

Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR

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Abstract

From an examination of the instruments of the Common European Asylum System (CEAS) and related policy measures regarding border surveillance and migration management, two interrelated issues stand out as particularly sensitive: Access to asylum and responsibility for refugee protection. The prevailing view, supported by UNHCR and others, is that responsibility for the care of asylum seekers and the determination of their claims falls on the state within whose jurisdiction the claim is made. However, the possibility to shift that responsibility to another state through inter-state cooperation or unilateral mechanisms undertaken territorially as well as abroad has been a matter of great interest to EU Member States and institutions. Initiatives adopted so far challenge the prevailing view and have the potential to undermine compliance with international refugee and human rights law.

This note reviews EU action in the field by reference to the relevant legal standards and best practices developed by UNHCR, focusing on the specific problems of climate refugees and access to international protection, evaluating the inconsistencies between the internal and external dimension of asylum policy. Some recommendations for the European Parliament are formulated at the end, including on action in relation to readmission agreements, Frontex engagement rules in maritime operations, Regional Protection Programmes, and resettlement.

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Executive Summary

Legal framework: International and regional instruments

There are two strands of international law providing for international protection: international refugee law and international human rights law, in accordance with which EU asylum law must be designed and implemented pursuant to Article 78 TFEU. The role of UNHCR as the guardian of the 1951 Convention and other instruments of refugee protection is highlighted in this context.

This international framework is complemented with regional instruments. The most important are the European Convention on Human Rights, the EU Charter of Fundamental Rights, the African Convention on Human and Peoples' Rights, the African Convention on Refugees, and the American Convention on Human Rights.

Main challenges: Jurisdiction, responsibility and access to asylum

Against this background, the main challenge currently facing international protection systems is the definition and effects of the concept of jurisdiction, as it constitutes the trigger of State responsibility. This problem plays out in a variety of areas and ways:

1. States are reluctant to accept responsibility for providing international protection when they engage in extraterritorial action. Mechanisms for border and migration control denying jurisdiction have multiplied in recent decades, from simply acting on the high seas outside national territorial waters, to concluding agreements with other countries placing responsibility on them for the care and protection of asylum seekers.
2. In the EU, the 'integrated border management' system together with the Global Approach to Migration constitute the main strategies through which migratory flows are administered. However, while controls are implemented inland as well as abroad, there has been no full recognition of the extraterritorial applicability of the rights of refugees and migrants. These measures obstruct access to international protection and entail a high risk of *refoulement*.

The emergence of new categories of displaced persons poses a challenge to international protection systems and access to asylum by those concerned. The specific problems of 'climate refugees' have so far been addressed by the international community in piecemeal fashion. There is, however, a need for a comprehensive response, looking at the central elements of the problem and how it intersects with international protection obligations generally. Concerted action at global level in this and related areas may be obstructed by the lack of a harmonious approach to refugee protection. In particular, there are states

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without refugee laws or which have not ratified any international instruments regarding international protection. Cooperation with these states should be avoided until they fully comply with international standards. As this includes most of the States on the southern shores of the Mediterranean, the point is of particular relevance for the EU, intersecting with the issues of jurisdiction and responsibility.

In all these different contexts, Member States may need to accept that asylum within the EU is the only viable option if international obligations are to be upheld.

Best practices: The gap between UNCHR guidelines and EU standards

There are problems with the standards promoted by the UNHCR and the current state of the EU counterparts. The source of specific problems are in the gap between the UNHCR guidelines on ‘accelerated procedures’ and ‘safe third countries’, and the EU standards in the procedures directive as these mechanisms translate the control rationale underlying the border and migration policies to the realm of asylum with the potential to frustrate its protection objective. In this regard there is insufficient EU attention to UNHCR recommendations.

The internal and external dimension of asylum: Consistency issues

A close review of EU policy in the area of asylum and the coherence between its internal and external policies reveals that the main objective of the Common European Asylum System (CEAS) is to guarantee a minimum level of international protection in all Member States. On the other hand, there is a very prominent focus on the prevention of abuse and irregular movements of refugees and no legal route of entry for asylum purposes in the EU. As a result, while the CEAS pursues an overall protection goal, the system is rendered inaccessible to its addressees, either through indiscriminate border and migration controls deployed extraterritorially that block prospective beneficiaries *en route* or through the operation of procedural devices, such as the ‘safe third country’ notion, that push responsibility away from the Member States.

This is the context in which The Hague Programme launched ‘the external dimension of asylum’, with a view to alleviate the problem of access to international protection. Against this background the Joint Resettlement Programme, Regional Protection Programmes and offshore processing plans all focus on the actions to move asylum obligations elsewhere. Our conclusion is that, because these mechanisms draw heavily on border and migration control preoccupations, their results have been unsatisfactory so far. The underlying inconsistencies between the EU’s internal and external action, generally, and between the internal and external dimension of asylum policy, in particular, become apparent.

Recommendations

In light of these difficulties, we formulate several recommendations, including a number of concrete proposals for the European Parliament, as ways to solve the problems of access to asylum and coherence between internal and external action:

- In the design and administration of Regional Protection Programmes the necessities and capacities of the targeted states hosting large refugee populations should be taken into account in a spirit of shared responsibility. Channels for direct consultation could be opened by the European Parliament, e.g. through parliamentary delegation visits.
- The European Parliament could also play a crucial role in improving the Resettlement programme during the next round of consultations for resettlement priorities or once the European Commission launches its Proposal on how to improve the EU Resettlement Programme in 2014. In particular, the activation of the program vis-à-vis Syrian refugees would enhance the credibility of the EU’s joint response to the ongoing conflict in Syria.
- Once the European Commission presents its Communication on new approaches concerning access to asylum procedures targeting main transit countries, announced in the Stockholm Action Plan, the

European Parliament shall make sure any such approaches are adopted in conformity with fundamental rights and international protection obligations.

- The European Parliament should evaluate the extent to which any EU sanctioned policies on safe third countries are consistent with those states' full implementation of international protection standards. In so doing, when negotiating readmission agreements, the Parliament should make sure detailed 'refugee clauses' are introduced to design the terms in which access to determination procedures and durable solutions are ensured in each individual case.
- The EU shall also engage consistently with spontaneous arrivals. The incorporation of protection-sensitive elements, including effective remedies, into the system of border and migration control is essential. The European Parliament has the opportunity to ensure that the new proposal for a Regulation on rules for the surveillance of the external sea borders in the context of Frontex operations (COM(2013) 197) meets the relevant standards.

1. The current international law framework

1.1 International obligations

The modern framework of international obligations in respect of persons in need of international protection dates from the end of WWII. The international conventions were revised and updated as a result of the tremendous pressures which had arisen from the 1930s onwards in Europe.¹ The cornerstone of the international refugee protection system is the UN Convention relating to the status of Refugees 1951 and its 1967 Protocol (The Refugee Convention). The key elements of the Refugee Convention are first, that it defines who is a refugee as a person outside his or her country of nationality or habitual residence with a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. Secondly, it requires all contracting states to respect the principle of non-refoulement: no person who claims to be a refugee must be returned to the borders of the state where he or she fears persecution. Thus all contracting states must consider and assess an application for refugee status and protection before any action is taken to expel a person to his or her country of origin or to any intermediate country where there is a substantial risk that he or she will suffer onwards expulsion to persecution. Thirdly it sets out the rights and obligations of state parties in respect of the treatment of refugees.

The Refugee Convention permits contracting states to apply an exclusion provision where the refugee has committed particularly serious (and circumscribed) crimes or is guilty of acts contrary to the principles of the UN.² All EU Member States are signatories of the Refugee Convention. The original Refugee Convention had a temporal and territorial limitation – it applied only in respect of events in Europe before 1 January 1951. The 1967 Protocol lifted the two limitations – territorial and temporal. There are states, such as Turkey, which are signatories to the Refugee Convention but not the Protocol and vice versa, like the USA.

Article 78 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union's common policy on asylum must be in accordance with the Refugee Convention and other relevant treaties.

Institutionally, the office of the UN High Commissioner for Refugees (UNHCR) is responsible to report to the UN on the application of the Refugee Convention (Article 35(2)(b)). All contracting states are under a duty of cooperation with the UNHCR in the exercise of its functions, and in particular facilitate its duty of supervising the application of the provisions of this Convention (Article 35(1)). Declaration 17 annexed to the EC Treaty (Amsterdam version) provides that UNHCR shall be consulted on all matters relating to asylum, the only institution with such an explicit consultative role under the Treaty framework on asylum. UNHCR advises the EU institutions and Member States on their international obligations and in particular, provides recommendations, legal positions and other input to legislative and policy proposals in the course of their preparation and negotiation in the EU framework, aimed at ensuring consistency with international refugee law.³ UNHCR's Bureau for Europe, based in Brussels, takes primary responsibility for providing guidance on the application of the Refugee Convention in the context of the EU. Its role is wider than merely

¹ GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd Ed., (Oxford: OUP, 2007).

² According to *the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees* HCR/IP/4/Eng/Rev 1 the United Nations High Commissioner for Refugees clarifies that the purposes and principles of the UN as referred to in Article 1 Refugee Convention are those set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. Also see M Zard, 'Exclusion, terrorism and the Refugee Convention', (2002) 13 *FMR* 32.

³ For instance, it has expressed significant reservations in respect of the EU Qualification Directive and even more so in respect of the Procedures Directive (see Section 2 below). In November 2012, the UNHCR issued a detailed document calling on the EU not to permit law enforcement access to the EURODAC database of fingerprints of asylum seekers due to its foreseeable impact on refugee rights: <http://www.unhcr.org/50adf9749.html> (last visited 18 Jan 2013). Nonetheless, the European Parliament voted in favour of a proposal to permit such access in December 2012.

commenting on draft legislation. It has also included in-depth research on the application of parts of the CEAS, engagement in resettlement approaches and involvement in policies pertaining to the external dimension of asylum policy.⁴

The supranational dispute resolution mechanism in respect of the Refugee Convention contained in Article 38 is available only to states (and international organisations) and has never been used. The interpretation of the Refugee Convention as regards disputes between individuals and states vests exclusively in national courts, while UNHCR may provide advice and assistance where possible and intervene where appropriate in national and supranational proceedings as a third party or through the submission of *amicus curiae* briefs. UNHCR has published guidelines on the Refugee Convention and assistance to interpretation of state obligations.

The UN's International Covenant on Civil and Political Rights 1966 (ICCPR) includes at Article 7 a prohibition on torture or cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee, the Treaty Body responsible for the supervision of the ICCPR and competent to receive petitions regarding its application, has interpreted this provision as including a prohibition on sending anyone to a country where there is a substantial risk that he or she would suffer treatment contrary to Article 7. In the context of petitions submitted to the Human Rights Committee, many relate to people who seek international protection and dispute a state's decision to expel them to a country where they claim a fear of torture or other treatment contrary to Article 7.⁵ However, countries which have ratified the (First) Optional Protocol of 1976 recognise the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the ICCPR. This is of course subject also to any reservations or declarations which the country may have made.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT) includes at Article 3 a prohibition on the expulsion, return ("refoulement") or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Article 22 UNCAT provides that states parties may recognise the jurisdiction of the UN Committee against Torture to receive petitions of complaint from individuals against them as regards obligations in the Convention. Many of the complaints which come to the UN Committee against Torture relate to people claiming international protection whose applications have been refused by the relevant state.

Both the ICCPR and the UNCAT have been signed and ratified by all EU Member States. A minority of EU Member States however have ratified the optional protocol to the ICCPR or made a notification under Article 22 UNCAT. Neither convention permits any exceptions or exclusions to the duty to prevent *refoulement*. As soon as an individual is determined to be at risk of ill-treatment in the country of origin (or habitual residence) he is entitled to protection even where there is a question of criminal activities or national security risks.

1.2 The regional framework

There has been a proliferation of regional human rights instruments which include provisions on international protection. In Africa, the African Charter of Human and People's Rights 1981 provides at Article 12(3) that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. The African Commission on Human and People's Rights is responsible for the supervision of the Charter. The African Court on

⁴ For all UNHCR analyses and recommendations refer to www.unhcr.org/eu. (All hyperlinks in this study were last accessed on 20 March 2013)

⁵ T Meron, 'Extraterritoriality of Human Rights Treaties', (1995) 89 *AJIL* 78.

Human and Peoples' Rights complements and reinforces the functions of the African Commission. The relevant Protocol on this court has been ratified by 26 states of which only six have made a declaration that allows individuals to file complaints. The African Union (formerly the Organization of African Unity) is the competent regional organisation of the Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and Article 2(2) of its own convention requires that no person be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return to or to remain in a territory where his life, physical integrity or liberty would be threatened.

In the Americas, the American Convention on Human Rights 1969 provides at Article 22(8) that in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions. The Inter-American Commission on Human Rights is responsible for receiving petitions regarding violations of the rights in the convention by contracting states. The Inter-American Court of Human Rights is charged with interpreting the rights contained in the Convention (including relating to asylum) and may receive petitions from individuals provided that the respondent state has accepted jurisdiction under Article 62 ACHR.

There is no equivalent development in Asia in terms of treaties not least as a number of Asian states are not parties to the Refugee Convention. The ASEAN Human Rights Declaration, nonetheless, includes at Principles 14 and 16 first a prohibition on torture and secondly a right to seek and receive asylum in accordance with national law and international agreements. The ASEAN Intergovernmental Commission on Human Rights has a mandate in its terms of reference to promote the full implementation of ASEAN instruments related to human rights. In addition, there are examples of refugee protection through national law in the region.⁶

In Europe, there are two main regional human rights instruments. The first is the European Convention on Human Rights 1950 (ECHR). This convention is part of the Council of Europe system, ratified by all Council of Europe member states. The TEU foresees the accession of the EU to the ECHR in Article 6(2). Article 3 ECHR prohibits torture, inhuman or degrading treatment or punishment and has been interpreted by the European Court of Human Rights as including a prohibition on being sent to a country where there is a substantial risk that such treatment will occur.⁷

The second instrument is the EU Charter of Fundamental Rights which forms part of the European Union legal structure. Article 4 prohibits ill-treatment in absolute terms, Article 18 provides a right to asylum and Article 19 contains a prohibition on return to a country where there is a substantial risk of the death penalty, torture, inhuman or degrading treatment or punishment. Since the entry into force of the Lisbon Treaty, the Charter is binding on both the EU institutions and the Member States when they are implementing EU law. The Court of Justice of the European Union (CJEU) is charged with ensuring the correct interpretation and application of the Charter, while remedies sufficient to ensure the effective protection of Charter rights must be provided by Member States at national level (Article 19(1) TEU). The CJEU fulfils its functions through a variety of procedures. On the one hand, it may receive a request from a national court for a preliminary ruling on the correct interpretation of the Charter (Article 267 TFEU). On the other hand, the Court scrutinises the legality of acts of the EU institutions or the Member States in application of their EU law obligations. Direct actions may be brought by the EU institutions and Member States (Articles 263-265 TFEU), in particular for the annulment of a legal act considered incompatible with fundamental rights (Article 263 TFEU). Private applicants may also take proceedings through this route, but there are very strict

⁶ CR Abrar and S Malik (eds.), *Towards National Refugee Law in South Asia*, (Dhaka: University of Dhaka Press, 2003).

⁷ N Mole and C Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files Vol. 9, (Strasbourg, Council of Europe, 2010).

standing criteria in respect of individuals and other interested parties such as international organisations (including UNHCR) or civil society bodies for them to file a complaint.⁸ One result is that UNHCR is not able, in practice, to take direct action or intervene as a third party in a preliminary reference proceeding before the Luxembourg Court, notwithstanding the organisation's mandate under international law which is specifically acknowledged in EU law. UNHCR can only appear in a proceeding before the Court of Justice if it has been joined as a third party in the case at national level from which the preliminary reference has emerged. The same constraint applies to other interested non-state stakeholders which play an active role in judicial proceedings in many Member States. The EU's Fundamental Rights Agency (FRA) is, in turn, charged with informing and advising the EU institutions and the Member States on fundamental rights, but it has no specifically privileged access to the CJEU.

1.3 The key issue: non-refoulement

In the international and regional human rights instruments there is substantial consistency in duties towards those in need of international protection. With the exception of the Refugee Convention itself, all the other conventions do not permit exceptions to the protection obligation once identified.⁹ Most problematic, as we will consider in the later chapters, is the issue of access to protection. While we will deal with this in detail below, we take the opportunity here to introduce the central problem: Member States consider that the *non-refoulement* obligation applies only to those persons who fulfil two criteria: (a) they have arrived at the border of the state where they seek protection (or are inside it); (b) there is no safe third country to which they can be sent. Both of these criteria are fundamentally territorial and they have led to very unfortunate practices in the European region where people seeking international protection are left to die in international waters because no state wants to take on responsibility for their protection claims.¹⁰ Or, they have led to people with international protection claims being pushed back to unsafe countries by the authorities of EU states.¹¹ The legal issue is one of the scope of application of international human rights obligations, the result for people is their return to torture, persecution and death.

2. The main challenge to the System of International Protection

2.1 Access to international protection

By far, the most important challenge facing asylum systems today is that of access to protection by those entitled to it.¹² The problem originates in differing – if not opposing – understandings of the notion of international responsibility among richer and poorer States around the world.¹³ Countries in the North – including those that are party to the Refugee Convention and related instruments of human rights protection – usually deny responsibility for refugees who do not arrive ‘directly’ at their borders and present themselves

⁸ CJEU, Case 25/62 *Plaumann v Commission* [1963] ECR 199.

⁹ For these purposes the CEAS is excluded.

¹⁰ T Strik, *Lives lost in the Mediterranean Sea: who is responsible?*, Parliamentary Assembly, Council of Europe, 29 Mar. 2012.

¹¹ V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’, (2011) 23 *IJRL* 174.

¹² For an overview, see T Gammeltoft-Hansen, *Access to Asylum*, (Cambridge: CUP, 2011); M den Heijer, *Europe and Extraterritorial Asylum*, (Oxford: Hart, 2012); and V Moreno-Lax, ‘Must EU Borders have Doors for Refugees?’, (2008) 10 *EJML* 315.

¹³ For a succinct presentation of the problem and possible solutions, see J-F Durieux, ‘Protection Where? – or When?: First asylum, deflection policies and the significance of time’, (2009) 21 *IJRL* 75.

‘without delay’ to the relevant authorities.¹⁴ Responsibility is conceived of in a very restrictive way. As a result, mechanisms for shifting away or denying responsibility have multiplied in recent decades. Developed countries have introduced a net of extraterritorial measures aimed at controlling migration flows at all their stages, from the moment in which the person attempts to leave his or her country of origin up to his or her arrival to the external frontiers of the country of destination concerned. Measures of *non-entrée* go from simply acting on the high seas outside national territorial waters, to settling agreements with other countries placing responsibility on them for the care and protection of asylum seekers.¹⁵ Outside the EU, some states such as Australia, Canada and the USA have excised parts of their sovereign territory for the purposes of eluding responsibility for asylum claims.¹⁶

2.2 The European Union context

In the EU, following the communitarisation of the Schengen *acquis*, the notion of ‘integrated border management’ has emerged, including a ‘four-tier access control model’.¹⁷ The system comprises measures to be implemented in third countries, cooperation with neighbouring states, border surveillance, control within the Union, and swift expulsion of those without adequate documentation.¹⁸ Accordingly, uniform visas¹⁹ and carrier sanctions²⁰ have been introduced to secure pre-entry checks before departure – Immigration liaison officers (ILOs) in regions of origin and transit assist in this task.²¹ Joint patrols survey the external borders of the Union under the auspices of the Frontex agency, both in territorial waters and on the high seas.²² On arrival at the frontier, migrants are subject to ‘thorough checks’, in accordance with the Schengen Borders Code.²³ If an application for international protection is lodged, the Dublin II Regulation establishes criteria for determining the State responsible for its examination. Through its application, such responsibility may,

¹⁴ This approach is inspired by the wording of Art 31 of the Refugee Convention. For a critic of this reading as being legally unsound, see A Hurwitz, *The Collective Responsibility of States to Protect Refugees*, (Oxford: OUP, 2009).

¹⁵ For an overview, see JC Hathaway, ‘The Emerging Politics of *Non-Entrée*’, (1992) 91 *Refugees* 40.

¹⁶ See contributions to B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control*, (Leiden/Boston: Brill, 2010).

¹⁷ EU Finnish Presidency, Council Conclusions of 4-5 Dec. 2006, Press Release 15801/06, at 27.

¹⁸ *Ibid.* See also The Hague Programme, [2005] OJ C 53/1, para. 1.7.2.

¹⁹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2001] OJ L 81/1 (as amended); and Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, [2009] OJ L 243/1.

²⁰ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, [2001] OJ L 187/45. This instrument introduces sanctions on carriers for bringing to the EU persons who do not have the necessary documents to be admitted to the territory. These take the form of economic fines, the obligation to return the migrant to a country to which he may be admitted and related costs, and, in the most grave cases, the detention and seizure of the means of transport used or the withdrawal of the commercial licence.

²¹ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, [2004] OJ L 64/1 (as amended).

²² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1 (as amended); Council Decision (2010/252/EU) of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2010] OJ L 111/20 (in effect until replacement).

²³ Art. 7(3), Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1 (as amended).

however, be diverted towards ‘safe third countries’ outside the EU,²⁴ even before the merits of the application have been considered.²⁵ Eventually, those who do not fulfil the entry criteria or whose asylum applications have been rejected are removed to third countries on the basis of readmission agreements.²⁶ This ring of measures intends to follow the entire cycle of migrant movements, controlling every step they take at every point in their way towards the EU.

The EU’s *Global Approach to Migration*, the European Commission’s policy document on migration, is based on the same vision.²⁷ The strategy aims to tackle migration comprehensively in cooperation with third countries of origin and transit, assisting them to increase their capacity to manage migration and readmission; resolve refugee crises independently; build their border control systems; and prevent unauthorised movement. Initially, it exclusively addressed Africa and the Mediterranean area,²⁸ but it has subsequently been extended to other regions of the world.²⁹ The ‘legal’ dimension of migration was only introduced afterwards, to enhance the bargaining power of the European Commission vis-à-vis the targeted states, on the realisation that securing cooperation from these countries required mutual benefits for each partner.³⁰

Nonetheless, of the three main goals the approach pursues, i.e. ‘promoting mobility and legal migration, optimising the link between migration and development, and preventing and combating illegal immigration’,³¹ the programme places substantial importance on the fight against undesired movement. The externalisation of migration control under this scheme is underpinned by flows of surveillance equipment, funds and personnel from European to African countries.

The European Commission has recently proposed that asylum be given a more prominent role, in an attempt to provide for a more balanced system. International protection is supposed to constitute one of the ‘four

²⁴ ‘Safe third country’ is a notion emerged in the 80s and 90s in several EU Member States to denote third countries in which it could generally be presumed not to be a risk of persecution or *refoulement*, where asylum applicants could be returned on a quasi-automatic basis. The concept has been used as a procedural device, allowing State authorities to refuse applications in accelerated procedures as ‘unfounded’ and ‘inadmissible’ and justifying immediate expulsion. The mechanism, as it entails either a very cursory or no examination of the merits of the case and reduced procedural guarantees, has proven to be defective. The CJEU has recently corroborated Strasbourg case law rejecting non-rebuttable presumptions of safety and removals to third countries without a prior comprehensive individual review. See Joined cases C-411/10 and C-493/10 *NS and ME*, judgment of 21 Dec. 2011. For further discussion see Section 4 below.

²⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1 (Dublin II Regulation). See, in particular, art. 3(3), sanctioning the ‘safe third country’ notion. The hierarchy of criteria for allocation of responsibility within the EU are listed in Chap III. For a critique of the effects of the Regulation see The Dublin II Regulation. A UNHCR Discussion Paper (Apr. 2006), available at: <http://www.unhcr.org/refworld/docid/4445fe344.html>.

²⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, [2008] OJ L 348/98.

²⁷ Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005) 621 final, 30 Nov. 2005.

²⁸ Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Council doc. 15744/05, 13 Dec. 2005.

²⁹ Draft Council Conclusions on Extending and Enhancing the Global Approach to Migration, Council doc. 10746/07, 13 Jun. 2007; and Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM(2007) 247 final, 16 May 2007.

³⁰ The Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final, 30 Nov. 2006. See also Strengthening the Global Approach to Migration: Increasing coordination, coherence and synergies, COM(2008) 611 final, 8 Oct. 2008.

³¹ The Stockholm Programme, para. 6.1.1.

pillars’ of the new *Global Approach to Migration and Mobility*,³² so that access to asylum can be guaranteed ‘at the earliest possible stage’ – preferably within the region of origin.³³ Integrated Border Management and the Global Approach to Migration, combining territorial and extraterritorial measures of migration management and border surveillance constitute the main strategies through which the movement of third-country nationals towards the EU is being controlled.

There are, however, two problems in this context. Whereas most controls are implemented extraterritorially, there has been very limited recognition that refugee and migrant rights – and parallel state obligations – may equally have extraterritorial applicability. Similarly, EU Member States have also failed sufficiently to recognise the special character of asylum seekers and refugees within mixed flows, without differentiating between voluntary and forcibly displaced and disregarding entitlements to international protection. In spite of formal recognition that border controls shall respect fundamental rights and the principle of *non-refoulement* in political declarations and policy documents, there has been no meaningful incorporation of this in legal texts.

The practical consequence of this ambiguity is that access to international protection in the EU has been made dependant ‘not on the refugee’s need for protection, but on his or her own ability to enter clandestinely the territory of [a Member State]’.³⁴ Maritime interdiction, visa requirements and carrier sanctions have become ‘the most explicit blocking mechanism for asylum flows’.³⁵ In fact, measures of ‘remote control’ leave refugees with no alternative but to have recourse to irregular means of migration to reach a country where there is the possibility of safety.³⁶ While it is true that ‘States enjoy an undeniable sovereign right to control aliens’ entry into and residence in their territory’,³⁷ it is no less certain that such a right is not absolute. Refugee law and human rights impose limits thereon.

2.3 The concept of jurisdiction

The concept of ‘jurisdiction’, inscribed in a number of the applicable instruments,³⁸ is pivotal in the articulation of this understanding. The notion has been defined as a ‘threshold criterion’ determining the applicability of the provision(s) concerned.³⁹ Although – in accordance with the prevailing position in international law – it has generally been territorially framed,⁴⁰ ‘in exceptional cases’ it is accepted that ‘acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction’.⁴¹

³² The Global Approach to Migration and Mobility, COM(2011) 743 final, 18 Nov. 2011, at 5-7.

³³ The Hague Programme, para. 1.6.1.

³⁴ *Mutatis mutandis*, UNHCR, ‘Brief as Amicus Curiae’, filed on 21 Dec. 1992, in *McNary v. Haitian Centers Council Inc.*, US Supreme Court Case No. 92-344, para. 18.

³⁵ J Morrison and B Crosland, ‘Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy’, *New Issues in Refugee Research*, Working Paper No 39, (Geneva: UNHCR, 2001).

³⁶ ECRE, *Defending Refugees’ Access to Protection in Europe*, 14 Dec. 2007, retrievable from: <http://www.ecre.org/topics/areas-of-work/access-to-europe/95-defending-refugees-access-to-protection-in-europe.html>.

³⁷ ECtHR, *Saadi v UK*, Appl. No. 13229/03, 29 Jan. 2008, para. 64 (references omitted).

³⁸ Art. 1 ECHR; Art. 2 ICCPR. In the cases of the Refugee Convention and the CAT, each provision is subject to a specific criterion, such as being ‘present’ or ‘legally staying’ in the State concerned. Non-refoulement prohibitions within these instruments are, however, free of any qualification and thus understood to follow the general theory on ‘jurisdiction’. See below for references to case law.

³⁹ ECtHR, *Al-Skeini v UK*, Appl. No. 55721/07, 7 Jul. 2011, para. 130.

⁴⁰ ECtHR, *Bankovic v Belgium* (Dec.), Appl. No. 52207/99, 12 Dec. 2001, para. 73.

⁴¹ ECtHR, *Hirsi v Italy*, Application No 27765/09, 23 Feb. 2012, paras. 71-2.

When States project their actions beyond their territorial boundaries, 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 territory⁴² or over persons abroad⁴³ – exercised either *de jure* or *de facto*, or through a combination of both – constitutes the trigger of State responsibility.⁴⁴ The principle underlying this construction is to prevent a double standard 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’.⁴⁵

Therefore, when undertaking extraterritorial action to combat irregular movement, the Union and its Member States are under the obligation of taking account of the respective entitlements of each individual affected. In such situations, the persons concerned are brought under the jurisdiction of the EU Member States with the consequence that human rights become applicable and must be duly 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*’.⁴⁶ Finding the right balance between control and protection constitutes the main challenge for the EU and its Members States.

3. The specific problems of climate refugees and countries without asylum laws

The two subjects at issue here present quite different problems for the international community as regards the movement of people. We will examine them separately, but will take this opportunity to make a few comments on the points of conjunction. Both issues raise questions of territoriality and how to understand international protection obligations. While climate refugees may not actually fulfil the legal definition of a refugee (Refugee Convention) they may well need a place to live beyond their state. To what extent should they be entitled to claim a right to remain on the territory of an EU state or to what extent should an EU state be entitled to expel them to a third state with which there may be some agreement? This issue has similarities, in law at least, with the question which has troubled the CEAS regarding Palestinian refugees and whether the possibility of UNRWA protection is sufficient to displace a Member State’s duty to provide international protection. Can Member States make agreements with third countries close to areas suffering climatic degradation to provide homes for the displaced such that if any of those displaced people turn up in the EU they can be sent to a third country? The second issue regarding countries without asylum laws raises a similar territorial issue. When Member States seek to send people seeking international protection to a country through which they transited on the way to the EU does it matter that the country has no asylum

⁴² ECtHR, *Loizidou v Turkey*, Appl. No. 15318/89, 23 Mar. 1995; *Cyprus v Turkey*, Appl. No. 25781/94, 10 May 2001; HRC, General Comment No. 31 (2004); CAT, General Comment No. 2 (2007).

⁴³ 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; HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29 Jul. 1981; *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 Jul. 1981; *Munaf v Romania*, Comm. No. 1539/2006, 30 Jul. 2009; 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; General Comment No. 2 (2007); *Sonko v Spain*, Comm. No. 368/2008, 25 Nov. 2011. 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 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Gen. List No. 131, para. 111.

⁴⁴ ECtHR, *Hirsi v Italy*, Application No 27765/09, 23 Feb. 2012, para. 75.

⁴⁵ HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29 Jul. 1981, para. 12.1-12.3. The principle has been explicitly ratified by the ECtHR. See, for instance, *Issa v Turkey*, Appl. No. 31821/96, 16 Nov. 2004, para 71; and *Al-Saadoon and Mufdhi v UK* (Dec.), Appl. No. 61490/08, 30 Jun. 2009, para 85.

⁴⁶ 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Council doc. 6975/10, 1 Mar. 2010, para. e.

law? The reason for this question is that if a country has no asylum law (such as Morocco) then to send people seeking international protection to that country will mean effectively sending them to a place where, by law, they cannot obtain asylum as the status does not exist. In the case of both questions, the issue at the heart of the matter is where protection must be provided and by whom.

3.1 Climate refugees

The term ‘climate refugee’ is most uncertain in law and practice.⁴⁷ While environmental migration is not a new phenomenon, the acceleration of climate change and its impact on habitation is a matter of substantial concern likely to increase the volume of cross-border movement over time. The former UN representative on the Human Rights of Internally Displaced Persons, Professor Walter Kälin, undertook substantial work on the issue during his mandate at the UN ending in 2010 and subsequently for UNHCR. Together with Nina Schrepfer, he has produced the most comprehensive work on the subject to date.⁴⁸ They start with the definition of climate change adopted by the UN Framework Convention on Climate Change of 1992,⁴⁹ as augmented by the four key findings of the Intergovernmental Panel on Climate Change relevant to population movement: (a) reduction of available water; (b) decreases in crop yields; (c) risk of floods, storms and coastal flooding; (d) negative overall impacts on health (especially for the poor, elderly, young and marginalised). Kälin and Schrepfer highlight that one of the important issues regarding forced migration in the face of these risks is that of causality. Climate change may not of itself trigger movement of people. It is rare that there is a direct clausal link between climate change and movement, it is climate specific events (such as a particular storm) which may cause movement but the link of the specific storm with climate change is not necessarily easy. Even in circumstances where there is a direct causal link, such as rising sea levels causing small islands to become submerged, the movement of people is often the result of multiple causes. Thus, the relationship of climate induced change and movement of people can be seen from two very different perspectives – first the slow onset of climate change effects and secondly immediate disasters such as storms.

There is an important temporal element to climate induced migration – if the event is one of fairly short duration (such as the consequences of a storm) – to what extent should people who flee from the resulting devastation be obliged to return once the danger has passed? Kälin and Schrepfer identify three kinds of impediments to forced return of people in such circumstances: (a) legal impediments to return after the end of an environmental crisis under human rights law – whether in forcing return, the host state would expose the individual to a substantial risk of torture, inhuman or degrading treatment or punishment; (b) factual impediments – there is no means of sending people to the country (e.g. no airports, roads etc); (c) humanitarian impediments where it is possible to return people and there is no human rights obstacle but people should not be sent back on compassionate and humanitarian grounds. According to Kälin and Schrepfer, so long as any one of the three situations exists then the person should be classified as forcibly displaced and in need of protection and assistance from another state.

Kälin and Schrepfer identify a number of obstacles to the engagement of migration experts in discussion on climate change which result in the inadequacies of responses where the two issues intersect. The development of a new framework for movement of people in the face of climate change appears unlikely, according to them. This is also the conclusion which Professor Stephen Castles comes to in the concluding

⁴⁷ J McAdam, *Climate Change, Forced Migration, and International Law*, (Oxford: OUP, 2012).

⁴⁸ W Kälin and N Schrepfer, *Protection of People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, (UNHCR, Feb. 2012).

⁴⁹ ‘A change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to other natural climate variability that has been observed over comparable time periods’.

chapter of McAdam's book.⁵⁰ If we are then to understand the challenge of climate induced migration, this will have to take place within the context of the existing international norms. International refugee law is among the least well placed to comprehend and provide assistance to people crossing borders because of climate change. Of this general category, the group best placed to fit into the refugee category will be those who have been internally displaced first, but then subjected to persecution, torture, inhuman or degrading treatment or punishment for doing so and, as a result, flee across international borders. However, in this kind of case, the causality between the flight and the right to international protection relates not to the change of physical climate, but to the actions of state or non-state actors in seeking to exclude those fleeing internally thus resulting in them fleeing beyond the borders of the state.

3.2 Countries without asylum laws

The challenge of this category of countries is that where there is no asylum law there is no certainty that someone in need of international protection will be able to obtain it. In the absence of a law specifying the conditions for the grant of asylum, any individual in need of asylum will be at the mercy of the official to whom he or she makes the plea for protection. This does not mean that these people will not be protected. In many cases, such as in Libya or Tunisia or elsewhere, officials may be generous to some groups if they see fit. The problem is that the rule of law does not regulate the subject. Where there is no asylum law in a state, that state, by definition, cannot be safe for someone in need of international protection because the person will have no right in law to claim it. In such circumstances, it would thwart the objective of the Refugee Convention to seek to send someone in need of international protection to such country on the basis that he or she could obtain protection in such a country.

The core issue here is one of effectiveness of rights and legal certainty. Where there is no legal provision for an individual right because the subject matter is not covered by law, then the individual cannot be guaranteed international protection as a matter of law. This is a different problem from the one where there is a law on asylum but there are serious problems with its implementation and well documented examples of unlawful refoulement by authorities or tolerated by state authorities and carried out by private actors.⁵¹ In the case of states with no asylum law, even the first and most basic precondition for international protection is not fulfilled, that is to say the existence of a law on asylum.

The EU needs to support the efforts of UNHCR to assist countries to ratify the Refugee Convention and related obligations, establish fully compliant refugee protection systems. However, these efforts may be in vain if the countries involved suspect or know that the EU's engagement is primarily self-serving – to assist the expulsion of asylum seeker to their states which can now be classified as 'safe' third countries. Concerned about being used as the 'dumping-ground' for the EU's irregular migrants, some third states are reluctant even to accept EU financial support and undertake strenuous efforts to build effective asylum and protection systems and mechanisms for fear that they will subsequently be pressured to prevent asylum-seekers from moving onwards towards Europe.

3.3 The way forward

In respect of both the problems of climate change related flight and the situation of people in need of international protection coming to the EU through countries without asylum laws, there is one common obligation: EU states need to accept that international protection within the EU will, in almost all cases, be the only reasonable option consistent with the international obligations of the Member States. The temptation

⁵⁰ J McAdam, *Climate Change, Forced Migration, and International Law*, at 239-246.

⁵¹ In these cases, the EU has an important role in exercising pressure on state authorities to improve their practices and comply with their international commitments.

to seek to displace the duty to provide international protection within the EU by entering into agreements with other countries either to readmit such persons or to take them in the context of resettlement should be resisted. The reasons for this are simple. The first is that sending people in need of international protection to third countries which do not have asylum laws in the context of readmission agreements will breach the Member States international human rights obligations. The second is that as a wealthy and secure part of the world, housing a small minority of the world's displaced persons, it will be difficult to convince the international community that other states should accept responsibility for a number of those who have already engaged the EU's protection obligations. Moreover, it is unlikely that third states willing to take displaced persons in the context of resettlement programmes will consider that those people who have managed to reach the EU are in particularly difficult circumstances. Instead, countries with generous resettlement programmes tend to focus on providing assistance to those closest to the geographical area of the problems which have caused the flight and those who are, accordingly, most vulnerable. It is not unreasonable to expect the EU Member States, with all the resources and capacities at their disposal, to provide international protection to those in need who fall squarely within the scope of those to whom the EU Member States owe protection under international law.

4. Best practices for refugee status determination and protection around the world and corresponding EU standards

This section will review best practices not of specific countries but as distilled and consolidated in universally applicable UNHCR guidelines – which are not strictly binding but cannot be completely disregarded by State Parties in light of Article 35 of the 1951 Convention. We will particularly focus on EU practices in relation to 'safe third countries' and 'accelerated procedures' as they constitute the most contested devices – on account of their impact on access to asylum and responsibility for protection – on which UNHCR has issued guidelines. This will illustrate the existing gap between UNHCR standards and what CEAS instruments codify.

The Refugee Convention does not specify the different elements of the refugee definition, nor does it regulate the procedures necessary for Contracting States to implement its provisions. There is, therefore, no direction as to how refugee status or a risk of *refoulement* should be established in practice.

In response to a call for guidance from different countries, the UNHCR elaborated a *Handbook on Procedures* with instructions on status determination and procedural guarantees,⁵² which has been complemented through *Guidelines on international protection* in several areas.⁵³ The different elements of the refugee definition are discussed with the overall object and purpose of the 1951 Convention in mind, recommending a generous interpretation of the relevant concepts to ensure that international protection is accessible to those who need it.

The same applies to asylum procedures. According to the Executive Committee of the organisation (EXCOM), the duty to grant 'access to fair and effective procedures for determining status and protection needs' should be fully observed.⁵⁴ There has been an elaboration of what these conditions require. Several EXCOM Conclusions specify a series of minimum standards, including that asylum claimants – at the border

⁵² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), re-issued in Dec. 2011, HCR/IP/4/ENG/REV.3.

⁵³ Nine sets of guidelines have been adopted until Oct. 2012: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=4a27bad46&cid=49aea93ae2&keywords=RSDguidelines>.

⁵⁴ UNHCR EXCOM Conclusions No. 65 (1991), para. (o); No. 71 (1993), para. (i); No. 74 (1994), para. (i); No. 81 (1997), para. (h); No. 82 (1997), para. (d) (ii); No. 85 (1998), para. (p); No. 87 (1999), para. (j); No. 100 (2004), Preamble; and No. 103 (2005), para. (r). All Conclusions can be found in UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6th Ed., (Geneva: UNHCR, Jun. 2011).

or elsewhere – be referred to the competent authority; that their claims be heard by sufficiently qualified personnel; that guidance on the procedure as well as legal and linguistic assistance be provided; that access to UNHCR and relevant NGOs be ensured; and that authorisation to remain in the territory of the country concerned be guaranteed, pending a decision on the claim.⁵⁵

According to the organisation, special procedures may be introduced in exceptional circumstances. Cases involving ‘safe third countries’ or manifestly unfounded claims may be channelled through inadmissibility or accelerated procedures. However, these arrangements must meet the minimum guarantees outlined by the Executive Committee to ensure compliance with protection obligations.⁵⁶ Summary examinations and rejection at the border without full consideration of protection needs may lead to *refoulement* and deprive the right to seek asylum of any effect.⁵⁷

The EU has adopted relatively high standards of protection in relation to refugee qualification criteria,⁵⁸ harmonising conditions broadly in line with international rules and guidelines. In spite of severe criticism of a number of individual provisions, UNHCR seems to be moderately satisfied with the recast Qualification Directive of December 2011, taking it as a step forward in comparison with the previous instrument. However, UNHCR stresses that more is needed for the EU Member States to comply with their international obligations, in particular in relation to the definition of ‘actors of protection’, the notion of ‘particular social group’, the determination of ‘serious harm’, and the use of revocation, and recommends taking this into account when implementing the Directive in national law.⁵⁹

Representing the position of civil society, the European Council on Refugees and Exiles (ECRE), has also indicated a broad acceptance of the CEAS recast qualification criteria.⁶⁰ Consistent with the position adopted by UNHCR, ECRE is primarily concerned about practices and implementation in the Member States.

The situation in relation to asylum procedures is less favourable. Member States have introduced a plethora of mechanisms designed to combat abuse – and deny responsibility, which hinder access to fair and effective procedures. Four elements deserve particular attention: accelerated procedures; inadmissibility criteria; border procedures; and the ‘safe third country’ concept.

According to Article 23(3) of the Procedures Directive (PD),⁶¹ Member States may prioritise the examination of claims from applicants who have presented false documents, disregarding the fact that there is no legal

⁵⁵ UNHCR EXCOM Conclusions No. 8 (1977), para. (e); and No. 30 (1983), para. (e)(i). The content of these have been reproduced in the *Handbook*, paras. 192 ff. See also UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, (Geneva: UNHCR, 2 Sept. 2005), available at: www.unhcr.org/refworld/pdfid/432ae9204.pdf.

⁵⁶ UNHCR, *Global Consultations on International Protection – Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁵⁷ UNHCR EXCOM Conclusions No. 6 (1977), para. (c); No. 22 (1981), para. II.A.2; No. 81 (1997), para. (h); No. 82 (1997), para. (d)(iii); No. 85 (1998), para. (q).

⁵⁸ 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), [2011] OJ L 337/9.

⁵⁹ See UNHCR, *comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 Jul. 2010, available at: <http://www.unhcr.org/refworld/docid/4c503db52.html>.

⁶⁰ *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive*, Mar. 2010, retrievable from: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/148.html>.

⁶¹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13.

access for asylum seekers to EU territory and that refugees should not be penalised for their illegal entry or stay pursuant to Article 31 of the Refugee Convention. Acceleration may also apply to applicants from supposedly safe countries or arriving at the border or to transit zones, entailing reduced time-frames and leading, in practice, to semi-automatic detention and a deterioration of procedural safeguards.⁶²

Asylum claims from applicants coming from countries considered safe may be summarily rejected as unfounded and/or inadmissible. Indeed, following Article 25 PD, ‘Member States are not required to examine whether the applicant qualifies as a refugee’. The premise is reinforced by article 3(3) of the Dublin II Regulation, establishing that ‘Member State[s] ... retain a right ... to send an asylum seeker to a third country, in compliance with the provisions of the [1951] Geneva Convention’. The safety of the third country in question is for the Member State concerned to determine, according to general criteria harmonised in the Directive, but pursuant to a methodology that may substantially vary from one Member State to another. According to Article 27 PD, this may include either a case-by-case appraisal of the safety of the specific country for a particular applicant or simply an overall designation of countries considered generally safe in a national list. The rebuttability of the presumption has not been explicitly contemplated in the Directive.

Although some improvements have been proposed by the European Commission,⁶³ the latest draft of the recast instrument under negotiation preserves the essence of these elements,⁶⁴ despite reiterated condemnation by UNCHR.⁶⁵ These mechanisms translate the control rationale underlying the border and migration policy of the EU to the realm of the Common European Asylum System, with the potential to frustrate its protection objective.

The ‘safe third country’ notion is particularly problematic. Although, according to the CJEU, the primary responsibility for an asylum application remains with the State where the claim is lodged,⁶⁶ it has been recognised – not least, in the Preamble to the 1951 Convention – that refugee protection requires (genuine) international cooperation. However, sharing of responsibility should be envisaged only between States with comparable protection standards, on the basis of voluntary agreements which clearly outline their respective duties. Yet, the ‘safe third country’ notion, as defined in the recast Directive – and maintained in the proposed Dublin III Regulation, rests on a unilateral decision by a Member State to invoke the responsibility of a third country, disregarding basic premises of international law and discounting refugee and asylum seeker rights.⁶⁷

⁶² UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, Mar. 2010, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

⁶³ Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final, 1 Jun. 2011.

⁶⁴ Preparation of the Seventh Informal Trilogue, Council doc.17698/12, 17 Dec. 2012.

⁶⁵ ECRE has also been highly critical see *Comments from the European Council on Refugees and Exiles on the Amended Commission proposal to recast the Asylum Procedures Directive (COM(2011) 319 final)*, Sept. 2011, available at: www.ecre.org/component/content/article/57-policy-papers/248-ecrecommentsrecastapd2011.html; UNHCR, *comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, Jan. 2012, available at: www.unhcr.org/refworld/pdfid/4f3281762.pdf.

⁶⁶ *Mutatis mutandis*, CJEU, Case C-179/11 *Cimade & GISTI*, 27 Sept. 2012 (nyr), paras. 54-5.

⁶⁷ UNHCR, *comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, Aug. 2010, at 34, retrievable from: <http://www.unhcr.org/refworld/pdfid/4c63ebd32.pdf>.

5. Review of EU policy in the area and the coherence between internal and external policies and the cooperation with UNHCR

Since the communautarisation of asylum policy with the Treaty of Amsterdam, the Union has aimed to create the CEAS. The European Council at its Tampere meeting distinguished two phases for its completion. Minimum standards should be adopted in the main areas of concern as a first step, with a common asylum procedure and uniform protection status following in the longer term.⁶⁸ Five major instruments have been adopted during the first phase, including four Directives and a Regulation, introducing minimum qualification standards, minimum criteria for asylum procedures, harmonised reception conditions, measures in relation to temporary protection in cases of mass influx of displaced persons, and rules for the determination of the country responsible for the examination of asylum applications lodged with the Member States.⁶⁹ Since 2008 the European Commission has launched a process of legislative revision of these instruments, with the objective of raising protection standards and complete the second phase of the CEAS before the end of 2012. So far, however, only the recast Qualification Directive has been adopted.

The main rationale of all CEAS instruments – which is maintained in all recast proposals – is to contribute to the construction of ‘a common policy on asylum ... [as] a constituent part of the European Union’s objective of progressively establishing an area of freedom, security and justice open to those who, forced by the circumstances, legitimately seek protection in the Community’. The CEAS intends to afford ‘an adequate level of protection’ to ‘persons genuinely in need of [asylum]’ on the basis of ‘the full and inclusive application of the Geneva Convention’. The objective is to guarantee that a minimum level of international protection is available in all Member States, according to the relevant standards.⁷⁰

At the same time, there is concern with abuse and irregular movements of refugees and, as discussed above, no legal route of entry for asylum purposes in the EU. While the CEAS instruments pursue an overall protection objective, the system is rendered inaccessible to its addressees, either through indiscriminate border and migration controls deployed extraterritorially, that block prospective beneficiaries *en route*, or through the operation of procedural devices, such as the ‘safe third country’ notion, that push responsibility away from the Member States. This is the context in which The Hague Programme launched ‘the external dimension of asylum’, purportedly with a view to facilitate access to international protection for refugees.⁷¹

Several initiatives have been proposed and/or are being implemented in this field by a range of actors, including the EU resettlement scheme,⁷² Regional protection programmes,⁷³ and offshore processing

⁶⁸ EC Tampere, 15-6 Oct. 1999, Presidency Conclusions, paras. 13-4, available at: http://www.europarl.europa.eu/summits/tam_en.htm#a.

⁶⁹ 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, [2001] OJ L 212/12; Council Directive 2003/09/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] OJ L 31/18; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged with one of the Member States by a third-country national, [2003] OJ L 50/1; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/14, recast by Directive 2011/95/EU, above n 59; and Procedures Directive, above n 62.

⁷⁰ See Preambles to all CEAS instruments.

⁷¹ The Hague Programme, para 1.6. For analysis see C Rodier, *Analysis of the External Dimension of the EU’s Asylum and Immigration Policies*, Study PE 374.366 (Brussels: European Parliament, 2006); S Alegre, D Bigo and J Jeandesboz, *La dimension externe de l’espace de liberté, sécurité et justice*, Study PE 410.688 (Brussels: European Parliament, 2009); P De Bruycker et al, *Setting Up a Common European Asylum System*, Study PE 425.622 (Brussels, European Parliament, 2010).

⁷² The establishment of a Joint EU Resettlement Programme, COM(2009) 447 final, 2 Sept. 2009.

strategies. The underlying idea seems to be that, where alternative ways of accessing protection elsewhere are offered, the need to seek asylum in the EU is no longer justified.

5.1 The EU Joint Resettlement Programme

Together with repatriation and local integration, resettlement is one of the ‘durable solutions’ for refugees supported by UNHCR. It consists of the selection and transfer of refugees from a country of first asylum to a third State that agrees to admit them as refugees and grants permanent residence.⁷⁴

The Commission submitted a proposal for the establishment of a *Joint Resettlement Programme* in 2009.⁷⁵ At the time, only 10 Member States had established annual schemes with very limited capacity and no common planning or coordination existed at EU level.⁷⁶ Thus, the programme intended to provide a framework for the development of a common approach to these activities, seeking to involve as many Member States as possible. In parallel, it was expected that the global humanitarian profile of the Union would rise and access to asylum organised in an orderly way. The Commission proposed to coordinate the programme with the Global Approach to Migration, through the identification of common priorities not only on humanitarian grounds, but also on the basis of broader migration policy considerations.

The European Refugee Fund was amended to support resettlement efforts and priorities for 2013 were agreed in 2012.⁷⁷ The results achieved so far are, however, meagre. During the Arab Spring only 700 resettlement places were offered EU-wide, while UNHCR had estimated at least 11,000 refugees and asylum-seekers previously resident in Libya were in need of relocation before and after the conflict.⁷⁸

5.2 Regional Protection Programmes

The objective of *Regional Protection Programmes* (RPPs) is to address protracted refugee situations in a comprehensive and concerted way. The aim is to create the conditions for ‘durable solutions’ to thrive in regions of origin and transit of refugees, enhancing the capacity of the countries concerned to provide ‘effective protection’. Simultaneously, it is also expected that the programmes will ‘enable those countries better to manage migration’.⁷⁹ RPPs have been designed as a ‘tool box’ of multiple actions, in the framework of which EU Member States may engage in a voluntary resettlement commitment, if they so wish.

Since 2007 a number of projects have been launched. The first focuses on Tanzania – hosting the largest refugee population in Africa. The second covers Moldova, Belarus, and Ukraine, which together constitute a major transit region towards the EU. Since September 2010, a new programme began in the Horn of Africa, and plans to develop one for Egypt, Libya and Tunisia started during the Arab Spring.⁸⁰ Not only humanitarian but also migration policy considerations have been contemplated in the selection of these

⁷³ Regional Protection Programmes, COM(2005) 388 final, 1 Sept. 2005.

⁷⁴ UNHCR, *Resettlement Handbook*, Jul. 2011.

⁷⁵ Underpinning the proposal see, J van Selm et al, *Study on the Feasibility of Setting Up Resettlement Schemes in EU Member States or at EU Level*, (Brussels: European Commission, 2003), available at: http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/resettlement-study-full_2003_en.pdf.

⁷⁶ Commission Staff Working Document accompanying the Communication of the Commission on the establishment of a Joint EU Resettlement Programme (Impact Assessment), SEC(2009) 1127, 2 Sept. 2009.

⁷⁷ Decision 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’, [2012] OJ L 92/1.

⁷⁸ Statement by Cecilia Malmström on the results of the Ministerial Pledging Conference 12 May, MEMO 11/295, 13 May 2011, available at: http://europa.eu/rapid/press-release_MEMO-11-295_en.htm?locale=fr.

⁷⁹ EU Regional Protection Programmes, at 3.

⁸⁰ Annual report on immigration and asylum, COM(2011) 291 final, 24 May 2011, at 6.

locations, with little regard for human rights or the fact that some of these countries are not party to the Refugee Convention.

An external evaluation has revealed the poor results achieved so far due to the inflexibility of the programmes, poor coordination between initiatives and the actors concerned, and the lack of any significant engagement of the EU Member States in the resettlement component of RPPs.⁸¹ The extremely limited amount of funding allocated to RPPs – relative to their ambitious goals and the far greater amounts of humanitarian and development funding devoted to the same geographical regions in unrelated projects – also undermined their potential impact.

5.3 Protected-Entry Procedures and Offshore Processing Plans

The idea of introducing humanitarian visas or full-fledged offshore procedures for the determination of refugee status abroad has been in circulation for a number of years. Reception camps in the region of origin were proposed by The Netherlands to the Inter-Governmental Consultations already in 1993.⁸² Tony Blair resuscitated the proposal in his ‘New Vision for Refugees’ a decade later,⁸³ facing strong opposition from UNHCR.⁸⁴ At EU level, there have been discussions in this direction, resulting in a feasibility study in 2002⁸⁵ and a Commission Communication in 2004.⁸⁶

The idea has been refloated to some extent by the European Commission in its Policy Plan on Asylum and its Communication in preparation of the Stockholm Programme.⁸⁷ A draft version of the programme 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’.⁸⁸ The reference progressively changed,⁸⁹ with the final document simply calling for ‘new approaches concerning access to asylum procedures targeting main countries of transit’ to be explored, ‘such as protection programmes for particular groups or certain procedures for examination of applications for asylum’. Crucially, the reference to responsibility has disappeared, considering that Member States should participate in any resulting initiative not due to any legal obligation, but ‘on a voluntary basis’.⁹⁰

Before the uprisings in Northern Africa, the French Delegation submitted a proposal to the EU Presidency to tackle the 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.⁹¹ Two solutions were identified. Asylum seekers would be intercepted at sea, (forcibly) returned to

⁸¹ First annual report on immigration and asylum, COM(2010) 214 final, 6 May 2010, at 6.

⁸² IGC Secretariat, Working Paper on Reception in the Region of Origin, Sept. 1994.

⁸³ New Vision for Refugees, 7 Mar. 2003, available at: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf.

⁸⁴ UNHCR, Three-Pronged Proposal, 26 Jun. 2003, available at: www.unhcr.org/refworld/pdfid/3efc4b834.pdf

⁸⁵ G Noll et al, *Study on the feasibility of processing asylum claims outside the EU*, (Brussels, European Commission, 2002), available at: http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/asylumstudy_dchr_2002_en.pdf.

⁸⁶ Improving access to durable solutions, COM(2004) 410 final, 4 Jun 2004.

⁸⁷ Policy Plan on Asylum, COM(2008) 360 final, 17 Jun. 2008, para. 5.2.3; and Communication in preparation of the Stockholm Programme, COM(2009) 262 final, 10 Jun. 2009, para. 5.2.3.

⁸⁸ Draft Stockholm Programme, version of 6 Oct. 2009, para. 5.2.2.

⁸⁹ For a meticulous account of the drafting process of the Stockholm Programme refer to: <http://www.statewatch.org/stockholm-programme.htm>.

⁹⁰ Stockholm Programme, para. 6.2.3.

⁹¹ 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.

Libya and either offered the possibility of requesting a protection visa at one of the Member States' embassies present in the country to travel to the EU for processing or their claims would be examined in Libya, with Member States offering resettlement opportunities (on a voluntary basis) to recognised refugees in need of relocation. Although the proposal was not adopted, it may be used as a model for subsequent action, in which case related legal, practical and humanitarian problems must be tackled first.⁹²

5.4 Consistency problems

These initiatives – like those undertaken under the integrated border management system and the Global Approach to Migration – draw heavily on migration control considerations.⁹³ They pay insufficient attention to human rights and fail to recognise that the international protection obligations of the Member States may be engaged through these extraterritorial actions. The fact that international law does not authorise States to evade legal responsibility through delegation of their obligations to other countries or international organisations has been omitted.⁹⁴ It also remains unclear which law the proponents of these initiatives consider applicable in this context – a complete exclusion of EU law, including fundamental rights, is not possible, even in extraterritorial situations.⁹⁵

It is necessary to ensure that the external dimension of asylum is consistent with its internal counterpart. It is established in Article 7 TFEU that ‘the Union shall ensure consistency between its policies and activities, taking all of its objectives into account’ – consistency is a crucial attribute of EU law that the Court of Justice guarantees, pursuant to Article 256 TFEU. Therefore, according to Article 13(1) TEU, ‘[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives ... and ensure the consistency, effectiveness and continuity of its policies and actions’. With regard to its external policies in particular, Article 21(3) TEU establishes that ‘[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies’. Flagrantly contradictory results between the external and the internal dimension of the CEAS constitute a breach of this legal obligation. To be sure, this consistency requirement does not extend the scope of application of the asylum *acquis*, but sets a minimum standard below which extraterritorial initiatives must not go.

Pursuant to Article 3(5) TEU, in its external action, the EU must ‘uphold and promote its values’ and contribute to the ‘strict observance and the development of international law’. This includes fundamental rights, as recognised in the EU Charter, and meaningful cooperation with UNHCR in relation to refugee law standards.

6. Policy Recommendations

There are two central problems in respect of the EU's current challenges regarding international refugee law and its cooperation with UNHCR: the question of access to international protection in the EU and a lack of consistency and coherence between the internal and external dimensions of the CEAS, aggravated by the development of the ‘integrated border management’ system and the external dimension of the EU's GAMM

⁹² A Communication on this issue is expected in 2014, according to the European Commission – see *Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, 20 Apr. 2010.

⁹³ Expressing similar concerns see UNHCR, *Response to the Green Paper on the Common European Asylum System*, Sept. 2007, at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>; and ECRE, *Response to the Green Paper on the Common European Asylum System*, Oct. 2007, available at: <http://www.ecre.org/topics/areas-of-work/protection-in-third-countries/130.html>.

⁹⁴ See 2001 Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

⁹⁵ CJEU, Case C-214/94 *Ingrid Boukhalfa v Federal Republic of Germany* [1996] ECR I-2253.

(Global Approach to Migration and Mobility). The policy recommendations we set out below, while specific in many cases, relate back to these fundamental weaknesses.

Moving to the specific recommendations we suggest the following:

1. The EU Member States' international protection obligations and those contained in the EU Charter of Fundamental Rights must be instituted as the guiding principles of the EU's activities in the external dimension where the issue of movement of people across international borders is engaged.
2. In particular, there must be an unambiguous recognition by the Union and its Member States, both in legal and policy documents, of the extraterritorial applicability of fundamental rights and refugee law obligations, which may be triggered in the context of border surveillance and migration control activities undertaken abroad.
3. The EU and its Member States must also recognise that any responsibility so engaged cannot be avoided or displaced to third countries or organisations through delegation or other forms of international cooperation, neither in the framework of climate change displacement, nor in relation to population movements due to war, widespread violence, ill-treatment or persecution.
4. The obligation to cooperate with UNHCR, enshrined in Article 35 of the Refugee Convention and explicitly recognised in EU law, should be taken seriously and translate into due consideration being given to best practices, observations, conclusions and recommendations formulated by the organisation in regard of CEAS measures and standards of both the internal and external dimensions.

These points require the institutional changes specified below:

5. UNHCR as guardian of the Refugee Convention and the Fundamental Rights Agency (FRA), with its responsibility regarding the implementation of the Charter, must be centrally associated with the development of the CEAS in both its internal and external dimensions. This association must be institutionalised in such a way that the opinions of UNHCR and the FRA are given full weight at the highest levels. The current situation where the development of the CEAS fails to take into account the advice and assistance of UNHCR should cease.
6. The EU's Global Approach to Migration and Mobility is institutionally related to DG HOME even where it involves external action. The external dimension of the GAMM does not reflect the centrality of the Member States' and the EU's obligations to refugees as it focuses on third country nationals as migrants, not as people in need of international protection. This needs to change. As a starting place, institutions which have responsibility for internal affairs should not be in charge of external treaty negotiation.
7. The European External Action Service needs to take responsibility for all negotiations with third countries regarding mobility and migration and ensure that compliance with the EU's and Member States' international protection obligations is a central objective.
8. In capacity building with third states including that which involves EU funding to support objectives of the GAMM, there must be an impact assessment for compatibility with the principles of rule of law and human rights as well as international protection obligations. Both UNHCR and the FRA must be associated with that assessment. This is particularly critical as regards expenditure under EU funds such as the Returns Fund, the Refugee Fund and others.
9. The external dimension of the CEAS must be accompanied by better evaluation of the internal dimension. To this end EASO (European Asylum Support Office) should be mandated to carry out objective and impartial evaluations and constant monitoring of the implementation of the CEAS, the Refugee Convention and the international protection provisions of the Charter by all Member States.

Specifically in respect of action by the European Parliament:

10. The European Parliament needs to take a central role in ensuring the consistency of the GAMM with the EU and Member State obligations in respect of international protection which should be reflected in the CEAS. Transparency and accountability must become a central priority of EU policies, actions and funding programmes/projects in third countries in order to ensure the added value and consistency of EU policy.
11. The European Parliament needs to place international protection and its application and correct implementation at the heart of foreign affairs and relations with third countries. External dimension initiatives should be built not on EU interests alone, but on a genuine engagement with the regions of origin and transit. In the design and administration of Regional Protection Programmes and, in particular, the resettlement component it includes, the necessities and capacities of the targeted states hosting large refugee populations should be taken into account in a spirit of shared responsibility. Channels for direct consultation with the authorities and agencies concerned could be opened by the European Parliament, e.g. through Committee delegation visits.
12. The European Parliament should engage with the dialogue for migration, mobility and security with the southern Mediterranean countries – which includes an express reference to asylum at page 9⁹⁶ – to ensure that this dialogue, in so far as it deals with issues of asylum, does so in a manner which is fully respectful of the EU obligations to provide protection to all those in need of it and who are within their jurisdiction. The Parliament should be mindful that this dialogue should not become a mechanism to pressure countries in the southern Mediterranean to assume responsibility for international protection in respect of people who are in fact seeking this protection in the EU and from the EU Member States.
13. The European Parliament should seek explanations from the EU Commission and Council regarding the negotiations and operation of the Mobility Partnerships with Cape Verde, Moldova, Georgia and Armenia and the cooperation with Morocco regarding the absence of any mention of asylum in these agreements and arrangements.
14. The European Parliament could also play a crucial role in improving the Resettlement programme during the next round of consultations for resettlement priorities or once the European Commission launches its Proposal on how to improve the EU Resettlement Programme in 2014. The objective should be that the EU becomes a key player in the international scene, capable of demonstrating solidarity at the global level in the context of refugee crises. The activation of the program vis-à-vis Syrian refugees would surely meet this objective and enhance the credibility of the EU's joint response to the ongoing conflict in Syria.
15. Engagement with the individual asylum seeker is also necessary. Once the European Commission presents its Communication on new approaches concerning access to asylum procedures targeting main transit countries, announced in the Stockholm Action Plan, the European Parliament will have the opportunity to make sure any such approaches are adopted in conformity with the applicable standards under the Charter of fundamental rights and related instruments.
16. The European Parliament should evaluate the extent to which any EU sanctioned policies on safe third countries are consistent with those states' full and consistent implementation of international refugee protection standards and ratification without condition of the key refugee protection instruments internationally and in their region.
17. In so doing, when negotiating readmission agreements or readmission clauses within larger cooperation treaties with third countries, the European Parliament should make sure that detailed 'refugee clauses' are introduced to design the terms in which access to determination procedures and

⁹⁶ See the communication from the European Commission (2011) A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292 final, Brussels, 24 May 2011, p. 9.

durable solutions will be ensured in each individual case. This should be accompanied by a refugee-specific monitoring system, established in cooperation with UNHCR and other relevant organisations, ensuring that the terms of these clauses are met in practice. This could be conceived of as a separate mechanism or as a specific component of the ‘forced-return monitoring system’ already required by Directive 2008/115. In case of non-compliance, effective remedies should be introduced for individuals to apply for re-admission to the expelling Member State concerned.

18. The European Parliament should work closely with UNHCR to ensure that third countries which are parties to the Refugee Convention live up to their obligations to provide protection fully and durably and assist UNHCR in efforts to convince states which are not parties to the Refugee Convention to sign and ratify it.
19. The European Parliament should require FRONTEX, in respect of its obligations to ensure the respect of fundamental rights, to report annually on how, within the scope of its activities, the extraterritorial application of European human rights obligations to persons potentially in need of international protection is being fulfilled and where further action needs to be taken.
20. The European Parliament should oversee that the EU engages consistently with spontaneous arrivals. The incorporation of protection-sensitive elements into the system of border and migration control is essential. Effective training, monitoring and reporting of actions undertaken to ensure compliance with refugee and human rights obligations should be taken into account when designing border control and migration management initiatives. All actors susceptible of encountering refugees and asylum seekers in the course of their actions should receive specific training and work on clear and binding instructions on how to handle asylum claims. Clear and effective individual remedies should be introduced at this level to ensure compliance with international obligations. The role of the European Parliament in ensuring the mainstreaming, in this sense, of forthcoming legislation on visas and Frontex is essential, in particular in relation to the new proposal by the European Commission for a Regulation on rules for the surveillance of the external sea borders in the context of Frontex operations (COM(2013) 197).

References

Literature

- Abrar, CR and Malik, S (eds.), *Towards National Refugee Law in South Asia*, (Dhaka: University of Dhaka Press, 2003).
- Alegre, S, Bigo, D and Jeandesboz, J, *La dimension externe de l'espace de liberté, sécurité et justice*, Study PE 410.688 (Brussels: European Parliament, 2009).
- De Bruycker, P et al, *Setting Up a Common European Asylum System*, Study PE 425.622 (Brussels, European Parliament, 2010).
- den Heijer, M, *Europe and Extraterritorial Asylum*, (Oxford: Hart, 2012).
- Durieux, J-F, 'Protection Where? – or When?: First asylum, deflection policies and the significance of time', (2009) 21 *International Journal of Refugee Law* 75.
- Gammeltoft-Hansen, T, *Access to Asylum*, (Cambridge: CUP, 2011).
- Goodwin-Gill, GS, and McAdam, J, *The Refugee in International Law*, 3rd Ed., (Oxford: OUP, 2007).
- Hathaway, JC, 'The Emerging Politics of *Non-Entrée*', (1992) 91 *Refugees* 40.
- Hurwitz, A, *The Collective Responsibility of States to Protect Refugees*, (Oxford: OUP, 2009).
- Kälin, W and Schrepfer, N, *Protection of People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR, February 2012.
- McAdam, J, *Climate Change, Forced Migration, and International Law*, (Oxford: OUP, 2012).
- Meron, T, 'Extraterritoriality of Human Rights Treaties', (1995) 89 *American Journal of International Law* 78.
- Mole, N, and Meredith, C, *Asylum and the European Convention on Human Rights*, Human Rights Files Vol. 9, (Strasbourg: Council of Europe, 2010).
- Moreno-Lax, V, '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 *European Journal of Migration and Law* 315.
- Moreno-Lax, V, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', (2011) 23 *International Journal of Refugee Law* 174.
- Morrison, J and Crosland, B, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy', *New Issues in Refugee Research*, Working Paper No. 39, (Geneva: UNHCR, 2001).
- Noll, G et al, *Study on the Feasibility of Processing Asylum Claims Outside the EU*, (Brussels: European Commission, 2002).
- Rodier, C, *Analysis of the External Dimension of the EU's Asylum and Immigration Policies*, Study PE 374.366 (Brussels: European Parliament, 2006).
- Ryan, B and Mitsilegas, V (eds.), *Extraterritorial Immigration Control*, (Leiden/Boston: Brill, 2010).
- Strik, T, *Lives lost in the Mediterranean Sea: who is responsible?*, Parliamentary Assembly, Council of Europe, 29 March 2012.
- van Selm, J et al, *Study on the Feasibility of Setting Up Resettlement Schemes in EU Member States or at EU Level*, (Brussels: European Commission, 2003).
- Zard, M, 'Exclusion, Terrorism and the Refugee Convention', (2002) 13 *Forced Migration Review* 32.

Official documents

- Council of the EU, Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2001] OJ L 81/1 (as amended).
- Council of the EU, Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, [2001] OJ L 187/45.
- Council of the EU, 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, [2001] OJ L 212/12.
- Council of the EU, Directive 2003/09/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] OJ L 31/18.
- Council of the EU, Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1 (Dublin II Regulation).
- Council of the EU, Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, [2004] OJ L 64/1 (as amended).
- Council of the EU, Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/14.
- Council of the EU, Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1 (as amended).
- Council of the EU, The Hague Programme, [2005] OJ C 53/1.
- Council of the EU, Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13.
- Council of the EU, Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Council doc. 15744/05, 13 Dec. 2005.
- Council of the EU, Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1 (as amended).
- Council of the EU, Council Conclusions of 4-5 Dec. 2006 under the Finnish Presidency of the EU, Press Release 15801/06.
- Council of the EU, Draft Council Conclusions on Extending and Enhancing the Global Approach to Migration, Council doc. 10746/07, 13 Jun. 2007.
- Council of the EU, Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, [2009] OJ L 243/1.
- Council of the EU, 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.

- Council of the EU, 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Council doc. 6975/10, 1 March 2010.
- Council of the EU, The Stockholm Programme: An Open and Secure Europe serving and protecting Citizens, 5731/10, Brussels, 3 March 2010.
- Council of the EU, Decision (2010/252/EU) of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2010] OJ L 111/20 (in effect until replacement).
- Council of the EU, Preparation of the Seventh Informal Trilogue, Council doc.17698/12, 17 December 2012.
- ECRE, Response to the Green Paper on the Common European Asylum System, Oct. 2007, available at: <http://www.ecre.org/topics/areas-of-work/protection-in-third-countries/130.html>.
- ECRE, Defending Refugees' Access to Protection in Europe, 14 Dec. 2007, retrievable from: <http://www.ecre.org/topics/areas-of-work/access-to-europe/95-defending-refugees-access-to-protection-in-europe.html>.
- ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive, Mar. 2010, retrievable from: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/148.html>.
- ECRE, Comments from the European Council on Refugees and Exiles on the Amended Commission proposal to recast the Asylum Procedures Directive (COM(2011) 319 final), Sept. 2011, available at: <http://www.ecre.org/component/content/article/57-policy-papers/248-ecrecommentsrecastapd2011.html>
- European Commission, Improving access to durable solutions, COM(2004) 410 final, 4 Jun 2004.
- European Commission, Regional Protection Programmes, COM(2005) 388 final, 1 Sept. 2005.
- European Commission, Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005) 621 final, 30 Nov. 2005.
- European Commission, The Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final, 30 Nov. 2006.
- European Commission, Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM(2007) 247 final, 16 May 2007.
- European Commission, Policy Plan on Asylum, COM(2008) 360 final, 17 Jun. 2008.
- European Commission, Strengthening the Global Approach to Migration: Increasing coordination, coherence and synergies, COM (2008) 611 final, 8 Oct. 2008.
- European Commission, Communication in preparation of the Stockholm Programme, COM(2009) 262 final, 10 Jun. 2009.
- European Commission, The establishment of a Joint EU Resettlement Programme, COM(2009) 447 final, 2 Sept. 2009.
- European Commission, Staff Working Document accompanying the Communication of the Commission on the establishment of a Joint EU Resettlement Programme (Impact Assessment), SEC(2009) 1127, 2 Sept. 2009.
- European Commission, Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20 Apr. 2010.

- European Commission, First annual report on immigration and asylum, COM(2010) 214 final, 6 May 2010.
- European Commission, Statement by Cecilia Malmström on the results of the Ministerial Pledging Conference 12 May, MEMO 11/295, 13 May 2011, available at: http://europa.eu/rapid/press-release_MEMO-11-295_en.htm?locale=fr.
- European Commission, Annual report on immigration and asylum, COM(2011) 291 final, 24 May 2011.
- European Commission, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292 final, Brussels, 24 May 2011.
- European Commission, Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final, 1 June 2011.
- European Commission, The Global Approach to Migration and Mobility, COM(2011) 743 final, 18 Nov. 2011.
- European Council, Presidency Conclusions at the Tampere European Council, 15-6 October 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm#a.
- European Parliament and Council of the EU, Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, [2008] OJ L 348/98.
- European Parliament and Council of the EU, Directive 2011/95/EU 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), [2011] OJ L 337/9.
- European Parliament and Council of the EU, Decision 281/2012/EU 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', [2012] OJ L 92/1.
- IGC Secretariat, Working Paper on Reception in the Region of Origin, September 1994.
- UNHCR, EXCOM Conclusions No. 6 (1977), No. 22 (1981), No. 81 (1997), No. 82 (1997), and No. 85 (1998).
- UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979), re-issued in Dec. 2011, HCR/1P/4/ENG/REV.3.
- UNHCR, 'Brief as Amicus Curiae', filed on 21 Dec. 1992, in *McNary v. Haitian Centers Council Inc.*, US Supreme Court Case No. 92-344.
- UNHCR, Global Consultations on International Protection – Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.
- UNHCR, Three-Pronged Proposal, 26 Jun. 2003, available at: www.unhcr.org/refworld/pdfid/3efc4b834.pdf
- UNHCR, Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards, (Geneva: UNHCR, 2 Sept. 2005), available at: www.unhcr.org/refworld/pdfid/432ae9204.pdf
- UNHCR, The Dublin II Regulation. A UNHCR Discussion Paper (Apr. 2006), available at: <http://www.unhcr.org/refworld/docid/4445fe344.html>.

- UNHCR, Response to the Green Paper on the Common European Asylum System, Sept. 2007, at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>.
- UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, March 2010, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.
- UNHCR, Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), 29 Jul. 2010, available at: <http://www.unhcr.org/refworld/docid/4c503db52.html>.
- UNHCR, Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, retrievable from: <http://www.unhcr.org/refworld/pdfid/4c63ebd32.pdf>.
- UNHCR, A Thematic Compilation of Executive Committee Conclusions, 6th Ed (Geneva: UNHCR, Jun. 2011).
- UNHCR, Resettlement Handbook, 4 July 2011, available at: <http://www.unhcr.org/4a2ccf4c6.html>.
- UNHCR, Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final, January 2012, available at: <http://www.unhcr.org/refworld/pdfid/4f3281762.pdf>.
- UK Government, New Vision for Refugees, 7 Mar. 2003, available at: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf.

Case-law

- Committee against Torture, General Comment No. 2 (2007).
- Committee against Torture, *J.H.A. v Spain*, Comm. No. 323/2007, 10 Nov. 2008.
- Committee against Torture, *Sonko v Spain*, Comm. No. 368/2008, 25 Nov. 2011.
- Court of Justice of the EU, Case 25/62 *Plaumann v Commission* [1963] ECR 199.
- Court of Justice of the EU, Case C-214/94 *Ingrid Boukhalfa v Federal Republic of Germany* [1996] ECR I-2253.
- Court of Justice of the EU, Joined cases C-411/10 and C-493/10 *NS and ME*, 21 Dec. 2011 (nyr).
- Court of Justice of the EU, Case C-179/11 *Cimade & GISTI*, 27 Sept. 2012 (nyr).
- European Court of Human Rights, *Loizidou v Turkey*, Appl. No. 15318/89, 23 Mar. 1995.
- European Court of Human Rights, *Cyprus v Turkey*, Appl. No. 25781/94, 10 May 2001.
- European Court of Human Rights, *Bankovic v Belgium* (Dec.), Appl. No. 52207/99, 12 Dec. 2001.
- European Court of Human Rights, *Issa v Turkey*, Appl. No. 31821/96, 16 Nov. 2004.
- European Court of Human Rights, *Ocalan v Turkey*, Appl. No. 46221/99, 12 May 2005.
- European Court of Human Rights, *Saadi v UK*, Appl. No. 13229/03, 29 Jan. 2008.
- European Court of Human Rights, *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 2 Mar. 2010.
- European Court of Human Rights, *Al-Skeini v UK*, Appl. No. 55721/07, 7 Jul. 2011.

European Court of Human Rights, *Hirsi v Italy*, Application No 27765/09, 23 Feb. 2012.

Human Rights Committee, *Delia Saldias de Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29 Jul. 1981.

Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 Jul. 1981.

Human Rights Committee, General Comment No. 31 (2004).

Human Rights Committee, *Munaf v Romania*, Comm. No. 1539/2006, 30 Jul. 2009.

Inter-American Court of Human Rights, *Coard v United States*, Case 10.951, Report No. 109/99.

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Gen. List No. 131.



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