II. The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers? *(Author: Maria Nagore Casas)*

A. Introduction

One of the most controversial issues regarding the legal protection of refugees is the determination of the exact scope of states' obligations towards them, in particular, towards those who have not yet crossed the state of destination's borders and find themselves outside the territory of that state in which they wish to seek protection. Governments, international organisations, scholars and policy-makers' views on the territorial scope of these obligations differ due, among other reasons, to the lack of clarity regarding paramount elements of the legal framework to be applied, such as the status of individuals under international law, the way in which international treaties should be interpreted or under which circumstances the obligations of states vis-à-vis individuals are engaged.[155] States tend to consider that their obligations to protect do not arise until the refugee has crossed their frontiers, while at the same time their involvement in extraterritorial activities aimed at preventing refugees from reaching their territories has increased significantly.

There are many cases in practice which illustrate the tension between states' obligations to protect and their deterrence activities: according to the UK government, the posting of immigration officers in a foreign airport in order to refuse leave to enter into the UK to undesired passengers is not contrary to the 1951 Refugee Convention.[156] The Italian government argues that systematic 'push-backs' of Libyan migrants in foreign territorial waters are lawful under the bilateral agreements signed between Italy and Libya between 2007 and 2009.[157] The Spanish government argues that the interception of a boat in the territorial waters of a third country does not amount to an exercise of jurisdiction.[158] These are just a few examples of the externalisation of border control activities by states, as well as their attempt to consider these activities lawful and respectful of their legal obligations under the international regime of protection of refugees, in particular regarding the principle of *non-refoulement*.[159]

[155] María-Teresa Gil Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18(2–3) International Journal of Refugee Law 571, 571–572.

[156] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

[157] European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR (GC) 23 February 2012) para 92.

[158] Committee against Torture, *J.H.A. v Spain*, Communication no 323/2007, CAT/C/41/D323/2007, para 6.1.

[159] This principle is laid down in Article 33.1 of the Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 (Refugee Convention). According to this article: No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. It is also established in some universal and regional human rights treaties either expressly such as in Article 3 of the Convention against Torture, Article 22.8 of the American

Despite this attempt by states to pretend to be in compliance with international refugee law, many commentators postulate that the increasing extraterritorial activity of states has the intention of precisely avoiding their obligations of protection once the individuals manage to cross their frontiers.[160] States have developed a complex system of deterrence measures, which in practice impede any contact by refugees with the territory of the receiving state. It is thereby often argued by NGOs and scholars that there is a huge gap between the rhetoric of states and their attitudes in practice.[161] On the one hand, states are pledging their commitment to refugee law, but on the other, they are not keen to assume obligations in practice. This 'schizophrenic attitude' of states towards international refugee law has given rise, in the words of Gammeltoft-Hansen and Hathaway, to the 'politics of non-entrée' aimed at 'ensuring that refugees shall not be allowed to arrive.'[162]

In addition to 'politics of non-entrée', several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: 'outsourcing, externalisation, offshoring or extraterritorialisation of migration management; external migration governance; remote migration policing';[163] 'de-territorialisation of border control';[164] 'politics of extraterritorial processing';[165] 'neo-refoulement';[166] or 'limes imperii'.[167] All of these terms refer to the various types of interception measures used by states against asylum-seekers and refugees, measures

Convention on Human Rights and Article 2.3 of the OAU Convention governing the specific aspects of refugee problems in Africa, or implicitly through the prohibition of torture or other cruel, inhuman or degrading treatment or punishment such as in Article 3 of the European Convention on Human Rights (ECHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

[160] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd end, Oxford University Press 2007), 369–371; Elspeth Guild and Didier Bigo, 'The transformation of European Border Controls' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 257; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 166; Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174.

[161] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), Doctors Without Borders, *Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe's Doorstep* (MSF 2009); CEAR (Comisión de Ayuda al Refugiado) Euskadi, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy* (CEAR 2012).

[162] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 241.

[163] These terms are listed by Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 3. See also Frank McNamara, 'Member State Responsibility for Migration Control within Third States — Externalisation revisited' (2013) 15 European Journal of Migration and Law 319, 326.

[164] Seline Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 Leiden Journal of International Law 661.

[165] Karin Fathimath Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific' [2006] Refugee Studies Centre Working Paper no 36, 2.

[166] Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 249.

[167] Alejandro del Valle Gálvez, 'Unión Europea, Crisis de Refugiados y Limes Imperii' (2016) 38 Revista General de Derecho Europeo 1.

which are usually developed by the wealthiest states, notably the United States, Australia, Canada and EU Member States.

Many factors explain state engagement in extraterritorial activities. Among them, one which has to be mentioned in order to frame the discussion is that in the post-9/11 context asylum is increasingly categorised as a 'security issue', including by the EU Member States. This has caused a shift from legal discourses based on the protection of refugees to 'more geopolitical projects based on security.'[168] The legal dimension of refugee protection based on the guarantees provided by international instruments has given way to a political dimension where the priority is the management of migrant flows in regions of origin and preventing asylum seekers from reaching the territories of states.[169] This 'securitization of asylum' is also present in the EU Schengen Acquis. According to the Council of the EU, 'The control and surveillance of borders […] help protect our citizens from threats to their security' and 'coherent, effective common management of the external borders of the Member States of the Union will boost security' and 'serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings'.[170]

The 'near-obsession'[171] of States with migration control contrasts with the human needs and vulnerability of asylum-seekers seeking protection and safety outside their countries of origin. The main argument of this section is that the 'politics of non-entrée' constitutes in itself another source of vulnerability for asylum-seekers. In addition to the causes of persecution in their own countries and the 'contextual' and 'compounded' vulnerability they face as explained in Section I.D above, what is contended here is that asylum seekers' vulnerability is exacerbated by some of the pre-border control instruments that will be analysed in this section. One alarming example is the direct relationship between migration control and human smuggling, which has been denounced by several authors and NGOs.[172] This phenomenon has been described as 'a never-ending race between border authorities and ever more inventive human smugglers', which in practical terms implies that for each loophole closed by border authorities two new modes of unauthorised entry come up.[173] In addition, the urgency of some EU Member States to combat irregular migration has exposed refugees to serious risks by giving rise to episodes of non-rescue, disputes

[168] Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 249, 251. See, also, Chapter I.D.2.b.

[169] Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 249, 250–252. See also Alejandro del Valle Gálvez, 'Unión Europea, Crisis de Refugiados y Limes Imperii' (2016) 38 Revista General de Derecho Europeo 1, 13; and Mitsilegas Valsamis, 'Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State' (2012) 19(1) Indiana Journal of Global Legal Studies 3, 45–59.

[170] Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' [2002] 10019/02, paras 1 and 4.

[171] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 236.

[172] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 237; CEAR, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy*' (CEAR 2012), 9.

[173] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 237.

over responsibility towards refugees and diversion of ships to third countries' ports.[174] The Red Cross has also noted with concern that some EU migration policy choices expose refugees to great vulnerabilities along their way to the EU and Schengen area, notably violence and human-trafficking and dangerous journeys to reach the EU's external borders.[175] The use by migrants of dangerous routes to Europe in the absence of regular and safer migration opportunities has indeed been considered a violation of the right to life.[176] The Commissioner for Human Rights of the Council of Europe identified the journey of migrants to Europe as one of the points in the migration cycle where vulnerability is greatest, and noted that one of the drivers of vulnerability is the 'excessive use of force by law enforcement officials charged with border control.'[177] Furthermore, it must be stressed that the most urgent need of refugees is to secure entry into a territory where they can find safety from the circumstances that led them to flee. Restrictions to this basic need may have serious consequences for refugees' protection: refugees denied entry into a country are likely to be returned to the risk of persecution in their countries of origin or to be condemned to 'perpetual orbit' in search of a state which allows them to enter.[178]

In spite of the increasing contextual and compounded vulnerabilities of asylum seekers, these state practices pose a variety of legal issues as they challenge not only the international legal framework for the protection of refugees, notably the principle of *non-refoulement*, but also well-established human rights such as the right to freedom of movement[179] and the right to leave any country, including one's own country.[180] States that through these measures obstruct access to asylum procedures or impose barriers on the individual's right to leave any country may breach their obligations under the Refugee Convention and the human rights treaties to which they are party. In addition, although the extraterritorial application of the ECHR to these state practices will not be studied in this section, it is necessary to recall that all EU Member States are parties to this Convention and consenquently they are bound by the jurisprudence of the ECtHR regarding vulnerability of asylum-seekers. It can be inferred from this jurisprudence that an asylum-seeker's vulnerability is 'inherent in his situation of asylum seeker'.[181] This implies that every asylum-seeker must be deemed to be vulnerable, regardless of their particular

[174] Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174.
[175] Red Cross EU Office, 'Addressing the Vulnerabilities linked to Migratory Routes to the European Union', RCEU 12/2015-002 Position Paper 1.
[176] European Parliament, Directorate-General for External Policies, Migrants in the Mediterranean: Protecting human rights (Study by Samuel Cogolati, Nele Verlinden and Pierre Schmitt) [2015] EP/EXPO/B/DROI/2015/01, 30.
[177] Council of Europe, Commissioner for Human Rights, The Human rights of irregular migrants in Europe, CommDH/IssuePaper(2007)1, 3 and 8–9.
[178] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 279.
[179] Universal Declaration of Human Rights (UDHR), adopted by resolution 217 A (III) of the UN General Assembly in Paris on 10 December 1948, art 13(1).
[180] International Convenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art 12(2) and UDHR, art 13(2).
[181] *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011).

circumstances. They are vulnerable because of their belonging to this group[182] and States should consider this inherent vulnerability when implementing their policies.

The aim of this chapter is to analyse some of these instruments of pre-border control implemented within the EU in order to (i) assess to what extent they generate or increase refugees' vulnerabilities and (ii) to discuss some of the legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement* set forth in the 1951 Refugee Convention and some of the main human rights law instruments.[183] These problems will be addressed in section C below, whilst section B will provide an overview of the main instruments of pre-border control carried out by the EU and the EU Member States. Finally, section D will provide some tentative conclusions and recommendations.

B. The main EU and Member States' instruments of pre-border control

1. Background

At the EU level, extraterritorial practices to control borders have to be historically framed in the process of European integration and the abolition of internal borders to facilitate the freedom of movement of persons, capital and goods. Once an internal space without borders was created, the protection of this space against the entrance of undesired categories of persons, capital and goods became a clear priority within the EU.[184] As the Preamble of the Schengen Borders Code (SBC) states, 'the creation of an area in which persons may move freely is to be flanked by other measures' and 'the common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure.'[185]

The need to control the external borders of the EU appeared at the very beginning of the shaping of the EU immigration and asylum policy. In particular, some authors situate the origins of the externalisation of immigration policies by the EU in the concept of 'preventive protection' introduced in 1993 by the then-UN High Commissioner for Refugees, Sadako Ogata, which was promptly adopted by the EU institutions. Ogata emphasized the 'right to remain in one's home country' over the traditional dominant discourse of the 'right to leave'. This concept served as a basis for the creation of an 'incremental and invisible policy

[182] Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart Publishing 2015) 249–251.
[183] See above footnote 160.
[184] María-Teresa Gil Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18(2–3) International Journal of Refugee Law 571, 572.
[185] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), Preamble para 2.

wall around the EU'.[186] In the 1994 Communication on Immigration and Asylum Policies the European Commission identified three main elements of these policies: 'Taking action on migration pressure, 'Controlling migration flows' and 'Strengthening integration policies for the benefit of legal immigrants.'[187] The protection of refugees and other persons in need of international protection were addressed within the second area (controlling migration flows) along with admission policies and measures to fight against illegal migration. This threefold distinction between legal immigration, illegal immigration and asylum has characterised this area of European policy since its very beginning. Border control and other migration enforcement measures reflect this distinction. As stated in the 1994 Communication:

> The first task in controlling migration is to formulate basic principles in order to reflect the distinction between migration pressure and other forms of migration. Admission policies will necessarily represent this distinction: they cannot be purely restrictive as they should respect international obligations and humanitarian traditions in general. Hence, controlling migration does not necessarily imply bringing it to an end: it means migration management.[188]

However, as will be discussed below, one of the main flaws in the European immigration and asylum policy is precisely the lack of an effective distinction between these different categories in the context of the current mixed flows of migrants.[189]

The 1994 immigration and asylum policy proposal relied on strong cooperation with the countries of origin of refugees. This external dimension of the policy, as will be discussed in greater detail below, has since been present in all the EU's policy formulation documents: the Tampere European Council of October 1999,[190] the 2004 Hague Programme,[191] the 2005 Global Approach to Migration,[192] the 2008 European Pact on Immigration and Asylum,[193] the 2010 Stockholm Programme,[194] and the new 2015 European Agenda on Migration.[195] An important feature of the EU's immigration and asylum policy is precisely the distinction between the internal and the external dimensions of this policy. In parallel to the system of

[186] Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 249, 252 and 262.
[187] Commission of the European Communities, Communication form the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final.
[188] Commission of the European Communities, Communication form the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final, para 70.
[189] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 165–166.
[190] European Parliament, Presidency Conclusions, Tampere European Council 15 and 16 October 1999.
[191] European Council, The Hague Programme: Strengthening freedom, security and justice in the European Union [2005] OJ C53/1.
[192] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final.
[193] Council of the European Union, European Pact on Immigration and Asylum [2008] 13440/08 ASIM 72.
[194] European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.
[195] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

rules which sets forth entry conditions into the EU, admissibility criteria and enforcement measures, laid down mainly in the SBC[196] and the Common European Asylum System, the EU has developed an external dimension of this policy which comprises, on the one hand, a set of instruments based on the remote control of the EU's external borders ('Integrated management of the external borders') and, on the other hand, those measures aimed at enhancing the capacity in third countries to 'handle migratory flows and protracted refugee situations' (External Asylum Policy).[197]

The instruments which will be discussed in this section respond to the concept of 'Integrated Management of the External Borders'. This concept was first established by the European Commission in its 2002 Communication entitled 'Towards Integrated Management of the External Borders of the Member States of the European Union',[198] and subsequently adopted by the Justice and Home Affairs Council in its 'Plan for the management of the external borders of the Member States of the European Union'.[199] The concept refers to the establishment of a 'framework of an integrated strategy which takes progressively into account the multiplicity of aspects to the management of the external borders' of the EU.[200] Three specific components can be identified in this strategy: (i) a common corpus of legislation, in particular the SBC; (ii) operational cooperation between EU Member States, including cooperation implemented through Frontex, and (iii) solidarity between Member States by means of the establishment of an External Borders Fund.[201] This strategy is strongly focused on ensuring security at external borders[202] and is also based on the idea that border controls are more effective if they are implemented across the various stages of an immigrant's travel towards the EU.[203]

[196] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1.

[197] European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 6.2.3. See Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 165.

[198] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union' [2002] COM(2002) 233 final.

[199] Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' [2002] 10019/02.

[200] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union' [2002] COM(2002) 233 final, para 6.

[201] Council of the European Union, Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting Brussels, 4–5 December 2006, 1.

[202] According to the Annex II of the 2002 Plan for the management of the external borders adopted in 2002 by the Council (Annex II), the management of external borders comprise: (i) checks and surveillance at external borders; (ii) gather, analyse and exchange any specific intelligence or general information enabling the border guard to analyse the risk that a person, object or asset constitutes for the internal security of the common area of freedom of movement, law and order or the national security of the Member States, (iii) analyse the development of the threats likely to affect the security of the external borders and (iv) anticipate the needs as regards staff and equipment to ensure security at external borders.

[203] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 172.

Four main instruments used by the EU can be identified within the concept of 'integrated border management': the EU Visa Regime, carrier sanctions, Immigration Liaison Officers (ILOs) and operations coordinated by Frontex.[204] These so called 'traditional non-entrée policies' have given way to a 'new generation of non-entrée policies' based on cooperation with third countries, notably diplomatic relations and financial and technical aid.[205] This section will focus on the instruments belonging to the EU's concept of integrated border management.

Recently, on 15 December 2015 the European Commission adopted a new set of measures to manage Europe's external borders, including the creation of a European Border and Coast Guard[206] and a European travel document for the return of illegally staying third-country nationals.[207] In addition, on 6 April 2016 the Commission adopted its Communication entitled 'Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe'.[208] In this Communication, one of the most controversial 'new generation measures', that is, the signing of a Joint Action Plan with Turkey in October 2015 in the current context of the Syrian refugee crisis in Europe, is deemed as a 'legal channel of resettlement' and a 'mechanism to substitute irregular and dangerous migrant crossing from Turkey to the Greek islands'.[209] Under this Agreement the EU undertakes, among other commitments, the mobilising of funds (3 billion euro) to support Turkey in coping with the challenge of the Syrian refugee crisis while Turkey undertakes, among other commitments, to 'further strengthen the interception capacity of the Turkish Coast Guard', 'step up cooperation with Bulgarian and Greek authorities to prevent irregular migration across the common land borders', and 'pursue the progressive alignment of Turkish visa policy, legislation and administrative capacities notably vis-à-vis the countries representing an important source of illegal migration for Turkey and the EU'.[210]

This Joint Action Plan was highly criticised because it ignored the conditions of poverty suffered by the over 2 million refugees that Turkey has already received, as well as Turkey's poor human rights record and its inadequate asylum system. In fact, by the end of 2015 forced returns by Turkey of refugees and asylum-

[204] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 171–184.

[205] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 243. These authors include also among these new generation practices the deployment of officials in foreign states, such as the European ILO, and the use of international agencies in order to intercept refugees, such as the operations coordinated by FRONTEX.

[206] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2015] COM(2015) 671 final, 2015/0310 (COD).

[207] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals [2015] COM(2015) 668 final, 2015/0306 (COD).

[208] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final.

[209] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14-15.

[210] European Commission, 'EU-Turkey joint action plan' [2015] MEMO/15/5860, 1–2.

seekers to Syria and Iraq were reported.[211] On 16 March 2016 the members of the European Council met with the Turkish authorities in order to reconfirm their commitment to the implementation of this Joint Action Plan by means of an agreement (EU-Turkey Statement) including eight points, among them, (i) the return to Turkey of all new irregular migrants crossing from Turkey into Greek islands from 20 March 2016; (ii) the resettlement from Turkey to the EU of one Syrian for every Syrian being returned to Turkey from Greek islands, taking into account the UN Vulnerability Criteria; (iii) the acceleration of the visa liberalisation roadmap with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016; (iv) the speeding up of the disbursement of the 3 billion euro under the Facility for Refugees in Turkey and additional funding of 3 billion euro, and (v) the EU and Turkey's commitment to 're-energise' Turkey's accession process to the EU.[212] This latest Statement is giving rise to widespread criticism because, among other issues, it assumes that Turkey is a safe country for refugees, involves massive expulsions of migrants, which is prohibited by Article 4(4) of the ECHR, and it may infringe the principle of *non-refoulement* and the legal guarantees that should be granted in cases of expulsion.[213]

2. Passive and active interception

There are different classifications of instruments of pre-border control. One of them distinguishes between passive and active interception of refugees. Although there is not an internationally accepted definition of 'interception', the Executive Committee of the High Commissioner's Programme in 2000 proposed one, which is often referred to by scholars.[214] According to the proposed definition, interception comprises 'all measures applied by a State, *outside its national territory*, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.'[215] This definition, which highlights the extraterritorial character of the interception measures, encompasses both 'physical or active measures' of interception, such as interception of boats at sea, and 'passive or administrative measures', such as the deployment of immigration control officers in foreign countries, visa requirements, carrier sanctions or financial and other assistance to origin or transit countries. The structure of this chapter will follow this distinction between passive and active measures of interception.

[211] Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 43.
[212] European Council, 'EU-Turkey statement' [2016] Press Release 144/16.
[213] CEAR, *Lesbos, 'zona cero' del derecho de asilo* (CEAR 2016), 33. See also Red Cross, 'The EU-Turkey migration deal: a lack of empathy and humanity – Opinion of 23 Red Cross National Societies' [2016] <http://www.redcross.eu/en/News-Events/NEWS-ROOM/The-EU-Turkey-migration-deal/>.
[214] Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 322 and 323; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 371-372.
[215] Executive Committee of the High Commissioner's Programme, Standing Committee, 'Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' [2000] EC/50/SC/CRP.17, para 10, emphasis added.

a) Passive measures of interception

(1) The EU Visa Regime

The EU has established a common visa policy for stays in the territories of the Member States not exceeding three months in any six-month period.[216] The Visa requirements were first established in the Convention Implementing the Schengen Agreement (CISA),[217] and subsequently governed by Article 5 of the SBC which states the general entry conditions which must be fulfilled by third-country nationals to be allowed entry into the Schengen area.[218] Council Regulation 539/2001 (Visa Requirement Regulation) lists the non-EU countries whose nationals must be in possession of a visa when crossing the external borders of the EU.[219] This is the so-called 'black list' of Annex I of the Visa Requirement Regulation, whereas Annex II lists the countries whose nationals are exempt from requesting a visa ('white list'). The procedures and conditions for issuing visas are laid down in the Visa Code.[220] Refugees are not afforded a special status in this Code, which only refers to 'recognised refugees and stateless persons' in order to stipulate that they are required to be in possession of a visa when crossing the external borders if the country in which they are resident and which has issued them with their travel documents is a third country listed in Annex I,[221] that is, they deserve the same treatment as nationals of the State in which they reside. In addition, as some scholars underline, the EU Visa system 'divide[s] the world into two main categories'.[222] For countries included in the 'white list' control is reduced in order to promote trade and tourism, whereas a

[216] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1 ('Visa Code').

[217] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and French republic on the gradual abolition of checks at their common borders, [2000] OJ L239/19. Article 5, which states the general requirements for aliens to be granted entry into the Schengen area was repealed by Article 39.1 of the Schengen Borders Code.

[218] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1 (consolidated version 2013).

[219] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1, Annex I.

[220] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1.

[221] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1.

[222] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439, 448–449. For a discussion on the EU and humanitarian visa, see, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf> accessed 10 May 2016.

considerable number of 'refugee-producing' countries have been included in the black list, for example, Afghanistan, Iraq, Somalia and Sudan.[223]

However, in accordance with the SBC, the refusal of entry shall be 'without prejudice to the application of special provisions concerning the rights of asylum and to international protection'.[224] Thus, although the Visa Code does not grant favourable treatment to asylum seekers or refugees, implying that in principle they are to comply with the requirements on the same footing as any national of a blacklisted State, they are exempt from the visa requirement according to the SBC. The paradox then is that refugees are not exempt from holding a visa until the very moment when this requirement is enforced, that is, when it is checked whether the person complies with the entry conditions established in the SBC.[225]

Furthermore, this must be examined in the light of the practices of Member States and the instruments they use to implement entry conditions. What state practice shows is that the standard procedure for carriers and officials deployed in foreign airports is checking that individuals hold a visa, without any consideration of the rights of asylum seekers or refugees. Thus, standard procedures could be highly problematic if the checks are not accompanied by proper guarantees for refugees.[226] Moreover, the SBC requires other entry conditions that refugees are unlikely to fulfil, notably documents in which they have to justify the purpose and conditions of the stay and that they have sufficient means of subsistence for the duration of the stay and for the return to their country of origin.[227]

Finally, it must be said that Member States are free to create more favourable conditions for asylum-seekers through the issuing of visas on humanitarian grounds or based on international obligations,[228] as well as through the issuance of long stay visas which are subject to their domestic procedures and rules.

(2) Carrier sanctions

As explained above, the mere fact of not holding a visa does not in itself prevent access to the EU. Asylum-seekers could present themselves at the EU's external borders and make an asylum claim that has to be examined by national authorities of the Member States, which are subject to the obligation of *non-refoulement*. However, the visa requirement has to be analysed in close connection to the EU's carrier

[223] Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 324–325.
[224] Schengen Borders Code, Article 13.1 which has to be read in conjunction with Article 5.4.c.
[225] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 173–174.
[226] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 173–174.
[227] Schengen Borders Code, Article 5.1.c.
[228] According to Article 5.4.c of the SBC, third-country nationals who do not fulfil one or more of the entry conditions may be authorised by a Member State to 'enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.'

sanction system, which has transformed the visa requirement into a 'precondition' which precludes individuals from even leaving their country of origin.[229]

Article 26 of the CISA lays down the duty of Member States to incorporate into their national laws three kinds of obligations for carriers which bring third country nationals by air, sea or land to the external borders of the EU: (i) the obligation to assume responsibility for aliens who are refused entry into the territory of one of the Member States and to return them to the third State from which they were transported or which issued their travel documents or any other third State 'to which they are certain to be admitted',[230] (ii) the obligation to check that aliens are in possession of the travel documents required for entry into the territory of the Member States, and (iii) the obligation to pay financial penalties in case they fail to meet their control obligations.

Article 26 CISA and the Preamble of Directive 2001/51/EC,[231] which complements Article 26, set forth that the application of these provisions is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees. Thus, as a matter of principle, carrier sanctions regimes shall respect international refugee obligations. However, scholars have underlined some problems in practice:[232]

- The regime depends on the assessment by private carriers of whether passengers who claim asylum have a founded claim. However, frequently they lack proper expertise and training.

- Limitations of time and the expedient nature of boarding procedures make it unlikely that private carriers undertake assessments seriously.

- In order to avoid fines and return obligations, private carriers tend to rely exclusively on the examination of travel documents, without any consideration of asylum claims.

- If carrier sanctions regime should not prejudice asylum seekers and refugee rights, one possible interpretation is to consider that asylum seekers fall outside the scope of the regime. Thus, carriers would be allowed to board individuals without travel documents provided that they file an asylum claim when arriving at the EU's external border. However, it is argued that such an

[229] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439, 450–451.

[230] Article 26.3 establishes some exceptions in cases of land border traffic.

[231] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45, Preamble, para 3.

[232] Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 326–327; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 174–177; Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439, 451.

interpretation would make the carrier regime prone to abuses if every undocumented migrant claims asylum.

- There is not uniformity in implementation by Member States. Some Member States impose sanctions on carriers regardless of the involvement of refugees, some release carriers from the sanctions if individuals are admitted to asylum procedures, and others release them only if asylum seekers are granted refugee status.

Along with this potentiality of the EU's carrier sanctions systems to preclude asylum seekers from accessing EU territory, another problematic issue has been underlined insofar as this measure implies a 'privatisation of migration control' where state functions are assumed by private companies which are not directly bound by international human rights standards and usually act on economic grounds which prompt private carriers to be cautious and reject any doubtful passenger.[233]

(3) Immigration Liaison Officers (ILOs) in third countries

A third mechanism that plays an important role in preventing asylum seekers from entering the EU is the deployment of officials of the destination country in the country of origin or transit, usually at their airports. Under EU law these officials are referred to as 'Immigration Liaisons Officers' (ILOs). Council Regulation 377/2004 (ILO Regulation) created a network of ILOs in order to coordinate the activities of the EU Member States' officers posted in non-EU States.[234] Moreover, on 27 May 2005 seven EU Member States signed a Convention aimed at the stepping up of cross-border cooperation (the Prüm Convention), which envisaged, in compliance with the ILO Regulation, the secondment of 'document advisers' to States deemed as origin or transit countries for illegal immigration.[235]

According to the ILO Regulation, these officers' main functions are 'to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of

[233] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439, 451.

[234] Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network L 64/1, OJ L64/1 (ILO Regulation), amended by Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network, [2004] OJ L141/13.

[235] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005, Arts 20 and 21. Bulgaria, Estonia, Finland, Hungary, Romania, Slovakia and Slovenia are also parties to this Convention which was incorporated into EU law by Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-Border Crime, [2008] OJ L 210/1.

illegal immigration, the return of illegal immigrants and the management of legal migration';[236] collecting and exchanging information in certain 'concern issues' such as flows of illegal immigrants from or transiting through the host country, the routes and modus operandi followed by them or the existence of criminal organisations involved in the smuggling of immigrants;[237] and rendering assistance to the hosting authorities in 'establishing the identity of third country nationals and in facilitating their return to their country of origin.'[238]

One key case dealing with the deployment of immigration officers in foreign countries is the judgment of the UK's House of Lords in *Roma Rights*.[239] The issue under appeal was the lawfulness of the procedures adopted by British immigration officers temporarily stationed at Prague Airport. The appellants, six Czech nationals of Romani ethnic origin, intended to leave the Czech Republic and enter into the UK but were refused permission to leave the country by the British immigration officers. This judgment, one of the most controversial in connection with the territorial scope of the Geneva Convention relating to the Status of Refugees, will be addressed later (see below section C.1), but it is worth mentioning here that the House of Lords found that the duty of *non-refoulement* is applicable exclusively to those refugees who have managed to enter the territory of the State. Consequently, according to the House of Lords the contracting States do not have legal duties towards refugees who find themselves outside their territories or at their frontiers.[240]

Scholars have been very critical of the role and status of these officers. The main concern is that, although according to the ILO Regulation these officers should not influence the sovereign tasks of the host countries, in practice they impede individuals from exiting the country, either directly or through 'advice or recommendation' to carriers or authorities in the country of origin or transit.[241] The nature of the 'advice or recommendation' is controversial, in particular regarding carriers, since they are receiving the advice from an official of a State, entitled to fine them if they fail to check whether individuals hold the required documentation to enter into the EU.[242] In addition, the ILO Regulation does not include any reference to refugee rights and the need to comply with the relevant EU law on border control and visas.[243] Finally, the lack of transparency regarding the activities of these officials has been denounced,

[236] ILO Regulation, art 1.
[237] ILO Regulation, arts 2.1 and 2.2.
[238] ILO Regulation, art 2.3.
[239] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.
[240] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, 14–16.
[241] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439, 452; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 178–179; Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 27-28; Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 253.
[242] Frank McNamara, 'Member State Responsibility for Migration Control within Third States — Externalisation revisited' (2013) 15 European Journal of Migration and Law 319, 330.
[243] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179.

since no public information is provided in connection with them. The ILO Regulation envisages biannual reports to the Council and the Commission but these reports are classified.[244]

b) Active interception: interception at sea and the role of Frontex

From January to November 2015 around 950,469 refugees and migrants arrived on Europe's shores via the Mediterranean. The vast majority of them (797,372) arrived in Greece. According to UNHCR, 49% of those arriving by sea are fleeing the Syrian Arab Republic. Other countries of origin are Afghanistan (20%), Iraq (8%), Eritrea (4%), Nigeria (2%), Pakistan (2%), Somalia (2%), Sudan (1 %), Gambia (1%) and Mali (1%).[245] Over the latter part of 2015 the sea route shifted from the central Mediterranean to the Aegean Sea.[246] In 2015 over 3,700 refugees and migrants lost their lives during this dangerous journey.[247] The trend for 2016[248] shows an increase in arrivals by sea: during January and February 131,724 people made the journey, a figure similar to the total number for the entire first half of 2015. In 2016, 410 refugees and migrants had died at the time of writing.[249] These refugees and migrants often have to face high levels of violence, including sexual and gender-based violence, extortion and exploitation during their journeys.[250] Against this backdrop, the EU has been heavily criticised for having failed to come up with a 'coherent, humane and rights-respecting response.'[251]

A traditional form of non-arrival policy is the interdiction of migrants on the high seas or in the territorial waters of third countries. This is the paradigmatic example of active interception, which was explained earlier. Not only have the EU Member States been engaged in these types of practices, so has the EU itself as well, through joint operations coordinated by Frontex. The extraterritorial strategies deployed by the EU and the EU Member States to intercept refugees and migrants by sea have been divided into three main categories:

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[244] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179.

[245] UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis*. *Greece and the former Yugoslav Republic of Macedonia* [2016], 3 <http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=14>.

[246] UNHCR, 'Refugee/Migrant Crisis in Europe, Situation Analysis — January 2016' [2016], 3 <http://data.unhcr.org/mediterranean/documents.php?page=2&view=grid&Type%5B%5D=9>.

[247] Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 41–42.

[248] Data at the time of writing, March 2016.

[249] UNHCR, 'Refugee/Migrant Crisis in Europe, Situation Analysis — March 2016' [2016], 3 <http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=9>.

[250] UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis*. *Greece and the former Yugoslav Republic of Macedonia* [2016], 3 <http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=14>.

[251] Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 41–42.

Joint operations in territorial waters of third countries: these operations are based on agreements which allow EU Member States to participate in border patrols in the territorial waters of third countries of origin of refugees and migrants. The most active countries in concluding this kind of agreements have been Spain and Italy. Although usually these agreements are not public, it appears that the way in which the joint patrols are conducted is the so called 'shiprider model'. This model involves the boarding by third countries' officials in EU Member States' vessels with the exclusive competences to decide on the boarding of vessels and the arrest of individuals on them. For example, Frontex operation Hera III, hosted by Spain, envisaged the placement of Senegalese and Mauritanian agents on EU Member States' vessels with similar competencies.[252]

'Push-backs' or interdiction and summary returns of migrants to third countries: in some cases these return policies are formalised in agreements with third countries where these countries undertake to accept the return of the refugees and migrants. The prominent example is the Italian push-backs of migrants to Libya and Algeria. In other cases, diversions of migrants are not formalised in agreements and attempt to prevent them from entering the territorial waters of the state or drive them back to the high seas.[253]

Rescue operations followed by disembarkation in a third country. The main concern regarding rescue operations is the identification of the place of disembarkation of the rescued passengers, especially in those cases where coastal states do not accept such disembarkation in their ports. International law does not lay down which state is required to allow disembarkation. As a result, there have been cases in which the dispute among States has resulted in long negotiations during which the most basic needs of the refugees and migrants are not provided for. One salient example in this regard is the *Marine I* case which involved the rescue by a Spanish vessel of 369 passengers from various Asian and African countries. Diplomatic negotiations between Spain, Senegal and Mauritania on their place of disembarkation took eight days, during which time the rescued vessel remained anchored off the Mauritanian coast. Rescue operations can also be framed in the context of sea border operations coordinated by Frontex. Another key concern regarding rescue operations is that they are used by states as a pretext to circumvent refugee and human rights law, while in fact they hide traditional border control measures.[254]

With regard to the participation of Frontex in the interception of refugees at sea, a variety of complex legal issues have been raised by scholars and NGOs, including:[255]

[252] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 212–213.

[253] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 212–213. See also Maria Dolores Bollo Arocena, 'Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósto de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia' in Santiago Torres Bernárdez (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez* (Iprolex 2013), 647; and Violeta Moreno Lax, '*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) Human Rights Law Review 574.

[254] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229, 243.

[255] See, also, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ*

- Concerns for human rights protection in the operations coordinated by Frontex. There is a lack of clarity in connection with how the protection guarantees set out by the EU and international legal framework can be applied to these operations and how compliance with these standards can be monitored. It is also questioned whether Frontex is itself responsible for ensuring the protection of human rights during the interception measures.[256] Furthermore, it has been stressed that it is even doubtful that Frontex can be deemed to be bound by international human rights instruments,[257] although the Frontex Regulation states its obligation to fulfil its tasks in compliance with the EU Fundamental Rights Charter as well as the 1951 Refugee Convention.[258] Besides, violations of human rights in areas covered by Frontex joint operations have been reported, for example, in connection with the practices of Greece, Italy, Spain and Cyprus.[259]

- Border control operations coordinated by Frontex at sea might push refugees to choose more risky routes in their travel to Europe's shores. One recent study by the Spanish Commission for Refugee Assistance (CEAR) shows that Frontex operations off the coast of the Greek island of Lesbos have blocked the northern route from Turkey to this island (9 km). As a consequence, refugees have been diverted to a more dangerous and longer route (21 km) which exposes them to great vulnerabilities.[260]

policies [2015] <http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf> accessed 10 May 2016.

[256] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229–230.

[257] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 256.

[258] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, Article 1.2 second paragraph, amended by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1. This Article states that 'the Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union'. Frontex Regulation has also been amended by Regulation (EU) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2004] OJ L199/30 and by Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11. (FRONTEX Regulation).

[259] Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (Human Rights Watch 2011), European Parliament, Directorate-General for External Policies, Migrants in the Mediterranean: Protecting human rights (Study by Samuel Cogolati, Nele Verlinden and Pierre Schmitt) [2015] EP/EXPO/B/DROI/2015/01, 31. See also Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 243–244; and Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174, 184.

[260] CEAR, *Lesbos, 'zona cero' del derecho de asilo* (CEAR 2016), 9.

- Two of the issues most frequently raised by scholars are the attribution of responsibilities in the framework of operations coordinated by Frontex and the identification of the real role that it plays in these kinds of operations. According to the Frontex Regulation, 'the responsibility for the control and surveillance of external borders lies with the Member States'.[261] The role of Frontex is reduced to 'facilitating and rendering more effective the application of existing and future Union measures relating to the management of external borders, in particular the SBC.'[262] However, it has been argued that Frontex's mandate, governance structure and its practice shows a different view. Frontex insists that it is less 'actor' than 'coordinator' but it has quickly become a powerful actor with a key role in enforcing EU immigration policy and an increasingly high budget.[263] Whereas Frontex has not legally been empowered to guard the EU's external borders, its establishment and development implies a shift in the exercise of powers, which traditionally have belonged to the national sovereignty of the Member States. The absence of clarity in connection to the exact scope of Frontex's coordinating role, and with its modus operandi in practice, make it extremely difficult to establish which authority should be held responsible for the protection of the individuals intercepted.[264] In addition, the Frontex Regulation does not set out a special legal process before the CJEU for actions implementing EU law.[265] Finally, it has been pointed out that with regard to operations implemented in the territorial waters of third countries, Frontex and EU Member States appear to consider that the responsibility for breaches of refugee and human rights law lies exclusively with those third states.[266]

- The lack of transparency regarding Frontex operations has also been highlighted. The existing evaluations and reports on Frontex operations are focused on providing figures on the number of people returned, deterred or rescued. However, there is no available data concerning, for example, their age, gender, or protection concerns. Most importantly, there is no information on the places to which they are returned or diverted, nor on their fate after the return or diversion. The information that is available does not allow either an assessment of whether the human needs of refugees and migrants are covered or whether the EU Member States involved comply with their obligations under international human rights law.[267] In this regard, in the framework of

[261] FRONTEX Regulation, Article 1.2.
[262] FRONTEX Regulation, Article 1.2.
[263] From €6.2 million in 2004 to more than €88 million in 2010. Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (Human Rights Watch 2011), 11.
[264] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229–230. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179–181.
[265] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 237.
[266] Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174, 200.
[267] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 243.

certain operations such as Hera, Frontex acknowledged that it ignored whether any asylum applications were lodged during the operation and that it does not collect this type of data.[268]

- Sea operations that are implemented in the territorial waters of third countries are usually based on bilateral agreements between EU Member States and the third country concerned. These agreements are not generally disclosed even to Frontex, despite its role in facilitating those operations. In addition, Frontex is authorised to facilitate operations under the framework or Working Agreements by means of which Frontex establishes bilateral cooperation with a third country. Some of these third countries have a poor record on protection of human rights and their treatment of refugees and migrants. Some of them, such as Libya, are not even parties to the 1951 Refugee Convention.[269]

- With regard to operations coordinated by Frontex at sea, Council Decision 2010/252/EU on Frontex Maritime Operations[270] raises serious concerns for its failure to include any of the procedural guarantees laid down in Article 13 and Part A of the Annex V of the SBC, notably the need to substantiate the decision of refusal and the right to appeal of persons refused entry.[271] The absence of these guarantees reflects a contradictory view within the EU regarding the extraterritorial application of the Schengen border crossing regime: it is accepted that there is a legal basis which allows EU Member States to engage in coercive measures beyond their territories, but the extraterritorial application of the procedural guarantees to those measures is disregarded.[272] The CJEU declared it null in 2012, but the Council Decision maintains its effects until the entry into force of new rules.[273]

C. Compatibility of the EU's and Member States' instruments of pre-border control with the international protection of refugees and the principle of non-refoulement

As explained, the EU Member States, individually or under the umbrella of the EU's strategy on integrated border management, are increasingly undertaking interception measures, both passive and active,

[268] Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174, 182.
[269] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 251–254.
[270] Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2010] OJ L111/20.
[271] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 200–203.
[272] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 200–203.
[273] Case C-355/10 *European Parliament v Council of the European Union* [2012] CJEU 5 September 2012.

outside their territories and territorial seas, with the purpose of forcing refugees back to their places of origin or the territory or territorial waters of other states. These strategies result in refugees being denied any direct contact with the receiving state and, as a consequence, protection of their rights.[274] In the light of international standards for the protection of refugees, these measures might imply an unjustified restriction on the 'right to seek asylum' as well as an infringement of the principle of *non-refoulement* laid down in Article 33 of the 1951 Refugee Convention. The key question then is to determine the territorial scope of states' obligations toward refugees, namely whether the duty of *non-refoulement* is extraterritorially applicable.

1. Extraterritorial applicability of *non-refoulement* principle

According to Article 33.1 of the Refugee Convention, 'No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[275] The duty of *non-refoulement* is frequently referred to by scholars as the cornerstone or centrepiece of the international refugee protection regime.[276] Since the Refugee Convention does not guarantee a right to 'obtain' asylum, the *non-refoulement* principle constitutes the 'strongest commitment that the international community of States has been willing to make to those who are no longer able to avail themselves of the protection of their own government'.[277]

Unlike other articles of the Refugee Convention, which require refugees to be inside the territory of the receiving state in order to grant them the rights set out in the Convention,[278] Article 33 does not contain any spatial or territorial limitation. However, nor does the Refugee Convention contain a duty of states to protect refugees' rights in the world at large.[279] This apparent ambiguity in the determination of the territorial scope of the duty of *non-refoulement* has led some states to deny its extraterritorial applicability.

One of the most prominent cases of denial of the extraterritorial applicability of the duty of *non-refoulement* is the US Supreme Court's decision in the case *Sale v Haitian Centers Council*. This case addressed the examination of the legality of an order issued in 1981 by President Reagan in which he

[274] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).
[275] Refugee Convention, Article 33.1.
[276] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), 44.
[277] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), 44. See also UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 5 and Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009), 33.
[278] For example, arts 17-19 on gainful employment, 21 on housing and 24 on labour legislation and social security.
[279] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 258.

ordered the Coast Guard to intercept vessels carrying Haitians who were fleeing Haiti following the military coup which displaced the government of Jean Bertrand Aristide, and to return them to Haiti. According to the Supreme Court:

> The drafters of the Convention and the parties to the Protocol […] may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.[280]

This case was decisive in the resolution of the *Roma Rights* case before the UK's House of Lords, which denied the application of the duty of *non-refoulement* towards those refugees who 'seek entrance into the territory' but have not yet managed to enter into the territory.[281] This case involved the deployment by the UK of immigration officers at Prague Airport in 2001, subject to an agreement signed with the Czech Republic which allowed UK officers to give or refuse leave to enter the UK to passengers at Prague airport. The British officers denied leave to six individuals of Romani ethnic origin who intended to travel to the UK. Some of the claimants declared that they intended to claim asylum on arrival to UK.[282] The particularity of this case was that, like other passive measures previously examined (for example, carrier sanctions and visa regimes), the claimants were intercepted before leaving the country, so they failed to meet one of the requirements for the Refugee Convention to be applicable, that is, to be 'outside the country of his nationality [...] or the country of his former habitual residence.'[283] Aware of this limitation, the claimants urged the House of Lords to admit a 'purposive interpretation' of the Convention, taking into account its humanitarian objects and purpose. They argued that if they had not been effectively prevented by the UK officials from travelling to the UK they could have done so, could have applied for asylum and, in case the requisite grounds were established, asylum would have been granted.[284] However, the House of Lords did not accept the argument on the grounds that the court's main task remains interpreting the Convention in accordance with its ordinary meaning, that is bearing in mind the 'written document to which the contracting states have committed themselves' and not 'what they might, or in an ideal world would, have agreed'.[285]

[280] United States Supreme Court, *Sale, acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* 509 U.S. 155 (1993), 183.

[281] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 17.

[282] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, paras 1 and 4.

[283] Refugee Convention Article 1.A.2.

[284] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, paras 18 and 20.

[285] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 18. The claim was, nevertheless, successful because the House of Lord considered that the pre-clearance procedure was discriminatory on racial grounds.

Despite this restrictive understanding of the territorial scope of the Refugee Convention, and in particular of the duty of *non-refoulement*, a significant number of scholars[286] contend that the duty is applicable not only within the territory of the state and at its border, but also in relation to any refugee *subject to or within the jurisdiction of the state*. This position incorporates the interpretation of the *refoulement* prohibition within the broader framework of the extraterritorial applicability of international and regional human rights instruments, in particular regarding its understanding of the concept of jurisdiction. In the view of Hathaway, certain Convention rights, among which is the principle of *non-refoulement*, are not subject to any territorial limitation. The obligation of states to respect these rights arises wherever 'a State exercises effective or de facto jurisdiction outside its own territory' either by State agents themselves, by private companies hired by governments, or by officials of a transit country acting on behalf of a destination State.[287] This opinion is also supported by Goodwin-Gill and Mc Adam, who postulate that Article 33 does not require any physical presence in the territory, but prohibits the return of refugees 'in any manner whatsoever' irrespective of the place where the relevant action occurs (at border posts, at transit points, in international zones, beyond the national territory of the States, etc.).[288] These authors go further, pointing out that the principle of *non-refoulement* has crystallised into a rule of customary international law, binding on all states whether or not they are parties to the Refugee Convention. The core content of this customary rule is the 'prohibition of return in any manner whatsoever of refugees to countries where they may face persecution'.[289] The territorial scope of this rule is informed by this essential purpose of the prohibition, thus regulating state action 'wherever it takes place.'[290]

This is also the view of the UNHCR in its Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the Refugee Convention, which stresses again the paramount importance of the concept of jurisdiction:

> It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not

[286] However, there are also contrary opinions. See, Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Significance and Contents* (Institute of Jewish Affairs 1952), 29; Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980), 40; Sadruddin Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', *Collected Courses of the Hague Academy of International Law* (1976) vol 149, 317–318; House of Lords, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55; US Supreme Court, *Sale acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* 509 U.S. 155 (1993).

[287] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 335–342.

[288] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 246.

[289] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 248.

[290] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 248.

> whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.[291]

In sum, a majority of scholars today are favourable to the extraterritorial application of the duty of *non-refoulement*. However, there are significant gaps in the protective scope of Article 33 which have special relevance here. First, the duty of *non-refoulement* does not cover cases of mass influx of refugees insofar as it threatens the ability of the state to protect its national interests. But most importantly, the duty of *non-refoulement* does not limit passive measures of interception such as visa controls, carrier sanctions or ILOs, since refugees are not allowed to leave the territory of their own states. As the *Roma Rights* case shows, one compulsory requirement for refugees to be protected is that they actually leave their countries. Until and unless this requirement is met they are not entitled to the protection of Article 33.[292] With the aim of overcoming this second restriction, it has been argued that states must interpret treaties, including the duty of *non-refoulement* laid down in the Refugee Convention, in good faith, according to the principle of *pacta sunt servanda* as stated in Article 26 of the Vienna Convention on the Law of Treaties. This argument was rejected, though, by the House of Lords in *Roma Rights* insofar as interpreting a treaty according to its wording cannot be contrary to good faith:

> But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that *pacta sunt servanda* cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do.[293]

2. Responses to the gaps in the protection of refugees

The above mentioned gap in the protection offered by the Refugee Convention has been referred as an 'intractable dilemma' to the extent that as long as states do not find themselves bound by a duty to allow refugees to seek asylum in other countries it is extremely difficult to find a proper response in international law to those measures of passive interception which 'imprison would-be refugees within their own states.'[294] However, scholars have pointed out some alternative responses.

a) Article 31 of the Refugee Convention

[291] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 43.
[292] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 367. See also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 385.
[293] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 19.
[294] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 368.

One possible answer has been found in Article 31 of the Refugee Convention. This article prohibits states from imposing penalties on those refugees that enter irregularly into their territories. This provision implies an acknowledgement that due to the circumstances that lead refugees to escape they are not usually in possession of the documentation required to enter into the country. Read in conjunction with Article 33 and the right to leave a country and seek asylum, which will be discussed below, this article upholds the recognition of the right of refugees to obtain temporary admission in the territory of a state in order to have access to refugee status determination procedures.[295] According to the UNHCR, this is necessary in order to give effect to states' obligations under the Convention, meaning that they must at least grant asylum-seekers, access to their territories and to fair and efficient asylum procedures.[296]

However, despite the clarity of the wording of Article 31, this article has been disregarded in practice by states. Refugees who, according to this article, enter into a country without holding proper documentation frequently suffer from the so called 'imputation of double criminality', that is, they become under domestic law the 'unlawful non-citizen' who has entered irregularly and is 'aligned with crime' by national authorities and the media so that his or her claim is assumed to be illegitimate. [297]

b) The duty of non-refoulement in international and regional human rights instruments

This second alternative provides strong arguments for reinforcing the Refugee Convention's duty of *non-refoulement*. The major human rights treaties have also established *non-refoulement* obligations for States, either through explicit provisions such as Article 3 of the Convention against Torture (CAT), Article 22(8) of the American Convention on Human Rights, and Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, or indirectly by means of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, such as Article 3 of the ECHR and Article 7 of the ICCPR. With regard to the scope of obligations under Article 3 ECHR and Article 7 ICCPR, as construed by the Human Rights Committee and the ECtHR, they also encompass the prohibition of exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country through their extradition, expulsion or return.[298]

Unlike Article 33 of the Refugee Convention, these standards of human rights law do not require the refugee to be outside of his or her country in order to trigger the state's duty of *non-refoulement*. Thus,

[295] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 384-385.

[296] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 8.

[297] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 384–385. See also James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 370–371.

[298] In this regard, see Human Rights Committee, General Comment no 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session (1992), para 9; and *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 123.

ILOs in foreign airports or airline carriers who refuse embarkation to individuals at risk of persecution in the country they wish to leave could be considered a breach of the *non-refoulement* obligations of destination states, as stated in human rights instruments.[299]

In addition, international bodies in charge of interpreting these instruments have been much more prone to the applicability of the *non-refoulement* obligations of States in an extraterritorial context. One central case is the ECtHR decision in the case of *Hirsi Jamaa and Others v Italy*.[300] The case was brought by 11 Somali nationals and 13 Eritrean nationals who were part of a group of about two hundred individuals who, departing from Libya, attempted to reach the Italian coast by boat. They were intercepted on the high seas by three ships from the Italian Revenue Police and the Coastguard, transferred to Italian military ships where their personal effects and documentation were confiscated, and returned back to Tripoli.[301] The ECtHR found that the interception of the vessels by the Italian authorities constituted an exercise of extraterritorial jurisdiction by Italy, triggering its obligations under the Convention.[302] In particular, the Court, although recognising the rights of States to establish their own immigration policies, considered that the removal of aliens in the context of interceptions on the high seas with the aim of preventing them from reaching the borders of the state or pushing them back to another state constituted an exercise of jurisdiction which engaged Italy's responsibility.[303] The Court stressed that 'problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention' and that treaties must be interpreted in good faith bearing in mind the object and purpose of the treaty.[304]

The Committee against Torture has also established the extraterritorial jurisdiction of states engaged in the interception of boats on the high seas. In the *Marine I* case[305] a Spanish maritime rescue tug, in response to a distress call sent by the vessel *Marine I,* which carried 369 immigrants from various Asian and African countries, towed *Marine I* from international waters towards the Mauritanian coast. Diplomatic negotiations began between Spain, Senegal and Mauritania regarding the fate of the vessel, and an agreement was reached by Spain and Mauritania eight days after the interception, during which time the ships remained anchored off the Mauritanian coast. Following the agreement, the passengers were disembarked in Mauritania and the Spanish national police force proceeded to identify them. During the recognition procedure they declared that they were fleeing persecution in India as a result of the conflict in Kashmir. The passengers were placed in a former fish processing plant under Spanish control throughout the repatriation process.[306] The claimants alleged a violation of Article 1 of the Convention

[299] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 385–387; James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 368–369.
[300] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012).
[301] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), paras 9–11.
[302] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 178.
[303] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 180.
[304] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 179.
[305] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, (here: *Marine I* case). See Kees Wouters and Marteen Den Heijer, 'The *Marine I* Case: A Comment' (2009) 22(1) International Journal of Refugee Law 1.
[306] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, paras 2.1–2.6.

against Torture on the grounds that their treatment by the Spanish authorities amounted to torture and of Article 3 because, if returned to India, they would be subjected to torture or cruel, inhuman and degrading treatment.[307] During the complaint procedure Spain denied its jurisdiction over the passengers because the incidents took place outside Spanish territory.[308] However, the Committee considered that Spain had *de facto* jurisdiction over the persons on board *Marine I* 'from the time the vessel was rescued and throughout the identification and repatriation process.'[309] The exercise of extraterritorial jurisdiction of the state in cases of interception in territorial waters of a third state was also postulated by the Committee against Torture in the *Sonko* case, brought against Spain.[310]

c) The right to leave any country

The right to leave any country including one's own is laid down in several human rights instruments, namely, Article 13(1) of the Universal Declaration of Human Rights, Article 12 ICCPR, Article 2 of Protocol 4 of the ECHR, Article 22 of the American Convention on Human Rights, and Article 12(2) of the African Charter on Human and Peoples' Rights. It is not an absolute right and the above mentioned provisions establish limitations on grounds such as national security, public order or the needs of a democratic society. However, as the Human Rights Committee has pointed out, restrictions of this right must be 'provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.' Further, they must respect the principle of proportionality, be the least intrusive instrument to achieve the desired result, and be proportionate to the interest to be protected.[311] As some commentators have stressed, immigration controls that restrict an individual's rights to leave do not meet these requirements.[312]

Nevertheless, there is no international mechanism to implement this right. Thus, there are no legal provisions which require the right to leave to be complemented by a 'duty to admit' by other States. It has been considered, then, an 'incomplete right' since there is not a correlative obligation on other States to allow entry to individuals other than their own nationals.[313] However, in the context of refugee protection some scholars refer to the 'right to leave to seek asylum from persecution'. In this particular

[307] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, paras 3.1–3.3.
[308] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, para 6.1.
[309] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, para 8.2.
[310] Committee against Torture, *Fatou Sonko v Spain*, Communication no. 368/2008, CAT/C/47/D368/2008, para 10.3.
[311] Human Rights Committee, General Comment no 27, Freedom of movement (Article 12), (1999) CCPR/C/21/Rev.1/Add.9, paras 11–18. See also Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 351–353.
[312] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 381–382; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 246–247.
[313] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 382–383. See also Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 353–354.

context they contend that the right encompasses a correlative duty on other states, which consists of the prohibition of controlling the movements of persons in a manner that frustrates attempts to find effective protection.[314]

3. Extraterritorial application of the Schengen Border Crossing Regime

The question at stake here is whether when EU Member States employ passive or active measures of interception of refugees the affected individuals can invoke the guarantees laid down in the EU's internal rules on border controls and asylum, notably the SBC.[315] As explained above, the SBC establishes some procedural guarantees applicable to the conduction of border controls, namely the requirement to substantiate the refusal of entry, the right to appeal against this decision, and other general rules regarding procedure and good administration that must be respected when conducting controls. The SBC also refers to the need to respect refugee rights, especially the duty of *non-refoulement*.[316]

Several legal problems have been identified in the analysis of the extraterritorial application of these guarantees concerning the scope of the powers of the EU and the Member States to subject persons placed beyond their borders to coercive measures and the determination of the rights of those persons under EU law. The question is whether EU law envisages a legal basis, which allows EU Member States to engage in pre-border controls and whether guarantees for crossing the EU's external border can be triggered when the individuals are well beyond those borders. In the view of some commentators the application of the SBC exclusively at the EU external borders or in the immediate vicinity of the external border would only create an 'anomaly' regarding practices of border control implemented in other places. According to this position, the SBC is flexible enough in terms of the geographical areas in which border controls may be conducted. As a consequence, EU Member States' extraterritorial practices which do not comply with the procedural guarantees laid down in the SBC should be deemed illegal.[317]

D. Conclusions and recommendations

Europe is experiencing its largest movement of refugees and migrants since World War II. The EU reaction to this enormous challenge has given rise to heavy criticism. One of the main critiques refers to the EU's and EU Member States' recourse to a complex system of extraterritorial deterrence measures and instruments which prevent refugees from having any contact with the territory of the various EU Member

[314] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 382–383; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 246.
[315] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 193–194.
[316] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), art 3(b).
[317] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 193–199.

States' territories. The implementation of this set of extraterritorial measures has to be considered as a factor that exacerbates the inherent vulnerability of asylum seekers. In addition to the causes that lead them to flee from their countries of origin, any refugee seeking protection is in a vulnerable situation, and in many cases they face compounded vulnerability when they belong to additional categories of vulnerable groups such as women, children or persons with disabilities. However, the extraterritorial instruments that have been analysed in this section fail to take into account the special protection needs of asylum seekers and may indeed increase their inherent vulnerability.

One of the main flaws of these instruments is that they are not implemented in a way that allows effective distinction between refugees and other categories of migrants. Some of them, such as the EU visa regime, are collectively implemented without any favourable treatment of asylum seekers or refugees, who are to comply with the requirement on the same footing as any national of a blacklisted state. In addition, a considerable number of 'refugee-producing' countries are included in the so-called visa black list, that is, non-EU countries whose nationals must possess a visa to cross the external borders of the EU. Furthermore, some legal instruments such as the SBC additionally require some entry conditions that refugees, because of the circumstances that lead them to flee, are unlikely to fulfil, such as documents regarding the purpose and conditions of the stay in the receiving country and evidence regarding their means of subsistence for the duration of the stay and for the return to their country.

Another problematic issue is that some of these instruments, such as carrier sanctions, imply a 'privatisation of migration control' in practice, where the control of visa and entry conditions are assumed by private companies which frequently lack the proper expertise and training to identify vulnerable passengers in need of protection. They are subject to boarding procedures that have to be urgently carried out, which make it very unlikely that carriers will undertake serious assessments. Finally, they are said to act on economic grounds that lead them to be cautious and to reject any doubtful passengers, and, more importantly, they are not directly bound by international human rights standards.

Problems in the identification of vulnerable refugees are exacerbated through the deployment in countries of origin of ILOs whose role and status is very controversial. They are not supposed to have any influence on the control tasks carried out by sovereign host countries, but in practice their 'advice or recommendation' to carriers or local authorities is crucial in order to prevent individuals from exiting the country concerned. Furthermore, no public information regarding their activities is provided, which has been the object of strong criticism.

Moreover, some of the legal instruments that create these instruments fail to consider the special vulnerabilities of refugees. In some cases they even lack any provision aimed at protecting refugee rights. In addition to the absence of any special treatment for refugees in the Visa Code, the ILO Regulation does not include any reference to refugee rights and the need to comply with the EU law on border control. Indeed, some legal instruments include sometimes apparently contradictory rules. For example, the Visa Code does not exempt refugees from the visa requirement yet the SBC includes such an exemption, so a paradox is created due to the fact that refugees are not exempt from holding a visa until the very moment when this requirement is enforced in border or boarding checks.

Finally, the panorama of interception measures at sea is not at all encouraging. The trend for 2016 shows an increase in refugees arriving in Europe by sea. Due to the circumstances in which refugees are forced to travel, their vulnerability is especially pronounced in this context. They must frequently face high levels of violence, extortion and exploitation during their journeys. Moreover, a direct relationship between the reinforcement of migration controls and the increase in human smuggling has been reported. The main concern regarding these operations at sea is that in many cases they are in direct conflict with the Refugee Convention, notably with the prohibition of the States parties to return refugees to places where they face persecution. Moreover, many concerns have been raised regarding those operations coordinated by Frontex, notably, concerns for human rights protection in these operations, problems of attribution of responsibility, and lack of transparency in Frontex activities.

In summary, what these instruments most importantly fail to do is to consider the most basic need of refugees: access to the territory of foreign states where they can find safety from the circumstances that lead them to flee. By ignoring this basic need they are also disregarding the most crucial guarantee recognised to refugees in both the Refugee Convention, to which all the EU Member States are parties, and the main international and regional human rights treaties, including the ECHR – that is, the prohibition of sending refugees back to the hands of their persecutors or the prohibition of *non-refoulement.* Denial of access to territory is therefore one of the crucial factors which makes refugees vulnerable.

Responses to these challenges must be found in legal, policy and practical scenarios. Some legal responses to the lack of protection of refugees, notably regarding the gaps in the Refugee Convention, have been pointed out in this section. Among them, international human rights law provides one of the strongest tools to protect refugees against the implementation of 'non-entrée policies' by states. In addition, the EU and the EU Member States should put in place legal avenues to make the enjoyment of the refugee's right to seek asylum in the EU possible, such as the concession of humanitarian visas, the exemption of visa requirements for certain vulnerable groups, the simplification of asylum procedures and the documentation required of asylum-seekers, or the possibility of submitting asylum claims in embassies located in third countries or to officials carrying out functions extraterritorially. In the policy arena, EU Member States must find a balance between their legitimate right to control access to their territories and to combat terrorism, illegal migration and trafficking in human beings, and the international standards of protection for refugees. EU policies are so strongly focused on security issues and the fight against illegal immigration that they fail to take refugee rights into consideration. Evaluations of the impact of the policies on refugees' rights and safety are needed to avoid the exposure of refugees to more dangerous journeys to Europe. Humanitarian actors such as the Red Cross are calling on Europe to establish search and rescue operations in the Mediterranean Sea to put an end to the increasing number of deaths at sea.[318] Finally, EU instruments of pre-border control should be implemented in practice in a manner which incorporates enough guarantees to distinguish those who are in need of international protection and their specific vulnerabilities, and should not function as barriers to the right to seek asylum. Asylum claims should be individually examined, which requires a limitation on the use of collective procedures such as

[318] Red Cross EU Office, 'Addressing the Vulnerabilities Linked to Migratory Routes to the European Union' RCEU 12/2015-002 Position Paper 6.

visa regimes and procedures such as carrier sanctions, which in practice involve the externalisation of examination procedures to private companies.

Unfortunately, the new package of measures proposed by the European Commission in 2016 does not seem to embrace these recommendations. It acknowledges that 'more legal channels are needed to enable people in need of international protection to arrive in the EU in an orderly, managed, safe and dignified manner and to contribute to saving lives whilst reducing irregular migration and destroying the business model of people smugglers.'[319] However, for the Commission these 'legal channels' are basically the heavily criticised agreement with Turkey[320] and a reform of the EU Blue Card Directive, that is, the legal framework for attracting highly skilled migrants.

[319] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14.
[320] See above section B.1.