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Migration deals and
responsibility sharing:
can the two go together?

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Abstract

This paper investigates how the EU's externalisation of migration policy relates to the efforts at the global level to strengthen solidarity in the protection of refugees. Where the New York Declaration of 2016 stressed the need for a more equitable sharing of the responsibility for hosting and supporting refugees, the chapter questions whether the EU policies develop into this direction. The overview of the impact of migration deals with third countries, focusses on the human rights risks for migrants stuck in a transit countries or returned there. The chapter describes how these risks will increase with the watering down of the safe third country concepts in EU legislation. Based on the consequences of the EU-Turkey deal, the author argues that extending similar deals with African countries, would not only threat the protection standards of refugees, but also affect the responsibility taken for refugees by transit countries. Those countries tend to adopt the externalisation policy of the EU, including a restricted visa policy, readmission agreements and avoiding and allocating responsibility for refugees with as an ultimate consequence that refugees face obstacles in fleeing their country. This copying behaviour has also serious implications for African regional relations and mobility schemes, which can be seen as an unintended side-effect of EU's policies. The author therefore argues that while the EU externalisation policy neglects the long-term and global effects, it risks to affect the aim of the draft UN Global Compact on the refugees to strengthen solidarity on the global level

Keywords

External dimension EU migration policy, responsibility sharing, safe third country, migration deals

1. Introduction

In the New York Declaration on Refugees and Migrants of September 2016, the EU Member States promised to contribute to ‘a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among states’.¹ The EU developments on asylum however, both on the external and the internal level, raise the question if the EU really keeps up with this commitment.

On the internal level, an important threat to this equitable sharing on the global level is the redefinition of the safe third country concept, which Member States are about to agree upon during the negotiations on the Asylum Procedures Regulation. On the external level, the formal and informal agreements the EU concludes with third countries of transit are also likely to result in less instead of more burden sharing. An important aim behind both concepts is to reduce and discourage irregular migration to the EU, including those who seek protection. Whether or not this policy would *de facto* diminish EU’s responsibility for refugees, also depends on other performances such as resettlement and strengthening protection outside the EU’s territory. These developments nevertheless beg the question how EU’s internal and external safe third country policies will affect the global aims on protection for refugees, more specifically the equitable sharing of responsibility. The experiences with the EU-Turkey Statement will be guiding for answering this question. This Statement covers both the internal and external concepts: the Greek authorities are supposed to apply the safe third country concept to asylum requests of refugees coming from Turkey, and the Turkish authorities have promised to prevent migrants from departing and to readmit those who left the country.

The chapter will start with an analysis of the developments on the cooperation between the EU and third countries on migration, followed by an overview of the development of the EU safe third country concepts. In this context, the results of the EU-Turkey Statement will be analysed, especially concerning the human rights and protection level in both Greece and Turkey. As the EU envisages to adopt the same approach to other third countries, such as Egypt, Tunisia and Niger, the implications of such wider application will be assessed. The chapter will conclude on the consequences of EU’s migration policies for the responsibility sharing on the international level and the principle of the Global Compact.

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1 UN General Assembly, New York Declaration for Refugees and Migrants of 19 September 2016, UN Doc A/RES/71/1, para 68.

2. The external dimension of EU migration policy

2.1. The bumpy road to the external dimension

During the last twenty years, the rapid development of both the internal and external EU migration policies has considerable common ground. Based on the Treaty of Amsterdam, EU norms offer rights to migrants and refugees who have arrived at the EU territory.² At the same time, the EU created many instruments to prevent irregular arrival at its territory, such as common visa policy, carrier sanctions and FRONTEX, and to promote the return of third country nationals staying irregularly at the EU territory. Both aims increased the importance of cooperation with third countries on migration.

Initially the externalisation was limited to one-dimensional agreements, of which the readmission agreements were the most important instruments to combat irregular migration. In the nineties, many Member States concluded bilateral agreements with Middle and Eastern European countries to avoid mass immigration to their countries.³ In order to overcome the persistent hesitance of many other third countries, the Commission called upon the Member States to integrate readmission agreements in a comprehensive foreign policy and to offer more compensation to third countries through a common policy.⁴ In a controversial strategy document, the Austrian Presidency criticised in 1998 the failure to persuade third countries in readmitting migrants.⁵ It advised the EU to show its 'international and political muscular balls' in order to gain cooperation by linking advantages such as visa liberalisation or trade benefits to return policy. As the Austrian proposal met severe public resistance (especially the division of the world into four concentric circles and the aim to limit the scope of the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention)), the Council did not adopt the paper. But in fact, the paper, to which the Commission had contributed, reflected the ideas of many Member States.⁶ The core message was retained: on the initiative of the Netherlands the Council installed a High Level Working Group on Asylum and Migration assigned to develop a comprehensive, cross-pillar common policy towards third countries which were of

2 The scope of the Procedures Directive for instance, explicitly excludes embassies and consulates outside the EU territory, see Art 3(2) of the European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Procedures Directive).

3 S. Lavenex, *Safe third countries: extending the EU asylum and immigration policies to Central and East Europe* (Central European University Press 1999) 76-82, 89.

4 Commission, 'Communication on immigration and asylum policies' COM (94) 23 final, paras 115 and 116.

5 European Council, 'Draft strategy paper on immigration and asylum' (Council document 9809/98, 1 July 1998).

6 J. van Buuren and W. van der Schans, 'Het Verdrag van Geneve in de terminale fase: Het Oostenrijkse strategiedocument' in *Dossier Europa: Het Europees asielbeleid in 2000* (Uitgeverij de Papieren Tijger 1999) 1.

strategic interest.⁷ Although the Working Group was tasked with concentrating on the root causes for migration, it mainly focused on border controls and readmission obligations.⁸

The Member States were keen to Europeanise the cooperation with third countries in order to create a stronger negotiating leverage.⁹ It allowed the Member States to make use of the Community's external powers in fields such as trade and development and merge national and EU budgets to serve their interests in the field of readmission.¹⁰ Under the 'more for more' principle, negotiations with third countries on migration control include various positive incentives for transit countries (e.g. trade benefits, visa liberalisation, direct financial support) to persuade them to strengthen their border controls, restrict their visa policy and readmit irregular migrants.¹¹ The leverage conferred on the EU by the pre-accession and visa liberalization conditionality, but also by the Neighbourhood Policy, greatly facilitates cooperation on migration. The closer the ties with the EU, the more difficult for the third country not to sign for agreements on readmission or border control. However, this dictated adaptation creates the risk that the human rights of returnees or stranded refugees are subordinated to the aim of combating irregular migration. In serving their own interests, third countries may become extremely cooperative towards the EU without having the guarantees for migrants in place.¹²

2.2. Transit countries

EU Member States have increasingly shifted their focus from countries of origin to transit countries, especially to those sharing their borders with the EU. This fits in the aim to create a 'buffer zone' around its territory by committing its neighbouring countries to readmit migrants who have passed through their

7 Council of the EU, 'Presidency Conclusions. 2148th Council Meeting, General Affairs' (Press Release 13677/98 (Presse 431), 6 December 1998) <http://europa.eu/rapid/press-release_PRES-98-431_en.htm> accessed 5 May 2017; S. Peers, 'Irregular migration and EU external relations' in B. Bogusz et al. (eds), *Irregular Immigration and Human Rights: Theoretical, European and International Perspectives* (Brill 2004) 11. Cross-pillar Action Plans were made for Afghanistan and the neighbouring region, Morocco, Somalia, Sri Lanka, Iraq, and Albania and the neighbouring region.

8 N. Coleman, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009) 23-24.

9 G. Lahav and V. Guiraudon, 'Comparative perspectives on border control: away from the border and outside the state' in P. Andreas and T. Snyders (eds), *The Wall around the West: State Borders and Immigration Controls in North America and Europe* (Rowman and Littlefield Publishers 2000) 55-79.

10 Coleman (n 8) 55; G. Noll, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 206.

11 See e.g. the prominent references on migration and border controls Commission, 'Implementation of the European Neighbourhood Policy Partnership for Democracy and Shared Prosperity with the Southern Mediterranean Partners Report' SWD (2015) 75 final.

12 See the case of Albania in S. Dedja, 'Human Rights in the EU Return Policy: the Case of the EU-Albania Relations' (2012) 14 EJML 95-114.

territory on their way to the EU. In order to reduce the number of readmitted migrants to a minimum, those transit countries tend to restrict their incoming and outgoing migration from their neighbouring third countries and to the EU. This effect of readmission agreements was intended by the EU, which wanted 'to make the Member States and third States take responsibility for the failings of their border control systems'.¹³ Preventing irregular entrance was thus more important than the readmission itself.

The strengthened border controls and restricted visa policies thus leads to more difficulties to enter the transit country, even if they need to flee from their own country or another transit country. This is currently the case at the Syrian-Turkey border where Turkey only admits refugees in a life-threatening situation.¹⁴ This effect not only undermines the right to leave a country but also the right to asylum.¹⁵ The chain-effect of border control and readmission agreements affects the mobility opportunities of migrants in their region as well. The cooperation of Niger and other African countries with the EU, has severely hampered the functioning of the ECOWAS free movement arrangements.¹⁶ There are ample indications that strengthened border controls also create risks for stability and livelihoods, limit protection opportunities and the right to seek asylum, promote repression and abuse against migrants and push migrants onto precarious routes.¹⁷

Returns on the basis of a readmission agreement entails the risk that an undocumented migrant is refused access to basic social needs in the transit country. Partner countries of the EU may agree to readmit them, but not with the intention to take actual responsibility for them. By concluding readmission agreements with other transit countries, they aim to immediately transfer this responsibility.¹⁸ For this reason, many readmission agreements with the EU include a clause that the obligations regarding non-citizens are only applicable after a

13 Council of the EU, 'Intensifying cooperation between CIREFI and Europol in the field of illegal migration and related issues' (Council document 13084/01, 31 October 2001) 9. See F. Trauner and I. Kruse, 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' (2008) 290 CEPS Working Document.

14 Human Rights Watch (HRW), 'Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians' (3 February 2018) <<https://www.hrw.org/news/2018/02/03/turkey/syria-border-guards-shoot-block-fleeing-syrians>> accessed 16 July 2018.

15 Art 12(2) of 1966 International Covenant on Civil and Political Rights (ICCPR) and Art 13(2) of the 1948 Universal Declaration of Human Rights (UDHR).

16 F. Molenaar *et al.*, 'A line in the sand. Roadmap for sustainable migration management in Agadez' (Clingendael Netherlands Institute of International Relations, CRU Report, October 2017).

17 J. Bergmann *et al.*, 'Protection Fallout. How Increasing Capacity for Border Management Affects Migrants' Vulnerabilities in Niger and Mali' (Global Public Policy Institute, November 2017).

18 T. Balzacq, 'The External Dimension of EU Justice and Home Affairs: Tools, Processes, Outcomes' (2008) 303 CEPS Working Document.

number of years after the conclusion of the agreement.¹⁹ This potential chain of transit threatens the principle of human dignity as enshrined in international law, in particular if the migrant is unable to return to his home country.²⁰ Bearing in mind this risk of a (legal) limbo situation for the returnee in a transit country, the Commission urged Member States in 2011 to give priority to returning undocumented migrants to their country of origin.²¹ The Member States however did not follow up the Commission's advice to be reticent to include third country nationals in readmission agreements in order to ease negotiations.²² If the return takes place in the context of the safe third country concept, the readmitted refugee will depend on the effectiveness of the asylum system in the third country. This impact will be described later.

Despite these human rights implications, readmission agreements do not require a certain protection level to be in place. Human rights standards are not included in the criteria for entering into cooperation with a third country, and there is no human rights impact assessment undertaken prior to the conclusion of a readmission agreement. As cooperation on border control has its legal constraints, these human rights considerations have led to a 'cat-and-mouse game' between the European Court of Human Rights (ECtHR) and Member States of the Council of Europe. In its landmark judgment *Hirsi v Italy*, the Court convicted Italy for its push back operations in the international waters in cooperation with Libya. Automatic returns (push back operations) without any individual assessment and the possibility of legal redress constitute a violation of Articles 3 and 13 of the European Convention on Human Rights (ECHR) and Article 4 of the Protocol no 4 to the Convention.²³ The Court made clear that Member States exercising effective control over migrants are bound by the obligations of the ECHR, even if this control takes place outside their territory. Since then, Member States tend to circumvent their responsibility with creative interpretations of their jurisdiction and territory. In a judgment on the automatic return of sub-Saharan migrants by the Spanish government to Morocco, the ECtHR however recalled its jurisdiction

19 See Art 24(3) of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation [2014] OJ L134/3.

20 See the UDHR, Preamble and Art 1, but more concretely related to social rights Arts 22 and 23. See also C. McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19 EJIL 655-724.

21 Commission, 'Communication on the evaluation of EU Readmission Agreements' COM (2011) 76 final, recommendation no 8: '(...) In those cases [of readmission of third country nationals, TS] the EU should also explicitly state that, as a matter of principle, it will always first try to readmit a person to his/her country of origin. The EU should also focus more its readmission strategy towards important countries of origin'.

22 *Ibid.*, recommendation no 8: 'The current approach should be revised. As a rule, future negotiating directives should not cover third country nationals, hence there would not be a need for important incentives. Only in cases where the country concerned, due to its geographical position relative to the EU (direct neighbours, some Mediterranean countries) and where exists a big potential risk of irregular migration transiting its territory to the EU, the TCN clause should be included and only when appropriate incentives are offered (...)'.
23 *Hirsi Jamaa and others v Italy*, App no 27765/09 (ECtHR, 23 February 2012).

as established in the *Hirsi* judgement and made clear that Member States cannot escape their responsibility while construing their jurisdiction in a certain way. Member States are hence not allowed to move their borders inwards in order to prevent asylum seekers from making an asylum claim.²⁴ The tendency of Member States to delegate their action to third countries raises serious questions of their responsibility if this bilateral cooperation has clearly resulted in human rights violations. The Court has not yet ruled on situations in which a neighbouring country, which is not a party to the Convention, pulls back migrants from the border on the request of a party to the Convention. Not to assume responsibility would imply that Member States can easily escape their obligations under the ECHR by simply letting third parties ‘do the job’. Such an outcome would clearly undermine the effectiveness of the Convention. A new case filed by the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigration (ASGI) with the Court at the beginning of May 2018 may have direct consequences of EU externalisation policies.²⁵ It concerns seventeen survivors of a fatal incident in which a boat carrying migrants found itself in distress off the coast of Libya: the applicants included the surviving parents of two children who died in the incident. The submission makes use of evidence compiled by a Forensic Oceanography and a detailed reconstruction of the incident and the policies that contributed to it.²⁶

2.3. Global Approach to Migration and Mobility

The need for more incentives for partner countries begged for a more comprehensive approach, which led to the adoption of the Global Approach to Migration (GAM) in 2005.²⁷ The GAM aimed to address the root causes of migration and prioritise the rights of migrants instead of the security concerns of the Member States. In 2011, the EU added the term ‘mobility’. The Global Approach to Migration and Mobility (GAMM) serves as a framework for dialogue and cooperation with third countries in the field of migration and development. The GAMM structure, meant to safeguard a coherent internal and

24 See C. Gortazár Rotaeché and N. Ferré Trad, ‘A cold shower for Spain-hot returns from Melilla to Morocco: *ND and NT v Spain* ECtHR, 3 October 2017’ (*EU Migration Law Blog*, 20 October 2017) <<http://eumigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/>> accessed 16 July 2018; A. Pijnenburg, ‘Is *ND and NT v Spain* the new *Hirsi*?’ (*EJIL Talk*, 17 October 2017) <<https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/>> accessed 16 July 2018.

25 Human Rights at Sea, ‘Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse’ (Press Release, 8 May 2018) <<https://www.humanrightsatsea.org/2018/05/08/legal-action-before-the-ecthr-against-italy-over-its-coordination-of-libyan-coast-guard-pull-backs-resulting-in-migrant-deaths-and-abuse/>> accessed 16 July 2018.

26 Ibid.

27 Commission, ‘Priority actions for responding to the challenges of migration: first follow-up to Hampton Court’ (Communication) COM (2005) 621 final, adopted by the European Council of 15/16 December 2005.

external migration policy, is characterised by four pillars, which the Commission considers as 'equally important'.²⁸ These pillars are: 1) Better organizing legal migration and fostering well-managed mobility; 2) Preventing and combating irregular migration; 3) Maximizing the development impact of migration; and 4) Promoting international protection and enhancing the external dimension of asylum. The pillars intersect on the two following principles: first, the notion of a mutual beneficial partnership with non-EU partner countries, based on equality, and second, the principle that the GAMM should be migrant-centred, as 'the migrant is at the core of the analysis and all action and that he must be empowered to gain access to safe mobility'.²⁹ From that perspective, the human rights of migrants are marked as a cross-cutting issue, with the aim to strengthen 'respect for fundamental rights and the human rights of migrants in source, transit and destination countries alike'.³⁰ These two principles emphasise the overall aim of the GAMM to create a 'win-win-win' situation, with benefits for EU Member States, partner countries, and migrants.

The European Agenda on Migration (EAM) that was formulated in the light of Europe's migration-management crisis in 2015 strengthens the focus on the external dimension of EU's migration policy.³¹ The Commission, while emphasising the lack of cooperation by the partner countries, launched proposals to enhance their willingness to cooperate. This rather one-sided approach contrasts with its evaluation of the readmission agreements of 2011, where it raised concerns on the human rights implications of readmitting migrants to transit countries.³² The perception of partner countries as the 'black sheep' of the external dimension, is also reflected in the most recent initiative of the previously mentioned New Partnership Framework with third countries.³³ This framework aims to adopt tailor made 'compacts' with priority partner countries, in which all instruments, tools and leverage are put together, 'to better manage migration in full respect of our humanitarian and human rights obligations'.³⁴ Here the principle of conditionality has been put to the centre of the policy, implying that the economic support of third countries depends on their performances on readmission and border control. The 'more for more' principle would therefore be complemented with the 'less for less' principle and strengthened by the use of all EU policy areas, with the exception of humanitarian aid.³⁵ The EU has put this approach to the test while

28 Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final.

29 *Ibid.*, 4.

30 *Ibid.*, 7.

31 Commission, 'A European Agenda on Migration' (Communication) COM (2015) 240 final.

32 'Communication on the Evaluation of EU Readmission Agreements' (n 21).

33 Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration' COM (2016) 385 final, 2-3.

34 *Ibid.*, 6.

35 *Ibid.*, 2-3.

negotiating with 16 priority countries on a country package.³⁶ Although this framework is built on the GAMM pillars, it reveals that ‘a solution to the irregular and uncontrolled movement of people is a priority for the Union as a whole’.³⁷ This prioritisation is likely to affect the claimed equality of the four pillars, but also the aim of a coherent and effective EU foreign policy, if this migration priority predominates all other policy objectives.

This prioritisation also leads to concerns on the implementation of the financing instruments under the Partnership Framework on Migration. A prominent one is the Emergency Trust Fund for Africa (EUTF), as established during the Valetta Summit.³⁸ Despite the labelling as an emergency instrument, most of the resources of the EUTF consist of Official Development Assistance (ODA), which is intended to fund long-term development programmes. Through this fund, a significant part of the European budget for development aid is channelled towards practices of migration management, border control, including the support of the Libyan Coast Guard intercepting migrants to take them back to horrible places of detention.³⁹

2.3.1. Border control and human rights

The implementation of the GAMM exposes a tension between the different pillars. Measures on border controls usually have an immediate impact, while improvement of protection standards is a long-term investment. Paradoxically, evaluators conclude that improvements of human rights seems to take shape on a more ad hoc basis, whilst cooperation on border controls is treated as a structural matter, receiving significantly more funding.⁴⁰ This creates the risk that migrants, including refugees are stranded in a transit countries without having protecting authorities to turn to. Amnesty International evidenced that ‘the demands being placed on third countries to prevent irregular departures to Europe put refugees,

36 *Ibid.*, 8. These selected countries are Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

37 *Ibid.*, 3.

38 Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa (Constitutive Agreement) and Its Internal Rules between the European Commission and Kingdom of Spain (Valetta, 2015) (Agreement establishing the EUTF).

39 S. Carrera *et al.*, ‘Oversight and Management of the EU Trust Funds. Democratic Accountability Challenges and Promising Practices’ (Study for the European Parliament, February 2018). See for the support of the Libyan Coastguard Annex IV to the Agreement establishing the EUTF (n 35).

40 P. García Andrade, I. Martín, and S. Mananashvili, ‘EU Cooperation with Third Countries in the field of Migration’ (Study for the LIBE Committee no PE536, 2015).

asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, *refoulement*, and ill-treatment'.⁴¹

For these reasons it is highly problematic that a conditionality between cooperation and certain standards on protection and human rights is failing, especially regarding partner countries with notorious negative human rights records.⁴² As a debate on the criteria on protection standards for entering into a cooperation on migration is failing, the question on which standards should apply in the partner country is still not answered. The EU does not employ independent and objective evaluation systems to scrutinise the lawfulness of the implementation of these rights-sensitive migration policies, and to ensure access by individuals to effective remedies in cases of alleged fundamental rights violations.⁴³ Furthermore, a suspension mechanism is lacking for situations in which a transit country would fall short of crucial standards. The Parliamentary Assembly has called upon the EU to establish those mechanisms as a way to ensure that the EU foreign policy is coherent with the EU's fundamental rights and values.⁴⁴ The UN Special Rapporteur on the human rights of migrants has criticised the GAMM for:

lack[ing] transparency and clarity in the substantive contents of its multiple and complex elements. Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development

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- 41 Amnesty International, 'The human cost of Fortress Europe. Human Rights violations against migrants and refugees at Europe's borders' (2014) <<https://www.amnesty.ch/de/themen/asyl-und-migration/festung-europa/dok/2015/die-kampagne-sos-europa/bericht-the-human-cost-of-fortress-Europe>> accessed 5 May 2017; see also Doctors without Borders, 'Violence, Vulnerability and Migration: Trapped at the Gates of Europe. A report on the situation of sub-Saharan migrants in an irregular situation in Morocco' (March 2013) <https://www.msf.org.uk/sites/uk/files/Migration_Morocco_2013_201303132441.pdf> accessed 5 May 2017.
- 42 A. Roig and T. Huddleston, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse' (2007) 9 EJML 363-387.
- 43 S. Carrera, 'The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration' (2011) CEPS Papers in Liberty and Security in Europe; J.P. Cassarino, *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (The Middle East Institute 2010); García Andrade, Martín, and Mananashvili (n 37).
- 44 Council of Europe, Parliamentary Assembly, 'Human rights impact of the "external dimension" of European Union asylum and migration policy: out of sight, out of rights?' (Report by T. Strik, Document 14575, 27 June 2018).

projects will be overshadowed by the secondary effects of more security-focused policies.⁴⁵

Another threat to the effective protection of rights under the Convention is the shift from legally-defined procedures with formal commitments to the use of informal tools which enable practical cooperation in migration control. Although these informal arrangements are often not intended to create legal obligations under international law, they do have serious implications for the distribution of responsibility between states and migrants' right to protection. The rights of asylum seekers are inherently depended on the possibility to have human rights violations assessed by a court, but without any formal agreements in place, it becomes very difficult to establish at the outset whether a state or organisation was engaged in extraterritorial jurisdiction and whether it actually agreed with a third state to delegate certain functions or acts. This 'informalisation' of the external cooperation also hampers the necessary transparency and democratic control.

3. The internal dimension of EU migration policy

3.1. Safe third country concepts as instruments for externalisation

Since the Europeanisation of the safe third country concepts, a parallel development can be observed with more obligations for Member States and less safeguards for asylum seekers. With the adoption of the Procedures Directive, the EU Member States have Europeanised three safe third country concepts which are applicable towards transit countries: the first country of asylum, the safe third country and the European safe third country. After a brief overview of the criteria for these concepts, it will be analysed below how they are developing into instruments applicable for externalised migration policy.

3.1.1. Safe third country

The current rules on a safe third country are laid down in Article 38 of the Procedures Directive. An asylum request can be declared inadmissible, which implies that no status determination takes place.⁴⁶ Such a decision is only allowed if the third country meets the criteria of Article 38 (1) of the Directive, which cover the criteria of Article 3 of ECHR and serious harm as defined in the Qualification Directive, as well as Article 1 and 33 of Refugee Convention. Member States

45 UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants: Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants' (UN Document A/HRC/29/36, 8 May 2015) <<http://www.refworld.org/docid/5576e3ba4.html>> accessed 5 May 2017.

46 Art 33(2)(c) Procedures Directive (n 2).

have to lay down national rules on the required connection between the asylum seeker and the safe third country as well as on the method of assessment.⁴⁷ This assessment may entail the assessment of the safety for a specific asylum seeker, but could also be limited to a general judgement of a country. The asylum seeker must be offered the opportunity to challenge the presumption of safety and the assumed connection with the third country. If the asylum seeker is not admitted to the third country, the Member States will have to admit the person to the regular asylum procedure.

3.1.2. *First country of asylum*

According to Article 35 Procedures Directive, a country can be considered as a first country of asylum for a particular applicant if this person has been recognised as a refugee in that country, and is still able to receive this protection, or if the country will guarantee sufficient protection otherwise, including *non-refoulement*. While assessing the safety of the third country, Member States may use the criteria of a safe third country, as laid down in Article 38(1) of the Procedures Directive. The same provision was laid down in Article 26 of Directive 2005/85. During the negotiations on that directive, UNHCR had unsuccessfully advocated to replace the term 'sufficient protection' with the internationally recognised term 'effective protection'. Goodwin-Gill and McAdam have chosen to read sufficient as effective: according to them, the concept can only be applied if the receiving country offers effective protection.

A big difference between the concepts of safe third country and first country of asylum, is that the asylum seeker already enjoyed protection or another form of legal residence in the first country of asylum, which was not the case in the safe third country. For the latter, more proof needs to be gathered if the protection will be granted. Legomsky considers it as a gradual difference.⁴⁸ Despite these differences many scholars argue that they have to fulfil more or less the same criteria according to international law.⁴⁹ In both cases the expelling country is bound by the *non-refoulement* principle and has to guarantee that the receiving country will grant certain additional rights to the refugee. It is however difficult to argue from the texts in the Directive that the term 'sufficient protection' requires the full protection of the Refugee Convention. The last paragraph of Article 35(b) only suggests that Member States take into account the criteria of Article 38(1), which is far from obliging them to a strict application of Article 38.

⁴⁷ *Ibid.*, Art 38(2).

⁴⁸ S.H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL 571.

⁴⁹ G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (OUP 2007) 393; Legomsky (n 45) 570; R. Hofmann and T. Löhr, 'Introduction to Chapter V' in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (OUP 2011) 1114.

3.1.3. European safe third country

The most far-reaching concept of safe countries is the one on European safe countries, as it waives the procedural safeguards of Chapter II of the Directive. This concept, enshrined in Article 39, allows Member States to not or not fully examine the asylum claim of a migrant who irregularly enters their country directly from a safe third country which is a member of the Council of Europe. It can be applied in case this country has ratified both the Refugee Convention (without geographical limitations) and the ECHR and actually observes those instruments.

3.2. Safe third country concept in line with international standards?

The Directive has provoked a debate, fuelled by the EU-Turkey Statement of March 2016, on whether or not the safe third country should have ratified the Refugee Convention, and on the level of protection that this country should need to guarantee. The requirement that the person must have the possibility to request a refugee status in my view already implies ratification. Most scholars agree that the protection offered by the third country should be effective.⁵⁰ But how should 'effective protection' be defined? Does it mean full protection, including all standards of the Refugee Convention, or the protection that needs to be granted to asylum seekers? During the asylum procedure, a refugee has the right to *non-refoulement*, non-discrimination, access to justice, impunity for irregular entrance, a right to identity documents and the right to a certain amount of free movement. Hathaway and Legomsky hold the view that only this limited number of rights need to be safeguarded in the third country.⁵¹ According to Hathaway, the Refugee Convention does not impose conditions on the transfer of the duty to protect.⁵² According to his line of reasoning, it would only be required that the third country national will not lose his rights as an asylum seeker through the allocation. Legomsky shares this view but with the argument that the expelling country, which has not yet granted the refugee status, cannot anticipate to the situation that the third country will grant this status.⁵³ It can therefore not be

50 Goodwin-Gill and McAdam (n 46) 393-397; J. Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 332; S. Peers and N. Rogers, *EU Immigration and Asylum Law. Text and Commentary* (Martinus Nijhoff Publishers 2006) 399; see also UNHCR in 2016 in its response to the EU-Turkey deal: 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (UNHCR 2016); UNHCR, Executive Committee, 'Problem of Refugees and Asylum-seekers who move in an irregular manner from a country in which they had already found protection. No 58 (XL) 1989' (UNGA Document 12A, A/44/12/Add.1, 13 October 1989); UNHCR, Executive Committee, 'Conclusion on International Protection. No 85 (XLIX) 1998' (UNGA Document 12A, A/53/12/Add.1, 9 October 1998).

51 Hathaway (n 47) 323; Legomsky (n 45) 645.

52 Hathaway (n 47) 333.

53 Legomsky (n 45) 645.

expected that the third country will grant more rights to the refugee than it enjoys in the Member State where he resides as an asylum seeker.

The British House of Lords holds even a more minimalist view: '[t]he Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose'.⁵⁴

These positions have in common that they do not differentiate between the legal position of an asylum seeker, who is still prior to or in the process of status determination, and the position of a refugee, who has been recognized and given the right to build a future in the country. The latter situation requires the enjoyment of all standards of the Refugee Convention, including social rights such as the right to education, work, integration and accommodation. If the transfer would imply that the refugee cannot invoke those rights in neither the sending nor the receiving country, the aim of the Convention to offer durable protection would be undermined. In order to guarantee the effectiveness of the Convention, the readmitting country needs to assure that in case the asylum seeker needs protection, he will be treated in accordance with all obligations of the Refugee Convention.⁵⁵ One could add to these arguments that the interpretation by UNHCR, mandated with supervising compliance with the Refugee Convention, should be guiding or at least be treated as relevant.

3.3. Turkey as a safe third country?

With the conclusion of the EU-Turkey Statement, the debate on the requirements for applying the safe third country concept became extremely relevant.⁵⁶ In the build-up to the EU-Turkey Statement, the European Council and the Commission began to encourage the Member States to apply the safe third country concept to Turkey.⁵⁷ In its proposals for the further harmonisation of the Common European Asylum System (CEAS) published later that year, the Commission

54 UK House of Lords, *R v Secretary of State for the Home Department, ex parte Yogathas* (36 UKHL, 17 October 2002).

55 See also Hofmann and Löhr (n 46) 1113.

56 For an explanation on the EU-Turkey Statement, see: K. Groenendijk, 'Insights from agreements on migration between the EU and Turkey', in: Sergio Carrera, Juan Santos Vara & Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, 2019 Cheltenham (UK): Edward Elgar.

57 Commission, 'EU-Turkey joint action plan' (Press Release, 15 October 2015) <[http://europa.eu/rapid/press-release MEMO-15-5860_it.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_it.htm)> accessed 5 May 2017; European Council, 'Statement of the EU Heads of State or Government, 7 March 2016' (Press Release 807/16, 8 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>> accessed 5 May 2017; Commission, 'Communication on the next operational steps in EU-Turkey cooperation in the field of migration' COM (2016) 166 final.

proposed to make the use of the safe third country concept mandatory.⁵⁸ Turkey still holds its geographical limitation to the Refugee Convention and besides the question on the need for ratification, many reports express doubts if the temporary protection status of Syrians and the treatment of non-Syrians meets the standards of the Refugee Convention. In its Resolution 2109 (2016) the Parliamentary Assembly of the Council of Europe found that returns of asylum seekers of any nationality to Turkey as a safe third country was contrary to EU and/or international law, and that returns of Syrian asylum seekers to Turkey as a 'first country of asylum' may be contrary to EU and/or international law. The Assembly referred to the many obstacles for asylum seekers to have access to the procedure due to the rules a lack of capacity and appropriate reception conditions, the limited access for Syrian refugees to housing, primary education, the labour market and livelihood and the allegations of deportation, unlawful detention and bad detention conditions.⁵⁹

During the implementation of the EU-Turkey Statement, organisations kept on reporting about the precarious position of refugees and asylum seekers. With a view to immediate deportation, readmitted migrants are sent to Turkish removal centres where they have very limited to no access to lawyers, UNHCR, NGOs, or to the asylum procedure.⁶⁰ Readmitted Syrians have been transferred to *de facto* closed camps where they are locked in cells and have very limited communication opportunities and access to the outside world.⁶¹ The expressed concerns not only relate to the readmitted refugees. Syrian refugees receiving temporary protection in Turkey live in extreme poverty, due to the combination of limited access to social welfare systems and to the labour market, where a quota system for Syrian refugees is applied and employers requesting for a working permit face long and expensive procedures. Many of them are exposed to exploitation at the informal labour market, including a substantial number of Syrian children.

58 See Commission, 'Proposal for the Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM (2016) 467 final; COM (2016) 85 final; and Commission, 'Proposal for a Regulation establishing the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270 final ('Proposal for a reform of the Dublin III Regulation').

59 Council of Europe, Parliamentary Assembly, Resolution 2016(2109) of 20 April 2016 on the situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016; see also Council of Europe, Parliamentary Assembly, 'The situation of refugees and migrants under the under the EU-Turkey Agreement of 18 March 2016' (Report by T. Strik, Document 14028, 19 April 2016).

60 O. Ulusoy and H. Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (2017) 15 VU Migration Law Series.

61 Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May – 4 June 2016, 10 August 2016, SG/Inf(2016)29; GUE/NGL Group, 'What Merkel, Tusk and Timmermans should have seen during their visit to Turkey' (Report from GUE/NGL Delegation to Turkey, 2-4 May 2016).

Soon after the EU-Turkey Statement had been concluded, the Turkish government closed its Syrian land border for Syrian refugees: since then only refugees in a life-threatening situation are admitted to the territory. The government has even created a 'safe zone' in Northern Syria, where Syrian refugees are returned to; according to the Turkish authorities on a voluntary basis.⁶² This makes it practically very difficult or even impossible for Syrian refugees to receive the protection they are entitled to in the context of Article 3 of ECHR and the Refugee Convention. The state of emergency that applies since the coup attempt of summer 2016, also has its repercussions for refugees and asylum seekers, as it has significantly reduced their safeguards against *refoulement*.⁶³ The Turkish Executive Decree 676/2016⁶⁴ has abolished the automatic suspensive effect of an appeal against removal orders for individuals considered to constitute a 'threat to public order, security and health' or regarded as somehow associated with 'terrorist organizations'. Although the reason for such labelling is not substantiated, administrative authorities and courts do not question its validity. In such cases, removal orders can be issued even when the person concerned is a recognized refugee or a registered asylum-seeker. The only instance being able to stop the deportation is the constitutional court.

3.4. The 'hotspot approach'

As a consequence of the EU-Turkey Statement, the EU Member States have tasked Greece to put the notion of Turkey as a safe third country to the test. Up until now however, Greece has not designated Turkey as a safe third country. It has adopted the concepts of safe third country and first country of asylum by a Presidential Decree, but it has not laid down any rules on the methodology to define a country as such, nor has it applied the concept up until the EU-Turkey Statement.⁶⁵ Greece has long struggled with a defective asylum system. Many fundamental problems still persisted in 2016, including inadequate provision of information to asylum seekers; persistent obstacles to accessing the asylum procedure; long delays in the asylum procedure, including a persistent backlog of applications; the capacity of the asylum service, including failure to open planned regional offices and under-staffing; persistent delays in clearing the backlog of appeals under previous procedures; and the structure and rules of procedure of the Appeals Authority and its Appeals Committees.⁶⁶ In April 2017,

62 'Human rights impact of the "external dimension" of European Union asylum and migration policy: out of sight, out of rights?' (n 41), para 4.1.

63 Amnesty International, 'Refugees at heightened risk of *refoulement* under Turkey's state of emergency' (Public Statement EUR 44/7157/2017, 22 September 2017).

64 Turkey, Executive Decree 676/2016 (29 October 2016).

65 Greece, Presidential Decree 90/08 (11 July 2008). See Y. Masouridou and E. Kyrioti, 'The EU-Turkey Statement and the Greek Hotspots' (The Greens/European Free Alliance of the European Parliament, June 2018).

66 UNHCR, 'Greece as a Country of Asylum – UNHCR's Recommendations' (6 April 2015) (UNHCR's Recommendations for Greece); ICJ and ECRE, '5th Joint Submission of the

the Greek Ombudsman issued a detailed, damning report entitled 'Migration Flows and Refugee Protection: Administrative Challenges and Human Rights Issues'. This report confirmed the UNHCR's concerns and even expanded on them in relation to, for example, poor conditions in the island hotspots and other accommodation facilities; deficiencies in the provision of food and health-care to asylum seekers; ineffective access to education; and, at great length, inadequate administrative co-ordination and planning, deficient legislative and regulatory frameworks and the Greek State's inability to absorb the available EU financing.⁶⁷ Those deficiencies were known to the EU: in its progress report of September 2017, the Commission repeated its concerns about the reception conditions of refugees on the overcrowded Greek islands, where the number of arrivals exceeds the number of departure.⁶⁸

Although the Commission tried hard to convince the Greek authorities that EU law requirements for returns to Turkey are satisfied, only 2,383 (out of 20,953 Syrians arrived at the Greek islands since the EU-Turkey Statement) asylum requests had been declared inadmissible on the basis of the safe third country concept during the first two years after the Statement.⁶⁹ These inadmissible decisions were based on written assurances from the Turkish government that readmitted Syrian refugees would have access to temporary protection and that it would readmit non-Syrians as well.⁷⁰ In several appeal cases against decisions on inadmissibility, the Greek Asylum Appeals Committee on Lesbos found that the temporary protection for Syrian refugees in Turkey did not offer rights equivalent to those guaranteed by the Refugee Convention, referring to reports from NGOs,

International Commission of Jurists (ICJ) and European Council on Refugees and Exiles (ECRE) to the Committee of Ministers in the case of *MSS v Belgium and Greece* and related cases' (March 2016).

67 See also the Explanatory Memorandum of the UNHCR's Recommendations for Greece (n 63), to the Committee of Ministers in the context of the latter's supervision of the execution of the relevant judgments of the ECtHR (Documents H-DD(2017)435 and DH-DD(2017)84 respectively); see also Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (February 2017)

<<https://www.amnesty.nl/content/uploads/2017/02/EU-Turkey-Deal-Briefing.pdf?x71839>> accessed 5 May 2017; and HRW, 'Greece: A Year of Suffering for Asylum Seekers' (15 March 2017)

<<https://www.hrw.org/news/2017/03/15/greece-year-suffering-asylum-seekers>> accessed 5 May 2017. See also Council of Europe, 'Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Greece from 10 to 19 April 2018' (Document 2018CPT/Inf (2018), June 2018) 20.

68 Commission, 'Seventh Report on the Progress made in the implementation of the EU-Turkey Statement' COM (2017) 470 final.

69 See Commission, 'Letter from Mr Matthias Ruete, Director General, Directorate General Migration and Home Affairs, European Commission, to Mr Vasileios Papadopoulos, Secretary-General, General Secretariat for Population and Social Cohesion' (Document Ref. Ares(2016)2149549, 5 May 2016).

70 Masouridou and Kyprioti (n 62), paras 2.4 and 6.1.

UNHCR and the Parliamentary Assembly of the Council of Europe.⁷¹ In response to these critical assessments, the Greek authorities have changed the composition of the Appeals Committee by reducing the number of independent experts.

On 22 September 2017, the Greek Council of State found that the decisions of the Appeals Committees holding that Turkey is a safe third country for the two applicants involved were reasonable.⁷² The Council of State took the view that ratification of the Geneva Convention was not required by Article 38, while contrasting this provision to the European safe third country provision of Article 39 where ratification is an explicit criterion. The Court was satisfied with 'sufficient protection' of certain fundamental rights of refugees, such as *inter alia* the right to health care and employment.⁷³ It stipulated that the UNHCR reading of the safe third country concept did not influence its decision, as the Convention itself does not grant UNHCR the power of 'authentic interpretation' of the Geneva Convention, nor does EU law acknowledge UNHCR's competence to formulate binding opinions on the content of legal concepts in the *acquis*.⁷⁴ The Council of State finally decided not to refer the cases to the Court of Justice of the European Union (CJEU) to determine the question as to whether Turkey can be considered a safe third country by a narrow majority of 13 votes to 12. The dissenting opinion of 12 judges highlighted the existence of reasonable doubt on a number of issues, including the requirement of ratification of the Geneva Convention without geographical limitation, the compliance of Turkish temporary protection with the requirement of being 'in accordance with the Geneva Convention', and the requisite degree of connection between the applicant and safe third country.⁷⁵ The dissenting opinion refers to the Turkish repressive regime after failed coup of 15 July 2016, in which 'fundamental rights and liberties are openly violated, judicial independence has been dismantled (...)'.⁷⁶ It is striking that the Council of State did not refer to the worsening human rights situation in Turkey at all.

Although the resistance within the Greek asylum system has reduced in favour of the EU position, the EU-Turkey Statement has not been effective in numbers of readmission. As of 31 May 2018, only 2224 migrants had been

71 See, for example, 'What Merkel, Tusk and Timmermans should have seen during their visit to Turkey' (n 58); HRW, 'EU/Greece: First Turkey Deportations Riddled With Abuse' (19 April 2016) <<https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse>> accessed 5 May 2017; Amnesty International, 'Turkey "Safe Country" Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal' (23 March 2016) <<https://www.amnesty.org/en/press-releases/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>> accessed 5 May 2017.

72 See Greek Council of State, cases no 2347/2017 and no 2348/2017 (judgments of 22 September 2017).

73 *Ibid.*, para 54. In para 55, the Court reiterates this definition as 'protection which guarantees the fundamental principles and values stemming from the Geneva Convention'.

74 *Ibid.*, para 58.

75 *Ibid.*, para 63.

76 *Ibid.*, para 60.

returned from Greece to Turkey since the EU-Turkey Statement was concluded.⁷⁷ On 7 June of that year, the Turkish government suspended the bilateral readmission agreement between Turkey and Greece following Greece's release into protective custody of four military servicemen that Ankara wants extradited in order to prosecute them for taking part in the 2016 coup attempt. This shows how deals on migration create the risk of migrants being used as a tool in a political conflict. Despite the failing prospect on return and the annulment of the geographical restriction of asylum seekers by the Greek Council of State, the asylum seekers continue to be contained on the islands.⁷⁸

4. The future of the EU safe third country concept

4.1. The Regulation on safe third country concepts

The proposal for the regulation, released in July 2016, clearly reflects one of the objectives of concluding migration deals with third countries: the transfer of responsibility for refugees.⁷⁹ The four main changes in the safe third country concept are the imperative wording of the provision, the relaxation of the criteria for a safe third country, the designation of third countries as safe at the EU level and Europeanisation of the criteria for the required connection between the asylum seeker and the third country. Member States are left no discretion not to apply the safe third country concept, but they are allowed to designate third countries as safe in addition to the common EU list of safe third countries, unless the Commission objects to it.⁸⁰ According to the Commission, the concept should also be applied before determining the responsible Member States in the framework of the Dublin Regulation, which means that family members stranded in another Member State, are to be sent back outside the EU territory where they have to apply for family reunification.⁸¹ That would make the provisions on family unity in the Dublin Regulation in many cases meaningless.

The criteria no longer include the possibility to request refugee status or full protection in accordance with the Refugee Convention. Article 45(1)(e) requires the possibility to receive protection in accordance with the *substantive standards* of the Refugee Convention or sufficient protection as defined in the first country of asylum concept. This wording seems to suggest that there are three

77 Commission, 'Operational implementation of the EU-Turkey Statement' (June 2018) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu_turkey_en.pdf> accessed 16 July 2018.

78 Greek Council of State, Decision no 805/2018 (17 April 2018).

79 'Proposal for the Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' (n 55), Arts 45-50.

80 *Ibid.*, Art 50 (3).

81 See Preamble 35 of the 'Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration' (n 55); and Art 3(3) of the 'Proposal for a reform of the Dublin III Regulation' (n 55).

categories of protective standards: first – the basic criteria on *non-refoulement*, no risk of harm and no threat to life and liberty, as laid down in sub-paragraphs ‘a’ to ‘d’ which should always be guaranteed; second – substantive standards as referred to in sub-paragraph ‘e’; and third – the criteria for sufficient protection as referred to in Article 44(2) within the context of the first country of asylum concept.⁸² The presentation of the latter two as a choice, implies a clear distinction. That the sufficient protection criteria refer to rights necessary to settle and build a future in a country, could imply that the substantive safeguards only refer to the rights guaranteed to asylum seekers. This limited definition, which confirm the reasoning by Hathaway and Legomsky, would mean that refugees cannot invoke the full protection of the Refugee Convention in any country. They might try this once transferred to the safe third country, but the Procedures Directive does not guarantee that this country offers more than the minimum protection against persecution, serious harm and *refoulement*, and the more procedural guarantees of the Convention such as impunity of irregular entrance. As the ratification of the Convention is excluded from the conditions, it is doubtful if they can invoke these rights at all, and rely on the supervisory role of UNHCR. Besides this significant widened scope of a safe third country concept, Member States are also given a large margin of appreciation with regard to the required connection: it should be ‘reasonable’ for the person to go to that country. This reason could exist ‘if he transited through that country which is geographically close to his country of origin’.⁸³ Although these grounds are not supposed to be exhaustive, the formulation seems to imply that these two criteria are cumulative. The concept can also be applied to unaccompanied minors under the condition that the authorities of the third country confirm they will take him in charge and that he will immediately have access to protection. On 22-23 June 2017, the European Council agreed that:

in order to enhance cooperation with third countries and prevent new crises, the ‘safe third country’ concept should be aligned with the effective requirements arising from the Geneva Convention and EU primary law, while respecting the competences of the EU and the Member States under the Treaties. In this context, the European Council calls for work on an EU list of safe third countries to be taken forward (...). The European Council invites the Council to continue negotiations on this basis and amend the legislative proposals as necessary, with the active help of the Commission.⁸⁴

The call for amending instead of adopting the proposal, suggests that the Member States are far from agreement. The expressed aim of the safe third

82 See also ‘Proposal for the Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ (n 55), recital nos 36 and 37.

83 *Ibid.*, Recital no. 37 and Article 45 (3)(a).

84 European Council, ‘Meeting of 22-23 June’ (Council document EUCO 8/17, 23 June 2017), Conclusion no 23.

country concept as furthering the cooperation with third countries seems to hint on widening, rather than restricting the scope.

In a discussion paper for the Member States, the Estonian Presidency has requested for a further definition of 'sufficient protection', explaining that this definition in the Asylum Procedures Directive exceeds the requirements of the Refugee Convention in certain aspects, such as the right to family reunification (the Convention lacks this criteria) and the right to legal residence (the Convention mentions lawful stay). Also, the access to education and the labour market are less concretely formulated in the Convention.⁸⁵ The President also wants to know to what extent Member States aim to further qualify the required connection between the asylum seeker and the third country, besides the proposal to require that the person has transited the country. It is to be seen if this discussion will remain limited within the criterion of transit, while certain Member States have already expressed their doubts if transit should be a requirement at all. The removal of this core element would pave the way to sending migrants to countries they never were before, which would perfectly fit in the political aim to send migrants who departed from Libya to Tunisia or Egypt. The Presidency also explicitly asks in the discussion paper if the concept should be applicable to certain parts of the territory of the third country. An agreement on this would feed into creating humanitarian zones in a third country that does not comply with international standards. Furthermore, the reasoning that criteria on a safe third country concept should be as minimal as possible, in order to leave space for agreements on protection standards with specific countries, is getting more and more support.⁸⁶ That would strip immigration officers, lawyers and judges of any legal framework, creating legal uncertainty and divergent practices and case law.

4.2. (North) African safe third countries

The current negotiations on the Asylum Procedures Regulation, especially the foreseeable watering down of the criteria for the designation of a safe third country, will further pave the way to the adoption of the EU-Turkey model to other countries with even less safeguards for protection, reception and access to society. Political leaders have clearly shown an interest in concluding similar agreements with Tunisia, but also other countries of interest have their attention. Morocco and Tunisia however refuse to conclude a readmission agreement with the EU. Readmission to Tunisia of Tunisian citizens is already problematic, but the main concerns of Tunisia concern the readmission of third country nationals. In a joint non-paper, the Commission and European External Action Service (EEAS)

85 Council of the EU, 'Note: Proposal for the Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' (Council document 12331/17, 25 September 2017).

86 See for instance the oral explanation by the Dutch Minister for Migration in the Dutch Senate on 30 April 2018 (*Kamerstukken I*, 2017/2018), 34 482 and 34 585, C.

propose to make this clause more flexible, related to readmission agreements with sub-Saharan countries of origin, but also points at the Member States' unwillingness to offer adequate mobility opportunities for Tunisian citizens.⁸⁷ However the constraints to the EU cooperation with Libya, has led to further pressure to conclude a migration deal on the Tunisian authorities by EU Member States like Germany and Italy, which are even prepared to link their support for Tunisia's fight against terrorism to migration control and readmission.⁸⁸ In response, NGOs released a joint statement that Tunisia does not qualify as safe given the lack of effective asylum legislation and adequate reception capacity.⁸⁹ In 2014, the International Federation for Human Rights (FIDH) and other NGOs, having 'repeatedly expressed their concerns about the "mobility partnership" signed by the EU and Tunisia', argued that:

implementation of such agreement is particularly worrying in the current Tunisian transitional context where key institutions and legislative instruments needed to guarantee the respect of the rights of migrants, refugees and asylum seekers are still lacking. The wording of the joint declaration (...) makes it clear that these rights are not a priority in the 'partnership'.⁹⁰

Similarly, in its analysis of the EU–Morocco mobility partnership, the Euro-Mediterranean Human Rights Network (EMHRN) expressed its 'fears that actions to combat irregular migration immigration will be prioritised and implemented at the expense of other themes included in the partnership and, more worryingly, at the expense of the rights of migrants and refugees'.⁹¹

Some criticise the EU for attempting to engage in a cooperation with Egypt, as it would implicitly endorse the Egyptian regime and give it a 'considerable leverage to exploit the partnership and impose a very high price

87 Council of the EU, 'Note: Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Tunisia' (Council document 7408/16, 31 March 2016).

88 In its renewed action plan, the Commission has identified Tunisia as a priority country to conclude a readmission agreement, see Commission, 'Communication on a more effective return policy in the European Union – a renewed action plan' COM (2017) 200 final.

89 FIDH, AEDH, 'Asylum down the drain. Intolerable pressure on Tunisia' (Joint Statement, 21 February 2017) <<http://www.aedh.eu/en/joint-statement-asylum-down-the-drain-intolerable-pressure-on-tunisia/>> accessed 5 May 2017. See also OHCHR, 'Magreb a safe region?' (Factsheet, May 2016) <<http://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH9.pdf>> accessed 5 May 2018.

90 Joint Statement by FIDH and a number of other NGOs, 'Tunisia-EU Mobility Partnership: marching towards the externalisation of borders' (Press Release, 17 March 2014) <<https://www.fidh.org/en/region/north-africa-middle-east/tunisia/14960-tunisia-eu-mobility-partnership-marching-towards-the-externalisation-of>> accessed 5 May 2018.

91 EMHRN, 'Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and nine Member States on 7 June 2013' (11 February 2014) <https://euromedrights.org/wp-content/uploads/2015/03/PM-Morocco_Final-Version-EN.pdf> accessed 5 May 2018.

tag'.⁹² Right after the tragedy 'Rashid' where 200 migrants had drowned in the Mediterranean (and the Egyptian authorities were blamed for their slow response), a representative of the Egyptian government sent a letter to all members of the European Parliament, where it recognized 'the need to inject a greater sense of urgency to curtail [migration]'.⁹³ This implicit invitation to cooperate on migration is considered as a way to use migration management for gaining funding as well as their much-needed international legitimacy.⁹⁴ Indeed, Statewatch released a confidential document of EEAS including all options for cooperating with Egypt as a 'sending, receiving and transit country for migrants', notwithstanding the 'important concerns about ensuring protection, livelihoods and access to services for refugees and migrants in Egypt, as well as ensuring the creation fully-fledged asylum and migration management systems compliant with international conventions and human rights'.⁹⁵

Moreover, the potential use of (the number of) migrants by threatening to terminate the cooperation as a way to ensure that the money keeps coming, makes the EU vulnerable for blackmailing. The frequent references by president Erdogan to its migration deal with the EU illustrates how real these risks are, especially if national checks and balances are lacking. Creating safe zones in fragile or failed states or countries with repressive or corrupt regimes, the safety of refugees cannot be guaranteed from a distance, even if these zones would be protected with EU security forces. If those operations should be regarded as extraterritorial processing, the EU would be obliged to apply EU standards on their procedure and reception. That would also imply access to an EU Member State for those qualifying for an EU protection status. But even if it would be labelled as outsourcing, certain standards should be met, including the guarantee of resettlement once the need for protection is determined. Since June 2018 it has become clear that Member States insist on making resettlement of refugees conditional on cooperation with the EU's migration agenda, and particularly on return. Although it will not be appealing for third countries (many demands and

92 T. Abderrahim and A. Knoll, "Egypt under the spotlight: can it be a safe third country?", ECDPM Talking Points Blog, 17 March 2017, <http://ecdpm.org/talking-points/egypt-safe-third-country-migration-eu/>, accessed 5 May 2018.

93 Ambassador N. Gabr, 'Fighting the waves. Egypt's response to the global challenge of illegal migration' (*Egypt MFA Blog*) <<https://mfaegypt.org/2016/10/08/fighting-the-waves-egypts-response-to-the-global-challenge-of-illegal-migration/>> accessed 7 May 2018.

94 Opinion of the EMNHR in S.P. Naceur and T. Rollins, 'Europe's migration trade with Egypt' (*Madamasr*, 1 February 2017) <<http://www.madamasr.com/en/2017/02/01/feature/politics/europes-migration-trade-with-egypt/>> accessed 7 May 2018.

95 Non-paper of the Commission and EEAS 'Options on developing cooperation with Egypt in migration matters', reproduced in 'European External Action Service "non-paper": how can we stop migration from Egypt?' (*Statewatch*, 20 December 2016) <<http://statewatch.org/news/2016/dec/eu-eeas-egypt.htm>> accessed 7 May 2018.

a relatively small number of pledges), this conditionality would serve to undermine a useful resettlement plan and EU foreign policy more generally.

5. EU asylum *acquis*: a more equitable responsibility sharing?

The external dimension of the EU asylum and migration policy has clearly crept into the EU internal common asylum system, affecting its standards on access to protection. The current negotiations on the interpretation of the safe third country concept, may lead to a Regulation at odds with Article 78(1) of the TFEU, which requires the asylum *acquis* to be construed in line with the general economy and objectives of the Geneva Convention. The current practice already shows that the EU and its Member States seek to allocate their responsibility for protection to spontaneously arrived asylum seekers, while being reluctant to offer significant support for protection offered in third countries. The same imbalance can be seen in the external dimension of EU migration policy: despite the official aims of comprehensiveness, the emphasis is clearly on the prevention of irregular migration. And although third countries are often framed as unwilling, the EU lacks an openness to long-term reforms from which partner countries could structurally benefit.

The EU policy to combat irregular migration also has a regional impact on the willingness and capability to offer adequate protection. Funding may lead to enhanced protection, but the focus on border control and readmission also provokes harsher and more restrictive immigration policies. Third countries respond to the fear of becoming responsible for too many migrants, but the EU also encourages them to restrict their visa policy and strengthen their border controls. Hence, the EU policy focussed on avoiding protection responsibilities, is adopted by third countries as well. If third countries are funded to build asylum regimes, it is only a matter of time before they deploy the same safe third country concepts that the EU is negotiating now, especially if they feel disproportionately affected through the behaviour of the EU. The legitimisation of the stripped criteria on safe third country concept will thus affect the protection standards elsewhere, and the authority of UNHCR to intervene as well.

The adoption of this excluding migration policy by countries of transit may also affect their regional co-operation, due to its repercussions for free movement regimes and flexible practises of border crossings for temporary protection. These actual and potential consequences at the regional level may be unintended by the EU, but they can undermine its objective to enhance regional cooperation and mobility. It goes without saying that this regional impact will impede the aimed enhancement of the regional protection regimes. The latter is however framed by the Union as the main alternative for granting access to protection on the EU territory.

The tendency to exclude migrants from protection avenues on the EU territory through the accumulation of its internal and external migration policy, will further shift the responsibility for refugees to third countries. But it may

therefore have a detrimental impact on the protection regimes in third countries and on the willingness to solve protection needs in a regional cooperation. As this puts the aim of a more equitable sharing of responsibility at risk, the EU's policy seems not well thought through on its consequences for the long term and the global level. Instead of more, we may face less solidarity. But also less arguments for the EU to credibly promote international solidarity.

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