Refashioning resettlement: from border externalization to legal pathways for asylum

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Abstract

Border externalization is a rational response to the structural flaws of the European return policy and to the need to regain control over migration flows to Europe. The same policy, though, is legally vulnerable, both because it relies on a set of undifferentiated *non-entrée* measures precluding legal access to asylum, and because it shifts the responsibility on third cooperating states without immunizing the sponsoring European States. This analysis suggests, first, that it is necessary to abandon the reassuring but obsolete assumption that asylum systems may function as territorially confined regime; second, that the creation of meaningful legal pathways is not only a moral and political imperative, but also a way to redeem the current European migration and asylum policy from its major legal flaws; third, that a EU-wide resettlement program, aimed at protecting *vulnerable* refugees, might be a pragmatic option. If the protection of the most vulnerable ones is a primary global good and it is conducive to a legally sound border externalization policy, EU Member States should accept to bear a proportional burden. This, in turn, might pave the way to the recognition of a positive claim – a *right to resettlement* – to a limited group of refugees: those whose special needs of protection cannot be met in less developed countries of refuge.

Keywords: Common European Asylum System, border externalization, State jurisdiction, Resettlement.

1. Introduction

Since the beginning of the migration crisis, regaining control over entry and secondary movements in the Schengen area has been the top priority of EU institutions and Member States. Border externalization is the key component of this broader strategy. The measures of interdiction on which it rests are aimed both at preventing the illegal entry of economic migrants and at restricting access to asylum in Europe. Because of their undifferentiated scope, those measures challenge the core value (responsibility-sharing) and the core principle (*non-refoulement*) of refugee law, both at international level (1951 Refugee Convention) and at Union level (Article 80 TFEU and Article 18 CFR).[1]

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[1] On the irresistible legal and administrative tendency to conflate asylum with irregular migration and on the failures of the Common European Asylum System, see V. Moreno-Lax (2017), *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: OUP; T. Spijkerboer, J. Rijpma and M. den Heijer (2016), "Coercion, prohibition, and great expectations: the continuing failure of the Common European Asylum System", *Common Market Law Review*, Vol. 53,

The absence of meaningful legal pathways from third countries of refuge confirms that the Common European Asylum System (CEAS) is firmly anchored to territorial premises. Unless exceptions apply, the EU provides shelter only to those refugees[2] who manage to set foot on its soil, without previous authorization and after hazardous journeys. The resulting paradox is that the CEAS feeds the very same phenomenon – unauthorized arrivals – that the broader EU migration policy intends to curb.

This contradiction has been transiently loosened by the successes of the containment policy. Cooperation with the two strategic Mediterranean gatekeepers, Turkey and Libya, makes it increasingly difficult for migrants to reach the European shores. Stemming mixed migration flows, tough, exacerbates the problem of the accessibility of the CEAS and affects the long-term sustainability of the cooperation with third countries on which the surveillance of our borders depends. The reluctance of those countries to cooperate will likely increase in the long run, unless a credible mechanism of responsibility-sharing, based both on financial support *and* on the admission of refugees, will be established by the EU.

This context explains the renewed political interest for the creation of legal avenues for refugees to Europe. Before the eruption of the Arab Spring in 2011, Member States acknowledged that the "strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them"[3], and that checks should "fully respect human rights, the protection of persons in need of international protection and the principle of *non-refoulement*".[4] The same commitment has been reiterated in the 2015 European Agenda on Migration,[5] in the 2016 Migration Partnership Framework approach,[6] in several joint

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No. 3, pp. 607-642; E. Guild (2016), "The Complex Relationship of Asylum and Border Controls in the European Union", in F. Maiani, V. Chetail and P. De Bruycker (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden: Brill, pp. 39-54; E. Guild, C. Costello, M. Garlick, V. Moreno-Lax, *Enhancing the Common European Asylum System and Alternatives to Dublin*, Study for the LIBE Committee, 2015; M. Den Heijer (2012), *Europe and Extraterritorial Asylum*, Oxford: Hart; T. Gammeltoft-Hansen (2011), *Access to Asylum*, Cambridge: CUP. On *non-refoulement* as principle of customary international law, see Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, UN Doc. HCR/MMSP/2001/09, 12-13 December 2001, and UN General Assembly, Resolution A/RES/57/187, 18 December 2001, § 4; see also C. Costello and M. Foster (2016), "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test", *Netherlands Yearbook of International Law*, Vol. 46, pp. 273-327.

[2] The terms "refugee" and "asylum seeker" are used interchangeably, due to the declaratory nature of refugee status recognition: see UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Geneva: UNHCR, 2011, § 28, stating that a person "does not become a refugee because of recognition, but is recognized because he is a refugee".

[3] Council of the European Union, European Pact on Immigration and Asylum, 13440/08, 24 September 2008, p. 11.

[4] Council of the European Union, *Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration*, 2998th JHA Council meeting, 25–26 February 2010, para E.

[5] European Commission (2015), *A European Agenda on Migration*, COM(2015) 240 final, 13 May, p. 4.

[6] European Commission (2016), *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final, 7 June, p. 2, proposing to "create genuine prospects of resettlement to the EU to discourage irregular and dangerous journeys".

political declarations with the African counterparts,[7] as well as in the 2016 New York Declaration, engaging all UN Member States "to provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met".[8]

The arrival of waves of Syrian refugees at the heart of Europe since 2014 and the sharp increase in asylum applications in many EU Member States rendered the issue politically intractable, despite the efforts of the European Commission to keep it alive.[9] More recently, however, following the reduction of the inflow along the Eastern and Central Mediterranean routes, the Commission seems ready to revive this (so far) neglected part of the European migration agenda.[10]

The following pages focus on resettlement as the main pathway to access asylum in Europe and make the strategy of border externalization legally more sustainable (*rectius*, less unsustainable).[11] The analysis is based on three assumptions.

First, it acknowledges – consistently with the Schengen Borders Code[12] – that the "strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them".[13] In principle, entry controls in the Schengen area should take into account their overall impact on asylum and refugee rights also when they are carried out extraterritorially. This obligation is especially intense towards vulnerable refugees, who can neither return home nor remain in the country of first refuge. This paper argues that the recognition of a *right to resettlement* to those *vulnerable* refugees, who have a stronger claim to be admitted in a country where their special needs can be satisfied, would be a desirable progress in European and international law.[14]

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[7] E.g. Valletta Summit on Migration, *Political Declaration*, 12 November 2015 (Valletta Declaration), p. 2 and its *Action Plan*, §§ 2 and 3.1; African Union and European Union Summit Declaration, 30 November 2017 (Abidjan Declaration), para 73.

[8] Resolution adopted by the General Assembly on 19 September 2016 (A/RES/71/1), para 78. On this attempt, see R. Dowd, J. McAdam, "International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?", *International and Comparative Law Quarterly*, 2017, vol. 66, pp 863–892.

[9] In the midst of the refugee crisis, the Commission reiterated that EU countries "should continue to be a safe haven for those fleeing persecution" (*A European Agenda on Migration*, COM(2015) 240, p. 1) and that they should "continue to stand steadfast in meeting their legal and moral commitment to those who need protection" (*Towards a Reform of the CEAS*, COM(2016) 197, p. 2).

[10] See European Commission, *Recommendation on enhancing legal pathways for persons in need of international protection*, C(2017)6504, 27 September 2017, recital 13. See also European Commission, *Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*, SEC(2017) 339, 4 July 2017, p. 2; European Commission, *Contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy*, COM(2017) 820 final, 7 December 2017, p. 9 and *passim*.

[11] Resettlement, defined as "the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees – with permanent residence status" (UNHCR, *Resettlement Handbook*, 2011, 416), is one of the three "durable solutions" for refugees, along with voluntary repatriation and local integration.

[12] Article 14(1) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.

[13] Council of the European Union (2008), European Pact on Immigration and Asylum (doc. 13440/08), p. 11.

[14] On resettlement as "last resort" or residual durable solution for refugees that can neither return home, nor integrate in the country of immediate refuge, see UN Executive Committees Conclusion No. 22 (1981), IV, §§ 3-4; UNHCR (1991), *Resettlement as an Instrument of Protection: Traditional*

Second, given the proportions of the global humanitarian crisis (22.5 million refugees and 40.3 million internally displaced people at the end of 2016)[15], existing national programs on humanitarian admission, although necessary as complementary tools, are insufficient to affect refugees' strategies of mobility in the Mediterranean area. Along with international initiatives such as the Global Compact on Refugees,[16] only a coordinated EU-wide effort may have a substantive impact and pave the way to a truly "common" European asylum, at least partially insulated from the destabilizing effects of domestic political cycles.

Third, to be legal and reliable, resettlement procedures should guarantee due process rights to eligible refugees: in the absence of minimum standards of procedural fairness and of an effective remedy against arbitrary decisions, any resettlement scheme under EU law may violate the right to good administration set by Article 41 of the EU Charter. While it is true that "even the most basic refugee rights can be claimed only once a refugee comes under the jurisdiction of a state party",[17] if extraterritorial jurisdiction is established, the concerned state or the international/supranational agency (e.g. UNHCR or Frontex) acting on behalf of EU member states and/or under the reach of EU law, must fulfill the legal obligations deriving from the EU Charter and the EHCR.

Whether the 2016 Commission's proposal on the Union Resettlement Framework[18] constitutes a first step in the mentioned direction is the main question here addressed. Before tackling it (§ 3), this chapter investigates the ongoing European migration strategy and its rationale (§ 2) with the aim both to show its legal fragility and to support the view that the legal sustainability of the externalization of border surveillance[19] crucially depends on the existence (and consistence) of humanitarian pathways to Europe.

2. The EU strategy: *non-entrée* and the problem of asylum accessibility

In his address on the state of the Union of September 2017, the President of the European Commission stressed the fact that in the previous year EU Member States "resettled or granted asylum to over 720,000 refugees – three times as much as the United States, Canada and Australia combined".[20] While this fact cannot be contested,

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Problems in Achieving this Durable Solution and New Directions in the 1990s, UN doc. EC/SCP/65, 9 July 1991; UNHCR, *New Directions for Resettlement Policy*, UN doc. EC/51/SC/INF.2, 14 June 2001.

[15] UNHCR, *Global Trends 2016*, Geneva: UNHCR, 2017, p. 2.

[16] With the New York Declaration for Refugees and Migrants, adopted on 19 September 2016, UN Member States have committed themselves to adopt by 2018 a Global Refugee Compact entailing a Comprehensive Refugee Response Framework (CRRF) for emergencies and protracted situations of forced displacement (UN General Assembly, A/RES/71/1). A "Zero Draft" of the Global Compact on Refugees has been published on 31 January 2018.

[17] J.C. Hathaway, M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge: CUP, 2014, p. 27.

[18] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2016.

[19] On the displacement extraterritorially of border surveillance activities, driven by Frontex (now European Border and Coast Guard Agency), see the chapter by Daniela Vitiello in this volume.

[20] J.-C. Juncker, *State of the Union Address 2017*, 13 September 2017.

the inference that Europe is not becoming "a fortress"[21] seems to downplay recent implementation of the European Agenda on Migration.

The overwhelming majority of the 2016 asylum applicants (710,395, corresponding to 98 per cent) had reached the European territory without authorization, after hazardous, expensive and often inhuman journeys. In the same year, resettlement – the only existing legal pathway of access to protection in Europe – has secured the arrivals of barely 2 per cent of refugees: in absolute numbers (14,205),[22] much less than the resettlement arrivals in the United States (78,761) and in Canada (21,865).[23] In the meantime, the agreements with Turkey and Libya have significantly reduced the number of unauthorized arrivals.[24] The idea of a "Fortress Europe" seems, thus, closer to reality than the Commission is willing to admit. Unless new legal avenues are opened, refugees will hardly be able to obtain protection in Europe.

The problem is linked with the European policy of border externalization in two important respects: first, it helps to understand why Europe cannot renounce the policy that restricts access to its territory and its asylum system(s) (§ 2.1); second, Europe's attempt to externalize entry controls exhibits major legal flaws, in terms of compatibility with refugee and human rights protection (§ 2.2).

2.1. Externalizing border surveillance: why and how

Border externalization is a rational strategy. The survival of the Schengen area depends on the ability to prevent the unauthorized entry of both unselected migrants and potentially dangerous persons without identity. EU institutions and Member States are all aware of the fact that the cherished European area of free circulation would be the first victim of a protracted inflow of irregular migrants and consequent secondary movements.[25]

Undeniably, Member States' asylum systems have undergone a severe stress: from January 2014 to September 2017, more than 3.5 million protection requests have been lodged in Europe and almost 1 million is still pending.[26] However, the asylum emergency cannot be used to support a border externalization policy aimed at deterring the entry of protection seekers. Not only, the asylum emergency is much less serious in Europe than in Turkey, Jordan or Lebanon[27] (with the exception of

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[21] Ibid.

[22] European Commission, *Migration: A Roadmap*, Brussels, 7 December 2017, p. 1. See also UNHCR, *Europe Resettlement*, 17 October 2017, p. 1.

[23] See UNHCR's portal on Resettlement Data.

[24] Since the EU agreement with Turkey of 18 March 2016, irregular arrivals in the Eastern Mediterranean have been reduced by 97 per cent. Following the Italian agreement with the Libya's Government of National Accord of 2 February 2017, endorsed by the European Council with the Malta Declaration of the following day, the arrivals along the Central Mediterranean route have been reduced by 68 per cent in the period July-December 2017 compared to the same months of the previous year: see UNHCR, Mediterranean Situation, 31 December 2017 and Italian Ministry of Interior, Cruscotto statistico giornaliero, 31 December 2017.

[25] E.g. European Commission, *Back to Schengen - A Roadmap*, COM(2016) 120 final, 4 March 2016.

[26] UNHCR, *Europe Monthly Report – September 2017*, 20 October 2017, 2.

[27] Turkey alone hosts more refugees (3.4 millions at the end of 2017) than the entire Europe, while in Lebanon 1 in 6 people is a refugee and 1 in 11 in Jordan): see UNHCR, Syrian Regional Refugee Response and Id., *Global Trends*, pp. 3 and 14-15.

Germany, the distribution of asylum requests in the EU is more diffuse than the combination between geography and the Dublin rules would suggest).[28] Most importantly, such a policy goal would contradict the Schengen Borders Code, which prohibits any measure of border control and surveillance affecting the right to seek asylum.[29]

The key argument in favor of externalizing border surveillance is related to return policy. Despite the efforts devoted to the implementation of the Return Directive,[30] returns' rate is far from satisfactory[31]. Member States show a persistent inability to return both irregular migrants and rejected asylum seekers to their countries of origin. The noteworthy consequence is a net increase in the number of irregular immigrants present in Europe[32]. Due to the structural limits of the EU return policy, the tightening of border management in Greece and Italy with the adoption of the "hotspot" approach,[33] and the strengthening of the operational capacity of Frontex (now European Border and Coastal Guard Agency)[34] cannot suffice to regain control over entry into the Schengen zone. The Commission's new recommendation to Italy to introduce further limitations to migrants' personal freedom is emblematic, as it conveys a sense of impotence.[35]

It is, thus, not surprising that EU Member States have adopted a panoply of extraterritorial measures designed to prevent access to the EU territory to any unauthorized person regardless of the motives of the mobility.[36] In addition to a first generation of *non-entrée* measures already adopted in the past – a mix of visa restrictions, carrier sanctions and interdiction on the high seas – a second generation of measures has been deployed, which share a common feature: they are based on an

[28] Out of the 3,53 million asylum applications filed in Europe in the period January 2014 - September 2017, 1,46 million have been filed in Germany (42 per cent), 350,000 in Italy (10 per cent of the EU+ total, corresponding to 58 per cent of the migrants arrived on Italian shores) and 95,000 in Greece (3 per cent of the EU+ total, corresponding to 8 per cent of the migrants arrived on Greek shores). In the same period, 270,000-250,000 applications have been filed in Sweden, France and Hungary, 170,000 in Austria and 130,000 in the United Kingdom: own elaboration based on EUROSTAT data and EASO monthly reports.

[29] Article 14(1) of Regulation (EU) 2016/399.

[30] See European Commission, *EU Action Plan on Return*, COM(2015) 453 final, 9 September, and *Communication on a more Effective Return Policy in the European Union – A Renewed Action Plan*, COM(2017) 200 final, 2 March.

[31] European Commission, *Progress report on the European Agenda on Migration*, COM(2017)669 final, 15 November, Annex 5.

[32] According to the European Commission, *State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy*, Press Release, Brussels, 27 September 2017, "an estimated 1.5 million people [should] be returned from EU Member States in the near future".

[33] On the hotspot approach, ECRE, *The implementation of the hotspots in Italy and Greece*, Amsterdam, December 2016; M.-L. Basilien-Gainche, "Hotspots, cold facts. Managing Migration by Selecting Migrants", in C. Grutters, S. Mantu, P. Minderhoud (eds.), *Migration on the Move. Essays on the Dynamic of Migration*, Leiden: Brill, 2017, pp. 153-171; M. Savino, "The Refugee Crisis as a Challenge for Public Law: The Italian Case", *German Law Journal*, 2016, Vol. 17, No. 6, pp. 981-1004, at 987-991.

[34] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016.

[35] European Commission's *Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*, SEC(2017) 339, 4 July 2017, p. 4.

[36] E.g. Moreno-Lax (2017), op. cit., p. 465.

asymmetric cooperation with third countries (Turkey, Libya, Niger, etc.) which are required to curb migration flows on behalf of European sponsoring state.

These extraterritorial practices help European States to *de facto* regain sovereign control over admission at the expenses of asylum seekers without formally withdrawing from refugee law: to the extent that asylum in Europe becomes less accessible, those legal obligations, although intact, lose their concrete relevance, assuming a merely symbolic importance.[37]

Indeed, *non-entrée* measures are designed to elude the prohibition set by Article 31 of the Refugee Convention to impose "penalties" on refugees for their illegal entry in another State's territory. This prohibition is commonly understood as recognition of the right of refugees to arrive of their own initiative in a state of refuge without its authorization, although the condition established by Article 31 is that they flee "directly" from the state in which they are in danger.[38] The extensive use of the "safe third country" notion is the European answer to Article 31.[39]

A similar circumvention takes place with regard to Article 33 of the Refugee Convention. The principle of *non-refoulement* implies the duty to admit a protection seeker at least until her claim is examined, "since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk".[40] When the border is projected extraterritorially, the responsibility to protect and the liability for *refoulement* fall on the third cooperating country, with the result that "deterrence is achieved even as liability is avoided".[41]

Border externalization policy is thus based on measures of indistinct control which "have the effect of further mixing up migration flows"[42], insofar as they are designed to neutralize the impact of those key refugee provisions that limit the territorial sovereignty of the states. Is this exclusion by design really compatible with European obligations arising from refugee and human rights law?

2.2. Border externalization: a legally vulnerable strategy

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[37] On the "costs" of a withdrawal from the international refugee regime, see T. Gammeltoft-Hansen and J.C. Hathaway, "*Non-Refoulement* in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, 2015, Vol. 53, pp. 235-284, at 239 s.

[38] For opposite understandings of Article 31, compare K. Hailbronner, "Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway", VerfBlog, 11 March 2016, and J.C. Hathaway, "Taking Refugee Rights Seriously: A Reply to Professor Hailbronner", *VerfBlog*, 12 March 2016. See also J.C. Hathaway, M. Foster, *The Law of Refugee Status*, p. 49.

[39] On the "safe country" notion and its dubious compatibility with due process guarantees and the principle of *non-refoulement*, V. Moreno-Lax, "The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties", in G.S. Goodwin-Gill, P. Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects*, The Hague: Martinus Nijhoff, 2015, pp. 665-721; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford: OUP, 2009, pp. 45-66 and 164-167; G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford: OUP, 2007, pp. 390-407; C. Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection", *European Journal of Migration and Law*, Vol. 7, No. 1, 2005, pp. 35–70. See also European Commission (2015), *Proposal for a regulation establishing an EU common list of safe countries of origin*, COM(2015) 452 final, 9 September. At present, according to Article 38 of Directive 2013/32/UE (Asylum Procedure Directive), safe country lists are defined at national level.

[40] Gammeltoft-Hansen and Hathaway, op. cit., p. 238.

[41] Gammeltoft-Hansen and Hathaway, op. cit., p. 243.

[42] V. Moreno-Lax, *Accessing Asylum in Europe*, p. 2.

The new generation of *non-entrée* measures is often based on a mixed formula, which combines the extraterritoriality of border surveillance (carried out by the authorities of a third country) with support activities of the sponsoring State (activities ranging from the provision of financial resources, equipment, training, to the deployment of liaison officials, up to joint or even exclusive enforcement)[43]. Does this "*extraterritoriality plus*" formula provide European governments with a sufficiently robust *legal shield* against the infringement of international and EU law?

In principle, territory provides the basic foundation of the concepts of jurisdiction and liability in international law. States are, thus, accountable for the violation of rights occurring to anyone *within* their territorial jurisdiction.[44] However, the concept of jurisdiction is not framed exclusively in territorial terms.[45] States can be found to have jurisdiction outside their territories in several instances: *when they have effective control over a territory or physical space*, for instance, as a consequence of military action,[46] or in a closed facility run by the sponsoring state,[47] or onboard craft or vessels which are registered in, or flying the flag of, that State (spatial model).[48] But States' jurisdiction can be also established *when their agents exercise authority, physical power or direct control over an individual*, and hence even when the spatial element of control is absent (personal model).[49] Any exercise of public power entailing "effective" control over a person and her subjugation to the "authority" of foreign agents, although limited in time, may suffice.

This expansive notion of extraterritorial jurisdiction imposes relevant legal constraints on the European policy of border externalization. Firstly, it would target the creation of an extraterritorial area placed under the control of a sponsoring State (for instance, a closed facility, equivalent to a "hotspot" area for the selection of migrants), which involves of the direct control exercised over the facility as well as over the persons therein detained.[50]

Secondly, a State can be held accountable when it carries out migration management functions outside its territory, as it may occur in the context of resettlement practices, even when – according to the personal model – spatial control

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[43] This typology is drawn from T. Gammeltoft-Hansen and J.C. Hathaway (2015), op. cit., pp. 250-256. On the instruments employed in the external dimension of the EU migration policy, see the chapter by Paula García Andrade in this volume.

[44] ECtHR (1989), Soering v. United Kingdom (Application no. 14038/88) § 86. See also ECtHR (2001), Banković v. Belgium (Application no. 52207/99) § 59.

[45] The concept of "jurisdiction" under Article 1 of the European Convention on Human Rights (ECHR) "is not restricted to the national territory of the High Contracting Parties": ECtHR (1995), Loizidou v. Turkey (Application no. 15318/89) § 62.

[46] ECtHR (1995), Loizidou v. Turkey (Application no. 15318/89) § 62.

[47] ECtHR (2009), Al-Saadoon and Mufdhi v. the United Kingdom (dec.) (Application no. 61498/08), §§ 86-89.

[48] See ECtHR (2001), Bankovic v. Belgium (Application no. 52207/99) § 73, and ECtHR (2012), Hirsi Jamaa v. Italy (Application no. 27765/09) § 81.

[49] See ECtHR (2011), Al-Skeini v. United Kingdom (application no. 55721/21), § 135. See also ECtHR (2017), N.D. & N.T. v Spain (Applications No. 8675/15 and 8697/15), § 54.

[50] E.g. UN Committee against Torture (2008), J.H.A. v. Spain, No. 323/2007, U.N. Doc. CAT/C/41/D/323/2007, § 8.2. Even when the establishment of extraterritorial areas for purposes of migration management is accompanied by a declaration aimed at exempting it from the international legal obligations of the sponsoring State, such declaration would be void or at best irrelevant: ECtHR (1996), *Amuur v. France* (Application no. 19776/92) (on international airport zone).

is absent. This specifically affects the deployment of migration liaison agents seconded to key third countries of origin and transit.[51]

Thirdly, also "indirect" control in the context of interdiction operations may prove to be sufficient to establish jurisdiction.[52] Albeit in tension with *Banković*, requiring an element of *direct* and *durable* control, this expansive approach might apply to cases of blockades and/or forcible escort of vessels carrying migrants on the high seas.[53] In the current context of maritime interdiction along the Central Mediterranean, the delegation of search and rescue activities to the Libyan Coast Guard marks a clear departure from the Italian push-back operations condemned in the *Hirsi* case.[54] Under the new scheme, Italian authorities do not carry out interdiction operations *directly*, and yet they might be held accountable when the Italian navy actively supports the Libyan authorities in those operations.[55] The *non-refoulement* principle, in fact, prohibits to hand over any person onboard "to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to (…) torture, persecution or other inhuman or degrading treatment or punishment".[56]

Fourth, modern understandings of jurisdiction admit that a shared responsibility may follow from the breach of a human rights provision. After an initial reluctance,[57] in fact, the Court of Strasbourg "has now accepted that Convention rights can be 'divided and tailored'" in accordance with the particular circumstances of the extra-territorial act in question.[58] Accordingly, two or more states responsible for the same human rights violation "can both be held individually liable on the basis of their own conduct and international obligations".[59]

Fifth, even when the sponsoring State does not act directly, its responsibility for "aiding and assisting" another State may emerge when the latter commit an internationally wrongful act and the former is aware of it.[60] It follows that, if a

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[51] See Council Regulation (EC) 377/2004 of 19 February 2004. On the creation of European migration liaison officers, their tasks and deployment to 13 priority third countries of origin and transit, see European Commission (2015), *Concept paper on the deployment of European Migration Liaison Officers*, Brussels, 13435/15, 4 November. On the jurisdictional implications, F. Baxewanos (2017), "Relinking power and responsibility in extraterritorial: the case of immigration liaison officers", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds., 2017), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, London: Routledge, pp. 193-213.
[52] See ECtHR (2001), Xhavara v. Italy (Application no. 39473/98).
[53] Gammeltoft-Hansen and J.C. Hathaway, op. cit., 266.
[54] ECtHR (2012), Hirsi Jamaa v. Italy.
[55] On the role of Italy with regard to the operations of interdiction carried out by the Libyan Coast Guard, see the request of clarification by the Commissioner of Human Rights – Council of Europe, Letter to the Minister of the Interior of Italy, CommHR/INM/sf 0345-2017, 28 September 2017. On the general issue, D. Guilfoyle, "Jurisdiction at sea: migrant interdiction and the transnational security state", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds.), op. cit., pp. 114-136; N. Markard (2016), "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries", *European Journal of International Law*, Vol. 27, No. 3, pp. 591–616.
[56] Article 4(1) of Regulation (EU) No 656/2014.
[57] ECtHR (2001), Banković v. Belgium, § 75.
[58] ECtHR (2012), Hirsi Jamaa v. Italy, § 74. See also ECtHR (2011), Al-Skeini v. United Kingdom, § 137.
[59] Gammeltoft-Hansen and Hathaway, op. cit., p. 272.
[60] Although not formally binding, Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (U.N. Doc. A/56/10), is acknowledged as a matter of State practice and *opinio juris*, also with specific regard to instances of *refoulement*: e.g., the opinion by Judge Pinto de Albuqerque in ECtHR (2012), Hirsi Jamaa v. Italy.

European State (e.g. Italy) provides financial support, training and maritime patrol vessels to the authorities of a third cooperating state (e.g. Libyan Coast Guard) in carrying out activities that breach the *non-refoulement* duty, those "aiding or assisting" might entail Italian responsibility.[61]

Finally, and not less importantly, according to EU law, the jurisdictional paradigm is even broader, as its basic assumption is that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law"[62] regardless of location.[63]

To sum up, according to the expansive notion of extraterritorial jurisdiction, European States' responsibility can be found in connection to a wide variety of extraterritorial activities of border management, with involve, in turn, *direct spatial control* over areas or migrant facilities, *direct personal control* as result of the exercise by State agents (e.g. liaison migrant officers or military personnel) of public powers or authority over individuals, or *"indirect" control* as result of activities (e.g. blockades or forcible escort of migrant vessels) in support of third countries' operations of maritime interdiction. The provision of financial, training or material support may also entail State *responsibility for aiding or assisting* a third country to carry out action that is contrary to human rights. In addition, any extraterritorial activity regulated by EU law or aimed at its implementation cannot escape the obligations arising from the EU Charter on fundamental rights.

All this suggests that the European attempt to externalize border surveillance, although rational, is a legally vulnerable strategy, both because it is designed as a set of undifferentiated *non-entrée* measures precluding legal access to asylum, and because it shifts the responsibility on third cooperating states without immunizing sponsoring States. More generally, this analysis suggests the necessity to abandon the assumption that asylum systems may function as territorially confined regimes: although reassuring, the view that "a legal duty arises only when and in so far as a potential refugee (…) has come within the scope of territorial jurisdiction of a State"[64] is becoming obsolete.

3. Beyond containment: resettlement as meaningful legal pathway?

Although well-established in international and EU law, the distinction between asylum and irregular immigration is increasingly distorted by a vicious circle. On the one side, the asylum procedure is exposed to the abuse of economic migrants, who – in the absence of legal pathways to the EU labor market – increasingly rely on that procedure to avoid immediate repatriation.[65] On the other side, the (possibility of)

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[61] A. Nollkaemper, "Shared Responsibility for human rights violations: a relational account", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds.), op. cit., pp. 27-51.
[62] CJEU (2013), *Åklagaren v Hans Åkerberg Fransson*, case C-617/10, § 19.
[63] On the extraterritorial reach of the "*Fransson* paradigm", see Moreno-Lax (2017), *Accessing Asylum in Europe*, p. 7 and ch. 7.
[64] K. Hailbronner (1996), "Comments on the Right to Leave, Return and Remain", in V. Gowland-Debbas (ed.), The *Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Brill), p. 115.
[65] E.g. European Commission, *A European Agenda on Migration*, p. 22, observing that "too many requests are unfounded" (55% of the asylum requests lodged in 2014), with the result of "hampering the capacity of Member States to provide swift protection to those in need".

asylum abuse is often used by policy-makers to justify the adoption and tightening of *non-entrée* measures aimed at curbing any sort of unauthorized arrival, regardless of the motives that trigger the mobility. As a result, the distinction between forced and unforced migration tends to vanish in the folds of EU rules on "remote border control" and entry into the Schengen zone.[66] The establishment of meaningful legal avenues to asylum in Europe would be, thus, essential also to revive the international refugee regime and the European commitment to it.

Unsurprisingly, though, the European debate on the establishment of asylum pathways is obstructed by the preliminary search for a suitable burden-sharing formula, which requires the Dublin system to be overcome. The temporary relocation mechanism established in 2015 has become a legal battlefield[67] with unsatisfactory results,[68] whereas the attempts to make relocation quotas permanent and to abandon the iniquitous rule that assigns responsibility to the first EU country of entry have met strong resistance.[69] All this inevitably questions the credibility of Member States' commitment to "the principle of solidarity and fair sharing of responsibility" (Article 80 TFEU) both internally and externally.[70]

Ideally, for EU Member States to shield their extraterritorial *non-entrée* measures from a predictable series of legal challenges, the straightest legal solution would be to externalize (not just border *surveillance*, but) complete border *controls*. Applying to "externalized" border controls the same asylum guarantees that EU law provides *within* the European territory would not only prevent refugees from embarking in perilous journeys across the Mediterranean. It would also remove the legal asymmetries that border externalization entails, as it would guarantee that, in addition to the well-established *negative* claim not be returned, refugees are also entitled to a *positive* claim to access asylum in Europe, thereby recognizing the specificity of their situation.

In the real world, this ideal solution has no chance to be adopted. Establishing a permanent and unrestricted "protected entry procedure" to the benefit of *all* the refugees intercepted on their way to Europe in a Middle Eastern or North African state

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[66] Moreno-Lax, *Accessing Asylum in Europe*, p. 2-5. See also M. O'Sullivan, D. Stevens, "Access to Refugee Protection: Key Concepts and Contemporary Challenges", and N. El-Enany, "Asylum in the Context of Immigration Control: Exclusion by Default or Design?", both in M. O'Sullivan D. Stevens (eds.), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, Oxford: Hart Publishing, 2017, pp. 3–28 and 29-45 respectively.

[67] CJEU, Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v Council, 6 September 2017.

[68] The Council adopted two legally binding Decisions (2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015) establishing a two-year temporary mechanism to relocate 106,000 applicants in clear need of international protection from Italy (39,600) and Greece (66,400). As of 7 March 2018, only 33,846 asylum seekers have been relocated: 11,999 from Italy and 21,847 from Greece: European Commission, *Progress Report on the European Agenda on Migration*, COM(2018)250 final, 14 March 2018, Annex 4.

[69] These issues are now in discussion in the context of the negotiation on the revision of the Dublin Regulation: compare the Commission Proposal (COM(2016) 270 final, 4 May 2016) with the LIBE Report of adopted by the European Parliament on 6 November 2017 (2016/0133(COD)), proposing that permanent mandatory quotas are established on the basis of Member States' population size and economy.

[70] On the complex relationship between the concept(s) of solidarity and the fair sharing of responsibilities with regard to refugees in the EU, see M. Takle, "Is the migration crisis a solidarity crisis?", in A. Grimmel (ed.), *The Crisis of the European Union*, New York: Routledge, 2018, pp. 116-128.

of transit would be neither feasible, as the processing of asylum requests on the opposite shores of the Mediterranean would involve insurmountable administrative and legal obstacles, nor acceptable, as it would inundate Europe and the cooperating third countries with masses of aspiring protections seekers.

Indeed, all the existing programs for humanitarian admission in Northern States are based on selective criteria. They do not target *all* the forced migrants entitled to international protection, but rather a specific group, usually the most vulnerable or those who already have a link with the state (e.g. family members). Moreover, Northern States tend to rely on the UN High Commissioner for Refugees (UNHCR) for the identification and selection of eligible refugees, so as to prevent "asylum shopping" and to make those programs manageable. Both selectivity and reliance on the administrative capacity of the specialized international agency explains why EU Member States put resettlement on top of their agenda.

3.1.The evolution of the EU legal framework

Although current EU law acknowledges a single humanitarian pathway, based on the international resettlement program supervised by UNHCR, in the past other options had been considered. Following the 1999 Tampere European Council, recommending that the area of freedom, security and justice "must (…) also offer guarantees to those who seek protection in or access to the European Union",[71] the Commission considered, in addition to "facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme", another option: the processing of protection requests in the region of origin.[72]

This option – identified with "Protected Entry Procedures" (PEPs) allowing refugees to lodge an asylum application at a European State's embassy or mission abroad, and to be granted an entry permit in case of a positive response, preliminary or final, to that claim – was the object of a feasibility study, which boldly recommended to use PEPs as a permanent pathway, rather than as an emergency measure.[73] The Commission upheld the recommendation and envisaged the establishment of a EU Regional Task Force, to be established with the purpose of carrying out refugee determination and identifying cases eligible for resettlement and PEPs in close cooperation with UNHCR.[74] However, a further assessment highlighted the main disadvantages of extraterritorial PEPs: high demand of resources for processing applications abroad, difficult contact with Member States' decision makers,

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[71] European Council (1999), Presidency Conclusions – The Tampere Milestones, 15–16 October, § 3.
[72] European Commission, Communication "Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum", COM(2000) 755 final, 22 November 2000, p. 9.
[73] G. 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*, Danish Center for Human Rights, European Community, 2002, pp. 4-5. Another commissioned study concerned the establishment of EU-wide resettlement schemes: J. Van Selm *et al.*, *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*, Migration Policy Institute, European Community, 2004.
[74] European Commission, Towards more accessible, equitable and managed asylum systems, COM(2003)315 final, 3 June 2003, pp. 15-16.

inaccessibility of legal assistance, need to preserve discretion and flexibility. Therefore, upon request of the Council, the Commission abandoned the idea and limited itself to propose the setting up of an EU-wide Resettlement Scheme.[75]

Other extreme options – such as the UK-sponsored plan to create "Regional Protection Zones" in the source region and "Transit Processing Centres" on transit routes to Europe, with the objectionable purpose to return therein asylum seekers arriving in Europe[76] – were also dismissed for their dubious compatibility with the 1951 Refugee Convention, EU legislation and the ECHR.[77]

As it soon emerged, resettlement has two comparative advantages *vis-à-vis* protected entry procedures. Firstly, resettlement schemes (can) rely on a specialized international agency (UNHCR) for the selection and referral of cases to the potential destination country: this administrative "availment" allows participating States to considerably reduce the amount of resources and competences otherwise required.[78] Secondly, resettlement can count on selective criteria of vulnerability, long-established in the UNHCR practice, that permit to focus on predetermined categories of refugees: it is their vulnerability, related to enhanced protection needs that cannot be satisfied in the less developed country of refuge, which justifies and trigger a "special" protection responsibility of wealthier states.[79] This contributes to explain why, by 2012, following the spread of the Arab Spring, all the European countries had abolished the possibility to seek asylum at their embassies.

At EU level, though, the only outcome of that seminal debate was a 2007 decision that diverted part of the European Refugee Fund's resource to support resettlement operations.[80] Since then, the EU approach to resettlement has been based on financial incentives to elicit Member States' engagement. Following a new attempt by the Commission to enhance national resettlement programs,[81] the current legal framework is defined by Regulation (EU) No. 516/2014.[82] The Asylum, Migration and Integration Fund (AMIF) thereby established supports Member States with financial incentives (6,000 euros per resettled person under national schemes and 10,000 euros under EU-wide schemes). In addition, the Regulation sets principles for the

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[75] European Commission, *Communication 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 final, 4 July 2004, §§ 20-35. With regard to PEPs, the Commission limited himself to proposing the use of this procedure "as an 'emergency strand' of wider resettlement action, though at the full discretion of individual Member States" and "with the important difference that the refugee status determination would take place in the EU (after a screening process)" (Ibid., § 35).

[76] UK Government, *New international approaches to asylum processing and protection*, Paper discussed at an informal meeting of EU Justice and Home Affairs (JHA) ministers, 28 March 2003. For a thorough legal assessment of the UK plan, G. Noll (2003), "Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones", *European Journal of Migration and Law*, Vol. 5, No. 3, pp. 303-341.

[77] Commission, Towards more accessible, equitable and managed asylum systems, pp. 5-7.

[78] Ibid., §§ 23 and 32.

[79] Ibid., §§ 23 and 32.

[80] 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.

[81] European Commission, *Communication on the establishment of a joint EU resettlement programme*, COM(2009)447 final, 2 September 2009.

[82] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund.

establishment of common Union resettlement priorities,[83] with the purpose of "increasing the impact of the Union's resettlement efforts (…) and maximising the strategic impact of resettlement through a better targeting of those persons who are in greatest need of resettlement".[84] However, no specific obligation on the part of Member States has been assumed.

Following the outbreak of the refugee crisis, emergency measures have been adopted. Acknowledging that national resettlement programs (by then, established in fifteen Member States) constituted an inadequate and insufficient answer,[85] the European Council urged the Commission to propose a pilot project on resettlement across the EU[86]. In July 2015, an EU-wide emergency scheme was then established to resettle 22,504 refugees over a two-year period.[87] The scheme was based on a merely "humanitarian" approach, aimed to showing solidarity to vulnerable refugees and third states, as well as on the assumption that resettlement from priority African and Middle-Eastern regions had to take place "through multilateral and national schemes (…) on request of the United Nations High Commissioner for Refugees".[88]

Few months later, however, the approach changed, due to the new overarching priority: stemming the mixed flows of economic migrants and refugees. The turning point has been marked by the Commission recommendation of 15 December 2015,[89] where the proposal to initiate a voluntary admission scheme was premised on a sheer logic of instrumentality: the European commitment to resettle 54,000 Syrian refugees was part of the offer to obtain Turkey's cooperation in the containment of flows along the Eastern Mediterranean route.[90]

The core of this agreement is based on a complete subjugation of resettlement to the priority of border surveillance. Not only the EU-Turkey "statement" provides for the notorious "1:1 scheme", based on the questionable assumption that Turkey is a "safe third country" of refuge.[91] The deal also dictates that the scheme may be "reviewed" or "discontinued" if the objective of ending the irregular migration had not been achieved,[92] and that, in selecting the candidates for resettlement, "[p]riority will be given to migrants who have not previously entered or tried to enter the EU

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[83] Article 1(d), Regulation (EU) No 516/2014.
[84] Recital 41, Regulation (EU) No 516/2014.
[85] European Commission, *Recommendation on a European resettlement scheme*, C(2015) 3560 final, 8 June 2015.
[86] European Council, Statement, Brussels, EUCO 18/15, 23 April 2015, § 3(q).
[87] EU Council of Justice and Home Affairs, Conclusions of the Representatives of the Governments of the Member States, 11097/15, 20 July 2015.
[88] Ibid.
[89] European Commission, *Recommendation for a voluntary humanitarian admission scheme with Turkey*, C(2015)9490, 15 December 2015.
[90] E.g. Recital 4 of Council Decision 2016/1754 of 29 September 2016: "*With the aim of ending irregular migration from Turkey to the EU*, on 18 March 2016, the EU and Turkey agreed (…) to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the Member States, within the framework of the existing commitments" (emphasis added).
[91] Greek Asylum Appeals Committees have so far consistently ruled (in 390 out of 393) that the safe third country requirements are not fulfilled with respect to Turkey: see M. Gkliati (2017), "The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committees", *European Journal of Legal Studies*, Vol. 10, No. 1, pp. 80-123. See also ECtHR [GC], *M.S.S. v. Belgium and Greece*, app. 30696/09, 21 January 2011, §§ 362-368.
[92] EU-Turkey Statement, 18 March 2016, § 2.

irregularly".[93] The latter provision, in particular, is of dubious compatibility with the duty not to impose "penalties" on refugees because of their unauthorized arrival set by Article 31 of the Refugee Convention.[94] The Court of Justice has nonetheless removed the entire international instrument from its review.[95]

Despite some elements of continuity between Regulation (EU) No. 516/2014 and the two ad-hoc resettlement schemes adopted in 2015 and 2016 (e.g. reliance on the processing capacity of UNHCR),[96] the paradigm shift is evident. The traditional humanitarian conception, which understands resettlement as a vehicle of solidarity both towards vulnerable refugees and poorer countries hosting disproportionate numbers of refugees, has been replaced with an "instrumental" conception, which conceives resettlement as an exchange currency to obtain the collaboration of key third countries in the control of EU borders.

3.2. The prospects: the proposed Union Resettlement Framework

While the focus of the European debate on asylum moves from *whether* to *how* legal channels for refugees must be established, some options proposed in the past resurface. In particular, two new developments deserve a mention.[97]

One concerns humanitarian visas. On 25 April 2016, following a European Parliament's resolution, the LIBE Committee has amended the Commission's proposal for a recast Visa Code[98] to propose that protection seekers may apply for a European humanitarian visa at any consulate or embassy of the Member States: once granted, the EU humanitarian visa would allow its holder to enter the territory of the relevant Member State and lodge an application for international protection in that country.[99] So far, both the Council and the Commission have opposed the proposal, arguing that the Visa Code should not deal with migration and that the issue should rather be examined in the context of the EU Resettlement Framework.[100] In the meantime, a 2017 ruling of the Court of Justice in the case *X and X v État Belge* has made clear that

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[93] Ibid.

[94] On the need to interpret the "penalty" concept as embracing both criminal and administrative sanctions, J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge: CUP, 2005, pp. 405-412, spec. 410-411; concurrently, M. Nowak, *UN Covenant on Civil and Political Rights*, Kehl: Engel, 1993, p. 278, affirms that "every sanction that has not only a preventive but also a retributive and/or deterrent character is (…) to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it".

[95] CJEU, *N.F. v. European Council*, case C- 192/16, 28 February 2017.

[96] See Recitals 8 and 10 of Commission recommendation for a voluntary humanitarian admission scheme with Turkey. Council Decision 2016/1754 allows Member States to fulfil their resettlement obligations not only through resettlement, but also through other ancillary channels, including "humanitarian visa programmes, humanitarian transfer, family reunification programmes, private sponsorship projects, scholarship programmes, labour mobility schemes, and others" (Recital 6).

[97] For overviews, see EU Agency for Fundamental Rights, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, Wien, 2015, Fra Focus No. 2; V. Moreno-Lax, *Europe in Crisis: Facilitating Access to Protection (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward,* Red Cross, 2016; MEDAM, *Sharing responsibility for refugees and expanding legal immigration*, IfW, 2017.

[98] European Commission, Proposal for a Regulation of the European Parliament and the Council on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final, 1 April 2014.

[99] European Parliament, LIBE Committee report on the proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), 25 April 2016

[100] Council, *Note from the Presidency to the Visa Working Party*, 12113/16, 20 September 2016, § 2.

– contrary to the view of the Advocate General[101] and to some national practices[102] – applications for visas on humanitarian grounds with a view to applying for asylum are not governed by the Schengen Visa Code or by other sources of EU law and, hence, fall solely within the scope of national law.[103]

The other development concerns the French President's proposal to establish "hotspots" in Niger, Chad and perhaps Libya, which spurred immediate reactions because of its similarity with the 2003 UK-sponsored plan to create "Transit Processing Centres".[104] On 28 August 2017, however, at the Paris Summit between the governments of France, Germany, Italy, Spain, Libya, Niger and Chad, the controversial formula of "extraterritorial hotspots" has been replaced by the idea of a common "resettlement" exercise based on joint extraterritorial processing, to be carried out in Niger and Chad with the involvement of UNHCR.[105]

Once again, when it comes to concrete details, the controversial idea of offshore processing translates into the more sustainable formula of resettlement.[106] Even if it is not combined with the purpose to *refoule* asylum seekers arriving in Europe to those transit zones, the idea of offshore processing of asylum requests meets skepticisms among scholars and field operators, as it can hardly provide access "to dignified reception conditions, fair processing guarantees and effective remedy standards abroad".[107]

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[101] Opinion of Advocate General Mengozzi, *X and X v État belge*, Case C-638/16 PPU, 7 February 2017.
[102] P. Hanke, M. Wieruszewski & M. Panizzon (2018), "The 'spirit of the Schengen rules', the humanitarian visa, and contested asylum governance in Europe – The Swiss case", *Journal of Ethnic and Migration Studies*, pp. 1-16, at 6-8.
[103] CJEU, *X and X v État belge*, Case C-638/16 PPU, 7 March 2017, paras. 42-46.
[104] See *supra*, § 3.1. On the proposal of the French President, e.g. E. Maurice, "Confusion swirls round Macron's Libya 'hotspots'", *EUObserver*, 27 July 2017.
[105] See the Joint Statement, *Addressing the Challenge of Migration and Asylum*, Paris, 28 August 2017, § 2.2-3. See also the French non-paper *Protection missions for the resettling of refugees in Europe*, 28 August 2017, envisaging the opening of "a legal migration channel for persons in need of protection according to international and European law, in particular those who are most vulnerable according to UNHCR criteria for resettlement".
[106] In November 2017, the Libyan authorities decided to set up, with the Italian support and the UNHCR endorsement, a "transit and departure facility" in Tripoli, aimed at facilitating the transfer of vulnerable refugees to third resettlement countries (*UNHCR welcomes Libya's transit facility to expedite third country solutions for vulnerable refugees*, Press Release, 29 November 2017). See also the Declaration of Intent of the Central Mediterranean Contact Group of 13 November 2017 in Bern. On this developments, D. Davitti, M. Fries, "Offshore Processing and Complicity in Current EU Policy", *EJIL Blog*, 10 October 2017.
[107] Moreno-Lax, *Europe in Crisis*, p. 37. See also, e.g., S. Carrera, E. Guild, *Offshore processing of asylum applications: Out of sight, out of mind?*, CEPS, 27 January 2017; J. McAdam, *Extraterritorial Processing in Europe*, Kaldor Centre Policy Brief 1, May 2015; Z. Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MPI, October 2014. The unsatisfactory concretization of the offshore processing formula in the United States and Australia has contributed to spread skepticism about its compatibility with human rights and the European asylum model: e.g. D. Ghezelbash (2015), "Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia", in J.-P. Gauci, M. Giuffré, E. Tsourdi (eds.), *Exploring the Boundaries of Refugee Law*, Leiden: Brill, 2015, pp. 90-117; B. Frelick, I.M. Kysel, J. Podkul (2016), "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants", *Journal on Migration and Human Security*, Vol. 4, No. 4, pp. 190-220. On the human rights guarantees that offshore processing would require, G.S. Goodwin-Gill, "The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations", in *UTS Law Review*, 2007, pp. 26-40; J. Rijpma, M. Cremona, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, EUI Working Papers, 2007, No. 1; A.

Although less problematic in terms of compatibility with refugee law,[108] an EU humanitarian visa program would not be less demanding in terms of legal and procedural requirements: due to the direct involvement of EU Member States' officials, extraterritoriality would not shield them from the demanding obligations arising from the ECHR and, if EU law would also apply, by the EU Charter.[109]

Therefore, the proposal to establish a permanent Union resettlement framework, advanced by the Commission in July 2016[110] is the only legislative measure that has a chance to be approved.[111] The proposal generalizes the instrumental logic of the "1:1 scheme" for the resettlement of Syrian refugees from Turkey. Whereas the objectives outlined in the explanatory memorandum encompass both humanitarian and policy effectiveness goals,[112] the proposed regulation explicitly aims at reducing "the risk of a large-scale irregular inflow" (Article 3) and includes "third country's effective cooperation with the Union in the area of migration and asylum" among the criteria for choosing the country from which to resettle (Article 4). Cooperation in at least one of the following areas – reducing the number of irregular arrivals, "creating the conditions for the use of the first country of asylum and safe third country concepts for the return of asylum applicants", "increasing the capacity for the reception and protection" of refugees, and "increasing the rate of readmission"[113] – is a precondition that the Union requires for sharing the responsibility to protect refugees.

The proposed regulation follows the model of the EU-Turkey agreement also insofar as it excludes from resettlement all the "persons who have irregularly stayed, irregularly entered, or attempted to irregularly enter the territory of the Member States during the five years prior to resettlement".[114] Again, a problem of compatibility with Article 31 of the Refugee Convention arises: if "refugees are not required to have come directly from their country of origin" and a penalty can only be imposed on "refugees who had settled, temporarily or permanently, in another country",[115] the

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Liguori, *The Extraterritorial Processing of Asylum Claims*, Jean Monnet Centre of Excellence on Migrants' Rights WP, 2015.

[108] See Ulla Iben Jensen, *Humanitarian visas: option or obligation?*, Study for the LIBE Committee, September 2015, pp. 43-50, describing national practices in Europe and finding that, although sixteen EU Member States use or acknowledge the relevance of humanitarian visa schemes, most deploy this instrument primarily on an exceptional basis.

[109] See, e.g., CJEU, *Soufiane El Hassani v. Minister Spraw Zagranicznych*, Case C-403/16, 13 December 2017. On the legal requirements that humanitarian visas entail, G. Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law?", *International Journal of Refugee Law*, Vol. 17, No. 3, 2005, pp. 542–573. See also S. Peers, "Do potential asylum - seekers have the right to a Schengen visa?", *EU Law Analysis*, 20 January 2014; V. Moreno-Lax, "Asylum Visas as an Obligation under EU Law", *EU Immigration and Asylum Law and Policy*, 16-21 February 2017.

[110] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2016.

[111] On 15 November 2017, the Permanent Representatives Committee (Coreper) endorsed, on behalf of the Council, a mandate for negotiations on the Commission's proposal.

[112] Explanatory memorandum attached to Commission Proposal for a Regulation establishing a Union Resettlement Framework, p. 3.

[113] Article 4(b) of the Commission proposal.

[114] Article 6 (d) of the Commission proposal.

[115] See G.S. Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection", in E. Feller, V. Turk, F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, CUP, 2003, pp. 185-234, at 218.

decision to penalize a refugee with the exclusion from resettlement for having reached Europe via a third country is questionable.

The instrumentalization of resettlement as an additional migration management tool and an exchange currency in negotiations with third countries of refuge and transit, otherwise reluctant to cooperate in the externalization of European border surveillance, has been the object of much criticism.[116] Indeed, such cooperation with overburdened third countries of refuge increases the risk that refugees, after being stopped along the transit route to Europe, are returned to their country of origin, in patent violation of *non-refoulement*. Predictably, whereas the Council working party has substantially upheld the Commission's text,[117] the European Parliament has proposed to eliminate or amend all the provisions implicating conditionality and to restore the humanitarian logic inherent in the resettlement.[118]

However, it will be difficult for the Commission to build consensus in the Council on a proposal based on a purely humanitarian approach, completely divorced from considerations of migration management. If full respect of *non-refoulement* is guaranteed, the Commission's attempt to reconcile humanitarian goals with the deterrence of irregular immigration is probably the only way to an otherwise improbable expansion of the European capacity to admit vulnerable refugees: reluctant national governments might more easily accept higher numbers, if arrivals are planned and limited by quotas, and if this involves a significant reduction of irregular flows and secondary movements in the Schengen area.

Granted that this instrumental logic will hardly be abandoned, the crucial question becomes whether the proposed Union resettlement mechanism is meant to create a stable and meaningful legal pathway, with a real impact on the mobility strategies of protections seekers in the Mediterranean area; or whether, by contrast, it is rather meant to become a new piece of the EU *non-entrée* strategy, which behind the humanitarian appearance conceals a substantial intent of deterrence, in line with the European "pattern of minimalist engagement"[119] with refugee law.[120]

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[116] E.g. Caritas Europa, CCME, ECRE, ICMC Europe, IRC, Red Cross EU office, Joint Comments Paper on European Commission proposal for a Regulation establishing a Union Resettlement Framework, Brussels, 14 November 2016; Amnesty International, European Commission: Proposals on resettlement and asylum a cynical attempt to strengthen the walls of fortress Europe, 14 July 2016.

[117] Council of the European Union – Asylum Working Party, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council (First reading), 5332/17, 22 February 2017.

[118] See amendments no. 40-42, 48 and 57 proposed by European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), Draft European Parliament legislative resolution on the proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, 2016/0225(COD), 23 October 2017. See also EP's Rapporteur M. Björk, "We Must Fight the Proposed EU Resettlement Program", *Refugees Deeply*, 15 July 2016, criticizing the mentioned instrumental logic and the Commission intention "to make itself the agency responsible for negotiating the details of the concrete resettlement schemes", with negative implications in terms of transparency and accountability.

[119] Gammeltoft-Hansen and Hathaway, op. cit., p. 242.

[120] The number of refugees resettled under EU schemes since 2015 is 29,314 (European Commission, *Progress Report on the European Agenda on Migration*, COM(2018)250 final, 14 March 2018, Annex 5).

Unfortunately, the proposal advanced by the Commission seems to point to the latter answer. Firstly, resettlement is designed as an even more selective pathway than it usually is in international practice. With the exception of the "family links" criterion,[121] the eligibility criteria are more restrictive than those long-established by the UNHCR.[122] Also, the exclusion criteria, predominantly based on security concerns, go well beyond those provided for by the 1951 Refugee Convention.[123]

Secondly, the application of these criteria to the specific case can hardly be checked, due to the absence of due process guarantees. The Commission's text makes the interview of candidate refugees optional,[124] denies any means of appeal against the decision not to resettle a person,[125] and refers to an implementing (non-legislative) act for the adoption of any other guarantees.[126] Although due process rights (to be heard, to a written reasoned decision and to an effective remedy) are firmly established in the EU Charter and in the ECHR, Members States and EU institutions remain attached for their expediency to a territorial conception of asylum, which allegedly exempt resettlement from fundamental rights obligations. Contrary to asylum procedures, where due process guarantees are imposed by both international law[127] and EU law,[128]

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[121] Article 10 (1) of the proposed regulation allows Member States to prioritize "family links" and undetermined "social or cultural links" with respect to refugees with "particular protection needs or vulnerabilities". To prevent the risk of reducing the number of places available for the most vulnerable, amendments proposed by the European Parliament reaffirm that resettlement must be regulated "as complementary to, and not a replacement of, other legal routes to international protection, including humanitarian visas, extended family reunification, and humanitarian admission programmes": see LIBE Committee, Report on the proposal for a regulation establishing a Union Resettlement Framework: Explanatory memorandum, and LIBE Committee, Draft legislative resolution, amendment 41, proposing to exclude from resettlement refugees eligible for family reunification under Council Directive 2003/86/EC. See also the "Zero Draft" of the Global Compact on Migration, §§ 69-72, marking a clear distinction between resettlement and family reunification mechanisms.

[122] A comparison with UNHCR vulnerability criteria (UNHCR Resettlement Handbook, Geneva: UNHCR, 2011, p. 243-296) shows that Article 5 of the proposed EU regulation neglects one of the eight UNHCR categories of vulnerability, concerning refugees who do not meet other eligibility criteria and yet lack foreseeable alternative durable solutions (i.e. refugees in a protracted refugee situation without prospects of local integration). On the development of the concept of vulnerability in the EU context, in relation to Recital 29 of Directive 2013/32/EU (recast Asylum Procedures Directive) and Article 21 of Directive 2013/33/EU (recast Reception Conditions Directive), see Asylum Information Database – AIDA (2017), *The Concept of Vulnerability in European Asylum Procedures*, ECRE, and L. Jakuleviciene, "Vulnerable Persons as a New Sub-Group of Asylum Seekers?", in F. Maiani, V. Chetail and P. De Bruycker (eds.), op. cit., pp. 353-373.

[123] Compare Article 6 of the proposed EU regulation with Article 1F of the Refugee Convention, on which see, e.g., J.C. Hathaway, M. Foster, *The Law of Refugee Status*, Ch. 7.

[124] Article 10(3) of the proposed regulation.

[125] Article 10(6) of the proposed regulation.

[126] Recital 24 and Article 8(2)(f) of the proposed regulation.

[127] On the requirements of refugee status determination procedures, G.S. Goodwin-Gill, J. McAdam, *The Refugee*, pp. 528-537; M. Alexander, "Refugee Status Determination Conducted by UNHCR", *International Journal of Refugee Law*, 1999, Vol. 11, No. 2, pp. 251–289; M. Kagan, "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination", *International Journal of Refugee Law*, 2006, Vol. 18, No. 1, pp. 1–29; D.J. Cantor, "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence", *Refugee Survey Quarterly*, 2015, Vol. 34, pp. 79–106.

[128] See the above-mentioned provisions of EU Asylum Procedures Directive. See also K. Pollet, "Accessing Fair and Efficient Asylum Procedures in the EU: Legal Safeguard and Loopholes in the Common European Asylum System", in M. O'Sullivan D. Stevens (eds.), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, Oxford: Hart Publishing, 2017, pp. 136-166, highlighting how those guarantees could still be strengthened in many respects.

resettlement procedures are left at the complete discretion of the international and national authorities intervening in the different stages of the procedure.

Thirdly, and most importantly, the proposed regulation is silent both on the scale of resettlement and on the distribution of the burden between Member States. It is up to the Council to periodically determine the maximum total number of persons to be resettled, the contribution of each Member State and the geographical priorities through an annual Union resettlement plan, adopted as an implementing act proposed by the Commission. [129] On that basis, the Commission is empowered to adopt (again with an implementing act which excludes the Parliament) one or more targeted Union resettlement scheme(s) covering one or more (cooperating) third countries of refuge.[130] This multi-layered decisional structure is designed to guarantee the maximum flexibility of the instrument, with the purpose to both preserve Member States' unconstrained will as to the extent of their annual commitment and to establish tailored and temporally-wise schemes, so as to prevent resettlement from becoming a pull factor.[131]

Inevitably, this political and administrative flexibility entails a trade-off in terms of (lack of) credibility of this legal pathway, which can hardly be compensated by a principled provision setting a general target for EU resettlement. In the absence of permanent resettlement quotas for Member States, any meaningful target could only be illusory. Suffice it to consider that, in response to UNHCR's request to contribute to the resettlement of 1.2 million vulnerable refugees in 2018,[132] the Commission is struggling to obtain from Member States 50,000 resettlement places in two years.[133]

4. Towards a right of access to CEAS for vulnerable refugees?

EU migration and asylum policy is, now more than ever, prisoner of a dilemma: how to reconcile border externalization, which has proven to be effective in curbing unauthorized arrivals by sea on the European shores, with the need to keep the CEAS accessible.

Cooperation with the Turkish government and with the panoply of actors who control the mobility throughout and from the Libyan territory have been very effective in reducing mixed migratory flows to Europe. This is good news for those national systems that have been overloaded by the refugee crisis. But the closure of spontaneous channels of access to protection in Europe is radically changing the basic functioning of the CEAS. In 2016 and 2017, almost all the asylum seekers that obtained protection in Europe (98 and 95 per cent respectively) had arrived without

[129] Article 7 of the Commission proposal.
[130] Article 8 of the Commission proposal.
[131] Generally, such schemes benefit vulnerable refugees who have already been registered in the concerned third country before a past cut-off date: e.g. Council of the European Union, Standard Operating Procedures implementing the mechanism for resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016, 8366/16, 27 April 2016, targeting as eligible, along with their newborns, only Syrian nationals who have been registered by the Turkish authorities prior to 29 November 2015.
[132] UNHCR (2017), *Projected Global Resettlement Needs 2018*, Geneva, 14 June, p. 9.
[133] By 7 March 2018, 39,839 places have been offered under the new two-year resettlement scheme: European Commission, *Progress Report on the European Agenda on Migration*, COM(2018)250 final, 14 March 2018, Annex 5.

authorization. Yet, as irregular channels of entry shrink, the CEAS is at risk of becoming *de facto* inaccessible, unless a new policy of refugee admission intervenes as "game changer".[134]

The question of CEAS' accessibility is even more pressing in a context of uneven distribution of the refugee burden, so unfair to third countries of refuge and transit in the Mediterranean region. Although formal compliance with refugee law is not in discussion, the commitment to resettle those in need of international protection from third countries of refuge depends on two variables: conditionality, or the willingness of those third countries to cooperate in curbing irregular migration to Europe; political convenience, or the willingness of European governments to keep that commitment and accept the related logic of burden-sharing.

An additional pressure comes from the legal side: an expanding notion of State jurisdiction and responsibility under international and EU law makes border externalization increasingly vulnerable. The new set of *non-entrée* measures, although based on extraterritorial cooperation with third countries, often requires a (direct or indirect) involvement of EU Member States. This, in turn, engages their jurisdiction, with the result that extraterritorial border management cannot escape the legal obligations arising from the Refugee Convention, the ECHR and, to the extent that EU law applies, the EU Charter.

Under these circumstances, the creation of meaningful humanitarian pathways is more than a moral and political imperative: it is probably the only way to start redeeming the current European migration and asylum policy of deterrence from its major legal flaws. Although distant in their basic rationales, the externalizing of border surveillance and the opening of humanitarian pathways have the potential to complement and integrate each other within a unitary framework of extraterritorial rules and activities of migration management, with the primary goal of making flows to Europe "safe, orderly and regular".[135]

The direct legal solution – externalizing complete border controls, so as to provide full asylum guarantees at the extraterritorial border – would be politically unacceptable and administratively unfeasible. For these reasons, EU Member States will hardly commit themselves to guarantee that, in addition to the well-established *negative* claim not be returned (*non-refoulement*), refugees are also entitled to a *positive* claim to access asylum in Europe from abroad.

This analysis rather suggests that an EU-wide resettlement program might be a pragmatic option. Numbers count. Europe cannot open its borders to the tens of millions of world's refugees, but it can accept to protect the most vulnerable among them. This group of refugees amounts, according to the last UNHCR's annual projection, to just above one million.[136] If the protection of the most vulnerable is a

[134] J. Van Selm, *What if the E.U. Had a Refugee Policy?*, Middle East Institute, 8 March 2016.
[135] New York Declaration for Refugees and Migrants, § 4.
[136] According to the UNHCR, out of the 17.2 million refugees under its mandate, 1.2 million persons need to be resettled in 2018 (UNHCR, *Projected Global Resettlement Needs 2018*, Geneva: UNHCR, June 2017, p. 9).

primary global good[137] and if its sharing might be construed as part of a legally sound border externalization policy, EU Member States might accept to bear such a burden, provided that it is proportional to its economic weight.[138] In principle, this arrangement might also be a sound basis for negotiating the contents of the Global Compact on Refugees, and might pave the way to recognizing a *positive* right to (access) asylum in Europe to a limited group of refugees: those whose special needs of protection cannot be met in less developed countries of refuge.

To achieve that goal, some preliminary conditions should be met. First, UNHCR's capacity of referral should be significantly strengthened, perhaps with the assistance of the forthcoming EU Agency for Asylum.[139] Existing EU and national programs mainly rely on UNHCR, whose processing capacity is very limited, as it annually ranges between 100,000 and 83,000 (less than 10 per cent of the annual resettlement needs).[140] The necessary resources must be found to make UNHCR the engine of more meaningful EU and global resettlement programs. The other condition is the provision of minimum due process guarantees, which the Commission's proposal still neglects. This lacuna is patently at odds with Articles 41 and 47 of the EU Charter and confirms that EU Member States and institutions are still faithful (or less innocently clinging) to an obsolete territorial concept of asylum. The introduction of such guarantees is precondition for the construction of any kind of legal pathway to CEAS from a third country, as well as for recognizing an embryonic legal claim to resettlement to vulnerable refugees.

[137] A. Betts (2003), "Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory", *Journal of Refugee Studies*, Vol. 16, No. 3, pp. 274–296.

[138] According to the European Parliament, EU Member States should resettle at least 20 or 25 per cent of the annual UNHCR Projected Global Resettlement Needs: a proportion that corresponds to the EU economy, which produces one quarter of the global GDP: see LIBE Committee, Draft EP legislative resolution, amendments 12 and 65.

[139] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271, 4 May 2016.

[140] UNHCR, *Global trends 2016*, cit., p. 44.