

HUMAN RIGHTS WATCH

350 Fifth Ave, 34th Floor
New York, NY 10118
Phone: 212-216-1861
Fax: 212-736-1300
E-mail: lemmas@hrw.org
Website: http://www.hrw.org

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An Unjust “Vision” for Europe’s Refugees

**Human Rights Watch Commentary on
the U.K.’s “New Vision” Proposal for the
Establishment of Refugee Processing Centers Abroad
June 17, 2003**

Table of Contents

INTRODUCTION.....2

I. THE REGIONAL PROCESSING CENTERS PROPOSED BY THE UNITED KINGDOM VIOLATE HUMAN RIGHTS AND REFUGEE PRINCIPLES.....3

Undermining of Responsibility Sharing Principles.....3

Violations of the Right to Seek Asylum and of *Nonrefoulement*.....4

Processing in Third Countries Constitutes a Penalty Under the Refugee Convention.....5

Lack of Procedural Safeguards6

Transferring Governments are Legally Responsible for Abuses that Occur as a Result of the Plan.....7

II. CONDITIONS FOR ASYLUM SEEKERS, REFUGEES, AND OTHER MIGRANTS IN PROPOSED LOCATIONS FOR PROCESSING CENTERS.....8

Albania8

Croatia9

Iran10

Morocco10

Romania10

Russia11

Northern Somalia11

Turkey12

Ukraine12

III. ASYLUM SEEKERS AND REFUGEES WILL BE SUBJECTED TO INEFFECTIVE PROTECTION IN PROCESSING CENTERS.....13

The “New Vision” Proposal Will Undermine International Effective Protection Norms.....13

The “New Vision” Proposal Will Undermine Existing Effective Protection Policies in the U.K. and other States15

CONCLUSION.....16

INTRODUCTION

June 20, 2003 will mark international refugee day – a day when governments should reaffirm their obligations to protect some of the world’s most vulnerable people. Instead, European governments will meet on June 20 to debate the United Kingdom’s (U.K.) proposal that promises to undermine those obligations. This proposal, to be discussed at the European Council meeting in Thessaloniki, Greece, outlines the U.K.’s “new vision” for the global management of asylum seekers, refugees, and other migrants.

The “new vision” proposal is to automatically send asylum seekers, refugees, and other migrants arriving in the U.K. to “regional protection zones” abroad. Other “transit processing centers” would be located at the external borders of the E.U. (the “zones” and “transit centers” are hereinafter referred to as “processing centers”), where asylum seekers, refugees and other migrants would be intercepted and required to submit their claims. The U.K.’s proposal attempts to circumvent its legal obligations to refugees, which are triggered when refugees are under the U.K.’s power or effective control.

The U.K. government says that it wants to increase protection for refugees in countries that are geographically closer to their homes.¹ In addition, it claims the U.K. or any other E.U. country might consider admitting refugees who could not be sent back to their own countries or integrated into the countries hosting the processing centers.² However, increasing refugee admissions is not the purpose of the U.K.’s “new vision.” On the contrary, the plan has been touted by the U.K.’s immigration minister as a way to halve the numbers of asylum seekers in the U.K. by September 2003.³ It is a means of pandering to xenophobic sentiments at the expense of human rights.

Human Rights Watch believes that this “new vision” constitutes an effort to avoid the U.K.’s responsibilities under the Refugee Convention and human rights treaties, most fundamentally to protect refugees from return to an unsafe place and to uphold the human right to seek and enjoy asylum. In addition, the proposal undermines the U.K.’s responsibility to work with other governments in addressing the problems of the world’s refugees, and not to “penalize” refugees who enter illegally. The institution of this policy may make the U.K. and any other government involved, as well as international organizations contracted to implement the policy, complicit for harms experienced by asylum seekers, refugees and other migrants transferred to and held in processing centers. Finally, the institution of processing centers in countries with serious records of human rights abuse promises to undermine the norms of “effective protection” under international and domestic law.

The U.K. acknowledges that Australia’s refugee policy is its source of inspiration for its “new vision” plan.⁴ In September 2001, in an attempt to reduce arrivals of asylum seekers from the Middle East and South Asia, the Australian parliament passed legislation permitting the forcible transfer to and detention of refugees in third states as part of its “Pacific Solution.” Australian law now permits the interception and forcible transfer of asylum seekers to other countries such as Nauru or Papua New Guinea where asylum seekers are placed in detention while waiting processing. Asylum seekers can also be intercepted and sent back to Indonesia. In Australia, and now as a feature of the U.K. proposal, the establishment of regional processing centers is an attempt to circumvent the purpose of the international protection norms enshrined in the Refugee Convention by diverting refugee protection obligations to poorer and less-equipped countries, as well as to international organizations—such as the International Organization for Migration (IOM)—without the territorial and sovereign legal responsibilities of states.

The U.K. recognizes that persons held in processing centers would need to be safe and protected, but the modalities for achieving this goal are not set out in the proposal. This failing raises serious concerns for Human Rights Watch since many of the countries suggested for hosting processing centers under the plan such as: Albania,⁵ Croatia,⁶ Iran,⁷

¹ “New International Approaches to Asylum Processing and Protection,” Correspondence from H.E. Tony Blair, Prime Minister of the United Kingdom to H.E. Costas Simitis, Prime Minister of Greece and President of the European Council (hereinafter Blair-Simitis Correspondence) March 10, 2003, at para. (1) (ii).

² Blair-Simitis Correspondence at para. 2.

³ Alan Travis, *New Asylum Centers Open by End of Year*, *The Guardian*, May 9, 2003.

⁴ A leaked copy of one version of the U.K. proposal acknowledges the relationship to Australia’s policy.

⁵ Alan Travis, *New Asylum Centers Open by End of Year*, *The Guardian*, May 9, 2003.

⁶ Jitendra Joshi, “Britain Defends Plan to Process Refugees Outside EU,” *Agence France Presse*, March 27, 2003.

⁷ Fabrice Randoux, “EU Wants Iraq Refugees Kept in Region,” *Agence France Presse*, March 28, 2003.

Morocco,⁸ northern Somalia,⁹ Romania,¹⁰ Russia,¹¹ Turkey,¹² and Ukraine,¹³ have serious records of violating the rights of asylum seekers, refugees, and migrants.

The U.K.'s proposal was forwarded to the E.U. on March 10, 2003. In a subsequent meeting of the European Council, the European Commission was asked to evaluate it. On June 3, 2003 the Commission issued a Communication on this subject for review at the June 5-6, 2003 meeting of E.U. Justice and Home Affairs (JHA) ministers and for consideration at the June 20, 2003 European Council meeting in Thessaloniki, Greece.¹⁴ The Communication offered its own interpretation of what might be accomplished in Europe to strengthen the integrity of the asylum system. With regard to the U.K. proposal, the Communication raised a series of important questions that this Human Rights Watch commentary seeks to answer.

I. THE REGIONAL PROCESSING CENTERS PROPOSED BY THE UNITED KINGDOM VIOLATE HUMAN RIGHTS AND REFUGEE PRINCIPLES

The U.K. proposal seeks to “reduce the incentive” for asylum seekers, refugees and other migrants to move to Europe.¹⁵ Rather than receiving direct protection from the United Kingdom, asylum seekers, refugees and other migrants would be sent to a third country. The goals of the plan would be to keep refugees closer to home so that when “the situation improved in their country of origin” they could be returned there. Rejected asylum seekers would be “returned to their countries of origin” immediately, through “raising awareness and acceptance of state responsibility to accept returns.”¹⁶

Recognizing that the countries hosting processing centers are likely to have resource constraints and poor human rights records, the U.K. has warned that “[g]enerally the further [the processing center host countries are] from Europe, the greater the challenge of providing such protection and moving people back to regions of origin”¹⁷ The provision of international protection would be narrowly limited to include only those asylum seekers, refugees, and other returned migrants within the physical boundaries of the processing center. Outside these boundaries the refugees and other migrants sent to the processing center would be subject to the treatment that befalls any non-citizen living in Albania, Croatia, Iran, Morocco, Northern Somalia, Romania, Russia, Turkey, or Ukraine. At the same time, however, the U.K. is wary of making conditions in the processing centers meet too high a standard. Otherwise, the proposal warns, “they could act as a pull-factor for local people.”¹⁸

Undermining of Responsibility-Sharing Principles

The U.K. proposal calls for improving “protection in source regions” for refugees, and to “prevent the conditions which cause population movements,”¹⁹ both of which are laudable goals. However, the proposal’s immediate purpose is to ensure that many refugees “remain in the regions close to their country of origin.”²⁰ Therefore, in the short term, the proposal promises to overwhelm underdeveloped and poorly resourced countries, many of which already host thousands of refugees, with a new and unfairly distributed burden of Europe’s refugees.

Shifting refugees from the U.K. or elsewhere in the E.U. to poor countries shatters notions of burden sharing upon which the international refugee protection system was established. The Preamble to the Refugee Convention underlines the “unduly heavy burdens” that sheltering refugees may place on certain countries, and states “that a

⁸ Jitendra Joshi, “Britain Defends Plan to Process Refugees Outside EU,” *Agence France Presse*, March 27, 2003.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Alan Travis, “UN Puts Forward ‘Fairer’ Alternative to Blunkett’s Asylum Processing Plan,” *The Guardian*, May 12, 2003.

¹² Fabrice Randoux, “EU Wants Iraq Refugees Kept in Region,” *Agence France Presse*, March 28, 2003.

¹³ Richard Ford, Asylum-Seekers May go to Transit Camps in Albania, *The Times*, May 9, 2003.

¹⁴ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final).

¹⁵ Blair-Simitis Correspondence at para. (1) (ii).

¹⁶ Blair-Simitis Correspondence at para. (1) (iv).

¹⁷ Blair-Simitis Correspondence at para (1) (iv).

¹⁸ Blair-Simitis Correspondence at para (1) (iv).

¹⁹ Blair-Simitis Correspondence at para. (1) (i), (ii).

²⁰ Blair-Simitis Correspondence at para. (1) (ii).

satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.” Numerous United Nations High Commissioner for Refugees (UNHCR) Executive Committee (ExCom) Conclusions²¹ also reiterate the need for international responsibility sharing to assist host countries in coping with large refugee influxes.²² In its Communication on the U.K. proposal, the European Commission makes the fundamental point that “any new approach should be built upon a genuine burden-sharing system both within the E.U. and with host third countries, rather than shifting the burden to them.”²³

Violations of the Right to Seek Asylum and of *Nonrefoulement*

The U.K. proposal threatens two fundamental human rights. The Universal Declaration of Human Rights, widely considered customary international law,²⁴ establishes that everyone has to the right to seek and enjoy in other countries asylum from persecution.²⁵ Individuals within the jurisdiction of the U.K. should thus be able to approach that government in order to seek such protection. Instead, the U.K. has stated that transfers to processing centers could act as a deterrent to abuse of the asylum system,²⁶ but its proposal for such external processing threatens to act as a deterrent to the exercise of the right to seek asylum itself. Transporting asylum seekers and migrants to processing centers outside U.K. territory, and possibly outside the E.U., would severely impair their ability to seek protection from the U.K., which would undermine their right to seek asylum.

Human Rights Watch also fears that the U.K. proposal will violate the right of refugees not to be returned to a country where their lives or freedom are threatened (the principle of *nonrefoulement*), which is the cornerstone of international refugee protection. The principle of *nonrefoulement* is enshrined in Article 33 of the Refugee Convention as well as being a fundamental principle of international customary law. Article 33(1) of the Refugee Convention states that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The U.K. proposal acknowledges the binding nature of the principle of *nonrefoulement* for refugees as well as Article 3 of the European Convention on Human Rights (ECHR), which prohibits the return of *anyone* (including migrants) to a place where he or she might be subject to torture, inhuman or degrading treatment.²⁷ However, the proposal lacks a detailed discussion of what safeguards would be employed to ensure compliance with these prohibitions. This lack of detail was noted by the European Commission in its Communication.²⁸

Refoulement can occur when a refugee is returned to any place where his or her life or freedom is at risk because of persecution, be it the refugee’s country of origin or any other country. Many of the countries under consideration for hosting processing centers have records of serious human rights abuse against non-nationals in their territories (discussed in Part II, below). Moreover, many of them routinely deport non-nationals without adequate procedures to

²¹ The Executive Committee of the High Commissioner’s Program (“ExCom”) is UNHCR’s governing body, of which the United Kingdom is a member. Since 1975, ExCom has passed a series of Conclusions at its annual meetings. The Conclusions are intended to guide states in their treatment of refugees and asylum seekers and in their interpretation of existing international refugee law. While the Conclusions are not legally binding, they do constitute a body of soft international refugee law. They are adopted by consensus by the ExCom member states, are broadly representative of the views of the international community, and carry persuasive authority. Since the members of ExCom have negotiated and agreed to their provisions, they are under a good faith obligation to abide by the Conclusions.

²² Between 1979 and 2000, the ExCom passed fourteen Conclusions citing the need for international responsibility-sharing to assist host countries to cope with mass influxes of refugees. The Conclusions also stipulate the fundamental obligation of first countries of asylum to keep their borders open to refugees and to provide them with full refugee protection on at least a temporary basis, while being assisted in meeting that obligation with financial assistance from other governments.

²³ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 6.

²⁴ International customary law is defined as the general and consistent practice of states followed by them out of a sense of legal obligation.

²⁵ Universal Declaration of Human Rights, Article 14.

²⁶ Blair-Simitis Correspondence at para. 2.

²⁷ Blair-Simitis Correspondence at para. entitled “legal framework”.

²⁸ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 6.

determine whether the individual fears persecution. UNHCR has repeatedly stressed that “the 1951 Convention prohibits not only direct refoulement to the country of origin, but also indirect, or ‘chain’ refoulement to third countries that in turn will refoule to the country of origin.”²⁹ Finally, while some of the countries under consideration are struggling to establish means by which Convention refugees can be protected against *refoulement*, none of them have established adequate procedures to ensure that migrants are protected from return to a place where they will suffer torture, inhuman or degrading treatment in accordance with article 3 of the ECHR.

Processing in Third Countries Constitutes a Penalty Under the Refugee Convention

The U.K.’s plan violates Article 31 of the Refugee Convention, which requires

the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The U.K. has stated that its plan is to prevent asylum seekers from “arriving illegally;”³⁰ however, Article 31 requires that no penalties should be imposed on refugees who enter illegally. The U.K. plan to forcibly transfer refugees to third countries for detention and processing constitutes a “penalty,” because it “unnecessar[ily] limit[s] the full enjoyment of rights granted to refugees under international refugee law.”³¹

Holding asylum seekers and refugees in processing centers would penalize them if their time in custody amounted to arbitrary and indefinite detention.³² Detaining asylum seekers and refugees violates UNHCR’s general principle that “asylum-seekers should not be detained.”³³ According to the United Nations Human Rights Committee, detention is arbitrary where there is no basis in law and where the confinement is characterized by inappropriateness, injustice, lack of predictability, and disregard for due process of law.³⁴ While Article 5 of the ECHR allows for detention of unlawfully present aliens pending deportation, recognized refugees could not be detained since they would be lawfully present in the country. The U.K.’s proposal envisions keeping refugees in the centers for an extended period of time while resettlement places or voluntary return is explored. In fact, if there are no resettlement places for recognized refugees, they could be detained indefinitely.

Holding asylum seekers and refugees in processing centers would also penalize them in violation of Article 31 by placing restrictions on their freedom of movement rights. The Refugee Convention affords refugees the right to freedom of movement, subject to any restrictions applicable to aliens generally in the same circumstance.³⁵ UNHCR has stated that “freedom of movement is the rule under international law and restrictions should be the exception.”³⁶

The processing centers as envisioned in the “new vision” proposal also threaten to violate the requirements of Deliberation No. 5 of the Working Group on Arbitrary Detention, which requires that a maximum period for the detention of asylum seekers or other migrants should be set by law and custody may in no case be unlimited or of excessive length.³⁷ In addition, the asylum seekers or other migrants would have to be informed of the grounds for detention in writing, and they should be able to apply to a judicial authority to decide on the lawfulness of the detention and, where appropriate, order their release.³⁸ Asylum seekers or other migrants should have the ability to communicate with the outside world, including a lawyer and a consular representative.³⁹

²⁹ UNHCR *Position on Readmission Agreements*, 1994, para. 3; UNHCR *Note on Treatment at Port of Entry*, 1991, para. 3.

³⁰ Blair-Simitis Correspondence at para. 3 under heading “background and aim.”

³¹ UNHCR Division of International Protection Internal Memo, May 2002, quoted in Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection,” *UNHCR Global Consultations*, October 2001, fn. 15, at <http://www.unhcr.ch/cgi-bin/texis/vtx/home>.

³² See UNHCR, “Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999, p. 1, at <http://www.unhcr.ch/cgi-bin/texis/vtx/home>. (Revised Guidelines).

³³ UNHCR Revised Guidelines.

³⁴ See *Womah Mukong v Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994.

³⁵ See Refugee Convention, Article 26.

³⁶ See UNHCR, *Policy on Refugees in Urban Areas*, December 12, 1997, para. 3.

³⁷ U.N. Human Rights Committee Working Group on Arbitrary Detention, *Deliberation No. 5*, Principle 7.

³⁸ *Ibid*, Principle 8.

³⁹ *Ibid*, Principle 8.

Lack of Procedural Safeguards

The European Commission Communication on the U.K. proposal makes the important point that “it needs to be clarified by which procedural rules (E.U. or national legislation) such centers or zones would be governed.”⁴⁰ The proposal addresses the issue of procedures in two sentences, stating that the centers “could be managed by the IOM [International Organization for Migration], with a screening system approved by the UNHCR,” and it goes on to state that “decisions taken in [the processing centers]” must “not expose applicants to inhuman or degrading treatment.”⁴¹

Human Rights Watch has raised its concerns about the fairness of refugee status determination procedures approved and or run by UNHCR in Indonesia,⁴² Kenya,⁴³ Malaysia,⁴⁴ Nauru,⁴⁵ and Thailand.⁴⁶

The U.K. proposal’s brief discussion of procedural issues raises serious concerns. The UNHCR has raised questions about whether it should be involved in these procedures, stating that running status determinations is “neither necessary nor in line with the traditional functions of [its] office.”⁴⁷ However, status determinations approved by UNHCR should adhere to guidelines and procedures to which it holds governments accountable. These include the *Handbook on Procedures and Criteria for Determining Refugee Status (Refugee Status Determination Handbook)*, based upon the conclusions of UNHCR’s Executive Committee,⁴⁸ and its *Training Module on Interviewing Applicants for Refugee Status (Status Interviews Training Module)*.⁴⁹

Unfortunately, in many of the places where UNHCR has been involved in status determinations, its procedures have fallen far short of these standards. In Kenya, Malaysia, Thailand and Indonesia, Human Rights Watch has found that applicants had information in a language they did not understand, or no information at all about the procedures they were about to undergo in violation of UNHCR’s own Refugee Status Determination Handbook, which states that applicants for refugee status should “receive the necessary guidance as to the procedure to be followed.”⁵⁰

Human Rights Watch concluded that UNHCR interviewers in Nairobi and Indonesia did not spend enough time with the asylum seeker to fully understand the facts of the case. Human Rights Watch also found that asylum seekers were unable to communicate all the details of their stories because they were asked to stop or edit themselves by UNHCR protection officers or translation staff. Such incidents are in violation of the standard established in the Refugee Status Determination Handbook that the examiner should “ensure that the applicant presents his case as fully as possible and with all available evidence.”⁵¹

UNHCR’s training manual recommends that the person conducting the interview read back notes to the asylum seeker in order to ensure accuracy.⁵² However, few refugees interviewed by Human Rights Watch were provided with such an opportunity. UNHCR’s guidelines recognize the value of independent legal assistance, including independent information about conditions in a refugee’s country of origin, for those applying for refugee status with governments, but this information and representatives are either categorically not allowed (Nauru, Malaysia) or rarely allowed (Thailand, Kenya) into status determinations run by UNHCR. Finally, rejected asylum seekers in Kenya, Thailand,

⁴⁰ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 6.

⁴¹ Blair-Simitis Correspondence at para. (2) and para. entitled “legal framework”.

⁴² Human Rights Watch, *By Invitation Only: Australia Refugee Policy*, Vol. 14, No. 10, December 2002.

⁴³ Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala*, November 2002.

⁴⁴ Human Rights Watch, *Living in Limbo: Burmese Rohingya in Malaysia*, Vol. 12, No. 4, August 2000.

⁴⁵ Human Rights Watch, *By Invitation Only: Australia Refugee Policy*, Vol. 14, No. 10, December 2002.

⁴⁶ Human Rights Watch, *Unwanted and Unprotected: Burmese Refugees in Thailand*, Vol. 10, No. 6, September 1998.

⁴⁷ See “Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedure,” UN Doc. EC/SCP/22, August 23, 1982.

⁴⁸ For an explanation of UNHCR’s ExCom, see note 21, above.

⁴⁹ The *Training Module* states that it is to be used by “UNHCR and government personnel involved in refugee status determination procedures in the field.” In addition, the module advises decision makers that they “should never forget that being recognized – or not – as a refugee will have direct implications on the life and well-being of the applicant and his or her family. This places a heavy burden of responsibility on the person conducting the interview whether or not this person is the final decision maker.” See UNHCR, *Training Module on Interviewing Applicants for Refugee Status*, 1995, p. iii.

⁵⁰ See UNHCR, *Refugee Status Determination Handbook* para. 192(i).

⁵¹ UNHCR, *Status Determination Handbook* at para 205 (i).

⁵² See UNHCR, *Training Module: Interviewing Applicants for Refugee Status*, 1995, p. 55 (noting that “a useful technique is to read back or go over those parts of the claim which remain unclear.”).

and Malaysia do not receive written information about the reasons for their rejection, apart from *pro forma* letters indicating that their case has been rejected for failure to fulfill eligibility criteria. Furthermore, an applicant's appeal is often reconsidered by the same UNHCR office that made the initial decision.

The International Organization for Migration (IOM), an intergovernmental organization based in Geneva, serves its member states and is not accountable to the U.N. General Assembly.⁵³ The IOM has stated that it is not bound by any international human rights treaties and is exempt from its member states' international legal obligations, including the prohibition against *refoulement*.⁵⁴ Human Rights Watch examined IOM's operations in Indonesia, and found that asylum seekers felt the organization over-emphasized return. The pressure to return to their home countries was exacerbated by the organization's failure to assist asylum seekers and refugees in Indonesia with tracing their families, which placed them under pressure to return prematurely, even when they continued to fear persecution.

IOM has expressly stated that it has no mandate for and is not concerned with legal protection *per se*.⁵⁵ Because IOM has not accepted a rights mandate there is the potential that asylum seekers, refugees and other migrants will not be afforded appropriate procedural safeguards. In past research in Indonesia and the Pacific, Human Rights Watch noted IOM's reluctance to fully commit to a rights-based approach. In particular asylum seekers in facilities managed by IOM in Indonesia told Human Rights Watch researchers that they felt they had not been provided adequate information about the status of their case and had been living in substandard conditions with inadequate medical treatment and no access to education facilities for children. Incidents such as these highlight the fact that IOM's current practices in the field fall short of international standards. In fact, IOM recognizes that the organization "should contribute more actively to the promotion of migrants' rights."⁵⁶

Transferring Governments are Legally Responsible for Abuses that Occur as a Result of the Plan

The U.K. government seeks to divert accountability to the international organizations that would administer processing centers, in this case, IOM⁵⁷ and / or UNHCR as well as to the countries hosting the centers. The European Commission Communication posed a question that implicitly recognizes the U.K.'s goal of avoiding jurisdictional responsibilities: "[c]ould they [asylum seekers] be kept as such outside the scope of the jurisdiction of the destination countries [e.g. Britain]?"

The U.K. government appears to believe that some redirection of responsibility could be achieved through tri-partite agreements between "destination, transit and origin countries."⁵⁸ However, even when the United Kingdom or other participating governments attempt to shift accountability to third parties, they retain an affirmative obligation to protect persons transferred to processing centers, otherwise, they may be complicit in abuses that occur.⁵⁹ Asylum seekers, migrants, and refugees must be protected against *refoulement* both to and from processing centers, and be provided with adequate human rights safeguards.⁶⁰ Moreover, the European Court of Human Rights has recognized that governments have an affirmative obligation to protect asylum seekers or other migrants from torture or other "inhuman or degrading treatment or punishment," when sending an asylum seeker or any other migrant to a third state.⁶¹

⁵³ Originally the Intergovernmental Committee for European Migration (ICEM), it was founded in 1951 and has assisted eleven million refugees and internally displaced persons to return or resettle since that time.

⁵⁴ IOM Legal Services, "IOM and Effective Respect for Migrant Rights," November 1997 (stating that "[i]n international law, protection is based on a mandate, conferred by treaty or custom, which authorizes an organization to ensure respect of rights by States. . . . IOM has no such mandate, and thus is not concerned with legal protection *per se*").

⁵⁵ *Ibid.*

⁵⁶ IOM Legal Services, "IOM and Effective Respect for Migrant Rights," November 1997

⁵⁷ Blair-Simitis Correspondence at para (2).

⁵⁸ Blair-Simitis Correspondence at para (1).

⁵⁹ Legomsky, p. 44, stating "no state should be allowed to assist another state to do what international law would forbid the first state from doing on its own. Otherwise, the first state would be an accomplice to the misdeed committed by the second state."

⁶⁰ "UNHCR has repeatedly stressed that the 1951 Convention prohibits not only direct *refoulement* to the country of origin, but also indirect, or 'chain' *refoulement* to third countries that in turn will *refoule* to the country of origin." Stephen Legomsky, "Secondary Movement of Refugees and the Meaning of Effective Protection," *UNHCR Global Consultations*, p. 44, citing to *UNHCR Position on Readmission Agreements*, 1994, para. 3; *UNHCR Note on Treatment at Port of Entry*, 1991, para. 3.

⁶¹ See *Chahal v. the United Kingdom* (70/1995/576/662) (1996); *Soering v. United Kingdom* (1989), 11 EHRR 439; Explanatory Memorandum to Recommendation No. R (97)22, Council of Europe "Guidelines on the Application of the Safe Third Country Concept," 1997, para. 11, at <http://www.cm.coe.int/ta/rec/1997/ExpRec%2897%2922.htm>.

According to the Draft General Comment on article 2 of the ICCPR by the Human Rights Committee, the body that monitors international compliance with the ICCPR, “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”⁶² The Draft General Comment further states that “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons.”⁶³ Since the processing centers would be set up at the behest of the U.K., Human Rights Watch believes that they would be “within the power and effective control” of the U.K. government. As a result, the U.K. may be responsible for any violations of the ICCPR that occur in the centers. The U.K. would also be responsible to guarantee the rights in the ECHR, in accordance with Article 1 of that treaty, to “everyone” within the centers.⁶⁴ Given prevailing conditions in the countries already under consideration, discussed below in Part II, the U.K. may be liable for extremely serious abuses.

The U.K. or other European governments may be complicit in violations of human rights law where countries hosting the processing centers are unable or unwilling to afford asylum seekers adequate protection. It is a general principle of international law that a state may not avoid its international obligations by allowing a second state to commit acts that would be prohibited if committed by the first state. Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission states that

a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.⁶⁵

International law also extends responsibility for internationally wrongful acts to the conduct of non-state entities, such as the IOM or the UNHCR when those entities exercise elements of governmental authority.⁶⁶ Even if the entity exceeds its authority or contravenes instructions, its conduct is considered an act of the state under international law if it is acting in a governmental capacity.⁶⁷ If destination countries choose to contract with international organizations they will not escape international responsibility for human rights violations associated with these organizations’ conduct simply by delegating their duties regarding refugees to non-state or intergovernmental actors. E.U. countries will still be responsible for the individuals they return.

II. CONDITIONS FOR ASYLUM SEEKERS, REFUGEES, AND OTHER MIGRANTS IN PROPOSED LOCATIONS FOR PROCESSING CENTERS

Human Rights Watch is extremely skeptical about the U.K.’s claim that it will be able to “ensure better protection” in regions of origin or in countries hosting processing centers at the fringes of the E.U.⁶⁸ It will be impossible to isolate processing centers from the overall human rights conditions, outlined below, facing asylum seekers, refugees and

⁶² UN Press Release, Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: Draft General Comment on Article 2” Oct. 29, 2002.

⁶³ UN Press Release, Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: Draft General Comment on Article 2” Oct. 29, 2002.

⁶⁴ See *X v. Federal Republic of Germany*, European Court of Human Rights, 1197/61 (holding that Sweden was responsible under the ECHR for its agent’s treatment of a Pole living in Germany); *Bankovic v. Belgium et al*, European Court of Human Rights, 52207/99 (stating that a government is extra-territorially responsible “when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”).

⁶⁵ Draft Articles on the Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its Fifty-third Session (2001)(extract from the Report of the International Law Commission on the work of its Fifty-Third Session), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, (A/56/10), Ch. IV.E.1), at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemode=bookmarks) (ILC Draft Articles).

⁶⁶ Article 5 of the ILC Draft Articles states that “the conduct of a person or entity which is not an organ of the State... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

⁶⁷ “The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.” Article 7, ILC Draft Articles.

⁶⁸ Blair-Simitis Correspondence at para. (1) (ii).

other migrants in the countries proposed. The laudable goal of ensuring better protection should be pursued throughout these countries, instead of in the isolated context of a U.K.-controlled processing center. Until effective protection (discussed in Part III, below) can be ensured throughout the territory of any of the proposed countries, the establishment of a processing center there should not be considered.

Albania

Albania is party to the Refugee Convention, and in 1998 passed domestic laws providing for the rights of refugees. UNHCR observes status determinations, which are run by the government's Office for Refugees. According to the U.S. State Department, government restructuring prevented the appeals procedure from functioning,⁶⁹ as well as UNHCR's ability to assist the government in the creation of viable asylum system.⁷⁰ Although Albania's domestic laws provide for the protection against return to an unsafe place, returns of individuals by border police (over 500 were returned in 2002)⁷¹ raised concerns about *refoulement*. Sometimes individuals crossing the border are detained for a few hours, not given an opportunity to apply for asylum, and then bused to the nearest border.⁷² This lack of access to an asylum process in Albania is illustrated by the fact that no asylum claims were recorded at the border in 2002.⁷³ Albania hosted 363 recognized refugees at the end of 2001.⁷⁴

Croatia

Croatia is party to the Refugee Convention, but it has not yet adopted its draft asylum law. Instead, Croatia's aliens law governs the treatment of asylum seekers and refugees. Croatia hosted 67,952 refugees at the end of 2001.⁷⁵ During 2002, Croatian authorities decided eighty-six individual cases and did not grant asylum to any of them.⁷⁶ UNHCR publicly stated that the fact that Croatia has yet to recognize its first asylum claim was "of great concern" to the agency.⁷⁷

Croatia not only faces difficulties in regularizing procedures for individuals seeking asylum in its territory, but the country remains plagued by the ineffectual and discriminatory treatment of its own nationals who have been living outside the country as refugees since the early to mid-1990s. Between 300,000 and 350,000 Serbs left their homes in Croatia during the 1991-95 war. Some ten years later, less than one third of the displaced Serbs have returned home. The most significant problem is the difficulty Serbs face in returning to their pre-war homes. Despite repeated promises, the Croatian government has been unwilling and unable to solve this problem for the vast majority of displaced Serbs. Though denial of access to housing is the biggest obstacle facing potential returnees, fear of arbitrary arrest on war-crimes charges and discrimination in employment and pension benefits also deter return.

⁶⁹ United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices – 2002, Albania, March 31, 2003.

⁷⁰ UNHCR Global Report 2002, p. 358.

⁷¹ U.S. Committee for Refugees, *World Refugee Survey*, Albania, June 2003.

⁷² See International Catholic Migration Commission, Services for Asylum Seekers, available at www.icmc.net.

⁷³ U.S. Committee for Refugees, *World Refugee Survey*, Albania, June 2003.

⁷⁴ UNHCR Statistical Yearbook, 2001, p. 27.

⁷⁵ *Ibid.*

⁷⁶ U.S. Committee for Refugees, *World Refugee Survey*, Croatia, June 2003.

⁷⁷ UNHCR, *Global Report 2002*, p. 370.

Iran

Iran is party to the Refugee Convention.⁷⁸ A government-run census in 2001 revealed that Iran hosted more refugees than any other government in the world: 2.56 million,⁷⁹ of whom 2,355,000 were Afghans and 203,000 were Iraqis.⁸⁰ This number likely excludes hundreds of thousands of Iraqis who were deported by Iraq to Iran during the 1980s, and refugees living in Iranian towns and cities without registering with UNHCR. In addition, thousands of Iranians remain internally displaced after the 1980-88 war with Iraq. The government of Iran has grown increasingly disenchanted over the years about hosting such a large refugee population in the face of minimal international interest, financial support, or burden sharing.

Refugees living in Iran's cities are extremely vulnerable to police abuse and discriminatory treatment. In fact, some policies curtailing refugees' rights are already in place in Iran. In June 2001, restrictions on refugees' access to employment were tightened even further, so that all refugees except those with old work permits were classed as illegal workers and thereby subject to expulsion under a law known as Article 48. A new policy of fining and imprisoning the employers of undocumented workers was also introduced. Many refugees were instantly fired from their jobs, and thereby also lost their homes and all entitlement to medical care. They had absolutely no access to state social security or any other safety net. Although it was decreed that even undocumented children would be permitted to attend school, many local authorities continued to deny refugee children entrance to public schools and forcibly closed down those organized by refugees themselves.⁸¹

Morocco

Morocco is party to the Refugee Convention; however, no appropriate domestic legislation on refugees has been passed.⁸² As a result, under current Moroccan law, all persons who enter the country unlawfully "shall be expelled."⁸³ Although other domestic laws allow for refugees to apply for asylum at the border, many are likely pushed back from the border since UNHCR in Morocco was unaware of any refugees who had their cases referred onward by border police.⁸⁴ The 2,540 refugees in Morocco who were recognized by UNHCR at the end of 2001⁸⁵ were denied status by the Moroccan government, and therefore their rights to employment, education, health, and freedom of movement are severely limited.⁸⁶ Under domestic law, children born to refugee women in Morocco are denied the right to Moroccan nationality, in violation of the Convention on the Rights of the Child. Refugees in Morocco are subject to harassment, arbitrary detention by the police and sometimes deportation or *refoulement*, to potentially unsafe conditions in Algeria.⁸⁷

Romania

Romania is party to the Refugee Convention and its new asylum law entered into force in November 2000. While the law has many rights-protective aspects, including providing successful applicants with identity cards, travel documents, a right to appeal, and limits on detention at the airport, UNHCR expressed concerns that individuals at Romania's borders may not have access to the asylum procedure, particularly in certain accelerated procedures allowed under the law.⁸⁸ Romania hosted 1,805 refugees at the end of 2001.⁸⁹

⁷⁸ Iran ratified the Refugee Convention on July 28, 1976.

⁷⁹ See UNHCR, *Global Report 2001*, p. 284.

⁸⁰ See U.S. Committee for Refugees, *World Refugee Survey 2002*, p. 167. In January 2003, the government of Iran announced that 470,000 Afghans returned home in the previous ten months, still leaving almost 2.1 million refugees in total in Iran. See "470,000 Afghans have returned home from Iran," *Agence France-Presse*, January 26, 2003.

⁸¹ These school closures violated Articles 28 and 29 of the *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49, 1989, entered into force September 2, 1990.

⁸² UNHCR, *Global Report 2002*, p. 277.

⁸³ Ordinance Relating to Immigration, Article 12, November 15, 1934.

⁸⁴ See Channe Lindstrom, "Report on the Situation of Refugees in Morocco," October 2002, p. 12.

⁸⁵ UNHCR Statistical Yearbook 2001, p. 28.

⁸⁶ See United States State Department, *Country Reports on Human Rights Practices*, Morocco, February 23, 2001.

⁸⁷ See Channe Lindstrom, "Report on the Situation of Refugees in Morocco," October 2002, p. 12.

⁸⁸ UNHCR Statistical Yearbook 2001, p. 28.

⁸⁹ U.S. Committee for Refugees, *World Refugee Survey*, Romania, June 2003.

⁹⁰ UNHCR Statistical Yearbook 2001, p. 28.

Russia

Russia is party to the Refugee Convention. Almost yearly changes in the laws and procedures applicable to refugees have created delays in processing that have resulted in few applications actually being processed. Refugees without identity documents are vulnerable to arrest and deportation by Russian authorities.⁹⁰ Given the difficulties in the procedures, UNHCR registers refugees coming from abroad; however, domestic Russian law regulates their daily lives, causing many of them to live without a secure legal status.⁹¹

Since most refugees lack a secure legal status in Russia, they are denied the right to work, to receive public assistance and non-emergency medical care. Many schools do not accept refugee children.⁹² Refugees struggle with the basic necessities of life, such as shelter and food, and they live under threat of arrest by the local police.⁹³ Others suffer without sufficient police protection. In August 2001, six African asylum seekers were attacked near the office of UNHCR by a group of teenagers with broken bottles and baseball bats. One of the Africans died of his wounds several days later.⁹⁴ Russian authorities also regularly apprehend, detain, and deport asylum seekers before they are able to have their claims to refugee status assessed. UNHCR had registered 17,970 refugees at the end of 2001,⁹⁵ a number that was widely believed to underestimate the actual numbers of refugees living in the country without documents.⁹⁶

Northern Somalia

Individuals sent to processing centers in Somalia will be in a country without an effective national government. The current Transitional National Government (TNG) has been plagued with problems. Its three-year term expires in mid-August 2003. According to UNHCR, the south remains unstable and attempts to move towards reconciliation have not improved the unpredictable security situation.⁹⁷ Insecure conditions in the south impeded large-scale refugee returns and made it very difficult for UNHCR to maintain a presence there.⁹⁸ However, the security situation is relatively stable in northern Somalia, and UNHCR has been able to assist Somali refugees returning to these northern areas from bordering countries.

Refugees arriving to Somalia from neighboring countries mostly live in the capital, Mogadishu. UNHCR says that these refugees “enjoy international protection and receive assistance to sustain themselves.”⁹⁹ However, some refugees are harassed by police and detained. Two Ethiopian refugees were arrested in April 2002 for spreading Christianity, and UNHCR intervened to secure their release.¹⁰⁰ Somalia hosted 589 refugees at the end of 2001.¹⁰¹

Refugees in Somalia faced the same difficult humanitarian conditions plaguing their Somali neighbors. Insecurity disrupted UN distributions in the country, as reported by the Secretary-General in August 2002. Above normal rainfall in northern Somalia in 2002 also spread waterborne disease, including cholera, malaria, and diarrhea.¹⁰² Somalia’s nationwide malnutrition rate of 17 percent remained one of the highest in the world,¹⁰³ and only one in six children attended school in the country in 2002.¹⁰⁴

⁹⁰ U.S. Committee for Refugees, *World Refugee Survey*, Russia, June 2003.

⁹¹ Svetlana, Gannushkina, “Legal Space of Refugees in Russia,” Human Rights Center, Moscow, 1995 (available at www.openweb.ru/cca/eng/htm/migrac_e.htm).

⁹² U.S. Committee for Refugees, *World Refugee Survey*, Russia, June 2003.

⁹³ See Yeo-sang Yoon, “Situation and Protection of North Korean Refugees in Russia,” Korea Political Development Research Center, 1999 (on file with Human Rights Watch).

⁹⁴ Human Rights Watch, *World Report 2002*, p. 345.

⁹⁵ UNHCR Statistical Yearbook 2001, p. 28.

⁹⁶ U.S. Committee for Refugees, *World Refugee Survey*, Russia, June 2003.

⁹⁷ UNHCR Global Appeal 2002, p. 86.

⁹⁸ UNHCR Global Report, 2002, p.178.

⁹⁹ UNHCR Global Appeal 2002, p. 88.

¹⁰⁰ UNHCR Mid-Year Progress Report 2002, p. 91.

¹⁰¹ UNHCR Statistical Yearbook 2001, p. 28.

¹⁰² U.S. Committee for Refugees, *World Refugee Survey*, Somalia, June 2003.

¹⁰³ *Ibid.*

¹⁰⁴ UNHCR, *Global Report*, 2002, p. 178.

Turkey

Turkey has ratified the Refugee Convention, but has exercised its option of limiting its acceptance of convention obligations to refugees from Europe only. Turkey has presented a substantial obstacle for those seeking refuge through strict regulations requiring registration in the asylum program within ten days following arrival in the country.¹⁰⁵ As a result of these regulations and other procedural difficulties, many refugees have been mistakenly considered “illegals.”¹⁰⁶ UNHCR reported that during 2001, fifteen refugees and asylum seekers in Turkey were forcibly returned to a country where they feared persecution either without being granted full access to a determination process, or following the grant of refugee status.¹⁰⁷ The U.S. Committee for Refugees reported that 97 asylum seekers and three refugees had been refouled during that same year.¹⁰⁸ Turkey hosted 7,687 refugees and asylum seekers at the end of 2001.¹⁰⁹

According to the European Commission’s 2002 Regular Report on Turkey’s Progress Towards Accession, in the first six months of 2002, 40,006 immigrants were apprehended in Turkey.¹¹⁰ As a result, Turkish border authorities arrested, detained, and deported large numbers of undocumented foreigners.¹¹¹ Between November 2001 and January 2002 at the Turkish border, at least four asylum seekers were shot and killed by Turkish border police, twenty-six froze to death in remote mountain crossings, and scores were drowned.¹¹² In July 2001, police conducted sweeps through immigrant neighborhoods that resulted in the arrest, detention, and deportation of approximately 200 Africans. The police severely mistreated some of the Africans in detention, depriving them of food, clean water, and medical assistance.¹¹³ Attempts to deport a number of these detainees to Greece failed when Greece refused re-entry and the detainees were trapped in the border zone.¹¹⁴ The result was the report of three deaths and allegations of three rapes. Finally, most asylum seekers and refugees living in Turkey did not receive financial assistance in 2001, leaving them destitute and disenfranchised from Turkish society.¹¹⁵

Ukraine

Political, legal, and bureaucratic disorder precluded the registration and adjudication of asylum claims in Ukraine for the last five months of the year 2001.¹¹⁶ The abolition and re-creation of the State Committee for Nationalities and Migration (SCNM), the agency responsible for refugees, is largely responsible for the slowed adjudication process. While a new Law on Refugees was passed in 2001, SCNM’s lack of legal authority for its implementation prevented the reestablishment of workable asylum procedures for some time. As a result, UNHCR reported that only two individuals received refugee status during 2001.¹¹⁷ Moreover, although the recently adopted Law on Refugees extended the term of refugee status from three months to one year, the duration of protection remains limited and requires renewal. Ukraine hosted 2,983 refugees at the end of 2001,¹¹⁸ and acceded to the Refugee Convention in January 2002.

¹⁰⁵ United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices – 2002, Turkey*, March 31, 2003, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18396.htm>.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ U.S. Committee for Refugees, *World Refugee Survey 2002 Country Report: Turkey*, available at <http://www.refugees.org/world/countryrpt/europe/2002/turkey.cfm>.

¹⁰⁹ UNHCR Statistical Yearbook 2001, p. 28.

¹¹⁰ European Commission, *2002 Regular Report on Turkey’s Progress Towards Accession*, October 9, 2002, available at http://europa.eu.int/comm/enlargement/report2002/tu_en.pdf.

¹¹¹ *Ibid.*

¹¹² See U.S. Committee for Refugees, *World Refugee Survey 2002*, p. 251; Human Rights Foundation of Turkey, *The Right To Seek Asylum and the Condition of Refugees* (Reports from November 2001 - January 2002); “Asylum Debate: Children Die in Snow on Route to the West,” *The Guardian*, May 31, 2002.

¹¹³ U.S. Committee for Refugees, *World Refugee Survey 2002 Country Report: Turkey*, available at <http://www.refugees.org/world/countryrpt/europe/2002/turkey.cfm>.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ U.S. Committee for Refugees, *World Refugee Survey 2002 Country Report: Ukraine*, available at <http://www.refugees.org/world/countryrpt/europe/2002/ukraine.cfm>.

¹¹⁷ United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices – 2002, Ukraine*, March 31, 2003, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18398.htm>.

¹¹⁸ UNHCR Statistical Yearbook 2001, p. 28.

While documentation issued to those legally recognized as refugees affords some protections to those whose claims have been adjudicated and accepted, unrecognized refugees remain subject to police abuse.¹¹⁹ Reports of arbitrary detention for extensive document checks and vehicle inspections, as well as the targeting of dark-skinned individuals and those suspected of anti-government demonstrations,¹²⁰ further contribute to the inadequate protection status afforded to refugees in Ukraine.

Ukraine has been under E.U. pressure to intercept undocumented migrants, among them asylum seekers and refugees, coming from countries such as Afghanistan, India, China, Sri Lanka, Vietnam, Pakistan, and Iraq,¹²¹ who cross over Ukraine's Carpathian mountains in an effort to reach western Europe. Those intercepted are placed in the Pavshino detention center or in a nearby railroad station, located approximately 500 miles southwest of Kiev. As documented by two western journalists, conditions in the two centers are appalling. Ukrainian authorities spend approximately one dollar a day to feed each detainee a bowl of buckwheat porridge and a small slice of bread twice a day.¹²² Detainees live in overcrowded conditions, without heat, hot water or showers.¹²³ They use the same buckets of water to drink and wash.¹²⁴ No doctor visits them and the only lavatories are in a filthy outhouse.¹²⁵ Several men alleged that they were beaten by the guards.¹²⁶ A Chinese man who was interviewed by a western journalist waited until his guard turned away, then made fists, swung them at his stomach and pointed to the guard.¹²⁷

III. ASYLUM SEEKERS AND REFUGEES WILL BE SUBJECTED TO INEFFECTIVE PROTECTION IN PROCESSING CENTERS

The “New Vision” Proposal Will Undermine International Effective Protection Norms

The U.K. proposal claims to “deal more successfully with irregular migrants within their regions of origin.”¹²⁸ The proposal contemplates returning asylum seekers to processing centers either along their transit routes or in another place closer to their home country, although it remains uncertain “whether protection in the regions should and could reach a level in which people could be moved from Europe to protected areas for processing.”¹²⁹ Given prevailing human rights conditions (discussed in Part II, above) in all of the countries proposed for the U.K. plan, sending asylum seekers and refugees to regional processing centers contravenes the evolving norm of “effective protection”¹³⁰ identified by UNHCR's ExCom,¹³¹ and recently elaborated in an expert roundtable held in Lisbon, Portugal in 2002.¹³² The European Commission Communication on the U.K. plan notes that the “key legal question seems to be what the exact definition of ‘effective protection’ is.”¹³³ The European Commission Communication goes on to state that:

protection can be said to be effective when, as a minimum, the following conditions are met: physical security, a guarantee against refoulement, access to UNHCR asylum procedures or national procedures with sufficient safeguards, where this is required to access effective protection or durable solutions, and social-economic well being, including, as a minimum, access to primary healthcare and

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Peter Baker, “Road to Freedom Ends in Grim Camp,” *Toronto Star*, October 13, 2002.

¹²² Mark Franchetti, “Migrants Held in Hell of EU's Eastern Front,” *The Times*, October 20, 2002.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Peter Baker, “Road to Freedom Ends in Grim Camp,” *Toronto Star*, October 13, 2002.

¹²⁷ Ibid.

¹²⁸ Blair-Simitis Correspondence at para (1).

¹²⁹ Blair-Simitis Correspondence at para (1)(iv).

¹³⁰ UNHCR first used the term “effective protection” when describing refugees who leave a country of first asylum, where they have obtained “effective protection,” for economic or other non-compelling reasons. UNHCR uses the term to refer not only to protection against refoulement in the country of first asylum, but also to whether the refugee was treated “in accordance with recognized basic human standards until a durable solution is found there.”

¹³¹ For an explanation of UNHCR's ExCom, see note 21, above.

¹³² UNHCR, Migration Policy Institute, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers*, Lisbon, Portugal, December 9-10, 2002.

¹³³ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 6.

primary education, as well as access to the labour market, or access to means of subsistence sufficient to maintain an adequate standard of living. In certain regional contexts, it was stressed that EU Member States may need to accept higher standards.¹³⁴

Human Rights Watch agrees with the European Commission Communication's setting forth of the minimum core of effective protection. Moreover, we would add that any state that violates the basic civil and political rights of refugees, such as the rights to freedom from arbitrary deprivation of liberty or property, should not be classed as offering effective protection. And it should be noted that effective protection does not remain static over time: without the prospect of local integration – that is, without a framework in which a refugee can enjoy basic rights such as the right to work and education – a refugee's international protection becomes ineffective over time.¹³⁵

Where a state permanently denies a refugee access to any form of legal status, it violates its Refugee Convention obligations,¹³⁶ even if it refrains from *refoulement*. For longstanding refugees, such a state cannot be said to offer effective protection. The basis for this position is the guidance of UNHCR in a number of public statements and Executive Committee Conclusions,¹³⁷ which in turn are based upon a full reading of the Refugee Convention rather than one that focuses only on *non-refoulement* (Article 33). For example, UNHCR stated in 1994, "To survive in the country of asylum, the refugee...needs to have some means of subsistence, as well as shelter, health care and other basic necessities...Beyond what is required for immediate survival, refugees need respect for the other fundamental human rights to which all individuals are entitled without discrimination."¹³⁸

The determination of whether effective protection exists should also focus on the living environment in a third country, including both the prevailing conditions at the time of return as well as the long-term prospects for continued effective protection. The inquiry should also extend beyond threats to life or liberty to include the provision or availability of basic subsistence needs. Refugees should have access to employment, housing, health care, education, and other basic necessities that will not be denied as a result of either official or *de facto* discrimination on ethnic, gender, religious, or immigration status grounds. UNHCR stated in 1994,

[t]o survive in the country of asylum, the refugee...needs to have some means of subsistence, as well as shelter, health care and other basic necessities...Beyond what is required for immediate survival, refugees need respect for other fundamental human rights to which all individuals are entitled without discrimination.¹³⁹

The inclusion of fundamental human rights and subsistence considerations finds further support in UNHCR's statement that refugees should not be returned to third countries unless they will be treated "in accordance with recognized basic human standards until a durable solution is found for them."¹⁴⁰ All non-nationals should be afforded, in accordance with article 11 of the International Covenant on Economic, Social and Cultural Rights, "an adequate standard of living for himself and his family, including adequate food, clothing and housing."¹⁴¹ This conception of effective protection is already applied by the U.K. when considering whether or not to transfer asylum seekers to third countries (discussed below). The Committee on Economic, Social, and Cultural Rights has clearly asserted that no

¹³⁴ Ibid.

¹³⁵ ExCom Conclusion No. 58 (XL) – 1989 refers not only to protection against *refoulement* in the country of first asylum, but also to whether the refugee was treated "in accordance with recognized basic human standards until a durable solution is found there." The meaning of "recognized basic human standards" however is not defined, and there is no reference to a situation in which the prospect of legal integration is specifically prohibited by national law. At a minimum, these "recognized basic human standards" might refer only to threats to life, liberty and security of the person. An expansive interpretation, on the other hand, might include the rights to work, education, religious freedom, access to courts and freedom of movement.

¹³⁶ The applicability of certain rights in the Refugee Convention has been read according to a sliding scale, in which certain rights apply to all refugees by virtue of their "simple presence," additional rights to those with "lawful presence," and a further subset to those who are "staying lawfully." See Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford, 1996), p.307ff.

¹³⁷ See e.g. UNHCR Excom Conclusion No.15, para k.

¹³⁸ UNHCR, "Note on International Protection," September 7, 1994, para 9.

¹³⁹ Ibid.

¹⁴⁰ ExCom Conclusion No. 58 (XL) (1989), para. f (ii).

¹⁴¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 11.

group, including non-nationals regardless of their immigration status, may be denied the core content of this right. In more developed countries the obligation to fulfill commitments under the Covenant is particularly strong.¹⁴²

The “New Vision” Proposal Will Undermine Existing Effective Protection Policies in the U.K. and other States

The European Commission Communication on the U.K. proposal assumes that persons who have already transited through or otherwise stayed in a country hosting a processing center could be returned to that country, as long as “effective protection” could be offered to them there.¹⁴³ Consideration of a third country’s respect for human rights and provision of access to subsistence needs is required under U.K. law¹⁴⁴ and that of other industrialized states.¹⁴⁵ However, as noted above, the countries currently under consideration for the proposal may not be able to ensure the effective protection of refugees. Since the U.K.’s existing legal requirements regarding third-country transfers and the best practices of other states are quite rigorous, implementation of the “new vision” proposal would constitute a serious retreat from existing policies.

The Third Country Unit (TCU) of the U.K.’s Immigration Service is responsible for determining whether a third country is indeed safe, or whether the applicant would face persecution upon return to a third country. The TCU looks at three criteria in making its determination: 1) whether the applicant is a national or citizen of the country of destination; 2) whether the applicant's life and liberty would be threatened in that country by reason of race, religion, nationality, membership of a particular social group, or political opinion; and 3) whether the government of that country would send the applicant to another country other than in accordance with the Refugee Convention.¹⁴⁶ Any threat to the applicant's life and liberty in a third country by reason of race, religion, nationality, membership of a particular social group, or political opinion will be found to constitute persecution by the TCU. In addition, the United Kingdom will consider most serious human rights violations to constitute persecution.¹⁴⁷ The United Kingdom has also extended its consideration of human rights violations to include human rights abuses by non-state actors.¹⁴⁸

In connection with decisions to transfer asylum seekers to third countries, the United Kingdom also requires consideration of human rights directly affecting subsistence and quality of life, including privacy, access to public employment without discrimination, access to normally available services such as food, clothing, housing, medical

¹⁴² See International Covenant on Economic, Social and Cultural Rights, art. 2 (stating that “[e]ach State Party to the present Covenant undertakes to take steps. . .to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”) (emphasis added).

¹⁴³ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 5. See also p. 6, posing the question “in how far would it be possible, according to the 1951 Refugee Convention, EU legislation or national legislation, to transfer persons to the envisaged [processing centers], who have not transited through or otherwise stayed in such [centers]/countries?”).

¹⁴⁴ Such inquiries into the subsistence needs of asylum seekers in third countries are somewhat surprising since the U.K. has tried several times in recent years to roll back the provision of basic subsistence to asylum seekers within its own territory.

¹⁴⁵ Countries such as Australia, which regard movements of a refugee through an intermediary country (or “secondary movements”) as a presumptive bar to asylum, fail to properly consider the conditions of effective protection listed above, and thus maximize the circumstances under which a refugee is returned to a third country where he or she is not truly safe. The existence of a global political climate characterized by xenophobia and hostility towards migrants and asylum seekers has presented Australia and others with an opportunity to export this negative model to individual countries, most recently the U.K., and lobby for the international acceptance of this flawed approach.

¹⁴⁶ Immigration and Nationality Directorate, Asylum Policy Instructions, Ch. 4, Sec. 2: Third Country Cases, at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=711>. (Asylum Policy Instructions)

¹⁴⁷ The human rights violations considered by the United Kingdom are divided into two categories. The violations in the first category are deemed to always constitute persecution, and include unjustifiable attack on life and limb, slavery, torture, and cruel, inhuman, or degrading punishment or treatment. Cruel, inhuman, or degrading punishment or treatment includes acts such as unjustifiable killing, maiming, physical or psychological torture, rape, and other serious sexual violence. See U.K. Asylum Policy Instructions, Ch. 1, Sec. 2, para. 8.2. The second category includes human rights violations that might be found to constitute persecution. Restrictions on the freedom of thought, conscience and religion, freedom from arbitrary arrest and detention, and freedom of expression, assembly, and association represent several types of prohibited acts and policies. See U.K. Asylum Policy Instructions, Ch. 1, Sec. 2, para. 8.3.

¹⁴⁷ U.K. Asylum Policy Instructions, Ch. 1, Sec. 2, para. 8.3

¹⁴⁸ U.K. Asylum Policy Instructions, Ch. 1, Sec. 2, para. 8.5.

care, social security, education, the right to work, and equal protection of the law.¹⁴⁹ TCU also seeks to avoid fragmenting nuclear families as a result of a transfer to a third country.¹⁵⁰

Other developed countries, such as the United States and Canada take a similar approach under their domestic laws. In the United States a grant of asylum to refugees who traveled through a third country prior to their arrival in the United States is barred only where the refugee was firmly resettled in another country.¹⁵¹ Presently under these regulations, firm resettlement generally occurs when an alien has received “an offer of permanent resident status, citizenship, or some other type of permanent resettlement” by another country prior to arrival in the United States.¹⁵²

Canada has adopted an interpretation of effective protection that requires comprehensive consideration of all relevant circumstances in third countries. Canadian courts consider the quality and duration of time spent in the third country,¹⁵³ and whether the individual can access status determination procedures.¹⁵⁴ In addition, the court considers the claimant’s subjective perception of his or her level of safety, as well as objective factors, including whether the claimant will enjoy genuine protection. Access for refugees to employment, education, and social services such as health care,¹⁵⁵ as well as the location of other family members, language abilities of the claimant,¹⁵⁶ and whether the refugee would be able to settle in the third country are all considered.¹⁵⁷

CONCLUSION

The U.K. has justified its “new vision” policy by claiming that financial support for refugees is badly distributed throughout the world and because asylum seekers reaching the E.U. are not the most vulnerable ones. The European Commission’s communication accepts that these are some of the main “deficiencies of the current asylum systems.”¹⁵⁸ However, Human Rights Watch takes issue with even these basic premises upon which the entire “new vision” proposal is based. First, while it is certainly the case that refugees in developing countries could benefit greatly from increased protection and financial assistance, improving those standards does not justify decreasing the protection offered to refugees in Europe. Second, Human Rights Watch has found that in many cases those refugees who move on from their regions of origin do so because they are in fact *exceedingly vulnerable*: they have been denied protection or a secure legal status in the first countries they reach.¹⁵⁹

¹⁴⁹ U.K. Asylum Policy Instructions, Ch. 1, Sec. 2, para. 8.3.

¹⁵⁰ See, e.g., *Nadarajah v. Secretary of State for the Home Department*, Case No: CO/1067/2002, High Court of Justice Queens Bench Division Administrative Court, December 2, 2002, para. 16.

¹⁵¹ See 8 U.S.C. § 1158(b)(2)(A)(vi). Even before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the United States Supreme Court, in *Rosenberg v. Woo*, held that firm resettlement constituted a factor in evaluating asylum petitions. *Rosenberg v. Woo*, 402 U.S. 49 (1971). The underlying rationale to denying asylum in instances of firm resettlement was that persons firmly resettled elsewhere “are by definition no longer subject to persecution.” *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996). The *Rosenberg* court, however, noted that refugees who flee persecution in successive steps are not disqualified from gaining asylum; rather, this policy is merely aimed at those refugees “who either never aimed to reach these shores or have long since abandoned that aim.” 402 U.S. at 57, n.6.

¹⁵² See 8 C.F.R. § 208.15 (2000). The government bears the initial burden of establishing that a third country issued to the alien an offer of some type of official status permitting the alien to reside in that country on a permanent basis. In the absence of direct evidence to prove the existence of a formal government offer of permanent resettlement, courts may look at circumstantial evidence of a government-based offer including the length of an alien's stay in a third country, the alien's intent to remain in the country, and the extent of the social and economic ties developed by the alien, as circumstantial evidence of the existence of a government-issued offer. See, e.g., *Abdille v. Ashcroft*, 242 F.3d 477, 486-87 (3d Cir. 2001)(holding the petitioner could not be deemed firmly resettled solely on the basis of a two-year grant of asylum by South Africa); *Abdalla v. INS*, 43 F.3d 1397, 1399 (10th Cir. 1994)(holding residence/visa permit tantamount to a government offer for permanent residence where after twenty-year stay, petitioner had longstanding and significant family ties in third country prior to arrival in United States).

¹⁵³ *Farahmandpour v. M.C.I.* F.C.T.D. IMM 92-97 (Dube, December 15, 1998).

¹⁵⁴ *Williams v. S.S.C.* F.C.T.D. IMM 4244-94 (Reed, June 30, 1995). While this factor is not as significant when the stay is temporary, it does become more important where the stay is longer and/or when the refugee initiated a claim in a third country and abandoned it to file a claim in Canada.

¹⁵⁵ *Hamdan v. Canada (M.C.I.)*, F.C.T.D. IMM 1346-96 (Jerome, March 27, 1997).

¹⁵⁶ *El-Naem v. Canada (M.C.I.)*, F.C.T.D. IMM 1723-96 (Gibson, February 17, 1997).

¹⁵⁷ *Soueidan v. Canada (M.C.I.)* F.C.T.D. IMM 5770-00 (Blais, August 28, 2001).

¹⁵⁸ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, June 3, 2003 (COM(2003) 315 final), p. 6.

¹⁵⁹ Human Rights Watch, *By Invitation Only: Australia Refugee Policy*, Vol. 14, No. 10, December 2002; Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala*, November 2002, p. 170-175.

The U.K. proposal should not be implemented as it stands because of the serious practical and legal problems outlined in this commentary. Instead of providing a basic level of protection to refugees and asylum seekers, as required by the Refugee Convention, the U.K. proposal threatens to subject such persons to persecution and tenuous living conditions, in some cases even beyond those experienced in the country they originally fled. The establishment of processing centers finds no support in international law and may directly implicate the U.K. or another transferring government in the human rights violations of a third country.

Human Rights Watch urges European governments to reject the U.K.'s "new vision" proposal because it exacerbates an unjust system for the world's refugees. Human Rights Watch urges all states to adopt an approach that complies with the standard of effective protection, which can best be provided to the world's refugees in a state's own territory.