EUROPE IN CRISIS:

Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward

Idomeni camp - migrants wait to cross the border to Macedonia. © Jarkko Mikkonen / Finnish Red Cross

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By Dr Violeta Moreno-Lax, December 2015.
Lecturer in Law, Director of the Immigration Law Programme, Queen Mary University of London; EU Asylum Law Coordinator, Refugee Law Initiative.

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1 Introduction: The Access Crisis

The European Union (EU)'s reaction to the current refugee situation – the gravest since World War II, according to the United Nations High Commissioner for Refugees (UNHCR)[1] – has been chaotic and utterly inadequate. Despite the fact that the fundamental difficulty facing those in need of international protection is the lack of channels for safe and legal access to protection within the Member States, the EU has addressed the crisis by increasing border surveillance and reinforcing migration controls, rather than by providing a comprehensive humanitarian response.[2]

There is an important flaw in the Common European Asylum System (CEAS) that the current situation has exposed and exacerbated, leading to the 'access crisis' that lies at the core of this paper. Despite the existence of harmonised standards of protection that have been agreed upon and codified in the different instruments composing the CEAS, as shown in section 2, their implementation is rendered near impossible by their practical inaccessibility.

The crisis has put procedural arrangements for asylum under strain, especially in the countries of first arrival located at the external borders of the Union, where Dublin rules on the determination of responsibility for the examination of asylum applications have collapsed and been replaced by an *ad hoc* system of 'hotspots', described in section 3. This appears to have *de facto* suspended normal procedural guarantees and deprived applicants of the safeguards attached to fair processing and effective remedy standards, which is against basic EU fundamental rights norms.

This tension has also caused a decrease in the quality of reception conditions in border zones, if not a descent into chaos, precisely in the areas hosting a 'hotspot'. As denounced by several organisations deployed on the grounds, the overwhelming focus of reception efforts, has remained on control – of arrivals, of secondary movements towards other European countries, and of smuggling and irregular migration routes – through forced fingerprinting, nationality profiling, and swift return. This has been complemented by the building of fences, the implementation of border closures, the re-introduction of intra-Schengen controls, and the deployment of military patrols at land and sea borders, including in the Mediterranean.[3]

More than centring on the provision of dignified living standards and access to basic services through a system of fair distribution of costs and shared responsibility, leading ultimately to the recognition of refugee status or subsidiary protection in the EU, Member States have endeavoured to manage (or 'stem') inflows through joint action and cooperation with third countries along the Balkan route and the African continent, as well as with neighbouring

[1] 'Worldwide displacement hits all-time high as war and persecution increase', *UNHCR News Stories*, 18 Jun. 2015, available at: <http://www.unhcr.org/558193896.html>; and UNHCR, *Global Trends 2014*, available at: <http://unhcr.org/556725e69.html>.

[2] For a detailed account, see GS Goodwin-Gill, *The Mediterranean Papers – Athens, Naples and Istanbul* (Sept. 2015), available at: <http://www.blackstonechambers.com/news/publications/the_mediterranean.html>.

[3] Amnesty International, *Fear & Fences: Europe's Approach to Keeping Refugees at Bay* (Nov. 2015), available at: <https://www.amnesty.org/en/documents/eur03/2544/2015/en/>; and Human Rights Watch (HRW), *Europe's Refugee Crisis: An Agenda for Action* (Dec. 2015), available at: <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>.

Turkey. Constant calls for border controls, return and readmission have pervaded discussions at the Valetta Summit and in the EU-Turkey dialogue; containing persons in need of refuge and assistance in areas that are ever closer to the countries they attempt to escape, to the detriment of strategies that expand international protection space and advance access to 'durable solutions'. Indeed, although the EU has devised a system for the internal relocation of asylum seekers reaching Italy and Greece, this mechanism is only activated once potential beneficiaries have arrived in Europe. There have been no joint and coordinated efforts to organise legal and safe arrivals to the EU, forcing people to resort to smuggling services and enhancing the risk of abuse and exploitation by human traffickers during ever more perilous journeys.

Options to facilitate access to protection in the EU, as proposed by the Fundamental Rights Agency (FRA) and others, still need to be fully explored.[4] A humanitarian admission scheme which has been submitted by the European Commission as part of the EU-Turkey deal deserves particular attention.[5] Sections 3 and 4 present and analyse initiatives in this realm, comparing them with similar schemes in the US and Australia and expounding the legal and practical issues they generate. Alternative avenues to guarantee access to the EU in conformity with human rights and refugee law obligations are introduced in section 5. Finally, a summary of recommendations is put forward in section 6. Key proposals are provided for a comprehensive strategy to organise the safe and legal arrivals of asylum seekers in the EU and overcome the current 'access crisis' plaguing the CEAS.

2 The Common European Asylum System: An Overview

2.1 The internal dimension of the CEAS

The provision of international protection does not feature as a stand-alone objective of the EU.[6] In fact, the EU started off as an economic integration plan and progressed towards 'an ever closer Union' among the peoples of Europe,[7] but asylum and immigration policy were not included in the common project until the 1990s. Measures addressing 'third-country nationals', who were not entitled to EU citizenship as introduced by the Treaty of Maastricht, were then perceived as 'matters of common interest' that Member States had to jointly regulate to achieve a single market.[8] The EU Single Market was, consequently, conceived of as a borderless area, wherein the free movement of persons (nationals of one of the Member States or family members of an EU citizen) could be realised.

Because free movement rights were to benefit only EU citizens (and their family members), the regulation of common formalities on entry and admission at the external frontiers of the EU, as well as across intra-Community borders – which were due to disappear between

[4] *Legal entry channels to the EU for persons in need of international protection: a toolbox*, FRA Focus 02/2015, available at: <http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf>. See also, CIR, *Access to Protection: Bridges not Walls* (Oct. 2014): <http://www.epim.info/2014/11/cir-presents-report-access-to-protection-bridges-not-walls/>.

[5] Commission Recommendation for a voluntary humanitarian admission scheme with Turkey, C(2015) 9490, 15 Dec. 2015.

[6] Art 3 TEU, Lisbon Treaty, [2010] OJ C 83/13.

[7] Preamble, TEU (inserted by Treaty of Maastricht).

[8] Art. K1 EU, Maastricht Treaty, [1992] OJ C191/01.

Schengen partners – became imperative 'flanking measures', constituting an 'area of freedom, security and justice' (AFSJ) that would facilitate market integration.[9]

The economic downturn precipitated by the oil crisis of the 1970s, alongside the recession of the 1980s and early 1990s, marked the direction of harmonised measures in this realm. It was perceived that former national programmes welcoming guest workers in several EU countries were no longer possible. Immigration policy needed to restrict access to the labour market, and security threats related to irregular immigration required rigorous controls, not only at the external borders of the EU, but throughout the journey of third-country nationals, from their countries of origin up to their arrival in a Member State, as well as during their stay.

Visa requirements, carrier sanctions, interdiction measures, employer fines, and deportation arrangements started being harmonised during this period, with calls for 'zero migration' leading the way. Under such restrictive arrangements, asylum and family reunion became the only channels available to foreigners to enter and settle in the EU. As a result, policy-makers across the Union launched proposals to avoid the 'abuse' of asylum procedures by 'bogus' claimants, even though no significant data corroborated these underlying suspicions. And this is the context in which the first common asylum measures were jointly adopted at the EU level, a key objective being to deter abusive requests for protection by non-genuine refugees.[10]

Migrants wait on the border between Greece and Macedonia, as only Syrian, Iraqi and Afghan nationals are allowed to pass. There is limited access to food and shelter in the transit camp. Greece, November 2015. © Caroline Haga / IFRC

[9] Art. 61 EC, Amsterdam Treaty, [1997] OJ C 340/1.

[10] For further details, see V Moreno-Lax, 'Life after Lisbon: EU Asylum Policy as a Factor of Migration Control', in D Acosta & C Murphy (eds), *EU Security & Justice Law* (Hart, 2014) 146.

In parallel, the Yugoslav wars and ensuing humanitarian crises, displacing thousands towards the Austrian and German borders, combined with the meagre corresponding EU response, prompted calls for solidarity and shared responsibility. It was indeed in the aftermath of these crises that EU legislators embarked on the completion of a CEAS. The first step was taken at the first European Council meeting entirely devoted to matters of justice and home affairs. The Tampere Conclusions, as they became known, set the direction and pointed the way forward. They required the establishment of a regime 'based on the full and inclusive application of the [1951] Geneva Convention'.[11] The system was to be accomplished in two phases; by adopting minimum standards in key areas as a first step, and striving for a 'common procedure' and 'uniform status' in the long term.[12]

The Amsterdam Treaty codified the legal basis necessary for adopting the instruments of the first phase.[13] Three key Directives introducing minimum qualification standards,[14] minimum criteria for determination procedures,[15] and minimum reception conditions were adopted,[16] in addition to a Regulation establishing rules to allocate responsibility for the examination of asylum applications lodged in one of the Member States.[17] The unanimity rules at the Council and the need to reach consensus, coupled with the European Parliament playing a marginal role through consultation, explain the low quality of some of the agreed provisions.[18] Although harmonisation may have had a positive impact in countries with small or previously inexistent refugee protection system,[19] overall, first phase instruments paint a picture of suboptimal standards, especially with regards to procedural protection.[20] The fact that at the time, the Court of Justice did not have full jurisdiction over asylum matters also had an impact.[21]

After the adoption of 'common rules and basic principles', asylum policy measures became subject to co-decision by the Council and the European Parliament,[22] which was able to exert some influence.[23] Following entry into force of the Lisbon Treaty, second phase instruments have been agreed on this basis.[24] The recast Qualification Directive has thus better aligned recognition provisions to the 1951 Refugee Convention.[25] In turn, the revised Reception Conditions Directive has eliminated several of the formerly optional clauses, improving access to education and employment and configuring a detention regime with a series of procedural

[11] *Tampere Conclusions*, 15-16 Oct. 1999, para. 13, at: <http://www.europarl.europa.eu/summits/tam_en.htm>.
[12] Ibid., paras. 14-15.
[13] Art. 63 EC, Amsterdam Treaty.
[14] Qualification Directive 2004/83, [2004] OJ L 304/12.
[15] Procedures Directive 2005/85, [2005] OJ L 326/13.
[16] Reception Conditions Directive 2003/09, [2003] OJ L 31/18.
[17] Dublin II Regulation 343/2003, [2003] OJ L 50/1, (DR II).
[18] See responses to *Green Paper on the Future of the CEAS*, COM(2007) 301 final, 6 Jun. 2007, available at: <http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2007/consulting_0010_en.htm>.
[19] N El-Enany and E Thielemann, 'The Impact of the EU on National Asylum Policies', in S Wolff et al. (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press, 2011) 97, available at: <http://www.asser.nl/asserpress/books/?rId=4409>.
[20] J Vedsted-Hansen speaks of 'below-minimum standards' in 'Common EU Standards on Asylum – Optional Harmonisation or Exclusive Procedures?' (2005) 7 EJML 369.
[21] Art. 68 EC, Amsterdam Treaty.
[22] Art. 67(5) EC, Amsterdam Treaty.
[23] For a summary of changes, see S Peers, *The Second Phase of the Common European Asylum System*, Statewatch Analysis (Apr. 2013), at: <http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>.
[24] *Stockholm Programme*, [2010] OJ C 115/1, para. 6.2.
[25] Recast Qualification Directive 2011/95/EU, [2011] OJ L 337/9, (QD). Convention relating to the Status of Refugees 189 UNTS 150 (*Refugee Convention* or *RC* hereinafter).

guarantees.[26] On the other hand, no significant changes have been introduced either in the Recast Procedures Directive[27], or the Dublin III Regulation.[28]

The reform of responsibility criteria or of current procedural norms would require a substantial reconsideration of the rationale sustaining the entire system. Yet, despite the human rights violations to which Dublin transfers and 'safe third country' arrangements have led,[29] there has been no significant revision to date. While the recast instruments' objective is to 'achieve a higher level of approximation' on the basis of improved standards, they purport to do this by 'confirm[ing] the principles' underpinning the first phase.[30] The general logic that these instruments share is that the CEAS 'is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice'.[31] So, whilst the provision of a common level of protection constitutes the 'main objective',[32] CEAS instruments also state that harmonisation 'should help to limit the secondary movements of applicants for international protection between Member States'.[33] In a Union in which 'Member States … are considered as safe countries for third-country nationals',[34] such movements are deemed illegitimate. In order to deter these secondary movements, CEAS instruments provide for the possibility of lowering reception conditions,[35] detaining applicants,[36] and reducing procedural guarantees under certain circumstances.[37]

As with its predecessor, the Dublin III Regulation rests on the assumption that Member States afford similar levels of protection. The choices made by applicants as to their destination country based on differences in reception conditions, recognition rates or procedural standards, are therefore deemed unjustified. The Regulation's main objective continues to be the allocation of responsibility for each asylum application lodged in the EU to a *single* Member State.[38] This serves not only to preclude unauthorised movement across the Union, but also tends to diminish the volume of asylum-seeker flows, as the opportunities for status recognition are reduced to just one. Excluding some humanitarian exceptions, the criteria are strongly grounded in the so-called 'authorisation principle', according to which the State responsible for examining the claim is the one that 'allowed' the refugee's presence in the EU (e.g. through insufficient control of its borders);[39] disregarding the real links, rights and preferences of asylum seekers, as well as the actual capacities of Member States at the external borders of the Union.[40]

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[26] Recast Reception Conditions Directive 2013/33/EU, [2013] OJ L 180/96, (RCD).
[27] Recast Procedures Directive 2013/32/EU, [2013] OJ L 180/60, (PD).
[28] Dublin III Regulation 604/2013, [2013] 180/31, (DR III).
[29] See, among others, ECtHR, *MSS v Belgium and Greece*, Appl. 30696/09, 21 Jan. 2011; *Tarakhel v Switzerland*, Appl. 29217/12, 4 Nov. 2014.
[30] Recital 10 QD. See also Recitals 7 RCD and 9 DR III.
[31] Common recital 2 QD, RCD, PD and DR III.
[32] Recitals 11, 31, 35 and art. 1 RCD; Recitals 11, 47 and Art. 1 PD; and Recitals 12, 16 and Art. 1 QD.
[33] Recital 13 QD; and common Recital 12 RCD and PD.
[34] Recital 3 DR III.
[35] Recital 25 and Art. 20 RCD.
[36] Art. 8 RCD.
[37] Arts. 31 (prioritised procedures), 32 (unfounded applications), 33 (inadmissible applications), and 43 (border procedures) PD.
[38] Art. 3(1) DR II and III.
[39] Recital 25 DR III.
[40] On the shortcomings of the Dublin system and advocating for a 'Dublin without coercion' alternative, see E Guild et al, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International*, Study PE

Moreover, the system should only benefit 'those who, forced by the circumstances, *legitimately* seek protection in the Community'.[41] Only persons 'genuinely in need' should have access to the CEAS.[42] Paradoxically however, such access has never been clearly regulated.[43] What is more, notwithstanding the assertions made that the AFSJ should remain 'open' to refugees,[44] these proclamations have been countered by constant action 'for a consistent control of external borders to stop illegal immigration'.[45] So, although Stockholm posits that '[t]he strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them',[46] no channels for safe and legal access to the CEAS have been opened. At the same time, while Member States have moved migration and border controls abroad, they have failed to recognise the extraterritorial reach of their obligations vis-à-vis refugees and others that are entitled to international protection. This asymmetry has worked to the detriment of asylum seekers, who in almost all cases access the CEAS through irregular means.[47]

2.2 The external dimension of the CEAS

Without channels for safe and legal entry, the CEAS has been 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, combined with a robust return and readmission policy, push responsibility away from the Member States.[48] This is the context in which The Hague Programme launched 'the external dimension of asylum', with a view to facilitating access to international protection for refugees 'at the earliest possible stage'.[49]

However, rather than being designed as a way of granting admission to the CEAS, the external dimension – integrated within the *Global Approach to Migration and Mobility* (GAMM) since 2011[50] – instead focuses on facilitating access to protection 'elsewhere'. The objective is to assist the regions of origin and transit of persons in need of international protection to build capacities and assume the responsibility of hosting 'their' refugees.[51] Several initiatives have

509.989 (European Parliament, 2014); and E Guild et al, *Enhancing the Common European Asylum System and Alternatives to Dublin*, Study PE 519.234 (European Parliament, 2015).

[41] Common recital 2 QD, RCD, PD and DR III (emphasis added).

[42] Recital 12 QD.

[43] For a detailed review, see V Moreno-Lax, 'Must EU Borders Have Doors for Refugees?' (2008) 10 EJML 315.

[44] *Tampere Conclusions*, para. 4. See also common recital 2 QD, RCD, PD, and DR III.

[45] Ibid., para. 3.

[46] *Stockholm Programme*, para. 5.1.

[47] E.g., despite the EU's proximity to Syria and Libya, Member States are hosting a small fraction of the total number of persons displaced from these countries, with nearly 100% of them reaching EU borders irregularly. See EUROSTAT, *Asylum Statistics* (as of 9 Dec. 2015), at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report>. See also UNHCR, *Asylum Levels and Trends in Industrialized Countries*, covering the 1999-2014 period, available at: http://www.unhcr.org/cgibin/texis/vtx/search?page=home&skip=0&cid=49aea93aba&comid=4146b6fc4&keywords=Trends

[48] C Rodier, *Analysis of the External Dimension of the EU's Asylum and Immigration Policies*, Study PE 374.366 (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 (European Parliament, 2009); P De Bruycker et al, *Setting Up a Common European Asylum System*, Study PE 425.622 (European Parliament, 2010); and E Guild and V Moreno-Lax, *Current Challenges for International Refugee Law with a Focus on EU Policies*, Study PE 433.711 (European Parliament, 2013).

[49] The Hague Programme, para 1.6.

[50] *The Global Approach to Migration and Mobility*, COM (2011) 743, 18 Nov. 2011.

[51] *Declaration on Principles Governing External Aspects of Migration Policy*, Annex 5 Part A to EC Edinburg, Presidency Conclusions, 12 Dec. 1992, Council doc. SN 456/92. *Cf.* UNHCR, *2007 Global Trends*, p. 7: 'the major refugee-generating

been proposed and/or are being implemented to this end, including the Joint EU Resettlement Programme,[52] and the so-called 'Regional Protection Programmes (RPPs)'.[53] The underlying idea appears to be that when alternative ways are available to access protection elsewhere, there should no longer be a need for refugees to seek asylum in the EU.[54] On the other hand, proposals for offshore/extraterritorial processing plans at the EU level, although periodically submitted (especially in times of crisis), have never materialised, as discussed further in sections 3 and 4.

2.2.1 Joint Resettlement Programme

Together with repatriation and local integration, resettlement is one of the 'durable solutions' for refugees supported by UNHCR. It consists in the selection and transfer of refugees from the country where they were first given asylum to a third State that agrees to admit them as refugees and grant them permanent residence.[55]

The Commission submitted a proposal for the creation of a *Joint Resettlement Programme* in 2009.[56] At the time, only 10 Member States had established annual schemes with very limited capacity, and there was no common planning or coordination at the EU level.[57] Thus, the Commission's programme intended to provide a framework for developing a common approach to these activities, seeking to involve as many Member States as possible. In parallel, it was expected that access to asylum would be organised in an orderly way and the global humanitarian profile of the Union would improve. On the other hand, the Commission also proposed coordinating the programme with the GAMM through the identification of common priorities, not only on humanitarian grounds, but also on the basis of broader migration policy considerations, in order to use resettlement in a 'strategic' way.

The European Refugee Fund was amended in 2012 to support resettlement efforts.[58] However, the results achieved were limited. During the Arab Spring, only 700 resettlement places were offered EU-wide, while UNHCR had estimated the need for at least 11,000.[59] Although the current Asylum, Migration and Integration Fund (AMIF) 2014-2020[60] (the replacement of the ERF with increased provisions) is expected to attract significant pledges, this has yet to fully materialise. Individual efforts at the domestic level have improved in some countries.[61] But the Commission's plan for a scheme of 20,000 places to respond to the Syrian crisis, proposed as

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regions host on average between 83 and 90 per cent of "their" refugees', available at: <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.

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

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

[54] For a detailed review, see V Moreno-Lax, 'External Dimension', in S Peers et al, *EU Immigration and Asylum Law*, Vol. 3 (Brill, 2dn edn, 2015) 617.

[55] UNHCR, *Resettlement Handbook* (2014), available at: <http://www.unhcr.org/4a2ccf4c6.html>.

56 (n 52). 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* (European Commission, 2003), available at: <http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/resettlement-study-full_2003_en.pdf>.

57 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.

58 Decision 281/2012/EU amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013, [2012] OJ L 92/1.

59 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>.

[60] AMIF Regulation 516/2014, [2014] OJ L 150/175.

[61] EASO Annual Report 2013, p. 71 and Annex C.14; and EASO Annual Report 2014, p. 8 and 81-82.

part of the *European Agenda on Migration*,[62] has still not been executed.[63] Member States had until 30 October 2015 to confirm the final number of persons they would resettle.[64] Nonetheless, it is possible that as part of the EU-Turkey deal to stem the influx of Syrian refugees, the Commission proposes a ten-fold increase by March 2016, in line with UNHCR requests.[65]

2.2.2 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 increase in regions of origin and transit of refugees, enhancing the capacity of the countries concerned to provide 'effective protection' themselves. Simultaneously, the programmes are also expected to 'enable those countries better to manage migration'.[66] RPPs have been designed as a 'tool box' of multiple actions. They provide a framework in which EU Member States *may* engage in *voluntary* resettlement commitments – but only if they wish to.

Since 2007, a number of projects have been launched. The first covers Tanzania – the country hosting the largest refugee population in Africa. The second includes Moldova, Belarus, and Ukraine, which together constitute a major transit route towards the EU. Since September 2010, a new programme began in the Horn of Africa, and plans to develop similar initiatives for Egypt, Libya and Tunisia started during the Arab Spring[67] – postponing the launch of the Libyan section until the end of the war.[68] Again, not only humanitarian but also migration policy considerations have been taken into account in the selection of these locations, with little regard for human rights or for the fact that some of these countries are not party to the 1951 Refugee Convention, and will therefore by definition not extend refugee protection to those who would otherwise qualify for this status.

A recent evaluation of RPPs has revealed the poor results achieved hitherto due to the inflexibility of the programmes, poor coordination between the different initiatives and actors concerned, and the lack of EU Members States' engagement in the resettlement component.[69] The extremely limited amount of funding allocated to RPPs – relative to their ambitious goals – also reduces their potential impact. Yet, the RPP framework should not be underestimated as it provides a platform for additional related collaboration. For instance, an ENPI project has been initiated as part of the European Asylum Support Office (EASO) External Action Strategy[70] regarding the participation of Jordan in EASO's work and the collaboration of Tunisia and

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[62] *A European Agenda on Migration*, COM(2015) 240 final, 13 May 2015, at 4-5. See also, Commission Recommendation on a European resettlement scheme, C(15) 3560, 8 Jun. 2015.

[63] The plan has only been officially 'adopted'. See JHA Council Conclusions, 20 Jul. 2015, Council doc. 11097/15.

[64] *Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, COM(2015) 510, 14 Oct. 2015, Annex 1, at 6-7.

[65] D Robinson & P Zalewski, 'Brussels draws up plan to resettle 200,000 refugees across Europe', *Financial Times*, 18 Oct. 2015, available at: <http://www.ft.com/cms/s/0/5bec9bee-758f-11e5-933d-efcdc3c11c89.html#axzz3uKVOKB9x>.

66 Regional Protection Programmes (n 53), at 3.

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

[68] Third Annual report on immigration and asylum, COM(2012) 250, 30 May 2012, at 16.

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

[70] EASO External Action Strategy (Nov. 2013), available at: <http://easo.europa.eu/wp-content/uploads/EASO-External-Action-Strategy.pdf>.

Morocco in both EASO and Frontex' missions[71]. This reinforces the link between protection in the region and border/migration control, despite the risk of containment and the protraction of refugee situations that it could entail.

3 Policies and Practices of Joint Processing

3.1 What is joint processing? Terminological difficulties

Strictly speaking, neither the EU resettlement plan nor RPPs (and their resettlement component) involve offshore refugee status determination (RSD) – since resettlement is applied *after* protection needs have been recognised. The term 'joint processing' has been used to denote different practices by different actors, but always in relation to experiences of jointly run RSD. These experiences range from initiatives of full procedural integration of the entire process (from the moment that international protection claims are received, up to the final conclusion on the application), to partial coordination of single phases or individual procedural operations, such as initial reception, screening, or referral processes through multi-actor/cross-jurisdictional collaboration. So, depending on the level and intensity of cooperation between the services and agencies involved, the degree of 'joint-ness' varies.

Joint processing can then be either 'internal' or 'external', depending on whether the procedures at stake take place within the territory of the host country concerned or abroad. Where initiatives are moved offshore and run extraterritorially, they are usually characterised as 'external (or extraterritorial) joint processing'. Within this category, depending on the scope and scale of the initiative, external processing may entail either the possibility for a claimant to approach the potential host State outside its territory with a claim for asylum that is then entirely processed offshore, or the option for the person concerned to obtain an entry permit for travel and subsequent onshore processing on arrival. The latter constitutes a sub-category of external processing; it involves minimal pre-arrival determination of requests for international protection and is usually denominated a 'protected-entry procedure'.[72] These variants of external processing are considered below.

3.2 Internal joint processing

Since EASO became operational, there have been several examples of 'internal joint processing' taking place within EU territory which comprise different levels of procedural integration and collaboration between the Member States concerned. EASO support and assistance programmes, alongside pilot projects and the so-called 'hotspots' scheme, constitute examples of actions undertaken to assist Member States faced with particular pressures on their reception and processing systems. The former are EASO regulation-based actions, whereas the 'hotspot' approach constitutes an *ad hoc,* policy-based initiative to deal with increasing arrivals in Italy and Greece, which has been designed and undertaken in parallel to the existing legal framework, grounded in the emergency assistance and solidarity clauses of the EU Treaty (Articles 78(3) and 80 TFEU).

[71] EASO Annual Report 2014, at 81. See also EASO Annual Report 2013, at 72-73.
[72] Noll et al (n 147), p. 5.

3.2.1 EASO Support and Assistance Programmes and Pilot Projects

EASO has been providing support to Greece, Italy, Bulgaria, and Cyprus, piloting several joint-processing projects since 2013.[73] Assistance in this realm has been afforded by the relevant provisions of the Agency's founding Regulation.[74]

Following the shipwreck of 3 October 2013, where 300 migrants drowned off the coast of Lampedusa,[75] the *Task Force Mediterranean* was set up, introducing several measures to deal with boat arrivals and avoid further loss of life at sea.[76] Among these, EASO, together with Frontex, Europol, and Eurojust, has contributed to a joint pilot project focussing on the phenomenon regarding the facilitation of irregular migration of persons in need of international protection to Italy and Malta. Project partners gather information on routes and the *modus operandi* of smuggling and trafficking networks at a 'pre-interview' stage – with no clear parameters regarding legal assistance and representation, as well as no specification of the procedural guarantees applied during the exercise.[77]

Following a request from the Italian government, a more general scheme has also been put in place to support **Italy** after the tragedy.[78] A Special Support Plan comprising 45 activities in different areas was launched in September 2013, with several EASO Asylum Support Teams (ASTs) coordinated by the Agency.[79] The focus is on technical and operational assistance, supporting Italy on Country of Origin Information (COI); the effective management of the Dublin system; and enhancing the quality of reception centres and procedural capacities.[80]

Also in 2013, **Greece** introduced its new Asylum Service, requiring training and assistance that was provided by EASO.[81] An Operating Plan Phase I (OPI) for emergency support was agreed to tackle the backlog of decisions; setting up an efficient reception structure and guaranteeing the quality of the asylum process.[82] To implement the OPI, EASO deployed and managed over 40 experts from 14 contributing Member States in over 50 ASTs.[83] Building on OPI, the Greek government filed a second request for assistance, which translated into the Operating Plan Phase II (OPII) for emergency support.[84] Further technical and operational assistance, especially with regard to training, reception and EU funding, was then delivered to Greece, with OPII covering 15 support activities, implemented via 55 ASTs. Also in the framework of

[73] EASO Annual Report 2014, at 8.
[74] EASO Regulation 439/2010, [2010] OJ L 132/11.
[75] 'Death toll of African migrants rises after boat disaster near Lampedusa', *The Guardian*, 12 Oct. 2013, available at: <http://www.theguardian.com/world/2013/oct/12/african-migrants-boat-lampedusa-capsizes-mediterranean>.
[76] Task Force Mediterranean, COM(2013) 869, 4 Dec. 2013.
[77] EASO Annual Report 2014, at 83-84. See also EASO Annual Report 2013, at 48.
[78] On the flaws of the Italian system, see UNHCR, *Recommendations on Important Aspects of Refugee Protection in Italy* (Jul. 2013), at: <http://www.refworld.org/docid/522f0efe4.html>.
[79] EASO, *Special Support Plan to Italy*, available at: <http://easo.europa.eu/wp-content/uploads/EASO-SPP-Italy-ELECTR-SIGNED.pdf>; *Amendment of the EASO Special Support Plan to Italy Ref. 1*, available at: <http://easo.europa.eu/wp-content/uploads/EASO-SPP-Italy-ELECTR-SIGNED.pdf>; and *Amendment of the EASO Special Support Plan to Italy Ref. 2*, available at: <http://easo.europa.eu/wp-content/uploads/2nd-amendment-SPP-Italy-ELECTR-SIGNED.pdf>.
[80] EASO Annual Report 2013, at 57-58. See also EASO Annual Report 2014, at 67.
[81] On the deficiencies of the Greek system, see UNHCR, *Current issues of refugee protection in Greece* (Jul. 2013), at: <https://www.unhcr.gr/fileadmin/Greece/News/2013/PCjuly/Greece_Positions_July_2013_EN.pdf>.
[82] EASO emergency support to Greece, Operating Plan Phase I (OPI) (01/04/2011-31/03/2013).
[83] EASO Annual Report 2013, at 55-57.
[84] EASO emergency support to Greece, Operating Plan Phase II (OPII) (01/04/2013-31/12/2014).

OPII, EASO and Frontex jointly delivered the first joint pilot training on nationality determination to support asylum and return procedures at the end of April of 2013.[85]

In the same year, **Bulgaria** faced a 400% increase in the number of applications for international protection compared to 2012, with large numbers of applications coming from Syrian nationals. EASO and the Bulgarian government thus jointly devised an Operating Plan covering the key challenges regarding access to the territory; registration of applications; adequate arrangements for unaccompanied minors; reception conditions; detention; and procedural capacity.[86] Measures have been delivered in three areas: operational support; institutional support; and horizontal support, encompassing the full spectrum of systemic needs.[87] Immediate support centred on the asylum process, putting forward detailed solutions for the registration, screening, and referral of asylum seekers.[88] A Special Support Plan to complement previous actions was signed in December 2014, and will operate until July 2016.[89]

Finally, regarding **Cyprus**, a Special Support Plan was agreed on 5 June 2014. The plan provided for EASO support, especially in the fields of reception and open accommodation, training, and age assessment.[90] Very few details have been provided by the Agency on the form of deployment, the concrete results achieved or any persisting challenges encountered,[91] which makes any assessment of the plan difficult to perform.

Following developments in 2014 regarding sea arrivals and increased pressures at the external borders of the EU, EASO launched a 'second generation' of more complex joint processing pilots and testing activities in the framework of the *Task Force Mediterranean*, supported by the EASO Processing Support Teams (PST). Three pilot projects have been implemented by experts from EASO and different Member States on asylum applications, asylum determination, and vulnerability assessment. Apparently, these experts have been integrated within the relevant domestic units of the Member State concerned and provided targeted assistance.[92] However, no specific details have been divulged, which makes it impossible to monitor and evaluate the compatibility with fundamental rights and effectiveness of these initiatives.[93]

3.2.2 The 'Hotspots' Scheme

Alongside these pilot projects, and the support and assistance programmes run by EASO in accordance with its founding Regulation, following requests from the Council, the Commission

[85] EASO Annual Report 2014, at 66.
[86] On the situation of the Bulgarian asylum system, see UNHCR, *Bulgaria as a country of asylum* (Jan. 2014), at: <http://www.refworld.org/docid/52c598354.html>; and *Observations on the current asylum system in Bulgaria*, (Apr. 2014), available at: <http://www.refworld.org/ docid/534cd85b4.html>.
[87] EASO Annual Report 2013, at 58.
[88] EASO, *Operating Plan to Bulgaria: Stock taking report on the asylum situation in Bulgaria* (Feb. 2014), available at: <http://easo.europa.eu/wp-content/uploads/EASO-Report-stock-taking-mission-to-Bulgaria-final-.pdf>.
[89] EASO Annual Report 2014, at 65.
[90] EASO, *Special Support Plan to Cyprus* (Jun. 2014), at: <http://easo.europa.eu/wp-content/uploads/EASO-CY-OP.pdf>.
[91] EASO Annual Report 2014, at 65.
[92] Ibid., at 79.
[93] Presumably, officers integrated within EASO PSTs, by analogy, are subject to the rules provided for in Arts 13-23 of the EASO Regulation regarding ASTs, but this should have been explicitly clarified, especially in what concerns any civil and criminal liability.

has set up the 'Hotspot approach' based on Articles 78(3) and 80 TFEU[94] as part of the immediate action foreseen in the *Agenda on Migration* to deal with the situation which saw the loss of 700 lives in the Mediterranean in April 2015.[95] The approach is therefore *ad hoc* and consists in EU agencies working with host Member States at the external borders of the EU to 'swiftly identify, register and fingerprint incoming migrants'.[96] The basic objective is to foster coordination and complementarity of efforts through an efficient division of labour, whereby EASO is to ensure that asylum seekers are 'immediately channelled into an asylum procedure where [ASTs] help process [applications] as soon as possible', while Frontex helps Member States with the return of irregular migrants that to not qualify for international protection, and Europol and Eurojust assist with investigations to dismantle smuggling rings.[97] But there is no specific legal instrument backing the initiative.

Hotspots have since been established in several locations in Italy and Greece to support the operational implementation of the emergency relocation programmes agreed in September 2015[98]. Their aim is to alleviate the Italian and Greek asylum systems from the strain caused by the considerable increase in sea and land arrivals – over 1 million throughout 2015, of which most are Syrian refugees.[99] The hotspot approach intends to provide a platform for joint and targeted action via an EU Regional Task Force (EURTF) that is responsible for overall coordination, coupled with a series of expert teams from contributing Agencies and Member States. EURTFs are located in their respective headquarters in Catania (Italy) and Piraeus (Greece),[100] with several hotspot locations opened in strategic points.[101] The teams assume a variety of different functions; from the registration, fingerprinting, screening and referral of arrivals, to the implementation of relevant procedures, the gathering of information on secondary movement and smuggling routes, and the coordination of return and readmission arrangements to facilitate the expulsion of 'persons who can be returned immediately'.[102]

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[94] Presidency Conclusions, Council doc. 12002/15, 14 Sept. 2015; *Measures to handle the refugee and migration crisis*, Council doc. 13880/15, 9 Nov. 2015.

[95] '700 migrants feared dead in Mediterranean shipwreck', *The Guardian*, 19 Apr. 2015, available at: <http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>.

[96] Agenda on Migration, at 6.

[97] Ibid.

[98] Relocation Decision 2015/1601, [2015] OJ L 248/80 (for the relocation of 40,000 persons in clear need of international protection from Italy and Greece over the next 2 years); and Relocation Decision 2015/1523, [2015] OJ L 239/146 (for the relocation of an additional 120,000 persons in the same conditions, over the same period).

[99] *Refugees/Migrants Emergency Response – Mediterranean*, UNHCR (undated), counting 1,015,078 sea arrivals in 2015, available at: <http://data.unhcr.org/mediterranean/regional.php>. *Cf.* EASO Newsletter Nov. / Dec. 2015, p. 2, stating that: 'For the first ten months of 2015 the total number of applications has already exceeded the 1 million mark'. On the possibility that the EU may be double-counting arrivals, see N Sigona, 'Seeing double? How the EU miscounts migrants arriving at its borders', *The Conversation*, 16 Oct. 2015, available at: <http://theconversation.com/seeing-double-how-the-eu-miscounts-migrants-arriving-at-its-borders-49242>.

[100] *The Hotspot Approach to Managing Exceptional Migratory Flows* (undated), available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf>.

[101] In Italy, the first hotspot was opened in Lampedusa on 17 Sept. 2015, with others in Porto Empedocle, Pozzallo and Trapani to open by the end of 2015 in Sicily, and from 2016 also in Augusta and Taranto. See '"Hotspots": the Italian example - conversation with Christopher Hein from CIR', ECRE Bull. 2 Oct. 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1210-hotspots-the-italian-example-conversation-with-christopher-hein-from-cir-.html>. In Greece, the first hotspot has been functioning in Moira former detention centre since 16 Oct. 2015 and additional hotspots were due to open on Chios, Samos, Kos, and Leros by end-November. See 'First hotspot inaugurated on Lesvos', *Ekathimerini*, 16 Oct. 2015, at: <http://www.ekathimerini.com/202586/article/ekathimerini/news/first-hotspot-inaugurated-on-lesvos>.

[102] *Explanatory Note on the Hotspot Approach* (Jul. 2015), p. 4-5, available at: <http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf>. See also Relocation Decision 2015/1601, Art 7; and Relocation Decision 2015/1523, Art 7.

EASO activities in this realm also include assistance in the process of matching potential beneficiaries of the relocation scheme with the most appropriate Member State for their relocation.[103] Indeed, the relocation programmes entail a temporary and partial suspension of Dublin rules vis-à-vis Italy and Greece, but by no means a complete withdrawal of its basic principles.[104] In particular, beneficiaries – i.e. applicants for international protection who lodge an asylum claim in either Italy or Greece and originate from countries with an average EU-wide positive recognition rate at first instance of at least, 75%,[105] are not allowed to choose their country of relocation and may oppose relocation decisions only on the basis of violations of their fundamental rights – through appeals, which have no automatic suspensive effect in principle. Otherwise, it is for the Member States to gauge their integration potential on the basis of language, family, cultural or social ties, and select the most appropriate relocation option through a matching process that considers 'the specific qualifications and [other] characteristics of the applicants concerned'.[106] In this sense, the relocation scheme reproduces the same coercive bias underpinning the Dublin system – which is precisely what led it to implode and motivated its suspension in the first place.[107]

Although results so far are unimpressive, with only 159 persons having been relocated of the 160,000 total envisaged,[108] structural deficiencies in the design and implementation of the hotspot approach have already emerged – and been generically acknowledged by the European Council.[109] The provision of information on relocation arrangements seems to be unsystematic and delivered only 'where appropriate'.[110] Fingerprinting practices include recourse to 'reasonable coercion',[111] and the avoidance of secondary movements may entail an imposition of reporting duties, detention, or even the issuing of re-entry bans.[112] Observers in Italy denounce a chaotic situation of arbitrary distinctions between forced and voluntary migrants through questionable methods, including physical force to obtain fingerprints, administrative detention without judicial oversight, zero information, limited access to UNHCR and other organisations (which is granted only *after* screening interviews), lack of protection safeguards, and summary (and possibly collective) expulsions.[113] On the other hand, the

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[103] *EASO and the Hotspots* (undated), available at: <https://easo.europa.eu/easo-and-the-hotspots/>.
[104] Relocation Decision 2015/1601, Recitals 23-24; and Relocation Decision 2015/1523, Recitals 18-19.
[105] Relocation Decision 2015/1601, Recital 25 and Art 3; and Relocation Decision 2015/1523, Recital 20 and Art 3.
[106] Relocation Decision 2015/1601, Recitals 34-35; and Relocation Decision 2015/1523, Recitals 28 and 30.
[107] For a thorough analysis of Dublin flaws and a proposal for a 'Dublin without coercion' paradigm, see (n 40).
[108] *Member States' Support to Emergency Relocation Mechanism* (as of 3 Dec. 2015), available at: <http://www.statewatch.org/news/2015/dec/eu-refugee-crisis-state-of-play-3-12-15-relocation.pdf>. This means it would take '180 years to reach the target' at this rate. See interview of J Sunderland (HRW), 'Desperate Journey: Shocking Video Shows Risks Refugee Families Take to Reach Europe Safely', *Democracy Now*, 18 Nov. 2015, at: <http://www.democracynow.org/2015/11/18/desperate_journey_shocking_video_shows_risks>.
[109] EC Conclusions, EUCO 28/15, 17-18 Dec. 2015, p. 1, para. 1.
[110] *Explanatory Note on the Hotspot Approach* (n 102), p. 4.
[111] Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, SWD(2015) 150 final, 27 May 2015, para. 7; and Relocation Decision 2015/1601, Art 5(5); and Relocation Decision 2015/1523, Art 5(5). On the risks of forcible fingerprinting, see *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, FRA Focus 05/2015, at: <http://fra.europa.eu/en/publication/2015/fundamental-rights-implications-obligation-provide-fingerprints-eurodac>.
[112] Relocation Decision 2015/1601, Recitals 38-41; and Relocation Decision 2015/1523, Recitals 32-34.
[113] 'Dallo sbarco all'hotspot, all'espulsione', *Redattore Sociale*, 6 Nov. 2015, avvailable at: <http://www.redattoresociale.it/Notiziario/Articolo/494075/Dallo-sbarco-all-hotspot-all-espulsione-Come-si-decide-il-destino-dei-migranti>; 'Sbarchi: caos identificazioni, anche i minori a rischio espulsione', *Redattore Sociale*, 13 Nov. 2015, available at: <http://www.redattoresociale.it/Notiziario/Articolo/494630/Sbarchi-caos-identificazioni-anche-i-minori-a-rischio-espulsione-Gravi-violazioni>; 'Italy: a worrying trend is developing in the "hotspots"', ECRE Bull. 20 Nov. 2015, at:

conditions in Greece's first hotspot on the island of Lesbos are so precarious that they have been described as 'life-threatening'.[114] The sheer lack of resources and proper delivery of basic services seems to add 'confusion and increase the suffering of refugees',[115] if not being directly increasing the risk of 'deaths inside the camps'.[116]

Serious shortages of material, equipment and personnel are deepening the crisis, with only a fraction of the total number of officers that were requested for deployment by EU agencies seconded to the hotspots.[117] In fact, one key drawback is that the hotspot approach 'does not provide reception facilities to its host Member States but builds on their existence and functioning',[118] which has revealed to be wholly unrealistic. With around 800,000 arrivals by sea in Greece and 150,000 in Italy in 2015 alone,[119] it is obvious that reception capacities in both countries can't but be overwhelmed, exposing the inadequacy of the premise underpinning hotspots. With the accent put on the control and containment of flows through coercion and pre-emption of onward movement, hotspots replicate the flaws of Dublin and, just like Dublin, cannot succeed. The need to recognise the rights and agency of forced migrants as to their decisions on where they wish to apply for asylum and incorporate their concerns and entitlements in the selection of the country of their relocation, if only for practical reasons, is fundamental to the functioning of the scheme. Until and unless a non-coercive system of responsibility allocation is in place, irregular secondary movements and human rights violations will continue, as people will find ways to reunite with extended family and friends.[120]

3.3 External joint processing

Alongside experiences with internal joint processing, external joint processing initiatives have also been discussed at EU level, drawing on examples from other regions, including the US Caribbean interdiction programme and the Australian Pacific Solution, which are further explored below. Yet, EU-wide consensus has proven difficult to reach, with offshore processing plans only recently and tentatively drawn[121] – as part of the EU-Turkey Action Plan adopted to

<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1285-italy-a-worrying-trend-is-developing-in-the-hotspots.html>.

[114] 'The rain has stopped in Lesvos but the inadequate reception conditions are still life threatening', MSF Sea, 25 Oct. 2015, available at: <https://twitter.com/MSF_Sea/status/658334514012409856>; '"Hotspot" opens in Lesvos, but reports of conditions on the island remain worrying', ECRE Bull. 29 Oct. 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1239-hotspot-opens-in-lesvos-but-reports-of-conditions-on-the-island-remain-worrying.html>.

[115] 'The EU's hotspot solution deepens refugee crisis', *IRIN News*, 23 Oct. 2015, available at: <http://newirin.irinnews.org/hotspot-solution-deepens-refugee-crisis>; 'Lesbos is a Disaster for Asylum Seekers. Will Becoming a 'Hotspot' Improve it?', *Human Rights Watch Dispatches*, 19 Oct. 2015, available at: <https://www.hrw.org/news/2015/10/19/dispatches-lesbos-disaster-asylum-seekers-will-becoming-hotspot-improve-it>.

[116] 'We've Had Children Dying When Their Boat Capsizes, Now We Are Potentially Faced With Deaths Inside the Camps', *Safe the Children*, 28 Oct. 2015, available at: <http://savethechildren.typepad.com/blog/2015/10/weve-had-children-dying-when-their-boat-capsizes-now-we-are-potentially-faced-with-deaths-inside-the.html>.

[117] 'The EU's hotspot solution deepens refugee crisis', *IRIN News*, 23 Oct. 2015, available at: <http://newirin.irinnews.org/hotspot-solution-deepens-refugee-crisis>.

[118] *Explanatory Note on the Hotspot Approach* (n 102), p. 5.

[119] *Refugees/Migrants Emergency Response – Mediterranean* (n 99).

[120] On this point, see (n 40).

[121] Humanitarian admission scheme (n 5).

support Turkey's refugee hosting efforts.[122] Generally, as pointed out above, the EU's strategy under the GAMM focuses instead on the containment of irregular flows within regions of origin and transit through cooperation packages with the countries concerned, exchanging development and other forms of aid for readmission agreements, strengthened (and sometimes joint) border controls, and collaboration in the fight against smuggling and trafficking.[123]

3.3.1 Examples from other regions: the US and Australia

The US Caribbean interdiction programme began as a response to rising numbers of irregular arrivals from Haiti, which at the time was immersed in a civil war.[124] A bilateral readmission agreement was concluded in 1981, authorising the US to intercept Haitian asylum seekers at high seas.[125] Subject to a rudimentary screening procedure on board US Coast Guards cutters, those that were determined as having a 'credible fear' claim were given access to the US mainland for processing, while the remainder were repatriated to Haiti. Out of the approximately 1,800 Haitians intercepted between 1981 and 1986, no one was ever reported to be a *bona fide* asylum claimant.[126] During the early 1990s, the policy was changed and Haitians that were intercepted were taken to the US Guantanamo Base for screening. In 1992, offshore processing was discontinued, and instead, all Haitians were taken back to Haiti.[127] The no-screening policy lasted until 1994, with the US Supreme Court concluding that the principle of *non-refoulement* did not apply extraterritorially.[128] At that point, Haiti threatened the suspension of the readmission agreement. Consequently, President Clinton resumed the pre-screening policy in May 1994, agreeing with Jamaica, and the Turks and Caicos Islands to use their territories for processing.[129] Eventually, President Aristide returned to office and the outflow of 'boat people' decreased.

Yet, in February 2004, violence broke out again, giving rise to another exodus. President Bush Jr. responded with orders that any 'refugee' attempting to reach US shores be turned back.[130] The 'shout test' was then introduced, so that upon interdiction, only those that were able to

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[122] EU-Turkey Joint Action Plan, European Commission Fact Sheet, MEMO/15/5860, 15 Oct. 2015. See also, Meeting of heads of state or government with Turkey, EU-Turkey statement, Council doc. 870/15, 29 Nov. 2015.

[123] This has generally been the approach followed in relation to African countries. See Valetta Summit, Political Declaration and Action Plan, 11-12 Nov. 2015. For a review and further references, *see Valletta Summit: EU and Africa commit to prevent irregular migration, but support legal mobility*, ECRE Bull. 13 Nov. 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1274-the-valletta-summit-eu-and-africa-commit-to-prevent-irregular-migration-but-support-legal-mobility.html>.

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

[125] Agreement to Stop Clandestine Migration of Residents of Haiti-US, TIAS No. 10241, 33 *UST* 3559, 23 Sept. 1981.

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

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

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

[129] Memorandum of Understanding between the Government of the United States and the Government of Jamaica for the establishment within the Jamaican territorial sea and internal waters of a facility to process nationals of Haiti seeking refuge within or entry to the United States of America, KAV 3901, Temp. State Dept. No. 94-153, in force on 2 Jun. 1994; and Memorandum of Understanding between the Government of the United Kingdom, the Government of the Turks and Caicos Islands, and the Government of United States to establish in the Turks and Caicos Islands a processing facility to determine the refugee status of boat people from Haiti, KAV 3906, Temp. State Dept. No. 94-158, in force on 18 Jun. 1994.

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

attract the attention of the crew were granted a pre-screening interview. Among these, only a small proportion, successful in persuading the crew of a well-founded fear of persecution, was brought to the US for full processing. The rest were returned without further investigation. Apparently, the Obama Administration continues this policy.[131] Similar practices undertaken by Italy have now been condemned by the Strasbourg Court in the *Hirsi* case. They have been considered to breach protections against *refoulement*, ill treatment, and collective expulsion, as well as constituting a violation of minimum procedural safeguards and effective remedy guarantees.[132]

Running parallel to the US interdiction programme, the Australian 'Pacific Solution' was launched after the *Tampa* incident, which involved a Norwegian container ship rescuing 433 asylum seekers in waters off the coast of Australia in August 2001.[133] During this time, Indonesia was the main transit country for those *en route* to Australia, which was assisting Indonesia with the costs of RSD processing. They were in the process of signing an anti-smuggling/anti-trafficking agreement. It is in this context that, when the *Tampa* requested permission to disembark, Australia considered it to be Indonesia's responsibility. In the end, survivors were taken to Nauru[134] and Papua New Guinea (PNG),[135] countries with which Australia had managed to sign informal agreements in exchange for an undisclosed transfer of funds. The incident led to the adoption of new legislation at the domestic level, according to which Australia excised part of its 'migration zone'. Thereafter, no valid asylum claims could be made outside mainland Australia, with asylum seekers taken to a 'declared country' for processing instead, i.e. Nauru or PNG. As part of the 'Pacific Solution', Australia funded closed reception centres in both countries that were managed by the International Organisation for Migration (IOM). However, RSD procedures were conducted by Australian immigration officials – albeit with no judicial control or any other form of monitoring. Upon recognition, refugees were finally resettled to neighbouring countries, with a handful of them admitted in Australia.[136]

In February 2008, Australia's new government announced a partial abandonment of the policy, discontinuing transfers to Nauru and PNG, but maintaining offshore processing in Australia's excised Christmas Island.[137] However, following pressures from the opposition, the Pacific Solution arrangements were reinstated in 2012.[138] In the summer of 2013, a 'Regional

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[131] A Dastyari, 'YLS Sale Symposium: Immigration Detention and Status Determinations in Guantánamo Bay, Cuba', *Opinio Juris*, 12 Mar. 2014, available at: <http://opiniojuris.org/2014/03/12/yls-sale-symposium-immigration-detention-status-determinations-guantanamo-bay-cuba/>. For the latest developments, see N Frenzen, 'Policy Responses to "Boat Migration": A Global Perspective - The US Response', in V Moreno-Lax and E Papastavridis (eds), *'Boat Refugees' and Migrants at Sea* (Brill, forthcoming).

[132] ECtHR, *Hirsi v Italy*, Appl. 27765/09, 23 Feb. 2012.

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

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

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

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

[137] Australian Ministry for Immigration and Citizenship, 'Last refugees in Nauru', 8 Feb. 2008, available at: <http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm>.

[138] Philipps, Social Policy Section, 'The "Pacific Solution" revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island', *Parliament of Australia: Research Publications 2012-13*, available at:

Resettlement Arrangement' was signed with PNG and Nauru.[139] Following the election of the Coalition government in September 2013, *Operation Sovereign Borders*, a military-led border security mission, was deployed. The focus is on deterrence, interdiction and forcible return of boat arrivals, with over 1,000 pushbacks registered in the first two months of the programme.[140] Since then, cooperation has been extended to Sri Lanka and Cambodia (both countries of origin of asylum seekers in the Asia-Pacific region) and deepened further with Malaysia (a main country of transit towards Australia) with very worrying results[141] – including accusations of collective expulsion, ill treatment, and excessive use of force, as well as allegations that Australian officials are directly involved in smuggling practices.[142]

3.3.2 Discussions at the EU level

The idea of introducing offshore procedures for the determination of refugee status abroad has been in circulation for a number of years amongst European countries. Already in 1986, Denmark submitted a proposal to the UN General Assembly for the adoption of a Resolution on the establishment of regional processing centres administered by the UN.[143] In 1993, the opening of 'reception camps' in asylum seekers' regions of origin was proposed by The Netherlands to the Inter-Governmental Consultations.[144] Tony Blair revived the proposal in his 'New Vision for Refugees' a decade later,[145] facing strong opposition from UNHCR.[146]

At the EU level, there have been numerous discussions in this direction, resulting in a feasibility study in 2002[147] and a cautious Commission Communication in 2004.[148] The idea was re-floated to some extent in the Commission's *Policy Plan on Asylum* and then again in its Communication on the Stockholm Programme.[149] A draft version of the programme expressly called on the EU institutions to examine 'the scope for new forms of responsibility for

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution>.

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

[140] Australian Customs and Border Protection Service, 'Operation Sovereign Borders', Jun. 2014, available at: <http://www.customs.gov.au/site/operation-sovereign-borders.asp>. See also, Maley and Tylor, 'More than 1100 asylum-seekers have been stopped from coming to Australia by boat as the Australian Federal Police and its Indonesian counterpart greatly boost their offshore disruption activities', *The Australian*, 12 Nov. 2013, available at: <http://www.theaustralian.com.au/national-affairs/immigration/indonesia-helps-afp-stop-boats/story-fn9hm1gu-1226757726065?nk=86f5e0cb92e0879bcc37f408751deabd>.

[141] For a detailed review, see C Higgins, 'The sustainability of Australia's offshore processing and settlement policy' in V Moreno-Lax and E Papastavridis (eds), *'Boat Refugees' and Migrants at Sea* (Brill, forthcoming).

[142] Amnesty International, *By Hook or By Crook: Australia's Abuse of Asylum-Seekers at Sea* (Oct. 2015), available at: <https://www.amnesty.org/en/documents/ASA12/2576/2015/en/>. See also, Amnesty International, 'Australia: Damning evidence of officials' involvement in transnational crime uncovered', 28 Oct. 2015, available at: <https://www.amnesty.org/en/latest/news/2015/10/australia-damning-evidence-of-officials-involvement-in-transnational-crime-uncovered/>.

[143] International procedures for the protection of refugees: Draft Resolution, UN Doc. A/C.3/41/L.51, 12 Nov. 1986.

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

145New Vision for Refugees, 7 Mar. 2003, available at: <http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf>.

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

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

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

[149] 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.

protection such as procedures for protected entry and the issuing of humanitarian visas'.[150] However, this reference progressively changed,[151] with the final document simply asking 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 disappeared in the final version, considering that Member States should participate in any such initiatives 'on a voluntary basis'.[152]

Before the uprisings in Northern Africa and the ensuing wars in Libya and Syria, 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 transit, enhancing Member States' interdiction capacities, and finding innovative means for access to asylum.[153] Two solutions were identified. Asylum seekers would be intercepted at sea and (forcibly) returned to the country of embarkation, where they would either be offered the possibility of requesting a protection visa at one of the Member States' embassies to then travel (regularly) to the EU for processing, or have their claims fully examined in the embarkation country, with Member States offering resettlement opportunities (on a voluntary basis) to recognised refugees in need of relocation.

The proposal drew heavily on the need for 'a strong political dialogue' with Libya and Turkey as key transit countries, and although it was never officially adopted, several aspects seem to have inspired subsequent EU action in this regard. Both the *Task Force Mediterranean* and the *Open and Secure Europe* Communications define cooperation with third countries for the return and readmission of irregular migrants, enhanced border controls, and the fight against smuggling and trafficking networks as top priorities.[154] These are precisely the areas in which the EU has most decisively invested thereafter,[155] with discussions on offshore processing (in any of its variants) moving to a second plane.

In fact, several recent proposals (seemingly) including an offshore processing component have been put on the table. However, they have not been fully elaborated, leaving the legal, practical and technical details involved underdeveloped.[156] Three of them deserve special attention, as they appear to be already underway.

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[150] Draft Stockholm Programme, version of 6 Oct. 2009, para. 5.2.2.
[151] For a meticulous account of the drafting process of the Stockholm Programme refer to: <http://www.statewatch.org/stockholm-programme.htm>.
[152] Stockholm Programme, para. 6.2.3.
[153] 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. See further Moreno-Lax (n 54), at 653-657.
[154] Task Force Mediterranean (n 76); and An open and secure Europe, COM(2014) 154, 11 Mar. 2014.
[155] For a most recent example, see Valetta Summit (n 123).
[156] While a new *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, HOME/2011/ERFX/FW/04 (European Commission, 2013) was completed in 2013, no parallel study has yet been undertaken on the implications of extraterritorial plans, despite repeated calls and promises to this effect since The Hague Programme, para. 1.3. *Cf.* 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, foreseeing the issuance of a specific Communication on extraterritorial processing in the course of 2014.

3.3.2.1 Pilot Multi-Purpose Centre in Niger

A 'pilot multi-purpose centre' seems to have been opened in Agadez (Niger), a major transit hub for thousands of West Africans attempting to reach Algeria and Libya to then travel on to Europe. The centre provides 'information, *local protection*, and resettlement opportunities for those in need', and is closely connected to broader initiatives to restore stability in Libya and Syria, as well as supporting efforts to host refugees in the region and 'tackle migration upstream'.[157] So far, this is the closest the EU has come to running extraterritorial asylum centres. However, the exact mission and capacities of the centre remain obscure. According to some media outlets, the action includes 'plans to process asylum seekers extraterritorially before they can arrive in Europe and lodge a claim'.[158] By contrast, other sources indicate that the centre seeks rather 'to provide emergency help/shelter for refugees and to facilitate voluntary returns to countries of origin', but that it does not 'accept or process asylum applications'.[159]

A recent Commission evaluation mentions the 'giving [of] direct assistance … and registration, as well [as] providing opportunities for safe and voluntary return and reintegration … [and] support to local communities' as tasks to be assumed by the centre, but there are no details about the applicable law, responsibility arrangements, or the rights and guarantees of the migrants targeted, making it difficult to appreciate the full extent of the initiative. In any case, the overarching rationale, in line with the GAMM ambitions, seems to be to 'strengthen [the] capacities of Niger to fight against irregular migration'[160] and limit arrivals, not to expand asylum space per se, or to facilitate access to international protection in the EU.[161] One immediate effect of the policy has been legal reform at the domestic level by Nigerian legislators, raising prison sentences up to 30 years for migrant smuggling in an attempt to stem the flow of migrants leaving Africa for Europe.[162]

3.3.2.2 Pilot Supported Processing Project in Tunisia, Morocco and Jordan

Beside the multi-purpose centre, the ENPI project mentioned above foresees that EASO implements initiatives in the context of the Mobility Partnerships with Tunisia, Morocco and Jordan concluded as part of the GAMM, to support asylum-related measures, provide training and other capacity-building assistance, and 'investigate the feasibility of a pilot project on *supported processing*'.[163] Eight such projects were implemented by the end of 2014, with

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[157] A European Agenda on Migration, at 5 (emphasis added). See also Answer given by Vice-President Mogherini on behalf of the Commission, Parliamentary question E-008909/2015, 11 Sept. 2015, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008909&language=EN>.

[158] 'EU countries to take in 40,000 asylum seekers in migration quota proposal', *The Guardian*, 27 May 2015, available at: <http://www.theguardian.com/world/2015/may/27/eu-countries-take-40000-asylum-seekers-migration-quota-syria-uk>. See also, *Extraterritorial Processing of Asylum Claims*, European Parliamentary Research Service, 10 Jun. 2015, available at: <http://epthinktank.eu/2015/06/10/extraterritorial-processing-of-asylum-claims/>.

[159] *DE/NL Food for Thought-Paper: Tapping the full potential of CSDP in the field of migration*, 13 Nov. 2015, at 2, available at: <http://www.statewatch.org/news/2015/nov/German-Dutch-Proposal-CSDP-Migration.pdf>.

[160] Managing the refugee crisis (n 64), at 15.

[161] Expressing similar concerns, see HRW, *The Mediterranean Migration Crisis: Why People Flee, What the EU Should Do*, 19 Jun. 2015, available at: <https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>.

[162] 'EU to open shelters in Niger in bid to keep illegal migrants out of Europe', *The Guardian*, 15 May 2015, available at: <http://www.theguardian.com/world/2015/may/15/eu-shelters-niger-africa-illegal-migration-europe>.

[163] EASO Annual Report 2013, at 48 (emphasis added).

another 3 scheduled for 2015.[164] Whether this supported processing scheme entails the deployment of EASO experts and/or the secondment of Member State asylum officials to the third countries concerned, amounting to a form of assisted offshore processing, is also ambiguous. Neither EASO reports nor Commission documentation relay any further details in this regard.[165]

3.3.2.3 Voluntary Humanitarian Admission Scheme with Turkey

Finally, a voluntary humanitarian admission scheme was proposed by the European Commission in December 2015,[166] the adoption of which Member States are due to consider 'rapidly'.[167] However, as discussed further below, the details of the Commission Recommendation are blurry. The humanitarian admission scheme is a hybrid between a normal resettlement plan (managed by UNHCR) and a fully-fledged offshore processing programme which is based on solidarity and fair sharing of responsibility, but has no minimum or maximum number of places. It is grounded in voluntary participation by Member States, and gives rise to subsidiary protection instead of refugee status. Also, the fact that the scheme is presented as a Recommendation makes its unenforceable, weakening its legal status.

The scheme is part of the EU-Turkey agreement concluded on 29 November 2015, the main objective of which is 'stemming the influx of irregular migrants [sic]… to Turkey and the EU'.[168] According to the President of the Council, '[t]he situation where hundreds of thousands of people are fleeing to the EU via Turkey must be stopped'.[169] As a result, it is expected that Turkey will impose tighter visa requirements and residence checks, in line with Schengen standards; that irregular migrants will be readmitted by Turkey and/or sent back to their countries of origin; and that border controls and the fight against migrant smuggling will be reinforced. In return, Turkey will receive a EUR 3 billion allocation in the form of a Refugee Facility to assist with the hosting of 2 million Syrian refugees; EU accession negotiations will be re-opened; and the Visa Dialogue will be accelerated to achieve the full liberalisation of travel arrangements for Turkish citizens within the Schengen zone by October 2016.[170]

The effects of the agreement have already started to be felt. A day after it was signed, 1,300 asylum seekers were detained at the Greek-Turkish border,[171] and reliable sources have reported pushbacks and denials of entry at the Turkish-Syrian border,[172] despite UNHCR

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[164] Managing migratory flows: follow-up to Council conclusions "Taking action to better manage migratory flows" of 10 October 2014 - Implementation of the actions under the Task Force Mediterranean and the Justice and Home Affairs Council conclusions of October, Council doc. 16222/14, 4 Dec. 2014, at 5.4, p. 19.

[165] Expressing similar concerns, see T Strik (Rapporteur), *Countries of transit: meeting new migration and asylum challenges*, Committee on Migration, Refugees and Displaced Persons, PACE Doc. 13867, 11 Sept. 2015.

[166] Humanitarian admission scheme (n 5).

[167] EC Conclusions, EUCO 28/15, 17-18 Dec. 2015, p. 2, para. 2.

[168] EU-Turkey statement (n 122), para. 7.

[169] Remarks by President Donald Tusk after his meeting with President of Turkey Recep Tayyip Erdoğan, Council doc. 698/15, 5 Oct. 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/10/05-tusk-meeting-turkey-president-erdogan/>.

[170] EU-Turkey statement (n 122), paras 5-6. See also, EU-Turkey Joint Action Plan (n 122).

[171] 'Turkey arrests 1,300 asylum seekers after £2bn EU border control deal', *The Guardian*, 30 Nov. 2015, available at: <http://www.theguardian.com/world/2015/nov/30/turkey-arrests-1300-asylum-seekers-after-2bn-eu-border-control-deal>. See also, 'Turkey arrests 1,300 migrants and smugglers after EU deal', *EU Observer*, 1 Dec. 2015, at: <https://euobserver.com/migration/131321>.

[172] 'Risks of the EU-Turkey Migration Deal', *HRW Dispatches*, 1 Dec. 2015, available at: <https://www.hrw.org/news/2015/12/01/dispatches-risks-eu-turkey-migration-deal>; AI, *Europe's Gatekeeper: Unlawful*

guidelines requiring that returns to Syria are avoided in all circumstances.[173] Border closures are forcing Syrians into dangerous crossings.[174] Coupled with the fact that Turkey has ratified the 1951 Convention with a geographical limitation,[175] according to which refugee status is only to be recognised to *European* refugees, this puts Syrians in a most precarious situation.

3.3.2.4 Offshore Processing: Practical and Legal Obstacles

The key challenge facing joint offshore processing schemes is ensuring that the subject matter, legal framework, and implementing practices are clearly defined and delimited so that they actually assist in facilitating access to protection to those in need, rather than turning into a new obstacle to reaching a 'durable solution', increasing delays, costs and uncertainty. Therefore, two sets of issues require attention: practical considerations and legal constraints. Who will be subject to what screening, and by whom? What will the reception conditions and time periods be? Where will they take place, and with what results? Central questions that will dictate the kinds of responses required – in line with refugee and human rights obligations of the participating States and organisations involved. Considering that the EU-Turkey humanitarian admission plan is now on the table for swift adoption, the remainder of this section takes the scheme as a reference point to concretely elaborate on these practical and legal considerations.

4 Practical difficulties for a joint EU external processing scheme

4.1 Objectives

The first point to consider is the aim pursued by the scheme, as this will determine its scope and scale, as well as the related costs, and its legal and practical constraints. The EU-Turkey initiative enables the 'humanitarian admission from Turkey of persons in need of protection displaced by the conflict in Syria… to ensure an orderly, managed, safe and dignified arrival'.[176] However, the ultimate objective pursued is 'the sustainable reduction of numbers of persons irregularly crossing the border from Turkey into the European Union'.[177] This reveals that the primary underlying ambition is not to facilitate access to protection in the EU, but to diminish the volume of unwanted arrivals. The plan also seeks to deter secondary movements within Europe.[178] It thus foresees that candidates are informed of their rights and obligations, 'in particular of the consequences of [unauthorised] onward movement within participating States and of the fact that they are only entitled to the rights attached to protection in the

Detention and Deportation of Refugees from Turkey, 16 Dec. 2015, available at: <https://www.amnesty.org/en/documents/eur44/3022/2015/en/>.

[173] UNHCR, International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV (Nov. 2015), available at: <http://www.refworld.org/docid/5641ef894.html>.

[174] 'Turkey: Syrians Pushed Back at the Border', *HRW News*, 23 Nov. 2015, available at: <https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>.

[175] Ratifications as at 20 Dec. 2015: <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en>.

[176] Humanitarian admission scheme (n 5), Recital 4.

[177] Ibid., Recital 5.

[178] Ibid., Recital 15.

State of admission'.[179] Persons moving irregularly between States should be sent back to the State of admission, pursuant to the Dublin Regulation.[180]

The problem with this approach is that the overarching idea is not to expand net asylum space, but simply to stem the flow of asylum seekers coming from Turkey and prevent further irregular intra-EU migration upon arrival. Following such as strategy would divert , attention from the key action required to solve the current access crisis – detracting credibility from the EU's commitment 'to create a system of solidarity and burden sharing with Turkey for the protection of persons forcefully displaced by the conflict in Syria'.[181]

4.1.2 Numbers and distribution criteria

Reflecting the key objective above – and the volatility of the EU's pledge of solidarity, 'the number of persons to be admitted under this scheme is to be determined regularly', leaving the scope and scale of the plan undefined. Indeed, depending on 'the overall numbers of displaced persons staying in Turkey, including the impact on these numbers of the sustainable reduction of numbers [sic] of persons irregularly crossing the border from Turkey into the European Union', the total volume of admissions will be adjusted. Material capacities, including the 'processing capacity of UNHCR' should also be taken into account, but the essential point here is that there are no a priori commitments or tentative alleviation goals.[182] Furthermore, Member States may actually conclude that 'there is no substantial reduction in the number of persons irregularly crossing the border from Turkey into the European Union', in which case they may even decide to unilaterally 'suspend *ex nunc* the implementation of the scheme' – apparently, without Turkey having any kind of say in the decision.[183]

Why and how Member States should take account of 'absorption, reception and integration capacities, the size of the population, total GDP, past asylum efforts, and the unemployment rate'[184] when distributing admitted persons is equally unclear. These are the criteria that underpin the internal relocation scheme benefitting Italy and Greece that is discussed above, as well as the Resettlement scheme for 20,000 persons agreed on 20 July 2015.[185] These criteria would make sense in a duty-based, compulsory participation framework, but become superfluous in a voluntary system, with no predefined commitments and a completely flexible determination of final numbers. Without a firm, specific pledge from EU countries to resettle refugees as a concrete component of the humanitarian admission scheme, the workability and overall impact of this programme will be negligible. Open quotas based on protection concerns are conducive to maximising results and responding to the real needs of displaced persons on the ground – this option would also best adjust to the exigencies of human rights and refugee law obligations discussed below. Yet, if numbers are contingent on migration control

[179] Ibid., para. 12.
[180] Ibid., para. 13.
[181] Ibid., Recital 3.
[182] Ibid., Recital 10 and paras 3 and 14.
[183] Ibid., para. 6. *Cf*. para. 15 on the establishment of a Joint Committee, with Turkish representation, meeting 'at regular intervals to monitor the implementation of the scheme'.
[184] Ibid., para. 4. See also Recital 13.
[185] Ibid., para. 11. See also EC Conclusions, 25-26 June 2015, EUCO 22/15, para. 4, p. 2; and Extraordinary JHA Council Meeting, 20 July 2015, Council doc. 11097/15, p. 5.

outcomes, humanitarian admission becomes a secondary, perhaps even desirable result, but it will not drive the programme.

4.1.3 Tasks, duties and final decisions

Once key objectives and intended outcomes have been defined, it is essential to apportion responsibilities for the day-to-day administration of the plan, identifying the competent actors and distributing the related tasks and duties amongst them. The needs, concerns, and capacities of the host country must equally be taken into account, following a logic of solidarity and shared responsibility. Furthermore, decisions need to be made as to whether offshore processing activities will be coordinated by the host country itself, UNHCR, or EASO, with due consideration of the implications.

In the proposed humanitarian admission plan, UNHCR is called on to play a key role in the identification, recommendation and referral of beneficiaries – which is why its 'processing capacities' should be assessed when determining or adjusting the number of people targeted by the scheme.[186] However, the final and concrete responsibilities of the agency are left undetermined. The plan envisages UNHCR issuing a 'recommendation … following referral by Turkey' so that persons displaced by the conflict in Syria gain admission in participating EU Member States 'in order to grant them subsidiary protection'.[187] But the basis for such a 'recommendation', the procedural steps that should be taken before the recommendation is adopted, the arrangements that should be followed, and the guarantees that should be respected, remain unknown.

All migrants arriving to Lesvos need to be registered at the Moria transit camp. Here they wait to be registered. Greece, January 2016. © Caroline Haga / IFRC

[186] Ibid., Recitals 6-8, 10 and paras 2-3 and 7-8.
[187] Ibid., para. 2.

The Commission mentions that selection procedures should constitute a 'collaborative effort' among participating Member States, Turkey, UNHCR and EASO, but does not specify 'operating procedures', 'processing modalities' and 'the roles of the actors involved'. It will be down to EASO, 'in close cooperation with the Commission, participating States, the Turkish authorities, UNHCR and IOM', to determine the relevant details at a later stage: 'at the latest one month after the adoption of this Recommendation'.[188] However, the potential contribution of participating actors should be clearly delimited beforehand. Knowing who does what, and to what effect, is necessary for the credibility and sustainability of the system. An arrangement which sees the division of labour left to a subsequent proposal by one of the participating actors after the start of the programme, seems unrealistic. For the plan to work, a minimum distribution of tasks and responsibilities before operations start is essential.

However, one key element is pointed out in the Commission Recommendation: 'authorities of the participating States should cooperate through *common processing centres* and/or mobile teams'.[189] The purpose of this cooperation should be 'the assessment of documentation and conducting of interviews'.[190] Nonetheless, final decisions on the admission of beneficiaries 'should rest with the participating States',[191] making it unclear whether a participating State may decide not to grant admission to its territory on completion of the identification procedure, and if so, on what basis. A system that accords a 'trump card' to destination countries on purely discretionary grounds with no guaranteed final outcome, may reveal difficult to manage.

Finally, considering that compliance with refugee and human rights law standards is an unavoidable condition, the initiative should envisage the introduction of dedicated monitoring arrangements by independent NGOs or other third parties to oversee the good functioning of the programme, and guarantee the transparency and accountability of the actors involved. Alternatively, existing monitoring procedures by the EU Agency for Fundamental Rights (FRA), the EU Ombudsman, the Council of Europe Commissioner for Human Rights, or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) should be unobstructed. The reporting and monitoring mechanisms contemplated in the Commission Recommendation, whereby the parties involved in the scheme also judge their own performance,[192] do not meet the necessary requirements of independence and impartiality to be credible.

4.1.4 Costs

Depending on the scale and typology of offshore processing arrangements selected, the material (and legal) implications will vary. These arrangements can range from fully centralised multi-actor screening and determination proceedings covering the whole first instance and appeal cycle – requiring the mobilisation of resources on a grand scale, to minimalist conceptions using pre-existing procedures with the assistance of experts from EU Member States, either independently or as part of EASO operations. Combinations of these variants may

[188] Ibid., para. 8.
[189] Ibid., para. 9 (emphasis added).
[190] Ibid.
[191] Ibid.
[192] Ibid., paras 14 and 15.

also be envisaged, whereby joint initiatives are adopted with a limited scope; focusing on the identification, registration and referral of the targeted group – as seems to be the case in the EU-Turkey scheme.

The Financial Statement accompanying the Commission proposal anticipates the costs of 20 million per year for 'one processing centre in Turkey' with a capacity of '10,000 people' that would be 'managed by UNHCR'.[193] It is foreseen that the 50 staff needed for the centre would primarily come from the Commission, to '[s]upport, process and monitor the activities in the area of resettlement at the level of the Commission, and assist Turkey in the processing centre'.[194] But without predicted volumes and anticipated numbers, it is difficult to assess whether this projection is realistic.

Regardless of whether common processing centres or mobile teams are set up, besides processing costs, a series of additional expenses – some of which have been reflected in the Financial Statement – should also be taken into account. These include: the provision of human rights to the centre's population in conformity with EU and international standards; the funding of UNHCR, IOM, and any other organisations contributing to the running of the scheme; the salaries of the experts and staff involved; the costs of the physical transfer of successful cases to countries of destination; the expense associated to the removal of rejected cases; the costs of border controls and readmission procedures, etc.[195]

4.2 Legal obstacles for a joint EU external processing scheme

4.2.1 Legal framework and legal responsibility

Although the Commission speaks of a 'standardised humanitarian admission procedure', there are no predefined qualification criteria or any specific procedural guarantees in its Recommendation.[196] The legal framework of reference seems to be the Qualification Directive,[197] but it is unclear whether the instrument is considered to apply extraterritorially or just by analogy. In addition, it seems that only its provisions dealing with subsidiary protection will be taken into account – since the purpose of the scheme is to admit persons displaced by the conflict in Syria 'in order to grant them subsidiary protection as defined in Directive 2011/95/EU or an equivalent temporary status'.[198] Other sources of EU and international law that may be relevant have also been left unspecified. It is as if the legal strength of the fundamental rights *acquis* could be ignored or displaced by an *ad hoc* system to be determined *ex novo* 'by EASO in close cooperation with the Commission, participating States, the Turkish authorities, UNHCR and IOM',[199] picking and choosing among existing standards at will, as if there were no legal parameters from which derogation is impossible.

[193] Ibid., financial statement, pp. 10 and 21.
[194] Ibid., financial statement, pp. 21 and 25.
[195] In this line, see G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 EJML 303, at 327-328.
[196] Humanitarian admission scheme (n 5), Heading of para. 7.
[197] Ibid., para. 2.
[198] Ibid.
[199] Ibid., para. 8.

Before the introduction of any offshore processing scheme, the applicable legal framework should be defined; be it the CEAS instruments, or a dedicated legal instrument yet to be adopted. Considering that both the Dublin III Regulation and all Recast Directives apply within the entire territorial confines of the Member States, including border zones and territorial waters,[200] actions taken to stem the flow of asylum seekers from Turkey to the EU must respect, and be adjusted to the current asylum *acquis*. In turn, action carried out in Turkey by Member State officials and/or EU staff will have to take account of the obligations ensuing from the EU Charter of Fundamental Rights (EUCFR),[201] the European Convention on Human Rights,[202] and other international instruments of refugee and human rights protection that trigger obligations extraterritorially.[203] In this context, the principles of *non-refoulement*, non-discrimination, fair trial and effective remedy, alongside the prohibition of ill treatment, have to be given special attention.

It should not be hastily assumed that legal responsibility will entirely lie with the country hosting joint processing initiatives within its territory. According to well-established legal principles, participating Member States retain responsibility for any actions or omissions that can be attributed to them, whether they act autonomously, through a joint body, via delegation to an international organisation, or through the intermediation of an independent private actor. Unless an alternative regime is put in place, whereby the determination of international responsibility for wrongful acts is effective and in line with international standards, the prescriptions of the ILC Articles on State Responsibility, as well as the Articles on the Responsibility of International Organisations remain applicable by default under international customary law.[204] This means that responsibility for any violations of human rights and refugee law standards cannot be eluded through delegation. Even instances of indirect perpetration of wrongful acts leading to a breach of obligations will trigger a duty to repair.[205] Activities such as aiding and abetting, financing, sponsoring, or directing wrongful conduct will entail liability under international law[206] – something which must not be forgotten when defining the details of the humanitarian admission scheme.

4.2.2 Beneficiaries: Inclusion, exclusion and outcomes

The determination of the selection criteria for humanitarian admissions is key to the implementation of the programme. In principle, it appears that all 'persons displaced by the conflict in Syria who are in need of international protection' may qualify.[207] But, since the criteria should be designed 'so as to avoid that the scheme creates a pull factor for persons to

[200] Common Art. 3 DRIII, RCD, and APD. The QD has no territorial scope clause (see further below on this point).
[201] Art. 51 EUCFR and Arts 6 and 21 TEU.
[202] For a recent assertion of the extraterritorial applicability of ECHR provisions, see *Hirsi v Italy* (n 132).
[203] For an overview, see V Moreno-Lax and C Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014) 1657 and references therein.
[204] Articles on State Responsibility, (2001) ILC 53rd Sess. (A/56/10), UNGA Res. 56/83; and Articles on the Responsibility of International Organisations, (2011) ILC 63rd Sess. (A/66/10).
[205] GS Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9 UTS Law Review 26.
[206] For a detailed account, see A Liguori, *The Extraterritorial Processing of Asylum Claims*, JMCEMigrants Working Papers 1/2015 (and references therein), available at: <http://www.jmcemigrants.eu/jmce/wp-content/uploads/2015/07/The-Extraterritorial-Processing-of-Asylum-Claims-LIGUORI.pdf>.
[207] Humanitarian admission scheme (n 5), para. 1.

come to Turkey to benefit from the scheme',[208] a cut-off date has been introduced. Only those 'who have been registered by the Turkish authorities prior to 29 November 2015' (the date of conclusion of the EU-Turkey agreement) will be considered.[209] Also, the interpretation of the notion of 'international protection' has been reduced to only encompass 'subsidiary protection as defined in Directive 2011/95/EU or an equivalent temporary status', without further specification.[210]

There is no substantiation as to why displaced persons should not be recognised as 1951 Convention refugees. This is problematic. Preclusion of qualification as a refugee when the criteria of the definition are met, is at odds with the explicit obligation to 'grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with [the Qualification Directive]'.[211] It also goes against the declarative nature of refugee status[212] and may amount to a hidden reservation to Article 1 of the Refugee Convention, against the explicit prohibition of Article 42 of the same instrument.[213]

When it comes to exclusion, it is unclear the extent to which the 'assessment of reasons for exclusion *from international protection*' only refers to exclusion from subsidiary protection, or also from refugee status.[214] Whether this derives from the 2011 Qualification Directive or some other reference framework is equally uncertain. Finally, the fact that some extra security and medical checks will be introduced, without a specification of the applicable standards, purpose or ultimate consequences, could lead to the indirect expansion of normal exclusion criteria – again in contravention of Article 42 of the Refugee Convention, and in contradiction to the principle of restrictive interpretation of exceptions that aims to guarantee the effectiveness of individual rights.[215]

What will happen to rejected cases and to failed but non-returnable applicants has been ignored by the scheme. However, the planning of final outcomes is essential for it to succeed. *Non-refoulement* protections, family and other humanitarian considerations may provide a justification for admission to the EU on a different (yet compulsory) basis, which cannot be ignored. Material difficulties in the implementation of readmission and deportation decisions also need to be taken into account; there may be instances in which returns may be legal, but cannot be performed due to technical, practical or diplomatic failures. If human rights are to be respected, such cases must not remain in indefinite detention or in conditions that do not meet the basic requirements of dignified treatment, and some kind of 'durable solution' will need to be provided – if only to avoid onward movements through irregular means.

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[208] Ibid., Recital 14. This 'pull factor' discourse disregards the impact of war, terror and insecurity as fundamental 'push factors' and root causes of displacement from Syria.
[209] Ibid., para. 2.
[210] Ibid., paras 2 and 11. Note that the term 'international protection', according to Art. 2(a) QD, 'means refugee status and subsidiary protection status as defined [in the Directive]'.
[211] Art. 13 QD.
[212] UNHCR, *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), para 28. See also Recital 21 QD.
[213] The text of Art. 42(1) of the Refugee Convention stipulates that: '[a]t the time of signature, ratification or accession, any State may make reservations to articles of the Convention *other than to articles 1*, 3, 4, 16(1), 33, 36-46 inclusive' (emphasis added), which includes the refugee definition contained in Art 1A(2).
[214] Humanitarian admission scheme (n 5), para. 7(3).
[215] See, among many others, Case C-578/08 *Chakroun* [2010] ECR I-1839, para. 43.

The link between the humanitarian admission programme and spontaneous arrivals from Turkey will also have to be clarified. If persons fail to be granted access to Member States through the scheme, or cannot wait their turn and decide to reach the EU by other means, this should not disqualify them from refugee status or subsidiary protection under EU law. The programme should be conceived of as a complementary channel to spontaneous arrivals – arrivals which cannot be refused entry, by virtue of human rights and refugee law standards, including the principle of *non-refoulement*. The programme must not be considered a replacement of the obligations owed to migrants that present themselves at Europe's borders. The opposite would amount to discriminatory treatment based on the mode of arrival, which contravenes the principles of non-discrimination and non-penalisation in the Refugee Convention.[216]

4.2.3 Substantive rights and reception conditions

The issue of reception conditions in Turkey is crucial, not only for failed cases, but also for those awaiting a final decision. However, the Commission Recommendation is silent in this regard, referring only to the need to inform candidates of their rights and obligations, and provide them with pre-departure cultural-orientation support.[217] It also mentions that the whole procedure should take no more than six months,[218] but does not specify the arrangements that are applicable throughout that period, giving rise to the assumption that the Turkish authorities will be the ones responsible for catering to the reception needs of applicants. It seems that the medical checks and vulnerability assessments to be carried out as part of the procedure are only for determination purposes, helping to decide (and perhaps prioritise) cases for humanitarian admission.[219] The consequences that could derive from a delay and the resulting measures that may be adopted are unclear. If conditions are inadequate, it will be hard for the scheme to provide a real alternative to onward migration through smuggling channels.

If 'common processing centres' are set up, whether they will also constitute reception and/or pre-removal centres will have to be decided, making adequate provision for the conditions to meet 'dignified standards of living'.[220] If detention measures are adopted – as a last resort, they will have to fulfil the requirements of necessity and proportionality inscribed in Article 6 EUCFR (among other applicable standards[221]) to avoid the risk of arbitrary detention.[222] However, drawing on the catastrophic results achieved with the 'hotspots' as analysed above, it is highly unlikely that the EU and/or participating Member States will be in a position to guarantee conditions at an adequate level to avoid any violations of fundamental rights, including the prohibition of inhuman or degrading treatment, the principle of *non-refoulement*, the right to family unity, and the needs and entitlements of particularly vulnerable persons. Over-demand, or the saturation of reception facilities do not constitute 'a justification for any derogation from meeting [the relevant] standards',[223] meaning that if the common processing

[216] Arts 3 and 31 RC.
[217] Humanitarian admission scheme (n 5), para. 12.
[218] Ibid., para. 10.
[219] Ibid., para. 7(5) and (6).
[220] See, by analogy, Case C-79/13 *Saciri* ECLI:EU:C:2014:103, paras 39-40.
[221] For analysis and relevant sources, see V Moreno-Lax, 'Beyond Saadi v UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5 *Human Rights and International Legal Discourse* 166.
[222] The extraterritorial application of Art 5 ECHR has been expressly acknowledged by the ECtHR in, among others, *Medvedyev v France,* Appl. 3394/03, 29 Mar. 2010.
[223] By analogy, *Saciri* (n 220), para 50.

centres option cannot be pursued in compliance with fundamental rights, the plan should be abandoned.

4.2.4 Procedural guarantees and appeal rights

Although the final specification of selection procedures has been deferred to EASO at a later stage,[224] seven consecutive steps have been identified by the Commission in its Recommendation. These include: (1) the confirmation of the identity of possible candidates; (2) the confirmation of their provenance and registration in Turkey prior to the cut-off date of 29 November 2015; (3) a 'preliminary assessment' of their reasons for fleeing Syria – instead of a full RSD procedure – including an evaluation of 'reasons for exclusion from international protection' nonetheless; (4) security and (5) medical checks – without, however, establishing the relevant reference framework and links to inclusion/exclusion decisions; (6) a vulnerability assessment 'according to UNHCR standards' – apparently separate from the vulnerability criteria already codified in existing CEAS instruments; and (7) an examination of 'possible family links' in the participating Member States.[225]

The extraterritorial applicability of fair processing and effective remedy guarantees has already been confirmed by the Strasbourg Court.[226] This renders the Recommendation provisions utterly insufficient – especially because a mere 'preliminary assessment of the reasons for fleeing from Syria' will not amount to a detailed examination of the individual circumstances of the case. All asylum decisions, including those that relate to identification, referral, and admission in the humanitarian admission plan, are subject to the requirements of fairness, good administration, and effective remedies, recognised in Articles 41 and 47 of the EUCFR,[227] to avoid invalidating determination outcomes or pre-empting the result of appeals – even when there are no concrete provisions in EU legislation.[228]

Access to determination procedures should be unobstructed, both in law and in practice. They should be proactively facilitated by properly trained and competent personnel and suitable facilities, including translation and legal assistance.[229] Any conceivable limitations must meet the requirements of proportionality and be assessed against asylum seekers' right 'to gain effective access to the procedure for determining refugee status'.[230]

Examinations at first instance must be rigorous and independent.[231] The competent body 'must be able to examine the substance of the complaint and afford proper reparation',[232] including by direct examination of the application through a personal interview with the

[224] Humanitarian admission scheme (n 5), para 8.
[225] Ibid., para. 7.
[226] *Hirsi* v Italy (n 132).
[227] Case C-175/11 *HID* ECLI:EU:C:2013:45.
[228] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.
[229] ECtHR, *MSS v Belgium and Greece* (n 29), paras 288 and 290; *IM v France*, Appl. 9152/09, 2 May 2012, paras 128 and 130; *AC v Spain*, Appl. 6528/11, 24 Apr. 2014 paras 82, 85 and 86.
[230] ECtHR, *Amuur v France*, Appl.19776/92, 25 Jun. 1996, para. 43.
[231] ECtHR, *Jabari v Turkey*, Appl. 40035/98, 11 Jul. 2000, para 39. See also Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla* [2010] ECR I-1493, paras 90 and 70-71; and Art. 4 QD.
[232] *MSS v Belgium and Greece* (n 29), para 387.

applicant.[233] Decisions must be served in writing, following a legal procedure previously established by law, and specify the underlying reasons, alongside the means and conditions that mount an appeal.[234] Any requirements regarding time limits, accelerated procedures, safety, or other presumptions and evidentiary rules, must preserve the effectiveness of procedural guarantees and not render their exercise pointless or exceedingly difficult.[235] Therefore, the delivery of 'insufficient information for asylum seekers about the procedures to be followed, [the absence of a] reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, [as well as] lack of legal aid' must be considered as 'shortcomings in access to the asylum procedure' that States have to avoid.[236] Ultimately, a 'real and adequate opportunity' for individual applicants to advance their claims must be guaranteed.[237] Legal assistance and interpretation are therefore essential to ensuring the appropriate conduct of proceedings.[238]

To comply with the applicable legal standards, effective remedies and judicial protection, which allow a competent authority to deal with the substance of the relevant complaint and grant appropriate relief, must be open to those whose application for humanitarian admission has been rejected at first instance.[239] How the effectiveness of remedies will be guaranteed in this context cannot be taken for granted, as the standards contained in Articles 47 of the EUCFR and 13 of the European Convention on Human Rights (ECHR) are fully applicable. Accessing and exercising appeal rights must be practicable and proactively facilitated, especially via linguistic and legal assistance.[240] Furthermore, in view of the risk of irreversible damage, remedies must be endowed 'with automatic suspensive effect'[241] *in law* – administrative or other informal arrangements are insufficient. [242]

5 Alternative Avenues to Guaranteeing Access to Asylum in the EU

5.1 Avoiding the violation of legal obligations: Dismissing external processing schemes

The efficient management of migration flows via enhanced border controls, or through the implementation of offshore processing plans, must not curtail the effectiveness of

[233] Art. 41(2)(a) EUCFR on 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.
[234] ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. 30471/08, 22 Sept. 2009, paras 107-117.
[235] See further Guild et al, *New Approaches* (n 40), ch 4.4.
[236] *MSS v Belgium and Greece* (n 29), para 301.
[237] Ibid., para 313.
[238] *IM v France* (n 229), paras 145, 151 and 155.
[239] The right to effective judicial protection constitutes a general principle of EU law. See Case C-69/10 *Diouf* [2011] ECR I-7151, paras 48-49. See also Art. 19(1) TEU, requiring MS to 'provide remedies sufficient to ensure effective legal protection in [all] fields covered by Union law'.
[240] *MSS v Belgium and Greece* (n 29), para. 319; and Art. 47(3) EUCFR.
[241] ECtHR, *Gebremedhin v France*, Appl. 25389/05, 26 Apr. 2007, para. 66; *MSS v Belgium and Greece* (n 29), para. 393.
[242] *IM v France* (n 229), paras 132, 134-135; *AC v Spain* (n 229), para 95. This means that suspension 'on request' or even ex officio on a case-by-case basis is not enough. See *AC v Spain*, para 94.

fundamental rights.[243] Rather the opposite is true;[244] Member States have a duty to organise their entire administrative procedure in a way that satisfies their fundamental rights obligations.[245] Any conceivable limitations to such rights – except of the rights which admit no derogations, including the prohibition of ill treatment and the principle of *non-refoulement* – have to pursue a legitimate aim, be strictly necessary, and meet the requirements of proportionality and non-discrimination.[246] Above all, they must be assessed against the backdrop of asylum seekers' right 'to gain effective access to the procedure for determining refugee status'.[247] This right is not optional. Therefore, conceiving humanitarian admission as a purely 'voluntary' endeavour, as in the case of the EU-Turkey programme,[248] disregards its status as an individual entitlement, as well as the requirement that it remains 'practical and effective'.[249]

Turkey is not a 'safe third country' as per the EU's own definition of the term, if only because 'the possibility… to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention' does not exist for Syrian refugees, due to the geographical limitation maintained.[250] For the same reason, it cannot be considered a 'European safe country' either.[251] In light of recent reports, it is also hard to argue that displaced persons 'otherwise enjoy sufficient protection in that country, including benefiting from the principle of *non-refoulement*', which would be necessary for Turkey to qualify as a 'first country of asylum'.[252] Ill treatment and *refoulement* risks cannot be discarded, meaning that keeping asylum seekers in Turkey and impeding access to international protection in Europe through tightened immigration and border controls, may violate Articles 3 and 13 of the ECHR and their counterparts under EU law.[253]

The opening of 'common processing centres' that is currently envisaged in the humanitarian admission programme will not remedy the problem. The impossibility of meeting legal requirements, especially regarding reception conditions and effective remedy standards – in similar circumstances to the 'hotspot' approach, the flaws of which have already become apparent – instead point to abandoning offshore processing plans in favour of more suitable options that guarantee safe and legal access to protection in Europe.[254] The consideration of alternatives that comply with fundamental rights is explored further in the next section.

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[243] (*mutatis mutandis*) *IM v France* (n 229), para 147.
[244] *MSS v Belgium and Greece* (n 29), para. 216.
[245] *AC v Spain* (n 229), para. 104.
[246] Art. 52(1) EUCFR.
[247] *Amuur v France* (n 230), para. 43.
[248] Humanitarian admission scheme (n 5), Recital 13.
[249] *Artico v Italy*, Appl. 6694/74, 13 May 1980, para. 33.
[250] Art. 38(1)(e) APD.
[251] Art. 39(2)(a) APD.
[252] Art. 35 APD.
[253] Arts 4, 18, 19 and 47 EUCFR.
[254] Expressing similar concerns, see M Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012), ch 7; Z Rabinovitch *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MPI (Oct. 2014), at: <http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing>; M Garlick, *The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims*, MPI (Mar. 2015), at: <http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims>; and J McAdam, *Extraterritorial Processing in Europe*, Kaldor Centre Policy Brief 1 (May 2015), at: <http://www.kaldorcentre.unsw.edu.au/publication/policy-brief-1-extraterritorial-processing-europe-regional-protection-answer-and-if-not>.

5.2 Exploring available options

Rather than full-scale offshore processing schemes, the best way to counter smuggling and reduce dangerous, deadly journeys would be to consider options for providing a protected-entry system for people in need international protection under existing immigration and asylum policy arrangements. The flexible use of available immigration measures and current asylum tools,[255] as well as other more innovative mechanisms concerning visas *and* refugees (and visas *for* refugees*)* are discussed in the next section.

5.2.1 Flexible use of existing immigration policy tools

Conditions for obtaining immigration visas under EU law could be made more flexible so as to facilitate access to the Union for applicants in need of international protection. The first category to consider is **family reunification**. The Family Reunification Directive allows Member States to implement more generous rules and to apply the terms of the Directive to extended family members.[256] Facilitating visas for the family members of beneficiaries of international protection that are already present in a Member State would be a straightforward way to use current immigration tools to assist safe access to the EU. The term 'family members' can be interpreted more widely than to just cover spouses and children that are minors, going beyond the minimum standard provided for by the Directive[257] – following the example of Germany, France and others.[258] But to be properly effective as a safe entry scheme, the onerous support, accommodation, integration and health insurance conditions of the Directive should either be waived or duly relaxed in light of the specific circumstances of those in need of international protection.

Similarly, Member States may issue **student and research visas** to those who are unable to complete their studies or research in their country of origin due to persecution, war, or similar circumstances. A legislative proposal on this matter is currently under negotiation, the scope of which could be widened to cover persons in refugee-producing contexts.[259] These types of visas could be combined with scholarships – following existing practice[260] – to be fully effective.

The **Blue Card Directive** for highly skilled workers could also be used more expansively. As a minimum standards Directive, it permits Member States to offer more generous conditions.[261] Many of the persons fleeing serious harm are highly skilled, though the recognition of their diplomas is far from automatic. Allowing them easier access to the EU labour market as a mechanism for reaching safety is also an option that should be explored. The current review

[255] This section draws on Guild et al, *Enhancing the CEAS* (n 40), ch 1.
[256] Arts 3(5) and 4(2)-(3), Family Reunification Directive 2003/86, [2003] OJ L 251/12.
[257] See the generous interpretation of the term 'relative' by the CJEU in Case C-245/11 *K* ECLI:EU:C:2012:685, for the purposes of the humanitarian clause of the Dublin Regulation.
[258] FRA, *Legal entry channels* (n 4).
[259] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast), COM(2013)151 final, 25 Mar. 2013.
[260] C Orchard and A Miller, *Protection in Europe for Refugees from Syria,* RSC Forced Migration Policy Brief 10/2014, available at: <http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf>.
[261] Art. 4, Blue Card Directive 2009/50, [2009] OJ L155/17.

process of the Directive presents an opportunity to expand the scope of the Directive in this direction.[262]

5.2.2 Execution (and expansion) of current asylum admission tools

As pointed out above, the Commission's **resettlement** scheme of 20,000 places has still not been executed.[263] This may be due to the fact that the scheme has been proposed as a Commission Recommendation, which is a non-binding and thus non-enforceable measure. Plans for a legislative proposal of a binding and mandatory nature, as foreseen in the *European Agenda on Migration*, still have to materialise.[264] This would be a most welcome development, as it would provide a statutory basis for resettlement and offer a chance to streamline processes and set out common EU-wide principles that are in line with refugee law and human rights standards – avoiding 'cherry picking' and other discriminatory practices. It would also offer an opportunity to increase numerical targets. The current figure of 20,000 resettlement places over a two-year period is derisory when compared to total arrivals in the EU, even when solely considering Syrian nationals – as criticised, not least by the UN Special Rapporteur on the Human Rights of Migrants.[265] Therefore, although the execution of current resettlement plans may be a first step in the right direction, more should be done for resettlement to represent a credible alternative to irregular entry and to demonstrate meaningful international solidarity and responsibility sharing.

Alternative resettlement programmes, involving NGO and non-state actors, including families, associations and individuals, through **private sponsorship schemes** also have an added value. This is a useful proposal that deserves further consideration, in line with FRA recommendations and experiences in Canada and elsewhere.[266] Early engagement of the private sector is critical to ensuring successful integration and public acceptance. It serves to inform public opinion, diminish anti-immigrant sentiment, and foster social inclusion, besides offering a practicable and effective alternative to smuggling and trafficking channels.

5.3 Visas for refugees: The details

In addition to the above possibilities, more innovative solutions should be envisaged regarding 'visas and refugees' and 'visas for refugees'. Both collective and individual options can be explored, including through the abolition or suspension of visa requirements for refugee-producing countries and the use of Limited Territorial Validity (LTV) visas to facilitate access to asylum.[267]

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[262] EU Agenda on Migration, p. 15.
[263] (n 63).
[264] EU Agenda on Migration, p. 4-5.
[265] 'Migrants: "EU's resettlement proposal is a good start but remains woefully inadequate" - UN expert', UNHCHR, 15 May 2015, at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15961&LangID=E visited>.
[266] *Privately Sponsored Refugee Resettlement in Canada*, Citizen & Immigration Canada Information Bull. (Apr. 2014), available at: <http://www.cic.gc.ca/english/pdf/pub/PSR_eng.pdf>.
[267] Art. 2(4), Community Code on Visas 810/2009, [2009] OJ L 243/1 (*CCV* hereinafter).

5.3.1 Collective solutions: abolishing/suspending visas for refugee-producing countries

The 'black list' in the Visa Regulation includes all refugee-producing countries.[268] So, it seems that asylum seekers are expected to abide by normal Schengen admission criteria, which constitute the basis for obtaining a visa.[269] Yet, persons in need of international protection cannot *by definition* demonstrate willingness or ability to return to the country of origin – which has been configured as one of the key requirements for issuing a Schengen visa. Both the legal characterisation of 'refugee' and 'beneficiary of subsidiary protection' in the Qualification Directive entail that persons escaping persecution or serious harm cannot justify 'the purpose and conditions of the intended stay, and… return to [the] country of [provenance]',[270] without thereby losing their status.[271]

Therefore, **abolishing visa requirements for refugee-producing** countries would be the best way of ensuring unobstructed access to international protection to those in need. Technically, there is no real risk of 'illegal immigration' by refugees,[272] which is the fundamental reason for placing a State on the visa 'black list'.[273] De-classification of the top refugee-producing countries would thus be coherent with the stated goals of EU visa policy.

Short of abolition, other alternatives should be explored to facilitate access to asylum and avoid potential violations of *non-refoulement*.[274] The first option is to establish a mechanism to **suspend visa requirements** for a period of time, until the root causes/push factors of forced displacement have been addressed, particularly for States issuing substantial flows of refugees seeking access to the EU, such as Syria. EUROSTAT data could be used to substantiate presumptions of the 'founded-ness' of asylum claims to select the relevant countries. However, this should not lead to rigid approaches or reverse assumptions that asylum seekers from *other* countries are not genuinely in need of international protection. The presumption should in no event undermine the right of 'everyone' to seek asylum and to have their claims individually assessed.[275]

Either the temporary suspension or total abolition of visa requirements for refugee-producing countries would also avoid additional practical obstacles, such as the absence of consulates in certain war-torn 'black listed' countries, where there is no physical possibility to apply for a visa. Indeed, *inaccessibility in law* is not the only concern when it comes to visas and refugees. *Inaccessibility in practice* further compounds the situation. Currently, there are no representations of any EU Member State in Liberia, Sierra Leone and Somalia, and all the visa sections of existing embassies in Libya and Syria are closed.[276] Obtaining a visa, at least in these 'black listed' countries, is therefore both legally and physically impossible. If visa requirements

[268] Visa Regulation 539/2001, [2001] OJ L 81/1 (*VR* hereinafter). See also UNHCR and EUROSTAT data (n 47).
[269] Art 21 CCV. See also Art. 5(1), Schengen Borders Code 562/2006, [2006] OJ L 105/1 (*SBC* hereinafter).
[270] Art 5(1)(c) SBC.
[271] Art. 2(d) and (f) QD.
[272] Recall Art. 31 Refugee Convention prohibiting penalization of illegal entry or stay.
[273] Recital 5 and Art. -1 VR; and Recital 3 CCV.
[274] On this issue, see V Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) *Non-Refoulement* in EU Law', M Maes, M.-C.Foblets, and P. De Bruycker (eds), *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011) 385.
[275] *HID* (n 227).
[276] List of Member States' consular presence, 30 Sept. 2015, available at: <https://www.udiregelverk.no/en/documents/schengen/16202010/Annex_28/>.

are not lifted or suspended in such circumstances, carrier sanctions impede travel through normal commercial means. Indeed, although the Schengen Borders Code specifically does not prejudice the rights of refugees and persons requesting international protection, in particular with regards to *non-refoulement*,[277] the effectiveness of these provisions is undermined by the threat of fines for the transportation of unduly documented migrants.[278]

The problem is one of structural design. Through the threat of sanctions, carriers have de facto been delegated to carry out travel document checks, without however being given the authority (let alone the means and necessary training) to undertake refugee status determination – which in an extraterritorial context, would anyway run counter to the most basic fundamental rights protections enshrined in the EU asylum *acquis*. As a result, carriers concerned with avoiding sanctions, simply refuse to transport anyone who does not have a passport and a visa (when required), pushing asylum seekers from 'black listed' countries into irregular migration channels.[279] If visa requirements are retained for refugee-producing countries, lifting or suspending carrier sanctions would transform the possibility of safe arrival for those in need of international protection and also end the smuggling business at the same time.

5.3.2 Individual solutions: using LTV visas as 'asylum visas'

If no collective solutions are adopted, and both visas and carrier sanctions are maintained for refugee-producing countries, one option for complying with extraterritorial obligations of *non-refoulement* and the right to asylum would be to consider individual visa solutions for people in need of international protection. The LTV visa provisions contained in the Community Code on Visas (CCV) already offer this possibility.

According to Article 25 of the CCV, '[a] visa with limited territorial validity *shall* be issued *exceptionally…* when the Member State concerned *considers it necessary* on humanitarian grounds, for reasons of national interest or *because of international obligations* to derogate from… the entry conditions laid down in… the Schengen Borders Code' (italics added). The equivocal, half-compulsory/half-discretionary language used is taken from pre-Visa Code, pre-Lisbon, pre-EUCFR documents – before it became clear that '[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter', regardless of the policy area concerned.[280]

Today, applying the *Koushkaki* judgment by analogy, when the conditions of Article 25 of the CCV (interpreted in line with EU fundamental rights obligations[281]) are met, Member States do

[277] Arts 3(b) and 13(1) SBC.
[278] Carrier Sanctions Directive 2001/51, [2001] OJ L 187/45.
[279] V Moreno Lax, 'Carrier Sanctions', in S Peers et al., *EU Immigration and Asylum Law,* Vol. 2 (Brill, 2nd edn, 2012) ch 12. See also S Scholten, *The Privatisation of Immigration Control through Carrier Sanctions* (Brill, 2015).
[280] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, para. 21.
[281] C-305/05 *Ordre des barreaux francophones* [2007] ECR I-5305, para. 28: '…the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty … Member States must … make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order'.

not seem to have the capacity to refuse to issue a LTV visa.[282] The binding force of fundamental rights obligations to which the Visa and Schengen Codes refer, supports this interpretation.[283] Accordingly, Article 25 of the CCV should be conceived of as one of the 'special provisions concerning the right of asylum and to international protection' referred to in the Schengen Borders Code.[284] So, if a refugee visa applicant were to apply for a LTV with a particular Member State, the application should be given serious consideration, in compliance with the principles of good administration, fair processing and effective remedy recognised in Articles 41 and 47 of the Charter.[285]

But, because LTV provisions have been inherited from past époques, the application, issuing, and appeal regime is ambiguous. Firstly, there is uncertainty as to whether a LTV can be 'applied for' separately in practice. The standard visa application appended to the Code does not specify any LTV-relevant reasons that the applicant may adduce.[286] It rather seems that LTV delivery depends on the appreciation of the circumstances by the issuing authority upon receipt of an 'ordinary' visa application. Then, the specific conditions and procedures to be followed when issuing a LTV have not been defined by the Code. In particular, there are no signs indicating that Member States are obliged to initiate an assessment of international protection needs *ex officio*.

According to the general rules, when consulates receive a visa application they have to carry out a preliminary check to ascertain that the elements necessary to make a decision have been provided before proceeding to a full examination of the file. Where these formalities are not satisfied, the application must be declared 'inadmissible' and its processing immediately discontinued.[287] 'By way of derogation' however, 'an application that does not meet the requirements… may be considered admissible on humanitarian grounds or for reasons of national interest'.[288] But the 'international obligations' to which Article 25 of the CCV refers have been omitted from the wording of Article 19 of the CCV governing admissibility decisions. As a result, there is a real risk that LTV applications are potentially dismissed without a 'formal' refusal. In such cases, there is the additional danger that LTV applicants are deprived of the right to appeal a negative (albeit 'informal') decision on their request.[289]

Current negotiations on the revision of the Visa Code could be used to clarify the LTV regime and clearly bring it in line with EU fundamental rights standards.[290] Otherwise, The Treaty

[282] Case C-84/12 *Koushkaki* ECLI:EU:C:2013:862. In this line, see S Peers, 'Do potential asylum-seekers have a right to a Schengen visa?', *EU Law Analysis* (Jan. 2014), at: <http://eulawanalysis.blogspot.co.uk/2014/01/do-potential-asylum-seekers-have-right.html>.
[283] Recital 29 CCV; and Recital 20 CCV and Art. 3a SBC.
[284] Art. 13(1) CCV. Thanks to Prof P Boeles for this observation.
[285] This argument is further developed in V Moreno-Lax, *Accessing Asylum in Europe* (OUP, forthcoming), and proposed in embryonic form in P. De Bruycker et al., *Setting Up a Common European Asylum System*, PE 425.622, (European Parliament, 2010), at: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf>. For a similar approach, see U Iben Jensen, *Humanitarian Visas: option or obligation?*, PE 509.986 (European Parliament, 2014), at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf>.
[286] See Box 21 of the standard application form in Annex I CCV, concerning the 'main purpose(s) of the journey'. Applicants could possibly indicate LTV-relevant reasons only under the rubric of 'other'.
[287] Art. 19(1) and (3) CCV.
[288] Art. 19(4) CCV.
[289] Art. 32 CCV. Expressing similar concerns, see Meijers Committee, *Note on the draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final;* at: <http://www.commissie-meijers.nl/assets/commissiemeijers/Jaarverslagen/CMJaarverslag2007_web.pdf>.
[290] Proposal for a Regulation on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final, 1 Apr. 2014.

provides a legal basis to adopt dedicated legislative acts 'for the purpose of managing *inflows* of people applying for asylum or subsidiary… protection'.[291] Discussions on an EU framework for 'asylum visas' based on the LTV visa provisions or otherwise, have been repeated since the early 2000s but have always failed to gather the necessary support.[292] The Commission has recently posited that protected-entry procedures '*could* complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines'.[293] But neither the guidelines nor the coordinated approach have ever been concretised. On the contrary, the harmonisation of visa rules in the Code has paradoxically led to the progressive dismantlement of existing LTVs at national level, on 'pull factor' or disproportionate pressure grounds[294] – reinforcing the perception that 'asylum visas' are (always) optional, despite the recognition by international courts of the existence of extraterritorial protection-related obligations that, in practice, may require this type of response (if no other options are available).

In any event, the dangers of asylum visas becoming a system of extraterritorial processing must be avoided. The purpose of 'LTV asylum visas' should be to grant pre-arrival clearance, allowing the holder to present him/herself to the asylum authorities of the EU Member State concerned upon reaching the territory, travelling through ordinary, commercial routes. The decision on beneficiaries and procedural arrangements must then comply with fundamental rights to seek asylum and with *non-refoulement*. Therefore, the best option may be to draw on existing standards. All those entitled to apply for international protection under the Qualification Directive should be able to apply for LTV asylum visas. The choice is justified by the fact that the Directive, unlike the other CEAS instruments, is not territorially limited and thus the obligation it entails to grant refugee status or subsidiary protection to those who meet the criteria[295] may arguably also apply in an extraterritorial context – especially when read together with Article 18 of the EU Charter. As they will translate rights that individuals derive from EU law, procedural arrangements to apply for LTV asylum visas should be established in a way that does not render their exercise 'practically impossible or excessively difficult'.[296]

In light of the difficulties analysed above in providing access to dignified reception conditions, fair processing guarantees and effective remedy standards abroad, full assessments of the merits of international protection claims should not be conducted extraterritorially. The most suitable option would hence be to deliver LTV asylum visas to those submitting an 'arguable claim' of exposure to a real risk of serious harm or a well-founded fear of persecution along the lines of Strasbourg case law, according to which claims raising *prima facie* issues under ECHR (or, by analogy, EU Charter) provisions must be accepted for detailed examination.[297] Therefore, people presenting an 'arguable claim' of a need for international protection should be delivered a LTV visa for travel to the EU Member State concerned and be allowed to fully substantiate their cases 'onshore' upon arrival, following normal processing arrangements under the CEAS. This may eliminate the deterrent potential of LTVs, but would best reflect the

[291] Art. 78(2)(g) TFEU (emphasis added).
[292] For a recent account, see Moreno-Lax (n 54), at 664 ff (and references therein).
[293] An open and secure Europe (n 154), p. 7-8 (emphasis added).
[294] On State practice, see Iben Jensen (n 285) at 41 ff and references therein.
[295] Arts 13 and 18 QD.
[296] See, among many others, Case 158/80 *Rewe* [1981] ECR 1805, para. 5.
[297] Note also that the concept of 'arguable claim' is not the same as 'admissible application'; it denotes a much lower threshold. See, e.g., *TI v UK*, Appl. 43844/98, 7 Mar. 2000, which the ECtHR considered 'arguable' and dismissed as 'inadmissible' only after a thorough examination of the case.

declarative nature of refugee status.[298] At the same time, it would provide a real alternative to smuggling and trafficking and avoid the practical and legal difficulties associated with offshore processing schemes, while keeping competent authorities in control and allowing compliance with international protection obligations.

Any other more stringent issuing criteria would require a certain amount of extraterritorial processing (and the need to provide for effective remedies in case of negative decisions), thus raising the danger of potential violations of human rights and refugee law standards. To avoid any detrimental effect that the adoption of this generous standard may entail, the roll out of LTV asylum visas could be progressive. It could first be introduced in countries where the presence of applicants from the top refugee-producing States is most pressing, and the presumption of unsafety/need for protection is most easily recognised (e.g. in Turkey and Libya, as key transit countries for Syrian, Eritrean and other presumptive refugees).

6 Conclusions and Recommendations

In light of the above, the following measures should be promoted with EU institutions and the governments of Member States:

- Any joint processing initiatives (of an internal or external character) must comply with EU fundamental rights, including protection from ill treatment, the principle of *non-refoulement*, the prohibition of collective expulsion, good administration, fair processing, and effective remedy standards, as enshrined in the EU Charter and related instruments.

- Information should be required from relevant sources on EASO assisted processing and pilot programmes, so as to assess their full implications and compatibility with the EU fundamental rights *acquis*. The same applies to the Niger multi-purpose centre and similar initiatives mapped out above, about which very little is currently known.

- The catastrophic situation at 'hotspots' in Italy and Greece must be remedied at once to bring practices in line with the applicable human rights and refugee law standards enshrined in the CEAS. In particular, non-coercive options should be explored to avoid 'hotspots' replicating the same flaws of the Dublin system. The rights and agency of asylum seekers should constitute the top priority in any decisions adopted, to ensure the effectiveness of any remedial action/replacement measures introduced.

- Lessons should be learnt from the US and Australian experiences regarding offshore processing schemes and their incompatibility, both in law and in practice, with relevant standards. This should deter the pursuit of similar plans at EU level, including the EU-Turkey humanitarian admission scheme as it currently stands, since it will not present a genuinely safe and viable alternative to dangerous irregular journeys.

[298] See (n 212).

- Alternative measures to facilitate access to protection to those in need, in full respect of refugee law and human rights norms, should be explored and their potential exploited. These include the flexible use of current immigration policy tools, as well as the full employment of existing asylum mechanisms.

- Wider use of family reunification by beneficiaries of international protection already in the EU, including for extended family members, and the waiver of support, accommodation and health insurance requirements to assist their safe entry should be promoted.

- A generous approach to the application of visa rules in other existing categories, including students, researchers, and workers must be encouraged. In particular, the opportunities afforded by negotiations on revised instruments in these areas (including the students/researchers and Blue Card Directives) should be utilised to promote, the insertion of flexibility clauses to cater for the specific needs of persons requiring international protection.

- The implementation of the resettlement programme of 20,000 places approved in June 2015 should be monitored to ensure execution in good time and in conformity with fundamental rights. EU institutions and the governments of Member States should be requested to expand resettlement in the short to medium term for the mechanism to be effective and for the Union to meaningfully contribute to global efforts to host Syrians and other refugees in need of relocation. Adding a scheme for private sponsorship by NGOs, families and other civil society actors and organisations in line with FRA recommendations, should be strongly promoted. These elements could be presented in discussions around the proposal anticipated in the *Agenda on Migration* for a binding instrument on resettlement to be put forward by the Commission in the course of 2016.

- Other innovative solutions should be envisaged, including both collective and individual approaches to facilitate access to asylum in the EU and put an end to the smuggling and trafficking business. This should entail the activation of a protected-entry mechanism for those in need of protection to reach the Union safely and regularly.

- Among collective measures, the lifting (or temporary suspension) of visa requirements for major refugee-producing countries would be coherent with the declared goals of visa and asylum policy at the EU level. Short of this, carrier sanctions on companies that transport unduly documented migrants should be abolished so that persons seeking asylum in the EU can arrive safely through ordinary, commercial means.

- In parallel to collective measures (while these are being negotiated/put in place), individual mechanisms of facilitation of access to international protection in Europe should be advanced. The opportunity should be seized during negotiations on the recast Visa Code to clarify obligations to issue Limited Territorial Validity (LTV) visas for the purposes of seeking asylum, in line with duties regarding *non-refoulement* and access to protection.

- It should always be kept in mind that the primary objective of these measures must be the facilitation of access to asylum in the EU, not the curtailment or containment of flows of persons in need of international protection within regions of origin and transit. In particular, these measures should not be employed for migration control purposes. Furthermore, they must be considered as a complement, rather than a replacement, of protection obligations owed to spontaneous (albeit irregular and/or unplanned) arrivals.

ACRONYMS

AFSJ	Area of Freedom, Security and Justice
AMIF	Asylum, Migration and Integration Fund
AST	Asylum Support Team
CCV	Community Code on Visas
CEAS	Common European Asylum System
COI	Country of Origin Information
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ENPI	European Neighbourhood and Partnership Instrument
ERF	European Refugee Fund
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EURTF	EU Regional Task Force
FRA	Fundamental Rights Agency
GAMM	Global Approach to Migration and Mobility
GDP	Gross Domestic Product
IFRC	International Federation of Red Cross and Red Crescent Societies
ILC	International Law Commission
IOM	International Organization for Migration
LTV	Limited Territorial Validity
NGO	Non-Governmental Organization
OPI	Operating Plan Phase I
OPII	Operating Plan Phase II
PNG	Papua New Guinea
PST	Processing Support Teams
RCEU	Red Cross EU Office
RPP	Regional Protection Programme
RSD	Refugee Status Determination
TFEU	Treaty on the Functioning of the European Union
UNHCR	United National High Commissioner for Refugees

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