

# ALREADY THERE?

## Extraterritorial Entry Controls and Extraterritorial *Non-Refoulement* in EU law

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### 1. INTRODUCTION: Acceding International Protection in a EU of Multiple Borders

Albeit no legal definition exists to date, the term *interdiction* has been coined in practice to denote the several '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.'<sup>1</sup> The means of interdiction, and thus the obstacles to overcome when attempting to reach the (geographic) confines of the Union in order to seek asylum, are, indeed, varied.<sup>2</sup> Refugees, as other migrants, encounter the (legal) border several times, and under multiple forms, in their way up to the Schengen Member States.<sup>3</sup> Entry controls have been reinforced by a panoply of complementary instruments of *pre-entry* surveillance that are being conducted abroad. Actually, both entry and pre-entry instruments are supposed to align in a control continuum intended to provide for an 'integrated border management' system, capable of unfolding at the several stages of the migratory flow towards the EU.<sup>4</sup>

The concern lays on the fact that the measures of *pre-entry* control have developed apart from refugee protection systems, resulting in solutions unlikely to be reconcilable with international protection obligations of the EU Member States. Some of these instruments entail a measure of *privatization* that renders conformity with international commitments by the EU Member States considerably difficult in practice. In other cases, the agents of the EU Member States operating abroad are ill-equipped to determine asylum requests or, simply, the instructions they have received are somewhat nebulous in relation to protection obligations. This, precisely, is particularly patent in the case of visas and carrier sanctions. Whereas both instruments attempt to resolve the problem of unauthorised immigration in a pre-emptive way, before any *actual* border-crossing has taken place, they pay, however, insufficient attention to the international obligations the EU Member States have assumed in regard of the forcibly displaced. They hold particular relevance in the case of asylum seekers and refugees. As these policies can be carried out right *inside* the country of origin, they may render illusory any prospects of a flight.

The system so structured appears to imply that, while pre-entry controls can operate extraterritorially, protection obligations only arise if potential beneficiaries present themselves at the (physical) border. This way, it seems to be understood that pre-entry controls can be conducted independently from the impact they have on asylum seekers and refugees, neglecting any international protection dimension to it. Hailbronner has argued that 'it is doubtful whether the principle of *non-*

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<sup>1</sup> UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc. EC/50/SC/CRP.17 of 09.06.2000, p. 10.

<sup>2</sup> See for instance J C Hathaway, 'The Emerging Politics of Non-Entrée,' *Refugees* (1992), pp. 40-41; J Vedsted-Hansen, *Europe's Response to the Arrival of Asylum Seekers: Refugee Protection and Immigration Control*, New Issues in Refugee Research, UNHCR (1999); J Vedsted-Hansen and G Noll, 'Non-communitarians: Refugee and Asylum Policies,' *The EU and Human Rights*, P Alston (ed), OUP (1999), pp. 359-410; S Areti, 'Interception Practices in Europe and Their Implications,' *Refuge* (2003), pp. 25-34.

<sup>3</sup> E Guild, *Moving the Borders of Europe*, Inaugural Lecture, Radboud University Nijmegen, (2001).

<sup>4</sup> *Towards integrated management of the external borders of the Member States of the European Union*, COM(2002) 233 final of 07.05.2002; *Plan for the Management of the External Borders of the Member States of the European Union*, Council doc. 10019/02 of 14.06.2002; EU Finnish Presidency, Council Conclusions of 04-05.12.2006, Press Release 15801/06.