and should thus automatically grant temporary asylum to those belonging to the populations that are beneficiaries of the programme in their region of origin. An exception would be a situation in which a high number of arrivals to the Union – which is a precondition for the application of the Directive – is not foreseeable. In this case, the affected persons that nevertheless reach European territory should individually be considered refugees or beneficiaries of subsidiary protection, bearing in mind that their repatriation to safe countries in the original region cannot be accomplished within a human rights perspective unless the statute that they are granted is equivalent to the one provided by Directive 55/2001.

On the other hand, and in close connection with this last statement, the fact that Directive 55/2001 is in force should prevent EU institutions from engaging in the promotion of any protection statute in third countries that provides less protection for refugees. The Union cannot, for the sake of consistency, abolish refugee camps within its territory and create an ERPP to help third countries set up such camps so that refugees do not reach EU borders.<sup>49</sup> And the same

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<sup>48</sup> Protection of displaced persons within the Union is certainly subject to terms that do not, in principle, depend on verifying the cessation of the situation that justified admission; that is, protection ceases regardless *rebus sic stantibus* as established in Art. 6.2 in relation to Article 6.1, b). The minimum standard of treatment will normally be provided for one year, although it may be extended by six month periods during the second year (Art. 4.1), and finally be extended for one more year by a new Council decision on the persistence of the reasons for granting temporary protection (Art. 4.2). According to the Directive, temporary protection must unavoidably come to an end (Art. 6.1, a), and this time regardless of the persistence of the reasons that motivated the discretionary decision of admission (Art. 22.1). A last caution is nevertheless included: 'in cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases' (Art. 22.2).

<sup>49</sup> As ECRE has pointed out, Directive 55/2001 does not refer to the right of freedom of movement either within Member States or within the Union (*ECRE Information Note on the Council Directive 2001/55/EC, 20 July 2001,*

applies to cases in which refugees are not granted the same rights that they would enjoy in the Union under Directive 55. In this sense, general references in the Regulation that establish the AENEAS Programme for the development of third countries' legislation and practices to comply with the provisions of the Geneva Convention of 1951 and its Protocol of 1967 as well as with other relevant international instruments are inconsistent with the *acquis communautaire*. The first and foremost such 'other instrument' should be Directive 55/2001 and used as a binding reference for activities funded by the Union. However, all efforts seem to concentrate on the admission and registration of refugees – so they can be returned in case they put their feet in Europe. The absence of references to the statute of refugees and displaced persons in the Regulation establishing AENEAS is not particularly promising. And the same reasoning applies to the references made in the Memorandum signed by the Commission with UNHCR to which we referred above.

UNHCR proposals for a special EU-based mechanism to be implemented as pilot programmes in designated countries of origin make, however, explicit mention of the EU asylum legislation in force. Nevertheless, it should be remembered that the main improvement suggested by UNHCR to proposals by EU Member States is that of locating reception facilities for processing claims close to the borders, but within EU territory. The EU Directive on *minimum standards for the reception of asylum seekers in Member States* should obviously apply to the eventual creation of closed reception facilities within one or possibly more Member States near the EU's external borders, in which asylum seekers would be required to stay during a process that should not exceed one month's time.<sup>50</sup> This counterproposal by UNHCR clearly shows that – while always seeking the better management of refugee flows – there is no reason for off-shore processing other than the non-application of the human rights *acquis communautaire* to asylum seekers. Considering that the denial of non-refoulement can be equated to the violation of basic human rights that motivated the refugees' initial flight, and that such an action clearly amounts to an indirect violation of their rights, plans by EU Member States, in their most extreme versions, can also then be equated to the United States' attempt to avoid national jurisdiction constraints for the torture committed in Guantanamo.

The Commission has not missed the opportunity to follow the UNHCR reference about the implementation of minimum standards in regard to reception conditions by not mentioning the relevant Directive while making it clear that subsistence levels will differ from country to country. It has done so in relation to the overall approach to enhance the protection capacity of third countries so that they become 'robust providers of effective protection'.<sup>51</sup> As the Commission stated, the main question regarding the establishment of Regional Protection Zones and/or Transit Processing Centres proposed by the United Kingdom is precisely that of the exact definition of *effective protection*. The Commission referred in this respect to the existence of a consensus of Member States on the minimum standards of effective protection, which includes

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[http://www.ecre.org/eu\\_developments/temporary%20protection/tpsumm.doc](http://www.ecre.org/eu_developments/temporary%20protection/tpsumm.doc), p. 3; accessed 20 April 2005). The procedure established as to the transfer of displaced persons to a different Member State, that is mentioned below, implies that there is no such freedom within the Union, although it seems clear that – unless a national emergency situation covered by Article 15 of the European Convention of Human Rights can be established – displaced persons can freely move within the country of residence.

<sup>50</sup> See the main features of UNHCR proposal in *Towards more Accessible, Equitable and Managed Asylum Systems*, (COM (2003) 315 final), p. 9.

<sup>51</sup> *Improving Access to Durable Solutions*, COM(2004) 410 final, p. 14.

physical security, a guarantee against refoulement, access to asylum procedures with sufficient safeguards, and social-economic well-being, including, as a minimum, access to primary healthcare and primary education, as well as either access to the labour market or means of subsistence sufficient to maintain an adequate standard of living.<sup>52</sup> Finally, these minimum conditions were transformed by the Commission into benchmarks in relation to general international standards, but the concepts ‘sufficient’ and ‘adequate’ were released with a reference to ‘the possibility... to live a safe and dignified life taking into consideration the relevant socio-economic conditions prevailing in the host country’.<sup>53</sup>

It is clear that the apparent agreement and proposed benchmarks fall short of the statute established by Directive 55/2001, since they are close to those contained in UNHCR Executive Committee Conclusion 22 (XXXII). It is in this connection that the most delicate question posed by the Commission becomes meaningful: how can people transferred to the Regional Protection Zones and/or to Transit Processing Centres who have not otherwise stayed in them be kept outside the jurisdiction of the destination countries and/or countries under which control of these Zones has been created?<sup>54</sup>

There are still several arguments that could possibly lead to different results. Accepting the second and more restrictive sense of coherence – that of reaching synergy – one could easily suggest that external action aimed at preventing refugees from stepping foot on EU territory fits perfectly with the non-application of Directive 55/2001. As the European Commission puts it, the European Council meeting held in Tampere ‘called for a greater coherence between the Union’s internal and external policies, and stressed the need for more efficient management of all stages of migration flows, in which the partnership with countries of origin and transit would be a key element for the success of such a policy’.<sup>55</sup>

However, most references to coherence in this context are restricted to coherence between different aspects of the external action of the Union.<sup>56</sup> From this perspective, migration management makes no distinction whatsoever between refugees and migrants, since coherence is nothing but a means to mitigate and even prevent people from entering the EU unless they have been previously selected. A very revealing example of this restrictive and highly political version of the principle is found in the Working Document of the *Informal Meeting of the Justice and Home Affairs Ministers* held in Brussels on 27-29 January 2005, the title of which is *Determining an Approach to the External Dimension of the European Asylum Policy*. Having mentioned the need for close partnership with third countries and the contribution that ERPPs are supposed to make in countries of origin by enabling refugees to find durable solutions, it is stated that ‘[c]oherence of the Programmes with the overall strategy towards the third countries concerned

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<sup>52</sup> *Towards more Accessible, Equitable and Managed Asylum Systems*, (COM (2003) 315 final), p. 6.

<sup>53</sup> *Improving Access to Durable Solutions*, COM(2004) 410 final, p. 16.

<sup>54</sup> *Towards more Accessible, Equitable and Managed Asylum Systems*, (COM (2003) 315 final), p. 6.

<sup>55</sup> *Ibid*, p. 4.

<sup>56</sup> The Conclusions of the European Council meeting held in Thessaloniki on 19-20 May 2003 stated that the integration of migration aspects into the Community’s external action should respect the ‘coherence of EU external policies and actions’ and should be part of a comprehensive approach towards each country or region, taking into account their specific situation (<http://www.eu2003.gr/en/articles/2003/6/20/3121/>, consulted on 20 August 2005).

as well as with existing EU initiatives in the field of development, should also be ensured'.<sup>57</sup> It does not seem difficult to guarantee this kind of external coherence if development aid is mainstreamed in order to avert mass influx and if migration management is mainstreamed in EU external relations, but this will only amount to a sort of *political*, not legal, coherence.

Undoubtedly, there are arguments that uphold that this or any other kind of EU external action in favour of refugees should be coupled with the non-application of Directive 2001/55 in the internal sphere of EU action. It could be said that there is a clear synergy in the attempt to deal with the crisis either by reinforcing regional absorption capacities while closing the door on beneficiaries at the common border or by promoting *prima facie* admission within the Union while regions of origin receive no help to cope with the burden. The Council, as a political body, would have a political choice between either of these means to confront the situation, which would thus provide a sense of coherence and even harmony insofar as the Council would have discretionary control over an alternative course of action.

However, it is frequently forgotten, even by the Commission itself, that the management of migratory flows includes the management of the fate of individuals. In this sense, the objective of integrating migration issues in the Union's relations with third countries disregards the fact that migration in this wide sense includes the forced migration of refugees. The strategy of improving the capacity of third countries to manage migratory flows by creating a partnership 'flowing from the analysis of mutual interest'<sup>58</sup> does not seem to reflect the conflicting interest of refugees, particularly that of respecting their human rights.

Coherence could indeed be understood as a *neutral* principle, insofar as politics determine its particular makeup, if values were not involved. The counter-argument is thus legally infallible, as the possibility of such a decision by the Council would represent the denial of the human rights *acquis* that constitute the core of the Union's legal order. If it were not for the values inspiring the European Union as a Community of Law, the decision would be up to the Council. But it is also true that if it were not for the pre-eminence of human rights as a core value, the Council could not be considered a fully democratic organ.

## 5. Conclusion

The European Union is about to achieve a major shift in its response to the refugee problem particularly in mass influx situations. In contrast with the apparently generous framework for temporary asylum established by Directive 55/2001, today's prevailing view is to develop new tools and perhaps mainstream development programme resources to prevent admission of refugees into EU territory. The emphasis of the new policy is not being placed on the right to remain *in the country of origin*, which was a common ground during the nineties, but on the granting of collective asylum by third countries *in the region of origin*.

In compensation, reception countries in the refugees' regions of origin will be helped technically and perhaps financially by the EU in order to cope with the burden. Despite its obvious strategic objective, and according to the distinction made by Gervaise C. Coles, the new

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<sup>57</sup> *Determining an Approach to the External Dimension of the European Asylum Policy*, Working Document of the 'Informal Meeting of the Justice and Home Affairs Ministers', Brussels, 27-29 January 2005, p. 2.

<sup>58</sup> *Integrating Migration Issues in the European Union's Relations with Third Countries*, Communication from the Commission to the Council and the European Parliament, COM (2002) 703 final, of 31 December 2002, p. 5.

European trend could thus be a worldwide opportunity to respond to the *refugee problem* – since it is aimed at strengthening the traditional ‘exilic’ bias of International Refugee Law – rather than at addressing the *problem of refugees*, which is linked to the so-called root causes of mass displacement.<sup>59</sup> In this sense, it is an opportunity to revitalize IRL, after fifteen years of consistent erosion.

However, the EU ‘toolbox’, which is now taking shape in Brussels in the form of the European Regional Protection Programmes, involves very distinct areas of decision-making and policy, and constitutes a true challenge for both IRL and the European integration process, since there is more involved than just its external dimension. The obvious risk, in financial terms, is that European funds are likely to be diverted to countries that, in spite of their population’s needs, are willing to co-operate with the EU endeavour. This new shift, however, represents a form of conditionality, and thus would not be consistent either with the EU’s expressed commitment to United Nations Millennium Development Goals or with the genuine objectives of EU development co-operation policy as established in the EU Treaty.

From an strictly legal perspective, risks could be even more substantial, as they involve questions relating to coherence and consistency within EU policies, along with the possible effect of the extraterritorial application of EU human rights standards. Considering Directive 55/2001 is the relevant reference for *EU internal acquis* in cases of mass exodus, and also considering that the obligation of coherence entails a contrast between external and internal dimensions of EU policies, two sets of considerations arise. On the one hand, the fact that the launching of ERPP in the region of origin of a mass influx of refugees should be considered inconsistent in most situations with the absence of a Council decision to create a category of protected persons under Directive 55/2001. On the other hand, the fact that Directive 55/2001 is in force, should prevent EU institutions from engaging in the promotion of any protection statute in third countries that provides less protection for refugees.

Last but not least, implicit references in Directive 55/2001 to emergency aid or action in the country of origin could now be interpreted as references to the region of origin. Given that the application of the Directive shall include consideration of the *convenience* and/or *adequacy* of the international response to the crisis in the state of origin, the ERPPs may be used as another powerful if not decisive argument for the Council to not grant admission to refugee populations in the EU territory on a *prima facie* basis. But the Council might not need new arguments for concealing its determination that the never-applied Directive is never applied in the future.

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<sup>59</sup> ‘Approaching the Refugee Problem Today’, in Gill Loescher and Laila Monahan (eds), *Refugees and International Relations*, Oxford, Oxford University Press, 1989, p. 390.