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Chapter 10

External Dimension*

1. *Introduction*

Ever since the Tampere Conclusions were adopted by the European Council in 1999,[1] the Area of Freedom, Security and Justice that the Union is mandated to "maintain and develop",[2] "with full respect for fundamental rights",[3] is supposed to remain accessible to "those whose circumstances lead them justifiably to seek access to our territory".[4] The Heads of State and Government agreed on that occasion that "[t]he aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments …".[5] The Stockholm Programme, ten years later, has corroborated this approach, setting out that "[p]eople in need of protection must be ensured access to legally safe and efficient asylum procedures".[6] At the same time, "the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes" remains a top priority.[7] A balance is, hence, supposed to be struck, so that "the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them".[8]

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* This chapter draws on and expands upon Moreno-Lax, "The External Dimension of the Common European Asylum System after Stockholm: In Need of a Comprehensive Approach to Access International Protection in the EU", in Gortazar Rotaeche et al. (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant, 2012) 103; and De Bruycker et al., *Setting Up a Common European Asylum System*, PE 425.622 (Brussels: European Parliament, 2010), Chap 5 and Section 5 of Part 3, available at: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf>.

[1] Presidency Conclusions, European Council 15–16 October 1999 (*Tampere Conclusions* hereinafter), available at : <http://www.europarl.europa.eu/summits/tam_en.htm>.

[2] Art. 3(2) TEU.

[3] Presidency Conclusions, European Council 26–27 June 2014, Council doc. EUCO 79/14, 27 Jun. 2014, para. 1.

[4] Tampere Conclusions, para. 3.

[5] Tampere Conclusions, para. 4.

[6] The Stockholm Programme, Council doc. 17024/09, 2 Dec. 2009, p. 5.

[7] Tampere Conclusions, para. 3.

[8] European Pact on Immigration and Asylum, Council doc. 13440/08, 24 Sept. 2008, p. 11.

The reality remains, however, that, while the "integrated border management" system of the EU has been adopted and is being thoroughly developed through the Schengen *acquis*,[9] no channels have been opened, as part of the Common European Asylum System (CEAS), to guarantee legal access for asylum seekers to the EU for the purpose of claiming international protection.[10] This means that asylum seekers enter the territory of the Member States irregularly. Although no official statistics exist, it has, indeed, been estimated that up to 90% of those eventually recognised as beneficiaries of international protection gained access to the EU either with forged or no documents, usually with the help of smugglers and/or falling prey to human trafficking networks.[11] The recast instruments adopted in 2013 during the CEAS second phase, analysed in this volume, have left this situation unchanged.[12] The assumption appears to be that, while Member States may reach beyond their borders to control migration flows and eventually contain and deter irregular entrants, their human rights and refugee protection obligations are limited to the confines of their own territories, so that no extra-territorial duties are owed to those trying the enter the EU to seek asylum.[13]

In this environment of prevailing extra-territorial border controls and contested extra-territorial international protection obligations, the Hague

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[9] For an extensive analysis of each of the measures concerned, see Vol. I of this collection.

[10] See Guild and Moreno-Lax, *Current Challenges regarding International Refugee Law, with a focus on EU policies and EU co-operation with UNHCR*, PE 433.711 (Brussels, European Parliament, 2013), available at: <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT%282013%29433711_EN.pdf>; Moreno-Lax, "Life after Lisbon: EU Asylum Policy as a Factor of Migration Control", in Murphy and Acosta, eds, *EU Justice and Security Law* (Hart, 2014), 146.

[11] ECRE, *Broken Promises – Forgotten Principles*, Jun. 2004, p. 17, available at: <http://www.ecre.org/topics/areas-of-work/access-to-europe/97-broken-promises-forgotten-principles-ecre-evaluation-of-the-development-of-eu-minimum-standards-for-refugee-protection.html>.

[12] See the territorial scope of application of CEAS instruments in Art. 3(1), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60 (*recast Procedures Directive* or *recast APD* hereinafter); Art. 3(1), Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L 180/31 (*Dublin III Regulation* or *DR III* hereinafter) Dublin III Regulation; and Art. 3(1), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96 (*recast Reception Conditions Directive* or *recast RCD* hereinafter), all limiting applicability to the territory of the Member State concerned, including the external border, territorial waters and so-called transit zones.

[13] The untenability of this assumption is further examined below and criticised in Section 3.

Programme launched "the external dimension of asylum".[14] Several solutions have been posited to "offer guarantees to those who seek protection in or access to the European Union",[15] although an overall emphasis on migration control and the prevention of abuse of the asylum system has been preserved. Indeed, the European Council is persuaded that "the prevention and tackling of irregular migration, will help avoid the loss of lives of migrants undertaking hazardous journeys" and that, therefore, "[a] sustainable solution can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity".[16] Some of these mechanisms thus focus on the regions of origin and transit of refugee flows, as vectors of the international system of protection, with the objective of enhancing *their* protection capacity to manage protracted refugee situations,[17] so as to provide access to durable solutions "at the earliest possible stage".[18] Other proposals engage directly with the individual refugee and his or her physical access to the territory of the Member States in a safe and orderly way. Four of these solutions have been quite comprehensively formulated and reappear periodically in negotiations at EU level, including (1) resettlement from outside the EU; (2) Regional Protection Programs; (3) offshore processing; and (4) protected-entry procedures.

2. *Measures*

2.1. *The Joint EU Resettlement Programme*

2.1.1. *Background*

The European Commission, concerned with the issue of "access to the territory", suggested the possibility, already in 2000, of "processing the request for

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[14] The Hague Programme, Council doc. 16054/04, 13 Dec. 2004, para. 1.6. For commentary see Baldaccini, "The External Dimension of the EU's Asylum and Immigration Policies: Old Concerns and New Approaches", in Baldaccini, Guild and Toner, eds, *Whose Freedom, Security and Justice?* (Hart, 2007), 277; Rodier, *Analysis of the External Dimension of the EU's Asylum and Immigration Policies*, Study PE 374.366, (Brussels: European Parliament, 2006); Alegre, Bigo and Jeandesboz, *La dimension externe de l'espace de liberté, sécurité et justice*, Study PE 410.688, (Brussels: European Parliament, 2009).

[15] Tampere Conclusions, para. 3.

[16] Presidency Conclusions, European Council 26–27 June 2014, para. 8.

[17] On the EU's efforts to engage third countries in migration management, see Chou, "The European Security Agenda and the External Dimension of EU Asylum and Migration Cooperation" (2009) 10 *Perspectives in European Politics and Society* 541.

[18] The Hague Programme, para. 1.6.1.

protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme", as a way "of offering rapid access to protection".[19] The US two-tier asylum procedure, considering resettlement as *complementary* to the reception of spontaneous arrivals, was mentioned as a model. A feasibility study on the establishment of resettlement schemes in the EU Member States or at EU level was carried out.[20] In light of the findings therein, the Commission posited that "only a common approach [would] create the necessary political and operational basis that [would] produce beneficial effects on terms for access to European territory and allow resettlement to be used for strategic purposes both to assist the European Union and to attain the objectives of the [UNHCR] Agenda for Protection".[21]

From its part, the Thessaloniki European Council called on the Commission in June 2003 "to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection … with a view to presenting to the Council before June 2004, a comprehensive report suggesting measures to be taken, including legal implications".[22] In October that year, the Italian Presidency held a seminar in Rome, in order to further progress in this direction. The resettlement feasibility study was closely examined and the conclusion was reached that "resettlement [was] an indispensible and essential part of the international protection system, the use of which has saved many lives".[23] Among the advantages identified, it was mentioned that resettlement "offers an immediate access to durable solutions", that it "allows for the identification of the most vulnerable and needy cases, contributes to more orderly and managed arrivals and enables States to carry out pre-arrival security and health checks". In addition, resettlement "enables better planning and management of resources and facilitates the early integration of refugees". Finally, the seminar established that "resettlement has

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[19] Towards a common asylum procedure and uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755, 22 Nov. 2000, para. 2.3.2.

[20] Study on the feasibility of setting up resettlement schemes in EU Member States or at EU level, against the background of the Common European Asylum System and the goal of a common asylum procedure, 2003, available at: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/index_en.htm>.

[21] On the common asylum policy and the Agenda for protection, COM(2003) 152, 26 Mar. 2003, p. 12.

[22] Presidency Conclusions, European Council 19–20 June 2003, Council doc. 11638/03, para. 26.

[23] On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, improving access to durable solutions, COM(2004) 410, 4 Jun. 2004, para. 19.

a positive impact on the integrity and credibility of the institution of asylum",[24] which could assist in preventing the abuse of the system.

In keeping with the deadline, the Commission issued a communication on "improving access to durable solutions" in June 2004, identifying the key elements of a EU Resettlement Scheme.[25] A fully-fledged proposal followed in September 2009. Building on the public consultations carried out in the framework of the Green Paper on the future of the Common European Asylum System in 2007,[26] and with the backing of the European Pact on Immigration and Asylum,[27] the Commission launched a *Joint EU Resettlement Programme*.[28] The Stockholm programme welcomed the initiative, inviting the EU institutions to "encourage the voluntary participation of Member States in the … scheme".[29]

2.1.2. *Main Features*

The Commission proposal for a Joint EU Resettlement Programme was divided in 4 chapters. The first provided the background to the proposal; the second identified the shortcomings of the current situation prevailing in the EU with regard to resettlement; the third expounded the Joint EU Resettlement Programme proper, identifying the objectives and the guiding principles alongside the different components of the scheme; and the fourth division referred to a separate and complementary proposal to adapt the European Refugee Fund (2008–2013).[30]

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[24] Ibid.

[25] Ibid., paras. 23–34.

[26] Green Paper on the future of the Common European Asylum System, COM(2007) 301, 6 Jun. 2007.

[27] European Pact on Immigration and Asylum, Council doc. 13440/08, 24 Sept. 2008, p. 12: The European Council agrees to "strengthen cooperation with the Office of the United Nations High Commissioner for Refugees to ensure better protection for people outside the territory of European Union Member States who request protection, in particular by moving, on a voluntary basis, towards the resettlement within the European Union of people placed under the protection of the Office …".

[28] On the establishment of a Joint EU Resettlement Programme, COM(2009) 447, 2 Sept. 2009 (*Joint EU Resettlement Programme* hereinafter).

[29] The Stockholm Programme, p. 72.

[30] Proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, COM(2009) 456, 2 Sept.2009 (*Proposal to Amend the ERF* hereinafter). The instrument was finally adopted as: Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows", OJ 2012 L 92/1.

The Commission characterised resettlement, clearly differentiating it from internal/EU relocation of beneficiaries of international protection, as "one of three so-called 'durable solutions' available to refugees",[31] "generally carried out with the UNHCR". The mechanism "targets those refugees whose protection needs have already been clearly established". Being an "orderly procedure", aiming to provide safe and legal access to the EU, resettlement is supposed to attenuate the need for asylum seekers "to resort to different forms of illegal immigration". An additional advantage attached to its predictability is "that reception and integration [of its beneficiaries] can be organized in advance".[32]

The major shortcoming of the current situation EU-wide is the low-profile engagement of the Member States in resettlement activities in comparison to other well-established resettlement countries. At the time the proposal was tabled, only ten EU Member States had a regular annual scheme,[33] and their limited capacity "contrast[ed] sharply with the numbers taken in by other countries in the industrialized world".[34] Canada's yearly intake, for instance, of 10,000 persons approximately, "is more than double the total number of refugees resettled annually in the EU".[35] Therefore, the principal objective of the joint EU resettlement program is "to involve more Member States in resettlement activities", so as "to provide for an orderly and secure access to protection for those resettled" and "to demonstrate greater solidarity with third countries receiving refugees".[36]

Additional flaws, at practical level, included the lack of structures and procedures for the coordination of national initiatives between the Member States. No exchange of information and no common planning or coordination mechanism of these activities existed either when the Commission tabled its proposal. National resettlement schemes were negotiated bilaterally with the UNHCR. Thus, the Commission believed that the introduction of the EU programme had the potential to enhance closer cooperation and to ensure

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[31] The other two are local integration and sustainable return.

[32] Joint EU Resettlement Programme, para. 1.2.

[33] Sweden, Denmark, Finland, The Netherlands, the United Kingdom, Ireland, Portugal, France, Romania and the Czech Republic. For detailed statistics see the Commission Staff Working Document accompanying the Communication on the establishment of a Joint EU Resettlement Programme and the proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, Impact Assessment, SEC(2009) 1127, 2 Sept. 2009.

[34] Joint EU Resettlement Programme, paras. 1.3. and 2.1.

[35] Ibid., fn. 15.

[36] Ibid., para. 2.1.

coordination of the national schemes at EU level. Economies of scale could be fostered and the costs associated with resettlement thereby eventually reduced. This way, the humanitarian impact of the EU could be exponentially increased, raising the Union's profile in international affairs generally and allowing for a strategic use of resettlement. In addition, there were no means prior to the introduction of the programme to identify priorities in a flexible and adaptive manner in the EU sphere. As a result, financial resources did not match real necessities. The European Refugee Fund (ERF) was considered too rigid to afford an adequate framework to ever changing circumstances. According to the Commission, a mechanism was necessary for the common definition of priorities at EU level, with a corresponding financial instrument offering incentives to the Member States to resettle according to those priorities.[37]

In response to these inadequacies, the Joint EU Resettlement Programme pursues three major objectives: (1) an enlarged humanitarian impact of the EU, with "greater and better targeted support to the international protection of refugees" world-wide; (2) the strategic use of resettlement, "ensuring that it is properly integrated into the Union's external and humanitarian policies"; and (3) the cost-effectiveness of EU resettlement efforts.[38]

Several principles underpin the Joint EU Resettlement Programme. First, involvement in the Programme is voluntary. It is expected that the creation of financial incentives in an improved version of the ERF – the current Asylum, Migration and Integration Fund (AMIF) 2014–2020[39] – will attract participation by those EU Member States that currently conduct no resettlement or a very reduced scheme. Second, priorities are to be revised annually, so that evolving needs can be matched with tailored responses. Third, a multiplicity of non-State actors will be involved in the concrete development and implementation of the Programme, such as UNHCR, IOM, international and local NGOs, as well as local authorities dealing with reception and integration. Fourth, the approach of the Programme towards resettlement is incremental, both quantitatively and qualitatively. The number of Member States participating should thus widen progressively, together with their resettlement capacity, and the scope of their annual commitments.[40]

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[37] Ibid., paras. 2.2. and 2.3.

[38] Ibid., para. 3.

[39] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ 2014 L 150/175 (*AMIF Regulation* hereinafter).

[40] Joint EU Resettlement Programme, para. 3.1.

The Joint EU Resettlement Programme, as designed by the European Commission, consists mainly of a mechanism that allows for the setting of common annual priorities on resettlement and more targeted use of the financial assistance available through the former ERF, now the AMIF.[41] To that effect, a Resettlement Expert Group, composed of members from both resettlement and non-resettlement Member States and other stakeholders, was proposed, to meet on a regular basis to exchange information on targets and specific needs. On the basis of its discussions, the Commission would then have drafted a Decision with the common resettlement priorities, taking account of the UNHCR yearly forecast of resettlement needs. The Commission considered, in addition, that an integrated approach between resettlement and other EU external policies was desirable. "In particular, coherence with the *EU Global Approach to Migration*[42] should be ensured". It thus suggested that resettlement priorities be established not only "on the basis of current needs", but also "on the basis of other humanitarian and political considerations identified by the Member States and the Commission, taking into account the specific situation of the third countries concerned, as well as the overall EU relations with these countries".[43]

A version of the Commission formula has been integrated into the AMIF Regulation, reflecting the Global Approach to Migration stance, leading to an alternative methodology to identify resettlement targets. EU resettlement priorities for 2014–2020 have been agreed upon in Annex III of the Regulation, as comprising refugees from the Regional Protection Programmes, examined in Section 2.2 below; refugees from Eastern Africa and the Great Lakes Region; Iraqi refugees from Syria, Lebanon, Turkey, and Jordan; as well as Syrian refugees from the region of origin. In addition to EU-wide priorities, each Member State is called upon to negotiate bilaterally with the European Commission its own national resettlement objectives for the year.[44] Significant financial incentives have been introduced to attract Member State activities in this area,

[41] Ibid., para. 3.2.

[42] Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005) 621, 30 Nov. 2005; The Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006) 735, 30 Nov. 2006; Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM (2007) 247, 16 May 2007; Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies COM(2008) 611 final, 8 Oct. 2008; The Global Approach to Migration and Mobility, COM(2011) 743, 18 Nov. 2011.

[43] Joint EU Resettlement Programme, para. 3.2.3.

[44] Arts. 3(2) and 7, AMIF Regulation.

including a lump sum of 6,000 EUR per resettled refugee – increased to 10,000 EUR, if they originate from the EU priority areas.[45]

Once common needs and annual priorities have been defined, strengthened practical cooperation is supposed to supplement the mechanism. From 2014, the European Asylum Support Office (EASO)[46] has provided the structural framework for practical cooperation initiatives undertaken with regard to resettlement.[47] Selection and fact-finding missions, pre-departure orientation programmes, medical screenings, travel or visa arrangements, joint training, reception and integration tools, the identification of best practices or the launch of pilot projects range among the activities the Agency may coordinate, in line with the original Joint EU Resettlement Programme proposal.[48]

Finally, to ensure progress and continuous relevance, as mandated by Article 70 TFEU, the Joint EU Resettlement Programme should be periodically evaluated. The Commission, in close cooperation with the EASO, is to report every year on resettlement efforts made in the EU, both to the Council and to the European Parliament. A mid-term evaluation should have been carried out in 2012, upon consultation with all relevant stakeholders, and, in 2014, a full revision should have been undertaken, so that any necessary improvements and the further development of the Programme could be introduced.[49] However, no full and thorough evaluation has yet been undertaken, as the Programme was only officially adopted in March 2012.[50]

In the meantime, results have been unimpressive, with numbers resettled from North African countries during and after the Arab Spring being tokenistic, if compared with efforts from neighbouring countries in the region and other traditional resettlement destinations. Upon repeated calls from UNHCR, the European Commission organised a pledging conference in May 2011,

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[45] Art. 17(1) and (2), AMIF Regulation.

[46] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010 L 132/11.

[47] EASO, Work Programme 2014, p. 26, para. 7.1, available at: <http://easo.europa.eu/asylum-documentation/easo-publication-and-documentation/>.

[48] According to EASO, *2013 Annual Report on the Situation of Asylum in the EU*, p. 72, a first seminar on EU Resettlement Policy was held on 12–13 Nov. 2013, focusing precisely on practical cooperation initiatives.

[49] Joint EU Resettlement Programme, para. 3.3.

[50] European Commission Newsroom, *Joint EU resettlement programme: increasing resettlement of refugees in Europe*, 29 Mar. 2012, available at: <http://ec.europa.eu/home-affairs/news/intro/news_201203_en.htm>. See also, UNHCR, *UNHCR welcomes adoption of Joint EU Resettlement Programme*, Briefing Note, 30 Mar. 2012, available at: <http://www.unhcr.org/4f7589ef9.html>.

which only achieved 700 places being pledged EU-wide.[51] The situation notably improved during 2013, in response to the Syrian crisis, with several Member States creating special resettlement programmes for Syrians,[52] catering for significant numbers of refugees, ranging from 500 refugees in Austria and France, for instance, up to 10,000 in Germany and 30,000 in Sweden, according to EASO data.[53] However, in general terms, as the Commission itself has recognised, "the EU's resettlement record so far is relatively modest",[54] with the European Council acknowledging that Member States should "increase contributions to global resettlement efforts".[55]

2.1.3. *Assessment*

The Joint EU Resettlement Programme represents an important step for the Union, supported by a strong institutional consensus.[56] However, the instrument suffers from some structural shortcomings worth pointing out. Firstly, the goal of the Programme, aimed primarily at involving "more Member States in resettlement",[57] reflects a persistent lack of political will across the EU to engage in these activities. More robust action is required to overcome this fundamental limitation than yearly discussions and voluntary activities.[58]

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[51] Commission Press Release, *Statement by Cecilia Malmström, EU Commissioner in charge of Home Affairs, on the results of the Ministerial Pledging Conference*, MEMO 11/295, 13 May 2011, available at: <http://europa.eu/rapid/press-release_MEMO-11-295_en.htm?locale=EN>.

[52] According to EASO, *2013 Annual Report on the Situation of Asylum in the EU*, p. 71 and Annex C.14, Denmark (217), France, Finland, Germany, Hungary, Ireland, The Netherlands, Portugal, Sweden and the UK maintained resettlement programmes started since the beginning of hostilities, while new resettlement programmes were adopted in Belgium, Romania and Spain, with varying capacities.

[53] Ibid., p. 71, fn. 216.

[54] An open and secure Europe: Making it happen, COM(2014) 154, 11 Mar. 2014, p. 7.

[55] Presidency Conclusions, European Council 26–27 Jun. 2014, para. 8.

[56] European Parliament legislative resolution of 29 March 2012 on the Council position at first reading with a view to the adoption of a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" (06444/2/2012 – C7-0072/2012 – 2009/0127(COD)), P7_TA(2012)0104, 29 Mar. 2012. See also Position of the Council at first reading with a view to the adoption of a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows", Council doc. 6444/2/12 REV 2, 9 Mar. 2012.

[57] Joint EU Resettlement Programme, para. 2.1.

[58] For a similar opinion see the LIBE Committee Draft Report on the establishment of a joint EU resettlement programme (2009/2240(INI)), 8 Feb. 2010, especially paras. 1–4.

For instance, EU-wide information campaigns conducted in partnership with the UNHCR and the NGO sector may yield practical results. Some kind of twining programs between EU Member States and major resettlement countries may prove equally beneficial. Inviting officials from these countries to EU meetings could have a major impact on awareness-raising among European policy-makers. The establishment of private sponsorship mechanisms, allowing for the resettlement of refugees by private entities, may also help build up public acceptance, while creating new opportunities for cooperation among governments, NGOs, and the private sector.[59] More substantial financial assistance could provide an adequate incentive in this direction.[60] In the short run and so as to foster a solid common understanding among Member States on resettlement, the introduction of an Open Method of Coordination-like scheme, based on the exchange of best practices and mutual-learning, may stimulate the approximation of national policies in this area.[61]

Secondly, the Programme proposal and subsequent adoption instruments should have gone into further detail. The identification of common priorities, providing the Programme with its main operational goal, is only a first step towards the development of a common EU approach to resettlement. However, this necessary premise is insufficient to achieve by itself the ultimate aspirations of the Programme. Together with the definition of common priorities at large, other key elements must be considered for a meaningful common approach to emerge.[62] There are numerous points in which Member States' practices and understandings differ with regard to resettlement. The Commission has identified some "with respect to the numerical targets and

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[59] UNHCR, Response to the Green Paper on the Common European Asylum System, (Sept. 2007), p. 45, available at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>.

[60] Draft Report on the proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC (COM(2009) 0456 – C7-0123/2009 – 2009/0127(COD)), 2 Feb. 2010, and result of the orientation vote on 7 Apr. 2010.

[61] For a similar proposal: On the common asylum policy, introducing an open coordination method, COM(2001) 710, 28 Nov. 2001. On the potentialities of using OMC-like mechanisms in the implementation of human rights see: De Schutter, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monet Working Paper No. 07/04, available at: <http://centers.law.nyu.edu/jeanmonnet/papers/04/040701.rtf>; and De Schutter and Moreno-Lax, eds, *Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union* (Bruylant, 2010).

[62] For an overview of key points, see UNHCR, *The Integration of Resettled Refugees*: *Essentials for Establishing a Resettlement Programme and Fundamentals for Sustainable Resettlement Programmes*, (2013), p. 22 ff, available at: <http://www.refworld.org/pdfid/51b81d9f4.pdf>.

specific caseloads … the legal criteria which are used for deciding who to resettle and the partners through which resettlement is carried out".[63] If the Programme is to have the desired humanitarian impact and if it is to provide asylum seekers with a credible alternative to irregular immigration,[64] all key elements should be harmonized in the long term. This was already noted by the Commission in its 2004 Communication on "improving access to durable solutions". Among the "key elements of an EU Resettlement Scheme", it was stressed, a "general procedural framework" and some minimum "criteria" to identify its beneficiaries would have to be formulated at EU level.[65] This observation continues to be valid today and should be given particular attention if the Joint EU Resettlement Programme is to produce significant effects. Follow-up measures ensuring the full integration of resettled refugees into their host communities should also be included in the programme.[66] The development of some sort of monitoring mechanism to guarantee the quality of resettlement in collaboration with the UNHCR and the NGO community would help achieving this aim.[67]

In the longer run, it has been posited that "an EU-wide resettlement scheme should be expanded into a truly joint European resettlement programme based on common criteria and the commitment of European States to make a significant number of resettlement places available every year. Member States would have to commit to collectively resettling a certain number of refugees, who would be dispersed across Europe according to a fair and equitable system. … [A] EU resettlement office could be established … to take on a [fully] operational role, placing representatives in regions, planning allocations, coordinating missions with UNHCR, and setting levels and resettlement priorities", in close cooperation with relevant NGOs.[68] Rui Taveres, LIBE Committee rapporteur on this issue, proposed to establish a Permanent Resettlement Unit within the EASO, which could coordinate and evaluate the policy by issuing annual reports and guidelines and liaise with the UNHCR

[63] Joint EU Resettlement Programme, para. 3.1.

[64] Ibid., para. 2.1.

[65] Improving access to durable solutions, paras. 23–34.

[66] On this point see Papadopoulou et al, *Comparative study on the best practices for the integration of resettled refugees in the EU Member States*, PE 474.393, (Brussels, European Parliament, 2013).

[67] Draft Report on the establishment of a joint EU resettlement programme (2009/2240(INI)), 8 Feb. 2010, paras. 9 and 30–35.

[68] ECRE, Response to the Green Paper on the Common European Asylum System, September 2007, p. 46; available at: <http://www.ecre.org/files/ECRE%20Green%20paper%20response%20final%20-%20Read%20only.pdf>.

and the NGO sector.[69] Without permanent structures that prepare for and coordinate resettlement and follow-up on the subsequent integration of the refugees concerned, "it will not be possible to increase the number of refugees in the EU",[70] thus the incremental perspective of the Programme risks being lost. If that were the case, the extension of the Programme to cover not only protracted refugee situations but also urgent humanitarian emergencies, as proposed by several actors,[71] would be easier to achieve.

A third point of contention relates to the *voluntary* nature of the participation in the resettlement scheme, as assumed in the Programme. On the basis of the TFEU, the Union "*shall* adopt measures for a common European asylum system comprising: … partnership and cooperation with third countries for the purpose of managing the *inflows* of people applying for [international protection]".[72] In turn, such measures "*shall* be governed by the *principle of solidarity* and fair sharing of responsibility, including its financial implications, between the Member States" and, "[w]henever necessary, the Union acts adopted [in this realm] *shall* contain appropriate measures to give effect to this principle".[73] While a choice is arguably left to the Member States as for the means to be employed, these provisions create a series of positive obligations. Against this background, it is difficult to reconcile the *obligation* to adopt legal measures for the management of refugee inflows in partnership with third countries, governed by the principle of solidarity among Member States, with the *voluntary* character of the participation in the resettlement programme.[74] Once the choice with regard to the means has been made, participation in its implementation should be deemed obligatory. Should any Member State

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[69] Draft Report on the establishment of a joint EU resettlement programme (2009/2240(INI)), 8 Feb. 2010, paras. 11–18.

[70] Ibid., para. 29.

[71] Amnesty International-EU Office, *Response to the Green Paper on the Common European Asylum System*, (Sept. 2007), p. 44, available at: <http://www.aieu.be/static/documents/2009/AIResponse_EASOProposalApr09.pdf>.

[72] Art. 78(2)(g) TFEU (emphasis added).

[73] Art. 80 TFEU (emphasis added).

[74] *Cf*. Tsourdi, "What Role for the EU as an International Protection Actor? Assessing the External Dimension of the Euorpean Asylum Policy", Dony, ed, *La dimension externe de l'espace de liberté, de sécurité et de justice au lendemain de Lisbonne et de Stockholm: un bilan à mi-parcours* (Bruylant, 2012), 147, at 156, hinting at the possibility of reading an obligation to participate in the Programme, in light of the language used in the AMIF Regulation in relation to the compulsory fields to be included in national plans on resettlement. Note, however, that the Regulation does not introduce an obligation to adopt the plans in the first place; it simply lists a number of priority fields to be included therein, should the Member State concerned agree to start resettlement operations and adopt such a plan.

encounter difficulties in meeting its obligations under the scheme, for instance, in the event of "an emergency situation characterised by a sudden inflow of nationals of third countries", provisional measures may be adopted "for the benefit of the Member State(s) concerned".[75] The activation of the Temporary Protection Directive could also be envisaged in this context.[76]

Fourthly, although it may be inferred from the general tenor of the Programme proposal and from its drafting history, nowhere is it clearly stated that "resettlement must be a complement to – and not a substitute for – the provision of protection where needed to persons who apply for asylum in the EU or at its borders".[77] One would have expected the Commission to introduce its 2004 observation in its 2009 Programme that resettlement remains "without prejudice to Member States' obligations to determine asylum claims in fair procedures and to provide protection in their territory in accordance with international law".[78] The existence of a resettlement scheme cannot be used as an argument not to grant admission to spontaneous arrivals; nor should it lead to a reduction of procedural guarantees for those who did not waited "their turn" in their regions of origin to be orderly resettled in the EU.

A further concern relates to the purported main objective of the Programme, which is supposed to provide "orderly and secured access to protection" and "to demonstrate greater solidarity to third countries in receiving refugees".[79] To maximise its humanitarian impact, in line with Article 78(2)(g) TFEU, a multilateral dialogue should be initiated with the countries hosting large numbers of refugees in the regions of origin and transit. But this is missing from the programme. It would, however, significantly facilitate cooperation and foster "the establishment of more commonality of visions, objectives and practices".[80] In addition, as noted in the Stockholm Programme, "any development

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[75] Art. 78(3) TFEU.

[76] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

[77] UNHCR, *Response to the Green Paper on the Common European Asylum System*, (Sept. 2007), p. 44.

[78] Improving access to durable solutions, para. 25.

[79] Joint EU Resettlement Programme, para. 2.1.

[80] The Hague Conference on Private International Law, "Some Reflections on the Utility of Applying Certain Techniques for International Co-operation Developed by The Hague Conference on Private International Law to Issues of International Migration", Prel. Doc. No. 8, (Mar. 2006), pleading for the introduction of multilateral approaches that would promote international cooperation, fostering "the establishment of more commonality of visions, objectives and practices in respect of international migration", available at: <http://www.hcch

in this area needs to be pursued in close cooperation with the UNHCR and … other relevant actors".[81]

It is also expected that resettlement coordinates with other EU external policies, in general, and with the Global Approach to Migration, in particular. This is problematic. From the three aims the Global Approach pursues "promoting mobility and legal migration, optimising the link between migration and development, and preventing and combating illegal immigration",[82] so far "the emphasis has indisputably been on [controlling irregular movement]".[83] Although the 2011 Global Approach to Migration and Mobility (GAMM) Communication introduced asylum as one of its "four pillars",[84] this addition has not modified the predominantly control-oriented perspective of the Approach. When it comes to asylum, the idea is not generally to promote orderly access to the EU. The overall emphasis within the GAMM is on "increase[d] cooperation with relevant non-EU countries in order to strengthen *their* asylum systems and national asylum legislation", so that *they* "offer a higher standard of international protection for asylum-seekers and displaced people who remain in the region of origin".[85]

Given the dissimilar goals each initiative seeks to attain, it is possible to anticipate frictions at the practical level when attempting to link the EU Resettlement Programme to the GAMM. Nonetheless, the Commission insisted that the identification of EU resettlement priorities takes account not only of protection needs but also of political considerations relating to "the specific situation of the third countries concerned, *as well as the overall EU relations with these countries*",[86] which is what the AMIF Regulation has done.[87] The adequacy of putting resettlement at the service of a broader migration management concern should, however, be subject to debate. Factoring political considerations, alien to international protection needs, into the definition

.net/index_en.php?act=progress.listing&cat=5>. See also van Loon, "Vers un nouveau modèle de gouvernance multilatérale de la migration internationale – Réflexions à partir de certaines techniques de coopération développées au sein de la Conférence de La Haye", *Liber Amicorum Hélène Gaudemet-Tallon* (Dalloz, 2008), p. 429–434.

[81] The Stockholm Programme, p. 72.

[82] Ibid. 60.

[83] Garlick and Kumin, "Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control", Martenczuk and van Thiel, eds, *Justice, Liberty, Security: New Challenges for EU External Relations*, (VUB Press, 2008), p. 116.

[84] Global Approach to Migration and Mobility, p. 6.

[85] Ibid., p. 17 (emphasis added).

[86] Ibid., para. 3.2.3 (emphasis added).

[87] Annex III, AMIF Regulation.

of resettlement targets risks detracting the Programme from its primary humanitarian objective.

Finally, cross-policy coherence in the Programme is only referred to in horizontal terms – to ensure consistency between the Programme and other external policies of the EU. The necessity to ensure that the external dimension of asylum is consistent with its internal counterpart has been omitted.[88] However, it is well established that "the Union *shall* ensure consistency between its policies and activities, taking *all* of its objectives into account and in accordance with the principle of conferral of powers".[89] *Consistency* is one prime characteristic of Union law that the Court of Justice guarantees.[90] Therefore, "[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions" in all areas within its competence.[91] In regard to its external policies in particular, the EU Treaty stipulates that "[t]he Union shall ensure consistency between the different areas of its external action *and between these and its other policies* …".[92] The European Council has had occasion in 2014 to recognise "the link between the EU's internal and external policies", particularly in the area of Justice and Home Affairs, and the need to improve it.[93] Consequently, pursuing or achieving contradictory results between or within the external and the internal asylum *acquis* should be considered in breach of this *legal* obligation.[94] Therefore, when common priorities are discussed, any agreements reached in regard of selection criteria or resettlement procedures to be used in the operationalization of the programme should take the relevant internal *acquis* into account. In particular, in light of the doctrine of acquired rights and the principle of non-discrimination, it is arguable that future arrangements in this sense may not be lawful if they entail a lowering of present levels of protection. The fact that the Qualification

[88] See, on this point, Peral, *EU Protection Scheme for Refugees in the Region of Origin: Problems of Conditionality and Coherence*, paper submitted to the International Conference on Refugees and International Law: The Challenge of Protection, Oxford, (15th–16th Dec. 2006), available at: <http://www.esil-sedi.eu/fichiers/en/Peral_181.pdf>.

[89] Art. 7 TFEU.

[90] Art. 256 TFEU and Art. 19 TEU.

[91] Art. 13(1) TEU.

[92] Art. 21(3) TEU (emphasis added).

[93] Presidency Conclusions, European Council 26–27 June 2014, para. 2.

[94] Gauttier, "Horizontal Coherence and the External Competences of the European Union" (2004) 10 *ELJ* 23, at 25.

Directive[95] and the Procedures Directive are in place should be understood to prevent the EU from engaging extra-territorially in the promotion of less protective standards than those adopted internally. The fact that the scope of application *ratione loci* of the Qualification Directive, unlike that of the other CEAS instruments,[96] has not been limited to the territory of the Member State concerned is noteworthy, and arguably constitutes an indication of its potential extraterritorial applicability – which is further discussed below. External action remains, in any event, subject to general principles of EU law,[97] and to the relevant provisions of the Charter of Fundamental Rights,[98] whenever (and wherever) EU law is implemented.[99]

Bearing in mind that an obligation to provide access to asylum or to prevent *refoulement* may arise extraterritorially,[100] there is room to consider that legal responsibility may be engaged in the course of a resettlement operation beyond the terms originally anticipated. A resettlement scheme would not substitute for compliance with other obligations stemming from international or EU law *vis-à-vis* the persons concerned. This dimension should be taken into account when designing concrete resettlement operations.

2.2. *Regional Protection Programmes*

2.2.1. *Background*

Regional Protection Programs (RPPs) constitute the response of the European Commission to a debate on extraterritorial processing that sparked in the Union in 2003. The UK's government commitment to cut by half the number of asylum applications lodged in the British Isles had led Blair's government to propose the offshoring of asylum procedures outside the EU. "Transit

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[95] Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ 2004 L 304/12; and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9 (*recast Qualification Directive* hereinafter).

[96] Art. 3(1), recast APD; Art. 3(1) DR III; and Art. 3(1) recast RCD.

[97] Art. 6(3) TEU.

[98] Art. 6(1) TEU.

[99] Art. 51(1) CFR.

[100] On the extraterritorial working of the principle of *non-refoulement* see Moreno-Lax, "(Extraterritorial) Entry Controls and (Extraterritorial) *Non-Refoulement* in EU Law", Maes, Foblets, and De Bruycker, eds, *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011), 385.

Processing Centres" and "Regional Protection Zones" were the two main components of this strategy. Certain categories of irregularly arriving asylum seekers would immediately be transferred to the protected areas, have their claims assessed there, and be either returned to their country of origin, if found not in need of international protection, or offered a durable solution in the EU or elsewhere. The chosen caseload was to correspond to a selection of nationalities of countries considered to be generally safe and supposedly producing economic migrants abusing the asylum channel.[101] The UNHCR submitted a "Three-Pronged Proposal" in response, advancing the idea of placing the camps *inside* EU territory and favouring the complementarity between the "EU prong", dealing with manifestly unfounded claims, and the "domestic prong", processing the rest of applications.[102]

Honouring the European Council's invitation to establish the merits of these proposals,[103] the European Commission issued a Communication.[104] After careful analysis of the British and UNHCR's proposals, and taking the fears of the NGO sector into account,[105] *Towards more accessible, equitable and*

[101] A first version of the UK Government's plan was leaked to the press and was referred to by *The Guardian*: "Safe havens plan to slash asylum numbers", 5 Feb. 2003, available at: <http://www.guardian.co.uk/society/2003/feb/05/asylum.immigrationasylumandrefugees>. The draft *New Vision for Refugees*, is retrievable from: <http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf>, in its version of 7 Mar. 2003. A later version: *New International Approaches to Asylum and Protection*, was attached to a letter Blair addressed to Simitis for discussion in the European Council on 10 Mar. 2003, which is available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>.

[102] UNHCR, *Three-Pronged Proposal*, Jun. 2003, available at: <http://www.unhcr.org/refworld/pdfid/3efc4b834.pdf>.

[103] Presidency Conclusions, European Council 20–21 Mar. 2003, Council doc. 8410/03, para. 63: "The European Council noted the letter from the United Kingdom on new approaches to international protection and invited the Commission to explore these ideas further, in particular with UNHCR, and to report through the Council … in June 2003".

[104] Towards more accessible, equitable and managed asylum systems, COM(2003) 315, 6 Mar. 2003.

[105] Amnesty International, *Strengthening Fortress Europe in Times of War*, Mar. 2003, available at: <http://www.refugeecouncil.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=1E1F9524-B02D-4065-BEEE-BDC0FA9330F1&mode=link&guid=6cc9c32da2a74b3b9721e4889774fee1>; ECRE-US Committee for Refugees, *Responding to the asylum access challenge, an agenda for comprehensive engagement in protracted refugee situations*, Apr. 2003, available at: <http://www.ecre.org/resources/Policy_papers/357>; UK Refugee Council, *Unsafe havens, unworkable solutions*, Jun. 2003, available at: <http://www.refugeecouncil.org.uk/policy/responses/2003/unsafe_havens.htm>; Human Rights Watch, *An Unjust "Vision" for Europe's Refugees*, Jun. 2003, available at: <http://www.hrw.org/legacy/backgrounder/eca/refugees0603/refugees061803.pdf>.

managed asylum systems identified the "basic premises of any new approach to the international protection regime".[106] The Commission announced the overall principles that should underpin future proposals, but avoided embarking in the definition of detailed policy instruments. For the Commission, the new approaches would have to fully conform, in any case, to the international legal obligations ensuing from the 1951 Geneva Convention and the ECHR. Any extraterritorial initiative should be considered complementary to the CEAS, without rendering in-country reception and protection of spontaneous arrivals obsolete. The Commission also considered that any new approach should be built upon a genuine burden-sharing system, in full partnership with third countries hosting large refugee populations. The root causes of forced migration would also have to be addressed, if the need for displacement is ever to diminish.

In June 2003, the European Council reiterated its invitation and asked the Commission "to explore all parameters" of this new approach in "a comprehensive report suggesting measures to be taken, including legal implications".[107] In its ensuing Communication, together with protected entry procedures and resettlement, the Commission proposed the establishment of *EU Regional Protection Programmes* as a specific means to enhance the protection capacity of regions of origin.[108] It avoided any moves towards the extraterritorialisation of asylum procedures and the return of asylum seekers to supposedly safe areas abroad. The Commission conceived of the initiative as a "tool box" of different measures, "*mainly* protection oriented",[109] and including a resettlement component that would serve to "addressing protracted refugee situations globally in a comprehensive and concerted approach".[110] The Hague Programme subsequently endorsed the proposal and invited the Commission to develop the initiative in practice, on the basis of the "experience gained in pilot protection programmes".[111]

2.2.2. *Key Features*

In September 2005, the Commission tabled its Communication on EU Regional Protection Programmes (RPPs).[112] The text was divided in six parts.

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[106] Towards more accessible, equitable and managed asylum systems, para. V.

[107] Presidency Conclusions, European Council 19–20 June 2003, Council doc. 11638/03, para. 26.

[108] Improving access to durable solutions, COM(2004) 410, 4 Jun. 2004.

[109] Ibid., para. 51 (emphasis added).

[110] Ibid., para. 57.

[111] The Hague Programme, para. 1.6.2.

[112] On Regional Protection Programmes, COM(2005) 388 final, 1 Sept. 2005.

The first contained a general introduction to the concept. The second established the constituent activities of the Programmes. The third discussed the factors considered for the selection of the regions where two pilot programmes were to be run. The fourth part dealt concretely with the pilot programme launched in the Newly Independent States (NIS) of Ukraine, Moldova and Belarus, whereas the fifth section was reserved to the pilot project in Tanzania. The sixth chapter dealt with the evaluation and sustainability of RPPs, before the seventh section closed with general conclusions.

RPPs, as framed in the Communication, are supposed to respond to the specific needs of the targeted countries. Accordingly, the emphasis, when dealing with countries and regions of origin, is placed on capacity building, in order to strengthen *their* ability to deliver adequate protection to refugees in protracted situations.[113] In regard of the countries and regions of transit, the focus is larger and also includes enabling "those countries better to manage migration".[114] In both cases, the overarching aim "should be to create the conditions for one of the three durable Solutions to take place – repatriation, local integration or resettlement".[115]

Among the conceivable activities RRPs may include, the Communication listed: "projects aimed at improving the general protection situation in the host country; projects which aim at the establishment of an effective Refugee Status Determination procedure which can help host countries better manage the migration implications of refugee situations … projects which give direct benefits to refugees … by improving their reception conditions; projects which benefit the local community hosting the refugees …; projects aimed at providing training in protection issues for those dealing with refugees and migrants; a registration component …; and a resettlement commitment, whereby EU Member States undertake, on a voluntary basis, to provide durable solutions for refugees by offering resettlement places in their countries".[116] These activities should be aimed at complementing the humanitarian action and development programmes of the EU, "which are already taking place". In order to maximise the impact of RPP activities, the Commission recommended "assessing where potential protection gaps may exist … ensuring that additional measures complement and add value".[117]

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[113] Protracted situations are those in which 25,000 or more refugees have been living in exile for at least five years: UNHCR Standing Committee, *Protracted Refugee Situations*, EC/54/SC/CRP.14, Jun. 2004.

[114] On Regional Protection Programmes, para. 2.

[115] Ibid., para. 5.

[116] Ibid., para. 6.

[117] Ibid., para. 5.

As far as funds are concerned, the Communication posited that RPPs "be rooted in actions already existing, notably in the AENEAS[118] and TACIS[119] financial programmes", without a dedicated budget being introduced.[120] The AMIF 2014–2020 now covers RPPs as part of both the objectives and activities the EU may support through common funds.[121] RPPs will thus no longer be funded from external aid budgets, but as part of the Justice and Home Affairs envelope. Potentially, this may translate into a significant increase in available funding.

In 2007, two pilot RPPs were launched in Tanzania, a region of origin hosting "the largest refugee populations in Africa",[122] and in three NIS countries, a major region of transit towards the EU.[123] A number of factors were considered in the selection of these locations, "principally, the assessment of particular refugee situations in third countries; the financial opportunities available under existing Community funds; existing relationships and frameworks for cooperation between the Community and particular countries or regions; … [and] the necessity to assure added value …".[124] "Political considerations" were also taken into account.[125] Some other possible emplacements were considered too. The Commission assessed whether to place a RPP in North Africa, Afghanistan, or the Horn of Africa in consultation with the Member States, but all three possibilities were eventually discarded. In the particular case of North Africa it was established that "the more complex nature of the migration situation from North African countries [meant that] a wider approach may be required".[126] This does not mean, however, that future RPPs were to exclude this region.[127]

An external evaluation of both pilot programmes was carried out in 2010, concluding that "their impact was limited due to limited flexibility, funding,

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[118] Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), OJ 2004 L 80/1.

[119] TACIS is the acronym for the "Technical Aid to the Commonwealth of Independent States" launched in 1991. In the 2007–2013 EU Financial Perspective, the TACIS Programme has been replaced with the "European Neighbourhood and Partnership Instrument" for the countries covered by the European Neighbourhood Policy, which includes Ukraine, Belarus and Moldova.

[120] On Regional Protection Programmes, para. 4.

[121] Arts. 7(1)(h) and 20(2)(f), AMIF Regulation.

[122] On Regional Protection Programmes, para. 16.

[123] On the establishment of a Joint EU Resettlement Programme, para. 3.2.3.

[124] On Regional Protection Programmes, para. 9.

[125] Ibid., para. 10.

[126] Ibid., para. 18.

[127] On the establishment of a Joint EU Resettlement Programme, para. 3.2.3.

visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries".[128] Nevertheless, the Commission proposed to continue the existing programmes and to extend them to North Africa, with a RPP covering Egypt, Libya, Tunisia, and the Horn of Africa, for neighbouring countries of Somalia, namely Kenya, Djibouti and Yemen.[129] Accordingly, the RRP for the Horn of Africa was launched in September 2011,[130] with the RPP for Egypt and Tunisia starting in December the same year[131] – postponing the beginning of the Libyan section until the end of the war and ousting of Gaddafi. The RRP in North Africa was in fact considered one of the key tools to respond to human displacement during the Arab Spring processes in the region.[132] The Commission plans to expand and strengthen RPPs further,[133] in line with European Council guidelines.[134]

2.2.3. *Assessment*

Like with the EU Resettlement Programme, it appears that RPPs pursue very high ambitions with quite modest means. Taking account of available funds – even as potentially expanded via the AMIF Regulation, the financial allocations on offer are insignificant in comparison to the scale of the needs to be addressed. This has led UNHCR to warn against excessive expectations and to support the comprehensive approach advanced by the Commission, to ensure that RPP activities are indeed carried out in coordination with development, humanitarian and other assistance providers in the field, avoiding the duplication of efforts, and preventing the creation of additional obstacles to the protection goals to be achieved.[135] Other actors also maintain that better coordination of existing protection-oriented initiatives in the areas of development

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[128] Although the evaluation has not been made publicly available, the Commission mentions it in its *First Annual Report on Immigration and Asylum (2009)*, COM(2010) 214, 6 May 2010, p. 6.

[129] Commission Staff Working Paper First Annual Report on Immigration and Asylum (2009), SEC (2010) 535, 6 May 2010, p. 38.

[130] Annual Report on Immigration and Asylum (2010), COM(2011) 291, 24 May 2011, p. 7.

[131] Third Annual Report on Immigration and Asylum (2011), COM(2012) 250, 30 May 2012, p. 16.

[132] A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292, 24 May 2011, p. 7.

[133] An open and secure Europe, p. 7.

[134] Presidency Conclusions, European Council 26–27 June 2014, para. 8.

[135] UNHCR, *Observations on the Communication on Regional Protection Programmes*, October 2005, available at: <http://www.refugeelawreader.org/inventory.d2?start=600&target=search&i_doctype%5B%5D=0>.

aid, humanitarian assistance and foreign affairs policy may deliver more tangible results than single RPP projects operating alone.[136] As Loescher and Milner have noted, "related areas, such as resettlement programmes, international development, foreign policy and asylum policy, can and should be rooted in a common understanding of the scope and nature of the refugee problem in the regions of refugee origin".[137] Inter-agency cooperation is, therefore, particularly necessary in this context. Consistency could be achieved by coordinating existing working groups dealing with the external dimension of the CEAS. Amnesty International has submitted that the initiatives undertaken within the framework of the European Neighbourhood Policy, the EUROMED cooperation, and the High Level Working Group on Asylum and Migration should be coordinated to ensure satisfactory results.[138] The role of the external dimension Unit of EASO is key in this regard.[139]

Enhanced efficiency may also be achieved through a genuine engagement with the regions of origin and transit hosting these projects. To muster support and acceptance, RPPs should take account of the interests and real capacities of the countries concerned, integrating them in the design and the implementation of their activities. As with the EU Joint Resettlement Programme, a multilateral framework of cooperation is required to this end. Only a full partnership with all relevant stakeholders can generate the ownership necessary for a maintained and sustainable dialogue with these regions. Only "[b]y engaging with the particular character of each refugee situation, and by considering the needs, concerns and capacities of the countries or first asylum, the countries of origin, and the resettlement and donor countries, along with the needs of refugees themselves" may these situations be possibly resolved.[140]

In considering the needs of its partners, the Union should also take account of the long-term impact of these programmes. In fact, "the presence of a large community of refugees may have a detrimental effect on the political stability

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[136] ECRE, *Response to the Green Paper on the Common European Asylum System*, p. 42.

[137] Loescher and Milner, "The Missing Link: The Need for Comprehensive Engagement in Regions of Refugee Origin" (2003) 79 *International Affairs* 595, at 596.

[138] Amnesty International, *Response to the Green Paper on the Common European Asylum System*, p. 43.

[139] EASO, *2014 Work Programme*, at 5, listing "third country support" amongst the EASO's principal activities for 2014, "supporting the external dimension of the CEAS, supporting partnerships with third countries to reach common solutions, including by capacity building and regional protection programmes, and coordinating Member States' actions on resettlement", available at: <http://easo.europa.eu/asylum-documentation/easo-publication-and-documentation/>.

[140] Loescher and Milner, p. 610.

of the host societies".[141] Assisting third countries in dealing with extensive refugee populations should not result into the further protraction of the situation.[142] "[I]t is important to bear in mind that durable solutions will not always be available in regions of origin or transit for all people in need of protection".[143] This is why the resettlement factor of RPPs is essential to the success of these initiatives. Resettlement, as part of a genuine burden-sharing endeavour, "could reinforce efforts to establish viable asylum systems and to create opportunities for local integration".[144] The experience gathered so far "shows, however, that resettlement has remained a relatively underdeveloped component".[145] In the period 2007–2008, for instance, only four Member States participated in the pilot RPPs resettling refugees from Tanzania in very low numbers (98 and 203 persons in each year).[146] Considerable efforts are thus required to make EU Member States engage in a true partnership with the countries concerned in a spirit of solidarity and shared responsibility,[147] if the Union is to meet its objective of an "efficient and well-managed migration, asylum and borders policy".[148]

In any case, the legitimacy of EU action in this realm, promoting capacity building for the protection of refugees in their regions of origin and transit, as some commentators have observed, depends on maintaining access to fair and affective asylum procedures in Europe. RPPs should unequivocally be considered complementary to the continued provision of protection in, and by, the Member States.[149] In fact, any initiative involving third countries will not diminish their legal obligations arising from international and EU law.[150]

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[141] Amnesty International, *EU Regional Protection Programs: Enhancing protection in the region or barring access to the EU territory ?*, Sept. 2005, available at: <http://refugeelaw.qeh.ox.ac.uk/pdfs/ai-eu-on-rpps-october-2005.pdf>.

[142] UNHCR EXCOM, Economic and social impact of refugee populations on host developing countries as well as other countries, Standing Committee, 26th Meeting, EC/53/SC/CRP.4, 10 Feb. 2003.

[143] UNHCR, *Observations on the Communication on Regional Protection Programmes*, p. 1.

[144] Ibid., p. 5.

[145] On the establishment of a Joint EU Resettlement Programme, para. 3.2.3.

[146] Garlick, "EU 'Regional Protection Programmes': Developments and Prospects", Maes, Foblets, and De Bruycker, eds, *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011), 371, at 380.

[147] Arts. 78(2)(g) and 80 TFEU.

[148] Presidency Conclusions, European Council 26–27 June 2014, para. 5.

[149] Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" (2006) 18 *IJRL* 601, at 625.

[150] Goodwin-Gill, "The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations", (2007) 9 *UTS Law Review*

As with the Joint EU Resettlement Programme, the migration management element of RPPs raises concerns. The 2004 Communication explicitly stated that the "tool box" should include arrangements that "would focus on improving the response of third countries and countries of transit to mixed migratory flows, as well as at combating illegal immigration and organised crime".[151] Although the 2005 proposal revises the language, and speaks instead of "[p]rojects … which can help host countries better manage the migration implications of refugee situations …",[152] the impetus appears to remain the same – an idea the Commission has reiterated in 2014, suggesting that "RPPs should put stronger emphasis on reinforcing national authorities' capacity to address human displacements".[153] In this line, the Stockholm Programme established that RPPs "should be incorporated into the Global Approach to Migration"[154] – which is precisely what the GAMM Communication has done.[155] The inconveniences of linking protection projects to migration control initiatives have already been identified above with regard to the Joint EU Resettlement Programme. Significant practical, political, and legal obstacles prevent the subordination of asylum systems to migration management strategies. Therefore, the central aspiration of RPPs should be to facilitate safe and legal access to protection. The objective should be the reduction of the root causes of forced displacement, not the containment of refugee flows in regions of origin and transit.[156]

An additional risk some commentators have identified concerns the question of whether countries hosting RPPs could be considered "safe" for returns by the Member States via the "safe third country" notion,[157] which may then process applications of asylum seekers originating from, or having transited through, these countries as manifestly unfounded.[158] This would entail the

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26, at 34: "[Under international law] no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organization".

151 Improving access to durable solutions, para. 51.

152 On Regional Protection Programmes, para. 6.

153 An open and secure Europe, p. 7.

154 The Stockholm Programme, p. 72.

155 GAMM, p. 10 and 17–18.

156 Frelick, "'Preventive Protection' and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia" (1992) 4 *IJRL* 439.

157 de Vries, "An Assessment of 'Protection in Regions of Origin' in Relation to European Asylum Law" (2007) 9 *EJML* 83.

158 On the "safe third country" concept see Chap. 5. Contesting the legality of the notion under international and EU law, see Moreno-Lax "The 'Safe Third Country' Notion Revisited: An Appraisal in light of General International Rules on the Law of Treaties", in Goodwin-Gill, ed, *International Migrations*, *The Hague Academy of International Law Research Session 2010*, (Martinus Nijhoff, forthcoming).

extension of the "safe third country" concept to countries in the targeted regions. Originally, the idea was indeed that RPPs would include an encouragement for these countries to accept the return of migrants. In the eyes of the Commission, "return could be aimed at the third country's own nationals, as well as other third country nationals for whom the third country has been or could have been a country of first asylum …",[159] provided the country concerned offered effective protection. The 2004 Proposal erased any explicit references to return. However, the extension or not of the "safe third country" concept to the countries covered by a RPP is ultimately a matter for each individual Member States to decide.[160] In any event, it should be borne in mind that "the majority of asylum seekers entering Europe … flee not only unsafe home countries, but also unsafe regions of origin. In many instances, borders are porous, and agents of the home government operate freely in neighbouring countries. Thus refuges may face threats to their life and liberty not only in their home country, but in the wider region".[161] The question, thus, arises as for what constitutes "effective protection" under EU law for the purposes of "protection elsewhere" initiatives – as RPPs may end up being understood.[162]

No legal definition has yet been accepted at international level. Within the internal dimension of asylum, for protection to be considered effective, the Court of Justice has clarified that the "factors which formed the basis of the refugee's fear of persecution [have to be] permanently eradicated".[163] In the eyes of the Court, this implies that "basic human rights are guaranteed in that country".[164] At minimum, there has to be "respect of the *non-refoulement* principle", the "observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture" as well as "a system of effective remedies against violations of these rights and freedoms".[165] Beside personal safety and basic civil and political rights, "living conditions" in the country of origin

[159] Improving access to durable solutions, para. 51.

[160] See Arts 35–39 recast APD; and Art. 3(3) DR III.

[161] Loescher and Milner, p. 602 and references therein.

[162] See Section 2.2.3 of Chap. 4 for "effective protection" under the Qualification Directive and related case law.

[163] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla* [2010] ECR I-1493, para. 73.

[164] Ibid., para. 71.

[165] Designation of safe countries of origin, Annex I, recast Procedures Directive, para. 2(b), (c) and (d). In addition, for a third country to be considered safe according to Art. 38(1)(a) and (e) of the recast Procedures Directive, life and liberty must not be threatened and the possibility to request and be accorded the rights attached to refugee status has to exist.

are also important.[166] Arguably, the conditions must be such that it is possible to "safely and legally … settle there".[167]

Mirroring these criteria and referring to the external dimension of asylum, the European Commission ventured in 2003 that "there seems to be generally agreement amongst the Member States 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 primary education, as well as access to the labour market, or access to means of subsistence sufficient to maintain an adequate standard of living".[168] To establish an acceptable general definition under EU law, applicable to both the internal and external dimensions of asylum, the Commission considered that "the EU should first look at the elements it uses itself when guaranteeing protection to those who require it and which are largely contained in Article [78 TFEU]. These measures focus on protection from persecution and *refoulement* … access to a legal procedure … and the possibility of adequate subsistence. This is the subject matter of what effective protection should represent".[169] The obligation to maintain legal consistency within the EU legal order,[170] as well as the duty to comply with the Charter of Fundamental Rights whenever Member States implement EU law,[171] warrant this interpretation. In these circumstances, asylum seekers submitting international protection applications to the Member States cannot be returned to the countries covered by RPPs, unless a comparable level of protection is accessible there,[172] fulfilling the conditions of "effective protection" under EU law.

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166 Case C-364/11 *El Kott*, 19 Dec. 2012, not yet reported, para. 63.

167 *Mutatis mutandis*, Art. 8(1) recast Qualification Directive, last indent.

168 Towards more accessible, equitable and managed asylum systems, p. 6.

169 Improving access to durable solutions, para. 43.

170 Arts. 7 TFEU and 21(3) TEU.

171 Art. 51 CFR.

172 *Mutatis mutandis*, ECtHR, *Amuur v France*, Appl. No. 19776/92, 20 May 1996, para. 48: "The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering *protection comparable* to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in" (emphasis added). On the issue of a comparable level of protection see also ECtHR, *Bosphorus v Ireland*, Appl. No. 45036/98, 30 Jun. 2005.

2.3. *Offshore Processing*

2.3.1. *Background*

Unilateral Initiatives

Offshore processing plans for the EU draw on a number of unilateral and multilateral experiences, some of which have eventually been implemented in practice elsewhere. Amongst unilateral initiatives, two major resettlement countries, the US and Australia, stand out as prominent examples of extraterritorial processing schemes, vehemently criticised by both academics and practitioners for the serious violations of human rights they have led to.

The US Caribbean interdiction programme began as a response to a surge in the number of irregular arrivals from Haiti,[173] immersed in a civil war at that time.[174] The 1981 bilateral readmission agreement between the US and Haiti authorised the US to intercept Haitian asylum seekers on the high seas.[175] Subject to a rudimentary screening procedure on board US Coast Guards cutters, those determined to have a "credible fear" were given access to the mainland for processing, while the remainder were directly repatriated to Haiti. Out of the some 1,800 Haitians intercepted from 1981 to 1986, none was ever reported to be a *bona fide* asylum claimant.[176] All were returned to Haiti without any opportunity to appeal the summary rejections of their claims. During the early 1990s, intercepted Haitians were taken to the US Naval Base at Guantanamo Bay for screening by the US Immigration and Naturalization Service. In 1992, however, President Bush allowed for direct repatriation to Haiti.[177] The no-screening policy continued until 1994. It was under the Clinton Administration that the Government succeeded in arguing before the US Supreme Court that *non-refoulement* did not apply beyond US territorial

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[173] Besides Haitians, other populations amongst the US neighbours have also been subjected to similar treatment, in particular Cubans. For a comprehensive overview see Legomsky, "The USA and the Caribbean Interdiction Program" 18 *IJRL* (2006) 677. The focus here is on the Haitian exodus.

[174] Little and Newhouse Al-Sahli, *Haitian Refugees: A People in Search of Hope*, Florida Immigrant Advocacy Centre, (May 2004), available at: <http://www.fiacfla.org/reports/HaitianRefugeesAPeopleinSearchofHope.pdf>.

[175] Agreement to Stop Clandestine Migration of Residents of Haiti-US, TIAS No. 10241, 33 *U.S.T.* 3559, 23 Sept. 1981.

[176] Francis, "Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing" 20 *IJRL* (2008) 273, at 284.

[177] Executive Order No. 12807, 57 FR 23134, 24 May 1992.

waters in the *Sale* case.[178] At that point, Haiti's President-in-exile Aristide threatened the US with the suspension of the 1981 agreement. Consequently, President Clinton resumed the pre-screening policy in May 1994, entering into agreements with Jamaica[179] and the Government of the Turks and Caicos Islands[180] to use their territory for extraterritorial processing. No prior screening was undertaken before transfers to these countries took place.[181] Eventually, Aristide returned to office and the outflow of Haitian boat people decreased. Yet, in February 2004, violence broke out again, resulting in a further exodus. On 25 February 2005 President Bush son announced that any *refugee* attempting to reach US shores would be turned back, in what has been characterised as a practice of outright *refoulement*.[182] The "shout test" was, then, introduced, so that, upon interdiction, only those able to attract the attention of the crew were given a pre-screening interview. Among these, only the few succeeding in convincing the crew that they had a well-founded fear of persecution were brought to the US for full processing. The rest were returned without further investigation. The Obama Administration continues the interdiction program.[183]

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[178] *Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al. v Haitian Centers Council Inc. et al.* [1993] 509 US 155. For analysis see Carlier, *Droit d'asile et des réfugiés: de la protection aux droits*, *Cours à l'Académie de droit international de la Haye*, Vol. 332 (Martinus Nijhoff, 2007), at 107 and references therein.

[179] Memorandum of Understanding between the Government of the United States and the Government of Jamaica for the establishment within the Jamaican territorial sea and internal waters of a facility to process nationals of Haiti seeking refuge within or entry to the United States of America, KAV 3901, Temp. State Dept. No. 94–153, in force on 2 Jun. 1994.

[180] Memorandum of Understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of United States to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti, KAV 3906, Temp. State Dept. No. 94–158, in force on 18 Jun. 1994.

[181] Koh, "The 'Haiti Paradigm' in United States Human Rights Policy" 103 *Yale Law Journal* (1994) 2391.

[182] Frelick, "'Abundantly Clear': *Refoulement*" 19 *Georgetown Immigration Law Journal* (2005) 245.

[183] Evans, *Florida advocates: Stop deporting Haitian immigrants!*, Facing South, 14. May 2009, available at: <http://www.southernstudies.org/2009/05/the-debate-over-floridas-haitian-immigrants-heats-up.html#>. See also, Dastyari, "YLS Sale Symposium: Immigration Detention and Status Determinations in Guantánamo Bay, Cuba", *Opinio Juris*, 12 Mar. 2014, available at: <http://opiniojuris.org/2014/03/12/yls-sale-symposium-immigration-detention-status-determinations-guantanamo-bay-cuba/>.

In parallel, the Australian "Pacific Solution"[184] was instated after the *MV Tampa* incident occurred.[185] A Norwegian registered container ship rescued 433 asylum seekers in the waters off Australia in August 2001. At the time, Indonesia was the main transit country for those *en route* to Australia. Australia was assisting Indonesia with the costs of processing asylum seekers in its territory. They were in the process of signing an agreement on the prevention of people's smuggling and human trafficking. When the *MV Tampa* sought permission to disembark, Australia considered it to be Indonesia's responsibility in the first place. At the end, having entered into agreements with Nauru[186] and Papua New Guinea,[187] Australia took rescuees to these countries. The incident led to the adoption of new domestic legislation on immigration and asylum. Australia excised certain of its islands from its "migration zone". No valid asylum claims could be made in those territories thereafter. And it provided that asylum seekers could directly be taken to a "declared country" for processing. Both in Nauru and Papua New Guinea, Australia funded closed reception centres, which were managed by IOM. However, status determination procedures were conducted by Australian immigration officials, initially with the support of the UNHCR, and without any judicial control.[188] Recognised refugees were resettled in neighbouring countries, with some admitted to Australia. In February 2008, Australia's new government announced the abandonment of the policy and the closure of the centres in Nauru and Papua New Guinea, but without excluding offshore processing for unauthorised arrivals in Australia's excised Christmas Island.[189]

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[184] Kneebone, "The Pacific Plan: The Provision of 'Effective Protection'?", 18 *IJRL* (2006) 696; Kneebone and Pickering, "Australia, Indonesia and the Pacific Plan", in Kneebone and Rawlings-Sanaei, eds, *New Regionalism and Asylum Seekers*, (Berghahn Books, 2007), Chap. 7.

[185] Bostock, "The International Legal Obligations owed to the Asylum Seekers on the *MV Tampa*" 14 *IJRL* (2002) 279.

[186] Memoranda of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues, 11 Dec. 2001, 9 Dec. 2002 and 25 Feb. 2004; Memorandum of Understanding between the Government Australia and Nauru for Australian Development and Assistance to Nauru and Cooperation in the Management of Asylum Seekers, 20 Sept. 2005.

[187] Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues, 11 Oct. 2001.

[188] Crock, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions" 24 *Melbourne University Law Review* (2004) 190.

[189] Australian Ministry for Immigration and Citizenship, Press Release, "Last refugees in Nauru", 8 Feb. 2008, stating that "[t]he asylum claims of future unauthorised boat arrivals

The Pacific Solution arrangements were reintroduced in 2012, following pressures from the opposition.[190] In the summer of 2013, a "Regional Resettlement Arrangement" was signed with Papua New Guinea and a similar agreement followed with Nauru.[191] Following the election of the Coalition government in September 2013, *Operation Sovereign Borders*, a military-led border security action, was launched, focusing on deterrence, interdiction and forcible return of boat migrants.[192] Allocated some 67 million Australian dollars,[193] the operation has reportedly prevented the arrival of over 1,000 asylum seekers to Australian shores.[194] In the meantime, cooperation has been extended to Sri Lanka – a main country of origin of asylum seekers in the Asia-Pacific region – and further deepened with Malaysia – a main country of transit towards Australia – with very worrying results.[195]

Multilateral Proposals

Together with these unilateral experiences in the US and Australia, there are other multilateral initiatives which, although not directly concerning the issue of offshore processing, provide two historical examples of multi-national joint

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will be processed on Christmas Island. Christmas Island will soon have an increased capacity for offshore processing of unauthorised arrivals with the opening of the new immigration detention centre built by the former Government. The new centre on Christmas Island will have the capacity to house 400 people with a surge capacity of a further 400 people", available at: <http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm>.

190 Philipps, Social Policy Section, "The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island", *Parliament of Australia: Research Publications 2012–13*, available at: <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution>.

191 A copy of the arrangement between Australia and PNG is available at: <http://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.pdf>. See also Australian Embassy Indonesia, Media Release, "Regional Resettlement Arrangement with Nauru", 6 Aug. 2013, available at: <http://www.indonesia.embassy.gov.au/jakt/MRDIAC13_002.html>.

192 Australian Customs and Border Protection Service, "Operation Sovereign Borders", Jun. 2014, available at: <http://www.customs.gov.au/site/operation-sovereign-borders.asp>.

193 Australian Minister for Immigration and Border Protection, "First 100 days of Operation Sovereign Borders finishes with no illegal boat arrivals", 27 Dec. 2013, available at: <http://www.minister.immi.gov.au/search/cache.cgi?collection=immirss&doc=2013%2Fsm210487.xml>.

194 Maley and Tylor, "More than 1100 asylum-seekers have been stopped from coming to Australia by boat as the Australian Federal Police and its Indonesian counterpart greatly boost their offshore disruption activities", *The Australian*, 12 Nov. 2013, available at: <http://www.theaustralian.com.au/national-affairs/immigration/indonesia-helps-afp-stop-boats/story-fn9hm1gu-1226757726065?nk=86f5e0cb92e0879bcc37f408751deabd>.

195 Power, "YLS Sale Symposium: 'Stopping the Boats'–Australia's Appalling Example to the World", *Opinio Juris*, 12 Mar. 2014, available at: <http://opiniojuris.org/2014/03/12/yls-sale-symposium-stopping-boats-australias-appalling-example-world/>.

programmes launched to resolve a regionally focused exodus with a multi-stage, multi-actor approach. On the one hand, the International Conference on Central American Refugees (CIREFCA – 1987/1994) was designed to deal with forced displacement in the Central American region caused by armed conflict in Honduras, Guatemala, and El Salvador. On the other hand, the Comprehensive Plan of Action for Indochinese Refugees (CPA – 1988/1996) tackled the issue of persistent mixed flows from Vietnam to other countries in Southeast Asia. Both entailed the collaboration between countries of origin, facilitating orderly departure of asylum seekers and return of non-refugees, neighbouring countries of transit in the region, providing first asylum and dealing with the determination of refugee status, and resettlement states, providing for durable solutions extra-regionally to those found in need of international protection. From a purely political, international relations perspective, both experiences have been portrayed as paradigmatic examples of successful collective action, illustrating that "significant global burden- and responsibility-sharing is possible and can lead to durable solutions".[196] By contrast, when the legal dimension is taken into account, serious procedural flaws become apparent. Particularly in the case of the CPA, status determination procedures, run by non-Contracting Parties either to the 1951 Geneva Convention or to other major human rights instruments, have been severely criticised.[197] Also, material reception and detention conditions in closed centres were appalling,[198] with officials being unfamiliar with refugee issues, legal counselling and representation lacking, and judicial review falling short of basic fair trial guarantees. It has been posited that "the deterrence rationale of the CPA concept ha[d] profoundly affected its implementation". In particular, "experience suggests that the humanitarian objectives [were] compromised by migration control priorities".[199] Accordingly, from the legal point of view, any attempt at replicating these experiences should be subject to careful consideration.

Albeit without subsequent implementation, several multilateral plans to extra-territorialise asylum procedures have resurfaced in recent times. Denmark

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[196] Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA*, New Issues in Refugee Research, UNHCR Working Paper No. 120, (Jan. 2006), at 5. See also Towle, "Processing and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?" 18 *IJRL* (2006) 537.

[197] Bari, "Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment" (1992) 4 *IJRL* 487.

[198] McDonald, "The CPA and the Children: A Personal Perspective" 5 *IJRL* (1993) 580.

[199] Helton, "Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment" 5 *IJRL* (1993) 544, at 557.

submitted to the UN General Assembly a proposal for a Resolution, suggesting the establishment of regional processing centres administered by the UN, already in 1986. According to the draft, asylum claims would have been processed in these centres and durable solutions granted to those found in need of international protection. Voluntary repatriation would have been privileged over "regional integration", and "resettlement outside the region" occurred only as a last resort.[200] However, the draft failed to attract sufficient support.

In 1993, The Netherlands placed "reception in the region of origin" in the agenda of the Inter-Governmental Consultations (IGC). The "Dutch Proposal" was "distinct from most traditional schemes by referring to the possibility of processing *exclusively* in the region, and consequently returning asylum-seekers from the territory or borders of participating states to facilities in the region of origin …".[201] Not only were processing centres envisaged, but also camps for the accommodation of applicants, run by a multilateral coalition of different actors. The proposal was studied in depth, but a plethora of legal and practical obstacles led to the abandonment of the idea. The IGC explicitly stated that, due to human rights and related issues, "the 'exclusive' option [was] not feasible and … [did] not deserve further elaboration".[202]

Ten years later, a comprehensive plan for "a pro-refugee but anti-asylum strategy" was tabled by Blair's government in its "New Vision for Refugees".[203] Four elements were considered essential. The first were "Regional Protection Areas", which were supposed to be "artificially created internationally controlled areas",[204] providing protection and humanitarian assistance to those accommodated in source regions. The second component was the return to those areas of certain categories of asylum seekers immediately upon the submission of an asylum claim. Coercive measures vis-à-vis countries of origin, sanctions and military action as a last resort were contemplated as the third fundamental element, aiming at "stop[ping] the protection need [from] occurring".[205] The final part "would be an assumption that the main way in

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[200] UNGA, *International procedures for the protection of refugee: draft resolution*, UN Doc A/C.3/41/L.51, 12 Nov. 1986, available at: <http://documents-dds-ny.un.org/doc/UNDOC/LTD/N86/299/46/img/N8629946.pdf?OpenElement>.

[201] IGC Secretariat, *Working Paper on Reception in the Region of Origin*, Sept. 1994, p. 6–7 (emphasis added).

[202] IGC Secretariat, *Reception in the Region of Origin: Draft Follow-Up to the 1994 Working Paper*, Aug. 1995, p. 7.

[203] *New Vision for Refugees*, 7 Mar. 2003, available at: <http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf>.

[204] Ibid., p. 14.

[205] Ibid., p. 3.

which refugees would move to a third country would be through Regional Protection Areas".[206] Recognised refugees would either be accepted for resettlement or required to integrate locally, whereas those found not to be in need of international protection would be repatriated to their home countries. A later version of the plan, submitted for discussion at the European Council in March 2003, projected that "Transit Processing Centres" be introduced alongside "Regional Protection Areas".[207] The ambition was "to deter those who enter the EU illegally and make unfounded asylum applications".[208] To guarantee their deterrent effect, it was proposed that these centres "be placed on transit routes into the EU".[209] According to the draft, asylum seekers arriving in participating Member States would be transferred to a transit processing centre to have their applications assessed. The centres would be located outside EU territory, possibly managed by IOM and financed jointly by participating Member States. The answer to whether the centres would also host "illegal migrants intercepted *en route* to the EU before they had lodged an asylum claim but where they had a clear intention of doing so" was deferred to further discussions.[210] The key question was "to consider whether such a process should apply to all, or only certain categories of unfounded asylum applicants".[211]

In response to the British initiative, as pointed out above, the UNHCR launched a "Three-Pronged Proposal",[212] a comprehensive model aimed at improving global access to durable solutions both in regions of origin and in destination countries. Accordingly, the "Regional Prong" addressed the necessity to strengthening protection capacities in source regions, whereas the "Domestic Prong" proposed measures to rationalize procedures in industrialized states. Bridging them both, the "EU Prong" engaged in a re-modelling of Blair's "Transit Processing Centres", so that "[u]pon arrival anywhere within the territory of EU Member States or at their borders, all asylum seekers from designated countries of origin would be transferred immediately to the centres, except from persons who are medically unfit to travel or stay in closed

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[206] Ibid.

[207] *New International Approaches to Asylum and Protection*, 10 Mar. 2003, attached to a letter Blair addressed to the President of the European Council, available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>.

[208] Ibid., p. 5.

[209] Ibid., p. 5–6.

[210] Ibid., p. 6.

[211] Ibid., p. 7.

[212] UNHCR, *Three-Pronged Proposal*, Jun. 2003, available at: <http://www.unhcr.org/refworld/pdfid/3efc4b834.pdf>.

reception centres, as well as unaccompanied and separated children".[213] These closed centres would be located *within* the territory of the Member States, would be funded by EU resources, and would offer rapid and fair processing, according to EU standards. Persons found in need of asylum would then be "distributed fairly amongst Member States, according to a pre-determined key",[214] whereas unfounded applicants would be returned. In regard of the target group, the UNHCR established that "consistent with the objective of tackling the abuse of asylum systems, the main focus would be on populations who consist primarily of economic migrants, that is, persons from specific countries of origin whose asylum applications are likely to be manifestly unfounded".[215] However, in December 2003, UNHCR reviewed its proposal on the "EU Prong", pleading instead for the establishment of a comprehensive EU system. The system would comprise EU Reception Centres, a EU Asylum Agency to take charge, in time, of first instance decisions, and a EU Asylum Review Board for appeals. Reception Centres in the revised version were to be open and decision-making undertaken under regular rather than accelerated procedures.[216]

In contrast to the cautious approach the European Commission adopted towards both the UK and UNHCR initiatives, excluding any moves towards the joint processing of asylum claims either inside or outside the EU,[217] the German Interior Minister at the time insisted on the creation of "safe zones", "camps" or, as referred to in later submissions, "reception facilities" in North Africa with the financial assistance of the Union. The new proposal was submitted informally to the Brussels JHA Council in July 2004. Such reception facilities would lodge those who would otherwise undertake unseaworthy routes to reach European shores. A screening process would be carried out inland to identify prospective refugees, but no appeal procedures were envisaged. Those found to be irregular migrants would be provided for return on the basis of readmission agreements. For some, EU Member States would offer durable solutions, on a voluntary basis.[218] In the aftermath of the *Cap Anamur* episode,[219] the idea was further elaborated and eventually

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[213] Ibid., p. 7.

[214] Ibid., p. 8.

[215] Ibid.

[216] UNHCR, *A Revised "EU Prong" Proposal*, Dec. 2003, available at: <http://www.unhcr.org/refworld/pdfid/400e85b84.pdf>.

[217] See *Towards more accessible, equitable and managed asylum systems* and *Improving access to durable solutions* above.

[218] *Deutsche Presse Agentur*, 19 Jul. 2004 and *Frankfurter Allgemeine Zeitung*, 19 Jul. 2004.

[219] In the summer of 2004, a German NGO vessel, the *Cap Anamur*, rescued some 40 asylum seekers/migrants in the Mediterranean. The Italian authorities requested the flag State to

emerged in a public document. In his "Effective Protection for Refugees, Effective Measures against Illegal Migration",[220] German Interior Minister Schilly submitted that the scheme would be based on joint interception on the high seas and return to extraterritorial processing centres in North Africa. The centres, he proposed, would not provide full status determination, only a simplified review, whereby those deemed to be refugees would either be transferred to "safe countries in the region of origin" or to the EU, but without any legal obligations being engaged. Following the US Supreme Court's ruling in *Sale*,[221] the proposal rested on the assumption that the prohibition of *non-refoulement* had "no application on the high seas", contrary to prevailing standards.

The Hague Programme, adopted in November 2004, did not contain any official endorsement of any of these proposals. Instead, it invited the Commission to present two separate studies, one to "look into the merits, appropriateness and feasibility of joint processing of asylum applications *outside* the EU territory, in complementarity with the [CEAS] and in compliance with the relevant international standards" and another one "on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications *within* the Union".[222] Some observers believe these studies were included in the Hague Programme in order to accommodate Schilly's demands and those of like-minded Member States supporting his approach. On the other hand, the highly qualified wording of the text reflects the reservation with which other Member States received the initiative.[223] So far, only the study on joint processing within the

take charge of the rescuees. Germany opposed and Italy eventually allowed disembarkation. However, most of the asylum seekers/migrants were directly returned, seemingly without a proper assessment of their asylum claims. Criminal proceedings were brought against the captain and the president of the NGO for abetting illegal immigration. Both were absolved by the Agrigento Court on 7 Oct. 2009. See news report at: <http://cerca.unita.it/data/PDF0114/PDF0114/text42/fork/ref/09281jrs.HTM?key=cap+anamur&first=1&orderby=1>.

[220] "Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration. Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika," 9 Sept. 2005, available at: <http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Archiv/presseerl/Schily_ueberlegungen.pdf>.

[221] *Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al. v Haitian Centers Council Inc. et al.* [1993] 509 US 155.

[222] The Hague Programme, para. 1.3.

[223] Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum ?", at 626.

EU has been completed,[224] while plans to carry out the second study seem to have been postponed indefinitely.[225]

2.3.2. *Key Features*

The Stockholm Programme, in rather cryptic terms, urged "the Commission to explore … new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a voluntary basis".[226] It omitted, however, the invitation to "the Council and the Commission to develop methods to identify those who are in need of international protection in 'mixed flows'"[227] and the reference to "taking forward the analysis of the feasibility and legal and practical implications of joint processing of asylum applications inside and outside the Union"[228] earlier draft versions of the Programme contained.

Meanwhile, in the aftermath of the Italian push-back campaign of some 900 migrants to Libya from May to September 2009,[229] former JLS Commissioner Barrot mentioned in an interview that he would propose Libya to open "reception points" for asylum seekers in its territory.[230] Elaborating on this idea, the

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[224] Urth et al, *Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, HOME/2011/ERFX/FW/04, Feb. 2013, available at: <http://www.ec.europa.eu/home-affairs/doc_centre/docs/hague_programme_en.pdf>.

[225] The European Commission has mentioned that "[a] feasibility study on possible joint processing of protection claims outside the EU … *could be initiated* [to complement other external dimension activities]" (emphasis added). See An open and secure Europe, p. 7.

[226] The Stockholm Programme, p. 73.

[227] Draft Stockholm Programme, 16 Oct. 2009, para. 5.2.3.

[228] Draft Stockholm Programme, 6 Oct. 2009, para. 5.2.2., available at: <http://www.statewatch.org/news/2009/oct/stockholm-draft-presidency-programme.pdf>.

[229] UNHCR, "Official: Italy to continue returning would-be immigrants to Libya", 23 Sept. 2009, available at: <http://unhcr-eu.se/official-italy-to-continue-returning-would-be-immigrants-to-libya/>; UNHCR, "Follow-up from UNHCR on Italy's push-backs", 12 May 2009, available at: <http://www.unhcr.org/4a0966936.html>. See also subsequent condemnation by the ECtHR, *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09, 23 Feb. 2012. For commentary refer to Moreno-Lax, "*Hirsi v Italy* or the Strasbourg Court *v* Extraterritorial Migration Control?" 12 *Human Rights Law Review* (2012) 574.

[230] "Barrot veut des points d'accueil pour les migrants", *Europe1*, 12 Jul. 2009, available at: <http://www.europe1.fr/Info/Actualite-France/Politique/Barrot-veut-des-points-d-accueil-pour-les-migrants/>; "Les dernières propositions de Jacques Barrot ne sont pas convenables", *France Terre d'Asile*, 13 Jul. 2009, available at: <http://www.france-terre-asile.org/index.php/component/content/article/1166> ; "Barrot wants reception points in Libya for asylum seekers", ECRE Weekly Bulletin, 17 Jul. 2009, available at : <http://www.ecre.org/files/ECRE_Weekly_Bulletin_17_July_2009.pdf>.

French delegation tabled a proposal to resolve the "migration situation in the Mediterranean", through the establishment of "a partnership with migrants' countries of origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures",[231] which remains the most detailed EU offshore processing scheme proposed to date.

The proposal was three-folded. In the first place, "a partnership with third countries of transit and of origin based on reciprocal requirements and operational support" was to be concluded.[232] It was submitted that "a strong political dialogue" had to be maintained with both Libya and Turkey, in particular, "on existing migration routes". It was posited that "the European Union must issue a firm reminder of its requirements while offering its support to those countries' operational capacities".[233] It was envisaged that practical cooperation be reinforced in the fields of external borders monitoring and the fight against irregular migration and organised crime. To that effect, the French delegation proposed that readmission agreements be concluded with these countries and that European immigration liaison officers be stationed in their territories. In exchange, "their efforts may be accorded appropriate support via the various Community resources".[234]

The second component of the initiative aimed at "enhancing joint maritime operations at the EU's external borders".[235] In this regard, it was suggested that "Frontex's *modus operandi* in the Mediterranean should be reviewed", so as to enable the agency to intervene at all levels of action deemed most fundamental "to cope with crisis situations at the maritime borders".[236] Maritime interdiction by the State of departure was considered "the most relevant", as it would take place the "closest to the illegal immigrants' place of embarkation". In contrast, high sea interdiction could create a pull factor and attract migrants "in order to 'provoke' their rescue". It was, therefore, proposed that air patrols take over surveillance operations at this level. Interdiction in Member State territorial waters would complement the other two levels of intervention, being considered "an effective means of preventing illegal disembarkations and subjecting the intercepted persons to the standard legal procedures".[237]

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[231] Migration situation in the Mediterranean: establishing a partnership with migrants' countries of origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures, Council doc. 13205/09, 11 Sept. 2009 (*Migration situation in the Mediterranean* hereinafter).

[232] Ibid., p. 3.

[233] Ibid.

[234] Ibid., p. 4.

[235] Ibid.

[236] Ibid.

[237] Ibid., p. 5.

For these purposes, Frontex should be allocated appropriate resources that it could use "to help finance the whole of this chain of intervention".[238] This part of the strategy would be supported by a comprehensive return policy, in which Frontex and EU funds would play a key role.

The final element of the French initiative dealt with "innovative solutions concerning asylum".[239] It was stated that "[e]very care must be taken to ensure that persons apprehended during interceptions or rescues at sea are not exposed either directly or indirectly, in the country to which they are to be repatriated, to the risk of any punishment or treatment which violates the provisions of the [ECHR]. Such persons must be given a genuine opportunity to request and – if a need is established – to obtain international protection".[240] Two alternatives were proposed. Either to launch an "*ad hoc* protection programme" in Libya, with the participation of UNHCR and IOM and the financial support of the EU, or to offer the possibility of lodging asylum applications at Member States' embassies there.[241]

The *ad hoc* protection programme entailed that persons interdicted at sea would be returned to Libya for processing. UNHCR would be in charge of establishing protection needs. Once in Libya, "special consideration would have to be given to the situation of such persons and to the guarantees which would be accorded to them … while their applications were being examined". [242] The EU, "in accordance with procedures yet to be determined and within the framework of resettlement operations, would undertake to receive persons recognised as refugees and requiring resettlement on a long-term basis".[243]

Thereafter, with Italy supporting France,[244] the Brussels European Council of October 2009 echoed the proposal, calling for a reinforcement of Frontex and the intensification of "the dialogue with Libya on managing migration and responding to illegal immigration, including cooperation at sea, border control and readmission".[245] The Council conclusions of February 2010, *29 measures for reinforcing the protection of the external borders and combating illegal immigration*, provided renewed support to the initiative.[246] But efforts to

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[238] Ibid.

[239] Ibid., p. 6.

[240] Ibid.

[241] The second possibility will be explored below in Section 2.4 below.

[242] Migration situation in the Mediterranean, p. 6.

[243] Ibid.

[244] Letter of Berlusconi and Sarkozy to Reinfeldt of 23 Oct. 2009 (on file).

[245] Presidency Conclusions, European Council 29–30 October 2009, Council Doc. 15265/09, 30 Oct. 2009, para. 40.

[246] 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Council conclusions, JHA Council, Brussels 25–26 Feb. 2010.

implement it were interrupted after the eruption of civil war in Libya during the Arab Spring.

The sinking of a boat off the coast of Lampedusa in October 2013 resulting in the death of some 300 migrants reignited discussions on access to asylum in Europe.[247] This led to the establishment of the so-called Task Force Mediterranean, promoting five main areas of action, including cooperation with third countries, reinforced border controls, and enhanced efforts to combat human trafficking, smuggling and organized crime.[248] Libya and Turkey, as main transit countries, were targeted as key recipients of EU aid and calls for cooperation.[249] In this framework, the Commission suggested that "a feasibility study on possible joint processing of protection claims outside of the European Union" *could* be undertaken.[250] In parallel, Italy launched the operation *Mare Nostrum* as a response,[251] which rescued around 140,000 persons in distress at sea in the first 12 months since inception.[252] However, talks to replace it with a Frontex operation indicate the forthcoming abandonment of *Mare Nostrum*.[253] Joint Operation *Triton* is planned for launch in November 2014, with a much narrower remit and a mandate primarily geared towards border security and migration control.[254]

Against this background, calls for the establishment of processing centres abroad have gained new momentum. Both Greece and Italy, holding the EU

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[247] Squires, "Italy mourns 300 dead in Lampedusa migrant boat tragedy", *The Telegraph*, 4 Oct. 2003, available at: <http://www.telegraph.co.uk/news/worldnews/europe/italy/10355661/Italy-mourns-300-dead-in-Lampedusa-migrant-boat-tragedy.html>.

[248] JHA Council, Luxembourg 7–8 Oct. 2013, Council doc. 14149/13; and European Parliament Resolution of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)).

[249] On the work of the Task Force Mediterranean, COM(2013) 869, 4 Oct. 2013, pp. 7–8.

[250] Ibid., p. 13. See also, An open and secure Europe, p. 8.

[251] "Immigration: Italy launches Mare Nostrum, 400 more saved", *ANSAMed News*, 15 Oct. 2013, available at: <http://www.ansamed.info/ansamed/en/news/sections/generalnews/2013/10/15/Immigration-Italy-launches-Mare-Nostrum-400-saved_9466386.html>.

[252] Rabinovitch, "Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing", *Migration Information Source*, 16 Oct. 2014, available at: <http://migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing>.

[253] "Frontex Triton operation to 'support' Italy's Mare Nostrum", *ANSAMed News*, 16 Oct. 2014, available at: <http://www.ansamed.info/ansamed/en/news/nations/italy/2014/10/16/frontex-triton-operation-to-support-italys-mare-nostrum_24a33334-3213-47d3-8bfb-2ce7793fa7a0.html>.

[254] European Commission, "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", Press Release MEMO/14/566, 7 Oct. 2014, available at: <http://europa.eu/rapid/press-release_MEMO-14-566_en.htm>.

Council presidency for the first and second halves of 2014 respectively, have re-floated the idea, with the Italian Prime Minister for the opening of UN refugee camps in Libya.[255] However, according to former Home Affairs Commissioner Malmström, there is no real appetite for this among the majority of Member States. An alternative, in her view, could be the opening of a EU Asylum Office abroad, but this would be "technically, legally, and practically complicated" and would require a prior agreement among Member States in relation to quotas of the refugees who would be resettled by this means.[256]

2.3.3. *Assessment*

As indicated by former Home Affairs Commissioner Malmström, the obstacles to which offshore processing programmes are confronted are numerous, at both practical and legal level.

Practical Obstacles

The first practical obstacle offshore processing encounters are costs. Both the Caribbean interdiction programme and the Pacific Solution have proven prohibitively costly. The offshore processing centre at Guantanamo Bay was closed down less than a year after inception, partly because, "[r]egarding costs, the US found [the] scheme … to be very expensive".[257] On the other hand, the Australian experience shows that any savings from reduced inland processing have to be relocated into the offshore scheme with considerable additional expenditure. "The Department of Immigration and Citizenship expended $289 million between September 2001 and June 2007 to run the Nauru and Manus [Offshore Processing Centres]".[258] From fiscal year 2002/3 to fiscal year 2005/6, for instance, the Pacific Solution represented a net loss of $900 million for the Australian taxpayer.[259]

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[255] "Italian Premier Renzi calls for UN refugee camps in Libya", *ANSAMed News*, 20 May 2014, available at: <http://www.ansamed.info/ansamed/en/news/nations/italy/2014/05/20/italian-premier-renzi-calls-for-un-refugee-camps-in-libya_49bd97fb-61c7-4e9a-8d03-beb9124b02b3.html>.

[256] Stevis, "The EU at a Migration Crossroads: Speaking With Cecilia Malmström", *The Wall Street Journal*, 26 Jun. 2014, available at: <http://blogs.wsj.com/brussels/2014/06/26/the-eu-at-a-migration-crossroads-speaking-with-cecilia-malmstrom/?KEYWORDS=malmstrom>.

[257] IGC Secretariat, *Reception in the Region of Origin: Draft Follow-Up to the 1994 Working Paper*, Aug. 1995, p. 27.

[258] "Last refugees leave in Nauru", Australian Ministry for Immigration and Citizenship, 8 Feb. 2008, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22>.

[259] Kingston, "Terror, boat people and getting old", *The Sidney Morning Herald*, 15 May 2002, available at: <http://www.smh.com.au/articles/2002/05/15/1021415009323.html>.

Besides processing costs, Noll identifies a series of additional expenses any offshore processing programme would have to cover, including the acquisition of the host State's agreement to set up the centres there; the acquisition of the consent by countries of origin and transit to conclude readmission agreements and to deliver on them; the provision of human rights to the population in the centres, in line with EU and international standards; the funding of UNHCR, IOM or any other organization running the system; the funding of removals of rejected cases; the salaries of expatriate expert staff; and the costs of enforcement of physical transfers from and to the processing centres.[260]

Alongside expenses, the "New Vision for Refugees" paper identified other major obstacles to the feasibility of offshore processing schemes. In case the French or Italian proposals were further pursued, persuading Libya to allow centres being established on its territory "will also require careful planning".[261] Several refugee-hosting countries have already opposed similar proposals when consulted in 2003 in the framework of the UNHCR Convention Plus initiative.[262] In a meeting with UNHCR held in September 2004, North African states showed clear resistance to collaborate in the development of offshore processing initiatives.[263] Any such initiatives "require considerably more international cooperation on refugees than has been witnessed in recent decades and an international confidence in collectively managing problems".[264] If Europe is to "receive persons recognised as refugees and requiring resettlement on a long-term basis", the concrete "framework of resettlement operations" has first to be established.[265] The development of an intra-EU burden-sharing scheme seems to be an essential precondition for any such program to succeed. As referred to above, experience "shows, however, that resettlement has remained a relatively underdeveloped component" of the EU asylum policy so far,[266] with a "relatively modest" record of resettlement pledges and actual places being offered every year.[267]

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[260] Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones", 5 *EJML* (2003) 303, pp. 327–328 (references omitted).

[261] New Vision for Refugees, p. 4.

[262] UNHCR, Convention Plus/Forum Briefing, 7 Mar. 2003, internal summary by the Department of International Protection, quoted by Loescher and Milner, at 604.

[263] Betts, "Towards a Mediterranean Solution? Implications for the Region of Origin", (2006) 18 *IJRL* 652, at 661.

[264] New Vision for Refugees, p. 4.

[265] Migration situation in the Mediterranean, p. 6.

[266] On the establishment of a Joint EU Resettlement Programme, para. 3.2.3.

[267] An open and secure Europe, p. 7. See also Task Force Mediterranean, para. 2.2, noting that "[i]n 2012, 4.930 persons were resettled to the Union by twelve Member States", according to EUROSTAT data.

In any event, "[t]he main risk is that it will not be possible to provide [abroad] a level of protection that is sufficient for the courts in Europe to recognise the protection as sufficient to safeguard human rights".[268] Material difficulties are aggravated in the Franco-Italian case by Libya's poor human rights record.[269] The fact that the country is not a party to the 1951 Refugee Convention, that it conducts no refugee determination procedures itself and that, although UNHCR's presence in the country is tolerated, it entertains no official cooperation with the Office magnifies practical concerns.

Legal Concerns

It is not clear from the Franco-Italian proposal who would be considered responsible for those intercepted and repatriated to Libya. However, under international law,[270] "no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organisation".[271] Cooperation with Libya would not exonerate EU Member States from their duties under the principle of *non-refoulement* or the right to leave any country in order to seek asylum.[272] According to the Strasbourg Court, "[w]here States establish … international agreements to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered

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[268] New Vision for Refugees, p. 4.

[269] See, for instance, Human Rights Watch, *Pushed Back, Pushed Around*, Sept. 2009, available at: <http://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf>; Jesuit Refugee Service Malta, *Do They Know? Asylum Seekers Testify of Life in Libya*, Dec. 2009, retrievable from: <http://www.statewatch.org/news/2009/dec/libya-jrs-do-they-know.pdf>. Regarding post-Gaddafi Libya, see Frykberg, "Human Rights Worse After Gaddafi", *IPS News*, 14 Jul. 2012, available at: <http://www.ipsnews.net/2012/07/human-rights-worse-after-gaddafi/>; Abrahams, "Two Years after Gaddafi, Lawless in Libya", *Human Rights Watch Dispatches*, 20 Oct. 2013, available at: <http://www.hrw.org/news/2013/10/20/dispatches-two-years-after-gaddafi-lawless-libya>; Jones, "Libya is a disaster we helped create. The west must take responsibility", *The Guardian*, 24 Mar. 2014, available at: < http://www.theguardian.com/commentisfree/2014/mar/24/libya-disaster-shames-western-interventionists>.

[270] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA A/56/49(Vol.I)/Corr.4.

[271] Goodwin-Gill, "The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations" 9 *UTS Law Review* (2007) 26, at 34. See also Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012), Chap. 7.

[272] See further Moreno-Lax, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea" 23 *International Journal of Refugee Law* (2011) 174.

by such [agreements]".[273] In addition, "[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State …".[274] The fact that Libya, with which FRONTEX and EU Member States would collaborate, is not a Party to the ECHR precludes its liability under that instrument. Independent responsibility of each EU Member State participating in the scheme would subsist, "where the person[s] in question had suffered or risk suffering a flagrant denial of the guarantees and rights secured to [them] under the Convention".[275] Nor would the EU Member States contributing to the scheme be able to avoid responsibility under the ECHR by transferring functions to the UNHCR, the IOM or FRONTEX. "Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards".[276]

Which group of people is addressed by the Franco-Italian proposal remains uncertain too. The impression is that all persons intercepted by the Member States on the high seas or in the territorial waters of third countries agreeing to it, presumably with the intervention of FRONTEX, would be repatriated to Libya, where "the UNHCR would be responsible for identifying persons in need of protection".[277] However, selecting asylum seekers on the basis of their migration route for offshore processing may amount to penalisation prohibited under Article 31 of the 1951 Convention. Recognising that the absence of travel documents or authorization are unrelated to protection needs, Article 31(1) of the Convention indeed exonerates refugees from penalties related to their irregular entry. Also, such selection may amount to discrimination in contravention of Article 3, establishing that "the Contracting Parties shall apply the provisions of [the 1951] Convention to refugees without discrimination as to race, religion or country of origin".[278]

Neither the Franco-Italian proposal, nor any other of the similar initiatives suggested so far specify where those intercepted and repatriated to Libya would be accommodated. But as the ultimate aim of the program is to prevent and deter irregular movement, it is conceivable that proponents envisaged

[273] ECtHR, *T.I. v UK*, Appl. No. 43844/98, 7 Mar. 2000, p. 15; and *K.R.S. v UK*, Appl. No. 32733/08, 2 Dec. 2008, p. 15.

[274] ECtHR, *Saadi v UK*, 37201/06, 28 Feb. 2008, para. 126.

[275] EComHR, *WM v Denmark*, Appl. No. 17392/90, 14 Oct. 1992.

[276] ECtHR, *Bosphorus v Ireland*, Appl. No. 45036/98, 30 Jun. 2005, para. 154.

[277] Migration situation in the Mediterranean, p. 6.

[278] On this point, see Noll, "Visions of the Exceptional", at 329–331 and 336–338.

reception centres in Libya to be closed. This would entail large-scale, and potentially also long-term, detention. The extraterritorial applicability of the ECHR having been firmly established,[279] the incompatibility of such a measure with Article 5 ECHR's requirements should prompt the abandonment of the initiative.[280] In addition, the ECHR fully applies on the high seas.[281] Retention of boat people in international waters, transfer to warships of the intercepting State or escorting back to the point of departure against free will, constitutes a restriction of physical freedom that may well amount to unlawful detention, against Article 5 ECHR and Article 6 CFR standards, unless appropriate legal safeguards and prompt and effective judicial review could be guaranteed.[282]

It is not known whether the Franco-Italian proposal envisages transfers to Libya to be automatic. Should that be the idea, EU Member States would presumably incur direct and indirect breaches of the principle of *non-refoulement* with regard to those having a "well-founded fear" of persecution or being at "real risk" of ill treatment in Libya or caused by the onwards deportation from Libya to "the frontiers of territories where [their] life or freedom would be threatened".[283] The human rights situation in that country has not considerably changed since Gaddafi's death from the ECtHR's pronouncements in *Hirsi*.[284] At the same time, the Court attaches paramount importance to country information contained in reports from independent sources,[285] so that when reliable accounts of the circumstances prevailing in the receiving State make it "sufficiently real and probable" that the general situation entails risks

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[279] ECtHR, *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 2 Mar. 2010; *Al-Skeini v UK*, Appl. No. Appl. No. 55721/07, 7 Jul. 2011; *Hirsi Jamaa v Italy*, Appl. No. 27765/09, 23 Feb. 2012. See further, Moreno-Lax, "*Hirsi v Italy* or the Strasbourg Court *v* Extraterritorial Migration Control?" 12 *HRLR* (2012) 574.

[280] On detention see Chapter 6. For close examination of ECtHR, *Saadi v UK*, Appl. No. 13229/03, 29 Jan. 2008, refer to Moreno-Lax, "Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law" 5 *Human Rights and International Legal Discourse* (2011) 166.

[281] ECtHR, *Women on Waves*, Appl. No. 31276/05, 3 Feb. 2009.

[282] ECtHR, *Rigopoulous v Spain*, Appl. No. 37388/97, 12 Jan. 1999; *Medvedyev v France*, Appl. No. 3394/03, 10 Jul. 2008.

[283] Art. 33 Refugee Convention.

[284] Task Force Mediterranean, para. 1.3, noting that "Libya is currently unable to counter the activities of the smugglers and traffickers … In order to address this situation, the EU should continue to strengthen its comprehensive support to Libya by promoting its stabilisation, enhancing governance and security … as well as by addressing *reports of human rights' violations*" (emphasis added).

[285] *Hirsi,* paras. 118 and 123.

for the person in the sense of Article 3 ECHR, a *refoulement* presumption is activated and removal must be suspended.[286] What is more, on account of the absolute character of Article 3, the State must undertake the relevant investigation *proprio motu*. As the Court asserted in *Hirsi*, "it was for the national authorities, faced with a situation in which human rights were being systematically violated … to find out about the treatment to which the applicants would be exposed after their return".[287] It is thus for the Member State(s) concerned to comply with their *non-refoulement* obligations proactively, regardless of whether the persons in question seek protection or alert of the dangers faced upon return. The fact that potential applicants may fail to request asylum or to formally oppose their removal to Libya would not absolve Member States of their responsibilities.[288]

In addition, according to Article 3 ECHR, read in conjunction with Article 13 thereof, access to adequate procedures must be granted. First and foremost, the individuals concerned must be informed of the steps to follow to avoid being returned.[289] In *Hirsi*, the Court emphasized "the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints".[290] Legal assistance and interpretation are also essential in this context.[291] Member States must offer a real opportunity to individual applicants to submit and defend their claims.[292]

As a corollary, an "arguable claim" that the transfer to Libya entails persecution or *refoulement* risks requires access to an "effective remedy".[293] And among other criteria, "the notion … requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible … Consequently, it is inconsistent with Article 13 for such measures to be executed *before* the national authorities have examined

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[286] Ibid., para. 136.

[287] Ibid., para. 133.

[288] Ibid. at paras. 133 and 157. See also Goodwin-Gill, "The right to seek asylum: interception at sea and the principle of *non-refoulement*" 23 *IJRL* (2011) 443.

[289] *Hirsi,* para. 203.

[290] Ibid., para. 204.

[291] Ibid., para. 185.

[292] *MSS v Belgium and Greece*, Appl. No. 30696/09, 21 Jan. 2011, paras. 301 and 319. See further, Guild, Costello, Garlick, Moreno-Lax, and Mouzourakis, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection* (Brussels: European Parliament, forthcoming), Chap. 4.

[293] *Inter alia*, ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11 Jul. 2000, para. 48.

whether they are compatible with the Convention".[294] In these cases, appeals have to be endowed "with automatic suspensive effect".[295] Because onboard screening would not satisfy these requirements,[296] the claimants would have to be taken before the competent courts in Europe.[297] This would translate in a considerable duplication of efforts, rendering the management of such a scheme overly complex. Two procedures would need to be run, one in Europe to decide on the appropriateness of the transfer to Libya and one in Libya to decide on the protection needs of the claimants. To be sure, determination procedures in Libya would also have to accommodate the standards of due process and effective remedy under EU law to be valid.[298]

Automatism of the transfers to Libya may breach the notion of an effective remedy on a different count too. The Strasbourg Court has indicated that expulsion orders have to be served in writing, after an individual examination of the case, following a legal procedure previously established by law, stating the reasons and indicating the means and conditions to appeal, before deportation occurs.[299] The opposite would amount to an arbitrary use of force and breach the prohibition of collective expulsion of the migrants concerned.[300]

All these reasons should lead to the rejection of the Franco-Italian and similar proposals. Member States should not embark on a system that would impede the fulfilment of their legal commitments – as that would hardly amount to a good faith implementation of their EU and international obligations. Some observers have suggested that, "if centres are to be established, they should first of all be established within the European Union and transported

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[294] ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 5 Feb. 2002, para. 79 (emphasis added).

[295] ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26 Apr. 2007, para. 66; *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22 Sept. 2009, para. 107; *MSS v Belgium and Greece*, para. 393; *IM v France*, Appl. No. 9152/09, 2 May 2012, paras. 132, 134–135; *AC v Spain*, Appl. No. 6528/11, 22 Apr. 2014, para. 95.

[296] On UNHCR scepticism towards onboard processing, see Blay, Burn and Keyzer, "Interception and Offshore Processing of Asylum Seekers: The International Law Dimensions" 9 *UTS Law Review* (2007) 7, at 17.

[297] Art. 47 EUCFR recognises a right to an effective remedy before a Court with all the guarantees of Art. 6 ECHR.

[298] Art. 47 EUCFR includes a right to a fair and public hearing before a competent court, a right to legal representation, a right to assistance by an interpreter, and a right to judicial review. See the Explanations Relating to the Charter of Fundamental Rights, p. 29–30. On the extraterritorial applicability of the Charter, see Moreno-Lax and Costello, "The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model", in Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014) 1657.

[299] ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22 Sept. 2009.

[300] ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 5 Feb. 2002; and *Hirsi Jamaa v Italy*, Appl. No. 27765/09, 23 Feb. 2012.

only as a model if shown to work satisfactorily".[301] But all the legal and practical preconditions for the scheme to deliver should be put in place first, including the necessary intra-EU solidarity and responsibility-sharing mechanisms. Thus, all in all, "reinforced and improved system[s] of territorial processing would be a better investment".[302] In fact, as Garlick has noted, "most European countries' asylum systems, if properly managed and resourced, could deal effectively with the caseloads they face, and provide long-term protection within the European Union to those who are in need of it".[303]

2.4. *Protected-entry Procedures*

2.4.1. *Background*

Discussion on protected-entry procedures has taken place in the EU from the beginning of asylum cooperation. The question of access to international protection became particularly urgent during the Yugoslavian and Kosovo crises,[304] bringing the European Council in the Tampere Conclusions to invite the Commission to consider ways to "offer guarantees to those who seek protection in or access to the European Union".[305] The Commission in response launched a study to investigate "common approaches [that] could be adopted to policies on visas and external border controls to take account of the specific aspects of asylum".[306] The 2002 *Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure* engaged in the scrutiny of

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[301] Parliamentary Assembly of the Council of Europe, *Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers*, Jonker Rapporteur, 13 Jun. 2007, PACE Doc. 11304, para. 61. See also PACE Resolution 1569 (2007), *Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers*.

[302] Noll, *Law and the Logic of Outsourcing: Offshore Processing and Diplomatic Assurances*, paper submitted to the International Conference on Refugees and International Law: The Challenge of Protection, Oxford, 15th–16th December 2006, p. 6, available at: <http://www.forcedmigration.org/events/protection2006/pdf/gregor-noll-working-paper-april-2006.pdf>. For similar opinions see: Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP, 2009), at 83 ff; Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable – Amnesty International's views on proposals for extraterritorial processing of asylum claims*, June 2003, available at: <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:4195>; UK Refugee Council, *Unsafe Havens, Unworkable Solutions*, June 2003, available at: <http://www.refugeecouncil.org.uk/policy/responses/2003/unsafe_havens.htm>.

[303] Garlick, "The EU Discussions on Extraterritorial Processing", at 614–615.

[304] Lavenex, "Passing the Buck: European Union Refugee Policies towards Central and Eastern Europe" 11 *Journal of Refugee Studies* (1998) 126.

[305] Tampere Conclusions, para. 3.

[306] Towards a common asylum procedure and uniform status, para. 2.3.1.

the various protected-entry procedures employed by the different Member States at the time and identified different avenues of policy approximation for the EU to explore, ranging from the maintenance of unilateral state initiatives to the creation of Schengen Asylum Visas.[307] The Thessaloniki European Council then invited the Commission to consider "all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection".[308] The Italian Presidency thus organised a seminar in October 2003, where the feasibility study was subject to debate. At that point, "it became clear from the Rome Seminar and from Member States' relevant legislative practice that with regard to the potential of Protected Entry Procedures, there is not the same level of common perspective and confidence among Member States as exists vis-à-vis resettlement". As a result, the Commission announced that it did not "plan to suggest the setting up at EU level of an EU Protected Entry Procedure mechanism as a self standing policy proposal". It noted, however, that "in certain circumstances, a protected entry in the EU of persons with immediate and urgent protection needs could nevertheless be procedurally facilitated. Such a procedure could feature as an 'emergency strand' …, though *at the full discretion* of individual Member States …".[309]

After wide consultations of the relevant stakeholders within the 2007 Green Paper process, the question of how to address mixed flows and "to establish effective protection-sensitive entry management systems" resurfaced.[310] In this connection, the Commission promised to "examine ways and mechanisms capable of allowing for the differentiation between persons in need of protection and other categories of migrants *before* they reach the border of potential host States, such as Protected Entry Procedures and a more flexible use of the visa regime, based on protection considerations".[311] However, no subsequent concrete action was undertaken thereafter, leading the Stockholm Programme to repeat older calls in this regard.

2.4.2. *Key Features*

Within the *new approaches* for the Commission to explore concerning access to asylum procedures, the Stockholm Programme indeed called for "certain

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[307] Noll et al., *Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure*, (Brussels: European Commission, 2002), available at: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/index_en.htm> (*PEP Feasibility Study* hereinafter).

[308] EC Thessaloniki, Presidency Conclusions, para. 26.

[309] Improving access to durable solutions, para. 35 (emphasis added).

[310] Green Paper on the future of the Common European Asylum System, para. 5.3.

[311] Policy Plan on Asylum, para. 5.2.3 (emphasis in original).

procedures for examination of applications for asylum" to be introduced in "main transit countries … in which Member States could participate on a voluntary basis".[312] Previously, a draft of the programme invited "the Council and the Commission to develop methods to identify those who are in need of international protection in 'mixed flows' …",[313] and a still earlier version expressly called on the EU institutions "to examining the scope for new forms of responsibility for protection such as procedures for protected entry and the issuing of humanitarian visas".[314]

The French delegation, in its proposal to "establishing a partnership with migrants' countries of origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures",[315] as an alternative to setting up an *ad hoc* protection programme in Libya for offshore processing purposes, suggested the introduction of a protected-entry procedure from Member State embassies in that country. The French delegation thus invited the Commission to consider "the possibility of introducing, in Member States' diplomatic representations in Libya, and with the logistical support of the European Asylum Support Office … a specific procedure for the examination of applications for asylum".[316] The procedure "would aim to identify applications which … did not appear to be manifestly unfounded … Persons whose applications were not considered to be manifestly unfounded would be authorised to enter EU territory … in order to submit an application for asylum there".[317] This proposal constitutes the most detailed of its kind submitted by a Member State for consideration within EU structures.

Thereafter, the European Commission has undertaken a new *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU* in 2013,[318] but no legislative or other policy action regarding protected-entry procedures has been pursued. As pointed out above, even the "separate study, to be conducted in close consultation with the UNHCR, … look[ing] into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory" mandated by The Hague Programme already in 2004

[312] The Stockholm Proramme, at 73.

[313] Draft Stockholm Programme, 16 Oct. 2009, para. 5.2.3.

[314] Draft Stockholm Programme, 6 Oct. 2009, para. 5.2.2.

[315] Migration situation in the Mediterranean.

[316] Ibid., p. 7.

[317] Ibid.

[318] Urth et al., *Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, HOME/2011/ERFX/FW/04 (Brussels: European Commission, 2013).

has been left aside.[319] The only thing the Commission has committed itself to is simply to "explore further possibilities for protected entry in the EU in the context of the reflection on the future priorities in the Home Affairs area after the expiry of the Stockholm programme". In this framework, it has ventured that "[t]hese *could* notably include … guidelines on a common approach to humanitarian permits/visas".[320] The assertion has been reiterated in 2014, with the Commission establishing that protected-entry procedures "*could* complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines", adding that "[a] feasibility study on possible joint processing of protection claims *outside* the EU … *could* be initiated".[321] The vagueness of the Commission's assertions possibly mirror Council's preoccupations, which revolve mostly around initiatives "with a view to preventing hazardous journeys by sea" more than to facilitate access to asylum in the EU.[322]

From its part, the Italian Refugee Council has mapped out Member State practices in this regard and proposed the used of humanitarian visas to facilitate entry in Europe and access to status determination procedures.[323] The European Parliament has taken heed and commissioned a study on humanitarian visas, exploring the question of whether there may be an obligation to issue then in certain circumstances,[324] examining past performance and considering possible options to enhance this practice in the future.[325]

2.4.3. *Assessment*

There is no legal definition of what constitutes a protected-entry procedure. According to the 2002 feasibility study, a protected-entry procedure is one that allows "a third-country national [either] to approach the potential host State outside its territory with a claim for asylum or other form of international protection, [or] to be granted an entry permit in case of a positive response to that claim, be it preliminary or final".[326] The Franco-Italian proposal appears to be a hybrid of these two possibilities. It foresees the introduction at

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[319] The Hague Programme, para. 1.3, p. 9.

[320] Task Force Mediterranean, p. 13.

[321] An open and secure Europe, p. 7–8 (emphasis added).

[322] *Conclusions on taking action to better manage migratory flows*, JHA Council, 10 Oct. 2014, p. 2.

[323] Hein and De Donato, *Exploring avenues for protected entry in Europe* (CIR Report, 2012).

[324] Maintaining this view, see Moreno-Lax, "Must EU Borders Have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States' Obligations to Provide International Protection to Refugees" (2008) 10 *EJML* 315.

[325] Iben Jensen, *Humanitarian Visas: Option or Obligation?*, PE 509.986, (Brussels: European Parliament, 2014).

[326] PEP Feasibility Study, Executive Summary, p. 5.

EU Member States' embassies in Libya of a screening procedure to detect "manifestly founded" claims or else applications which "did not appear to be manifestly unfounded". This may pose problems of correlation with regard to the concept of "arguable claims" under the ECHR. The term "arguable" in that context is not readily identifiable with the claim not being "manifestly ill-founded".[327] At times, the ECtHR has accepted the arguability of a claim rejecting its foundedness only afterwards. In *T.I.*, for instance, the Court considered the claim *arguable*, because it raised prima facie concerns about ill treatment risks faced after expulsion, although it was declared *inadmissible* in the end.[328]

The 2002 feasibility study also suggests that these procedures, which were running under different forms in the majority of the Member States before being dismantled throughout the 2000s, can be offered "either as an exclusive channel to protection in a host State, as a complementary channel, or as an exceptional practice to be activated *ad hoc*".[329] It ensues from the text of the Franco-Italian proposal that their proponents envisage the procedure as an exclusive channel to access the EU. Otherwise, the deterrent effect it pursues would be minimal. Yet, exclusivity "would shift rather than solve any problem of abuse". Indeed, "persons arriving as asylum applicants today could also chose to simply go underground tomorrow, and bypass any form of system whatsoever".[330] The success of this mechanism "can only be brought about if protection seekers find it favourable to select protected-entry procedures over the smuggling option".[331] It should be recalled at this juncture that spontaneous asylum seekers could not be penalised on account of their unauthorised entry or presence in accordance with Article 31 of the 1951 Geneva Convention.[332]

The first thing to decide is the group of beneficiaries under this scheme. The Franco-Italian proposal addresses the "examination of applications for asylum" in general. Under the current CEAS arrangements an application for asylum "means a request made by a third-country national or a stateless

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[327] Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009), at 333 ff; Mole, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2007), at 67 ff; Hampson, "The Concept of an 'arguable claim' under Article 13 of the European Convention on Human Rights" (1990) 39 *ICLQ* 891; and Spijkerboer, "Subsidiarity and 'Arguability': The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases" (2009) 21 *IJRL* 48.

[328] ECtHR, *T.I. v UK*, Appl. No. 43844/98, 7 Mar. 2000.

[329] PEP Feasibility Study, Executive Summary, p. 6.

[330] PEP Feasibility Study, p. 61.

[331] Ibid., p. 63.

[332] Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in Feller, Türk and Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 185.

person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection … that can be applied for separately".[333] The introduction of additional selection criteria, based on family ties, linguistic abilities or previous visits to the country concerned, should therefore be excluded.[334] In addition, it should be taken into account that the Qualification Directive establishes that Member States *shall* grant refugee status or subsidiary protection status to a third country national or a stateless person, who qualifies for it in accordance with the Directive, without introducing any explicit territorial limitation.[335] Unlike other CEAS instruments that have limited their application to asylum requests "made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States",[336] the possible extraterritorial applicability of the Qualification Directive has not been explicitly excluded in this way. And implicit exceptions or limitations in law should be considered contrary to the principle of good faith interpretation and the *expressio unius* maxim.[337] So, the observation by the French delegation that "Community law does not apply outside EU territory" is inaccurate and should be revised.[338] To the contrary, according to the CJEU, "[t]he geographical application of the Treaty [as] defined in Article [355 TFEU] … does not … preclude Community rules from having effects outside the territory of the Community",[339] provided that a sufficient link to EU law can be established.[340] Article 51 of the Charter of Fundamental Rights points also in this direction, when stipulating that its provisions bind the EU institutions and the Member States "when they are implementing Union law", regardless of location.[341] Therefore, whatever the final rules to select the target group for protected-entry procedures, these must be consistent with those established in the Qualification Directive and take account of any acquired rights asylum seekers may have accrued from other sources.

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[333] Art. 2(h) recast QD; Art. 2(b) recast APD; Art. 2(a) recast RCD; and Art. 2(b) DR III.

[334] This is apparently what most countries have done in their protected-entry procedures in the past. See PEP Feasibility Study, p. 73 ff.

[335] Arts 13 and 18 recast QD.

[336] Art. 3(1) recast ADP; Art. 3(1) recast RCD; and Art. 3(1) DR III.

[337] Further on this point, see Moreno-Lax, *Seeking Asylum in Europe: Border Controls and Refugee Rights under EU Law* (OUP, forthcoming), Chap. 9.

[338] Migration situation in the Mediterranean, p. 7.

[339] Case C-214/94 *Ingrid Boukhalfa v Federal Republic of Germany* [1996] ECR I-2253, para. 14.

[340] Ibid., para. 15.

[341] See further, Moreno-Lax and Costello, "The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model" in Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014) 1657.

The specific procedural arrangements according to which entry from the EU Member States' embassies in Libya would be allowed remain "yet to be defined".[342] However, as they translate rights individuals directly derive from EU law, including the right to protection against *refoulement* and the right to asylum,[343] procedures would need to be established in a way that does not "render practically impossible or excessively difficult [their] exercise".[344] Such legislation would also have to make possible the ancillary "right to effective judicial protection" including Article 47 EUCFR guarantees.[345] Several options could be explored in this regard.

Full assessments of the merits of asylum claims should not be conducted at embassies. The difficulties of providing access to an effective remedy abroad have already been discussed above in the framework of offshore processing schemes. If the procedural requirements of EU law are to be guaranteed, access to information, legal aid, counselling, representation and access to an appeal must be provided. A better option would thus be to grant Limited Territorial Validity (LTV) visas, according to the relevant provisions of the Community Code on Visas,[346] to those *alleging* a need to seek asylum, a "real risk" of ill treatment or a "well-founded fear" of persecution. A valuable alternative to smuggling would hence be provided. Otherwise, if pre-screening proceedings were to be introduced in order to establish the *arguability* of a claim prior to the issuance of a LTV visa, further resources would have to be mobilised. Recourse could be made to NGOs, the UNHCR and the EASO for the purpose of providing legal counselling, translation and representation *in situ*. Claims could be lodged in person or by post. Interviews should be held by the competent national asylum authorities for the guarantees of effective remedies to be ensured. This could entail the secondment to embassies and consulates of personnel from national asylum authorities or be undertaken by consulate officials themselves, if appropriate prior training has been delivered.[347] Time would be a factor to consider. If procedures are too long, the smuggling

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[342] Migration situation in the Mediterranean, p. 7.

[343] Arts 4, 19 and 18 EUCFR.

[344] Case 158/80 *Rewe* [1981] ECR 1805, para. 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 12.

[345] Joined Cases C-87/90 and C-89/90 *Verholen and Others* [1991] ECR I-3757, para. 24.

[346] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ 2009 L 243/1. See Moreno-Lax, *Seeking Asylum in Europe: Border Controls and Refugee Rights under EU Law* (OUP, forthcoming) Chap. 4, for further details.

[347] Before being dismantled, the Swiss model provided an example of the secondment of asylum decision-makers abroad; see PEP Feasibility Study, p. 129 ff. See also Hein and De Donato, *Exploring avenues for protected entry in Europe* (CIR Report, 2012), at 57–58.

sector will remain competitive. In addition, "the guarantees accorded to such persons in the country concerned while their applications [are] examined", to which the French proposal refers,[348] will have to reach the level of "effective protection" discussed earlier to comply with the relevant standards. The physical safety of applicants will also have to be guaranteed, along with data protection. To avoid imbalances that may amount to discrimination between asylum applicants abroad and spontaneous arrivals in Europe procedural arrangements, including evidentiary rules, should be adapted to cater for the specific realities and difficulties of protected-entry procedures. However, the provision of appeals of negative decisions will still remain a major concern.[349] Compliance with Articles 13 ECHR and 47 EUCFR requires that real access to effective remedies, both in law and in practice, be made available in every case.

Ultimately, the impossibility of articulating appeal channels to the standard of effective remedies should entail that entry be allowed with a LTV visa for the purpose of judicial review to all rejected cases. This may withdraw any deterrent effect from the scheme, but indeed provide a credible alternative to human trafficking and smuggling, serving the dismantlement of criminal networks in the field.

In any case, since international and EU law obligations may be engaged from abroad, in a context of prevailing extraterritorial controls, to ensure that the right to seek asylum and to *non-refoulement* remain accessible in law and in practice, a common European system of protected-entry procedures should be codified to provide a safe alternative to irregular entry. Article 78(2)(g) TFEU provides the legal basis to adopt legislative acts "for the purpose of managing *inflows* of people applying for asylum or subsidiary or temporary protection". It further appears that such measures *shall* be adopted as an integral part of the CEAS the Union has to develop under the current constitutional arrangements. In any event, such procedures should offer a *complementary* means of access that should not replace the provision of adequate protection to spontaneous arrivals, according to the principles of *non-refoulement* and non-penalisation of irregular entry enshrined in the 1951 Geneva Convention.

3. *Closing Remarks*

Ever since Tampere, the fight against irregular movement has featured high on the EU agenda. At the time, the European Council declared itself "determined

[348] Migration situation in the Mediterranean, p. 7.

[349] The Swiss Refugee Council has pointed out that the possibility to appeal from abroad is not effective. See PEP Feasibility Study, p. 135.

to tackle at its source illegal immigration".[350] Thereafter, EU efforts have concentrated on "[c]ombating illegal immigration with an integrated approach",[351] to which both the Global Approach to Migration and Mobility as well as the "integrated management system for external borders" contribute decisively.[352]

On the other hand, it has also been recognised that "there are a plethora of reasons for individuals' attempts to enter the EU".[353] The flows towards the Union are mixed. Together with other migrants, refugees and exiles are among those trying to reach European shores. Although irregular immigration and asylum constitute, in principle, separate issues, refugees are oftentimes compelled, in practice, to resort to irregular means of migration to access international protection in the Member States.[354]

While it is true that "States enjoy an undeniable sovereign right to control aliens' entry into and residence in their territory",[355] it is not less certain that such a right is not absolute. Refugee law and human rights impose limits thereto. While jurisdiction in international law is generally territorially framed,[356] when States project their action beyond their territorial confines, extraterritoriality does not prevent human rights obligations from being engaged under certain conditions. International human rights bodies consider that the exercise of "effective control" over an area in foreign territory[357] or over persons abroad[358] constitutes the trigger of State

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[350] Tampere Conclusions, para. 23.

[351] *Council Conclusions on measures to be applied to prevent and combat illegal immigration and smuggling and trafficking in human beings by sea and in particular on measures against third countries which refuse to cooperate with the European Union in preventing and combating these phenomena*, Council doc. 10017/02, 14 Jun. 2002, para. 1.

[352] Art. 77(1)(c) TFEU. On "integrated border management", see further Vol. I of this collection.

[353] On policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402, 19 Jul. 2006, para. 9.

[354] Morrison and Crosland, *The trafficking and smuggling of refugees: the end game in European asylum policy?*, New Issues in Refugee Research, Working Paper No. 39 (Geneva: UNHCR, 2001). See also ECRE, *Defending Refugees' Access to Protection in Europe* (Brussels: ECRE, 2007), retrievable from: <http://www.ecre.org/topics/areas-of-work/access-to-europe/95-defending-refugees-access-to-protection-in-europe.html>.

[355] *Inter alia* ECtHR, *Saadi v UK*, Appl. No. 13229/03, 29 Jan. 2008, para. 64 (references ommitted).

[356] ECtHR, *Bankovic v Belgium,* Appl. No. 52207/99, 12 Dec. 2001, para. 73.

[357] ECtHR, *Loizidou v Turkey*, Appl. No. 15318/89, 23 Mar. 1995; *Cyprus v Turkey*, Appl. No. 25781/94, 10 May 2001; *Bankovic v Belgium,* Appl. No. 52207/99, 12 Dec. 2001, para. 70; HRC General Comment No. 31 (2004); CAT General Comment No. 2 (2007).

[358] ECtHR, *Issa v Turkey*, Appl. No. 31821/96, 16 Nov. 2004; *Ocalan v Turkey*, Appl. No. 46221/99, 12 May. 2005; *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 2 Mar. 2010;

responsibility.[359] The principle underlying this construction is to prevent a double standard of human rights compliance from arising. In the words of the Human Rights Committee, it would be "unconscionable" to interpret responsibility under human rights instruments as to "permit a State Party to perpetrate violations … on the territory of another State, which violations it could not perpetrate on its own territory".[360] Therefore, when undertaking extraterritorial action to combat irregular movement, the Union and its Member States ought to take into account the respective entitlements of each individual affected. In such situations, the persons concerned are brought under the jurisdiction of the Member States with the consequence that human rights become applicable to their case and must be observed. To preserve their effectiveness, border surveillance and migration control measures should be designed and implemented in a way that renders that action compatible with "human rights, the protection of persons in need of international protection and the principle of *non-refoulement*".[361] The external dimension of the CEAS has thus a key challenge ahead of it that Member States cannot escape.

HRC, *Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29 Jul. 1981; *Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 Jul. 1981; *Munaf v Romania*, Comm. No. 1539/2006, 30 Jul. 2009; HRC General Comment No. 31 (2004); Inter-AmCHR, *Coard v United States*, Case 10.951, Report No. 109/99; CAT, *J.H.A. v Spain*, Comm. No. 323/2007, 10 Nov. 2008; CAT General Comment No. 2 (2007). The ICJ has confirmed that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Gen. List No. 131, para. 111.

[359] Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP, 2011).

[360] HRC, *Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29 Jul. 1981, paras. 12.1–12.3; *Celiberti de Casariego v Uruguay*, Comm. No. 56/1979, 29 Jul. 1981, para. 10.3. The ECtHR, on the basis of the HRC pronouncements, has concluded that: "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory" in *Issa v Turkey*, Appl. No. 31821/96, 16 Nov. 2004, para. 71. See also *Isaak v Turkey*, Appl. No. 44587/98, 28 Sept. 2006, p. 19; *Solomou v Turkey*, Appl. No. 36832/97, 24 Jun. 2008, para. 45; *Andreou v Turkey*, Appl. No. 45653/99, 3 Jun. 2008, p. 10; and *Al-Saadoon and Mufdhi v UK*, Appl. No. 61490/08, 30 Jun. 2009, para. 85.

[361] *29 measures for reinforcing the protection of the external borders and combating illegal immigration*, para. e.