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In Need of a Comprehensive Approach to Access International
Protection in the EU

by Violeta Moreno Lax

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THE EXTERNAL DIMENSION OF THE CEAS AFTER STOCKHOLM

In Need of a Comprehensive Approach to Access International Protection in the EU

by Violeta Moreno Lax*

1. Introduction:

The Area of Freedom, Security and Justice that the Union shall offer to its citizens¹ is supposed to remain penetrable to “those whose circumstances lead them justifiably to seek access to our territory”.² The Tampere Milestones clearly articulated that “[t]he aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments [...]”.³ At the same time, “the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes”⁴ is also of concern. A proper balance is thus to be struck, so that “the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them”.⁵ Against this backdrop, migration management, border control, and access to international protection should be developed in parallel. In practice, though, the control component has received substantially more attention hitherto.

This contribution starts from the hypothesis that in a context of prevailing extraterritorial controls, considering that asylum seekers and refugees advance in mixed flows, there may be a need to introduce equally extraterritorial protection-sensitive components at all the stages in which migratory movements are being administered. On this

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¹ Art. 3(2) Consolidated Version of the Treaty on European Union, OJ C 83/13 of 30.03.2010.

² Presidency Conclusions, European Council 15-16 October 1999, § 3 [*Tampere Milestones* hereinafter]; available at : http://www.europarl.europa.eu/summits/tam_en.htm.

³ Tampere Milestones, § 4; for the continuous validity of this principle see art. 78(1) Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47 of 30.03.2010, establishing that: ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection [...] in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’.

⁴ Tampere Milestones, § 3.

⁵ European Pact on Immigration and Asylum, Council doc. 13440/08, 24.09.2008, p. 11.

basis, EU migration and border surveillance strategies are expounded at the outset. The concepts of “Integrated Border Management” and the “Global Approach to Migration” are both scrutinized. Section three examines the territorial scope of human rights obligations binding upon the EU Member States. Section four engages in the analysis of the measures adopted and proposed at EU level within the “external dimension of asylum”,⁶ so as to elucidate whether a right balance between movement control and access to protection has been struck. On account of the findings arrived at, and considering that the Stockholm Programme calls on the European Commission to explore “new approaches concerning access to asylum procedures”,⁷ the necessary elements of a comprehensive approach to access international protection in the EU will be outlined at the end.

2. Controlling Movement:

Ever since the beginning of the Schengen collaboration,⁸ the project of abolishing controls at the internal borders of the Member States has been perceived as necessitating the coordination of checks at the common external frontiers and the pooling of efforts in managing migratory movements. It is in this context, following the communautarisation of the Schengen *acquis*,⁹ that the notions of “Integrated Border Management” and the “Global Approach to Migration” have emerged.

Integrated Border Management was first introduced by the European Commission,¹⁰ on the basis of the Laeken conclusions of December 2001.¹¹ The core components of the

⁶ The Hague Programme, Council doc. 16054/04, 13.12.2004, § 1.6.

⁷ The Stockholm Programme, Council doc. 17024/09, 02.12.2009, § 6.2.3.

⁸ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual abolition of checks at their common borders of 14 June 1985 and Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/13 and 19 of 22.09.2000 [*CISA* hereinafter].

⁹ Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340/96 of 10.11.1997; Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, OJ L 176/1 of 10.07.1999 and Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, OJ L 176/17 of 10.07.1999.

¹⁰ Towards integrated management of the external borders of the member states of the European Union, COM(2002) 233 final, 07.05.2002.

¹¹ Presidency conclusions, Laeken 14-15 December 2001, Council doc. SN 300/1/01 REV 1, § 42.

system were outlined in a 2002 Council Plan,¹² which considered that the efficient management of the external borders of the EU Member States required a “common corpus of legislation”, common operational co-ordination, integrated risk analysis, inter-operational equipment, and burden-sharing.¹³ A full definition of the concept was only articulated in 2006. The Council then declared that it would consist of “multiple dimensions”, encompassing border control, crime prevention, as well as a “four-tier access control model”.¹⁴ In the EU discourse border controls serve, indeed, a variety of purposes. They are supposed to assist in the fight against terrorism and cross-border crime, in maintaining internal security and public order, and in the management of migration flows. Recently, border surveillance has explicitly been defined as a privileged means to combat illegal immigration.¹⁵ This is precisely what the “four-tier access control model” attempts to address. Following a pattern of concentric circles, including measures in third countries, cooperation with neighbouring states, border surveillance, control within the Union, and return, it covers the full migration cycle.¹⁶ Accordingly, uniform visas¹⁷ and carrier sanctions¹⁸ have been introduced to secure pre-entry checks before departure. Immigration liaison officers deployed

¹² Plan for the Management of the External Borders of the Member States of the European Union, Council doc. 10019/02, 14.06. 2002.

¹³ For commentary see MONAR, J. (2006): “The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders”, *Freedom, Security and Justice in the EU – Implementation of The Hague Programme*, The Hague: T. M. C. Asser Press, 73-88; PEERS, S. and ROGERS, N. (2006): “Border Controls”, *EU Immigration and Asylum Law*, Leiden/Boston: Martinus Nijhoff Publishers, 169-84; HOBGING, P. (2005): *Integrated Border Management at the EU Level*, CEPS Working Documents, available at: <http://www.ceps.be/book/integrated-border-management-eu-level>.

¹⁴ EU Finnish Presidency, Council Conclusions of 4-5 Dec. 2006, Press Release 15801/06, at 27.

¹⁵ Council conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Council doc. 6975/10, 01.03.2010. See also Council conclusions on the management of the external borders of the member states of the European Union, 5-6 June 2008, available at: http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/June/0506_JHA-external_borders.pdf.

¹⁶ In the wake of the communitarisation of the Schengen *acquis*, the Austrian Presidency submitted a controversial *Strategic Paper on Immigration and Asylum Policy*, Council doc. 9809/98, 01.07.1998. The Presidency believed that ‘[a]n effective entry control concept [could not] be based simply on controls at the border but must cover every step taken by a third country national from the time he begins his journey to the time he reaches his destination’ (at § 85). The Hague Programme has perpetuated this rhetoric, establishing that ‘[t]he management of migration flows, including the fight against illegal immigration, should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings’ (at § 1.7.2.).

¹⁷ 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, OJ L 81/1 of 21.03.2001 and Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ L 243/1 of 15.09.2009.

¹⁸ Art. 26 CISA and 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, OJ L 187/45 of 10.07.2001.

in regions of origin and transit assist in the task.¹⁹ Joint patrols survey the external borders of the Union, under the auspices of the FRONTEX agency.²⁰ On arrival at the frontier, migrants are submitted to “thorough checks”.²¹ Ultimately, those who do not fulfil the entry requirements stipulated in the Schengen Borders Code are returned²² on the basis of readmission agreements.²³

Participating in the rationale of managing “migration flows at all their stages”,²⁴ the Global Approach to Migration was launched in 2005.²⁵ It aims to tackle migration comprehensively, in cooperation with third countries of origin and transit, assisting them in the enhancement of their capacity to manage migration and readmission, resolve refugee crisis, build their border-control systems, and prevent illegal immigration. Initially, the strategy exclusively addressed Africa and the Mediterranean area,²⁶ but it has subsequently

¹⁹ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64/1 of 02.03.2004; Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, COM(2009) 322 final, 08.07.2009.

²⁰ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1 of 25.11.2004; Regulation (EC) 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 OJ L 199/30 of 31.07.2007; Council Decision (2010/252/EU) of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20 of 04.05.2010; Proposal for a Regulation of the European Parliament and the Council 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 (FRONTEX), COM (2010) 61 final, 24.02.2010.

²¹ 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), OJ L 105/1 of 13.04.2006, art. 7 (3) [*Schengen Borders Code* hereinafter].

²² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, OJ L 348/98 of 24.12.2008.

²³ Together with a series of bilateral agreements concluded independently by the Member States with third countries, the EU has signed readmission agreements with Albania, Bosnia and Herzegovina, Macedonia, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka and Ukraine. Although the Commission has received a mandate to negotiate readmission agreements with Algeria, China, Morocco and Turkey, negotiations are on a halt. For an overview see: <http://www.mirem.eu/datasets/agreements/index/european-union>.

²⁴ Tampere Milestones, § 22. See also The Hague Programme, § 1.2.

²⁵ Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005) 621 final, 30.11.2005.

²⁶ Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Council doc. 15744/05, 13.12.2005.

been extended to other regions.²⁷ The “legal” dimension of migration was only introduced afterwards.²⁸ Of the three main goals the strategy currently pursues; i.e. “promoting mobility and legal migration, optimising the link between migration and development, and preventing and combating illegal immigration”,²⁹ the emphasis has been placed on the fight against irregular movement.³⁰

Integrated Border Management and the Global Approach to Migration, combining territorial and extraterritorial controls, have become the main strategies through which migratory movements towards the EU are being administered.

3. Controlling Controls:

Since Tampere, the fight against irregular movement has featured high on the EU agenda. At the time, the European Council declared itself “determined to tackle at its source illegal immigration”.³¹ Thereafter, efforts have concentrated on “[c]ombating illegal immigration with an integrated approach”,³² to which both the Global Approach to Migration and Integrated Border Management contribute decisively.

On the other hand, it has also been recognised that “there are a plethora of reasons for individuals’ attempts to enter the EU”.³³ The flows towards the Union are indeed mixed. Together with other migrants, exiles are among those trying to reach European shores. Although illegal immigration and asylum constitute, in principle, separate issues, refugees are oftentimes compelled, in practice, to resort to irregular means of migration to access

²⁷ Draft Council Conclusions on Extending and Enhancing the Global Approach to Migration, Council doc. 10746/07, 13.06.2007 and Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM(2007) 247 final, 16.05.2007.

²⁸ The Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final, 30.11.2006. See also Strengthening the Global Approach to Migration: Increasing coordination, coherence and synergies, COM (2008) 611 final, 08.10.2008.

²⁹ The Stockholm Programme, § 6.1.1.

³⁰ GARLICK, M. and KUMIN, J. (2008): “Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control”, *Justice, Liberty, Security – New Challenges for EU External Relations*, Brussels: VUB Press, 111-144, at 116.

³¹ Tampere Milestones, § 23.

³² Council Conclusions on measures to be applied to prevent and combat illegal immigration and smuggling and trafficking in human beings by sea and in particular on measures against third countries which refuse to cooperate with the European Union in preventing and combating these phenomena, Council doc. 10017/02, 14.06.2002, § 1.

³³ On policy priorities in the fight against illegal immigration of third-country nationals, COM(2006) 402 final, 19.07.2006, § 9.

international protection in the Member States.³⁴

If it is true that “States enjoy an undeniable sovereign right to control aliens’ entry into and residence in their territory”,³⁵ it is not less certain that such a right is not absolute. Refugee law and human rights impose limits thereto. While jurisdiction in international law is generally territorially framed,³⁶ when States project their actions outwards, beyond their territorial confines, extraterritoriality does not prevent human rights obligations from being engaged under certain conditions. International human rights bodies consider that the exercise of “effective control” over an area in foreign territory³⁷ or over persons abroad³⁸ constitutes the trigger of State responsibility.³⁹ The principle underlying this construction is to prevent a double standard of human rights compliance from arising. In the words of the Human Rights Committee, it would be “unconscionable” to interpret responsibility under human rights instruments as to “permit a State Party to perpetrate violations [...] on the territory of another State, which violations it could not perpetrate on its own territory”.⁴⁰ Therefore, when undertaking extraterritorial action to combat irregular movement, the Union and its Member States ought to take into account the respective entitlements of each individual affected. In

³⁴ MORRISON, J. and CROSLAND, B. (2001): *The trafficking and smuggling of refugees: the end game in European asylum policy?*, New Issues in Refugee Research, Working Paper No. 39, Geneva: UNHCR. See also ECRE (2007): *Defending Refugees’ Access to Protection in Europe*, retrievable from: www.ecre.org.

³⁵ *Inter alia* ECtHR, *Saadi v UK*, Appl. No. 13229/03, 29.01.2008, § 64 (references omitted).

³⁶ ECtHR, *Bankovic a. o. v Belgium a. o.* (Dec.), Appl. No. 52207/99, 12.12.2001, § 73.

³⁷ ECtHR, *Loizidou v Turkey*, Appl. No. 15318/89, 23.03.1995; *Cyprus v Turkey*, Appl. No. 25781/94, 10.05.2001; *Bankovic a. o. v Belgium a. o.* (Dec.), Appl. No. 52207/99, 12.12.2001, § 70; HRC, General Comment No. 31 (2004); CAT, General Comment No. 2 (2007).

³⁸ ECtHR, *Issa a. o. v Turkey*, Appl. No. 31821/96, 16.11.2004; *Ocalan v Turkey*, Appl. No. 46221/99, 12.05.2005; *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 02.03.2010; HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29.07.1981; *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29.07.1981; *Munaf v Romania*, Comm. No. 1539/2006, 30.07.2009; General Comment No. 31 (2004); Inter-AmCHR, *Coard a. o. v United States*, Case 10.951, Report No. 109/99; CAT, *J.H.A. v Spain*, Comm. No. 323/2007, 10.11.2008; General Comment No. 2 (2007). The ICJ has confirmed that the International Covenant on Civil and Political Rights ‘is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Gen. List No. 131, § 111.

³⁹ GONDEK, M. (2009): *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Antwerp/Oxford/Portland: Intersentia; GUILD, E. (2007): *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action*, Nijmegen: Wolf Legal Publishers.

⁴⁰ HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Comm. No. 52/1979, 29.07.1981, § 12.1-12.3; *Lilian Celiberti de Casariego v Uruguay*, Comm. No. 56/1979, 29.07.1981, § 10.3. The ECtHR, on the basis of the HRC pronouncements, has concluded that: ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’ in *Issa a. o. v Turkey*, Appl. No. 31821/96, 16.11.2004, § 71; *Isaak v Turkey* (Dec.), Appl. No. 44587/98, 28.09.2006, p. 19; *Solomou v Turkey*, Appl. No. 36832/97, 24.06.2008, § 45; *Andreou v Turkey* (Dec.), Appl. No. 45653/99, 03.06.2008, p. 10; and *Al-Saadoon and Mufdhi v United Kingdom* (Dec.), Appl. No. 61490/08, 30 Jun. 2009, § 85.

such situations, the persons concerned are brought under the jurisdiction of the EU Member States with the consequence that human rights become applicable to their case and must be duly observed. To preserve their effectiveness, border surveillance and migration control measures should, thus, be designed and implemented in a way that renders that action compatible with the respect of “human rights, the protection of persons in need of international protection and the principle of *non-refoulement*”.⁴¹

4. Striking the Right Balance? The External Dimension of Asylum

In an environment of multiplying extraterritorial surveillance mechanisms, The Hague Programme launched “the external dimension of asylum”.⁴² Several initiatives have been proposed in this realm by a range of actors with varying degrees of success. While attempting to “offer guarantees to those who seek protection in or access to the European Union”,⁴³ the preservation of the deterrent effect of the measures adopted to combat illegal immigration and to prevent the abuse of the asylum system has remained a priority. Accordingly, the instruments that have been promoted thus far are those aimed at enhancing protection in the regions of origin and transit, to provide access to “durable solutions at the earliest possible stage”.⁴⁴ Targeted Regional Protection Programmes,⁴⁵ the establishment of a EU resettlement scheme,⁴⁶ and recent plans favouring offshore processing strategies⁴⁷ follow this motivation.

4.1. The EU Joint Resettlement Programme:

The European Commission submitted a proposal for the establishment of a *Joint EU*

⁴¹ 29 measures for reinforcing the protection of the external borders and combating illegal immigration, § e.

⁴² The Hague Programme, § 1.6. For commentary see BALDACCINI, A. (2007): “The External Dimension of the EU’s Asylum and Immigration Policies: Old Concerns and New Approaches”, *Whose Freedom, Security and Justice?*, Oxford: Hart Publishing, 277-298; RODIER, C. (2006): *Analysis of the External Dimension of the EU’s Asylum and Immigration Policies*, Study PE 374.366, Brussels: European Parliament; S ALEGRE, S., BIGO, D. and JEANDESBOZ, J. (2009): *La dimension externe de l’espace de liberté, sécurité et justice*, Study PE 410.688, Brussels: European Parliament.

⁴³ Tampere Milestones, § 3.

⁴⁴ The Hague Programme, § 1.6.1.

⁴⁵ Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM(2005) 388 final, 01.09.2005 [*EU Regional Protection Programmes* hereinafter].

⁴⁶ Communication from the Commission to the European Parliament and the Council on the establishment of a Joint EU Resettlement Programme, COM(2009) 447, 02.09.2009 [*Joint EU Resettlement Programme* hereinafter].

⁴⁷ ‘Migration situation in the Mediterranean: establishing a partnership with migrants’ countries of origin and of transit, enhancing Member States’ joint maritime operations and finding innovative solutions for access to asylum procedures’, Council doc. 13205/09, 11.09.2009 [*Migration Situation in the Mediterranean* hereinafter].

Resettlement Programme in September 2009.⁴⁸ Currently, only 10 EU Member States run annual resettlement schemes with a very limited capacity.⁴⁹ The Commission has noted, in fact, that “the number of refugees who are resettled to Canada each year – around 10.000 – is more than double the total number of refugees resettled annually in the EU”.⁵⁰ In addition, no common planning or coordination of these activities exists at EU level. The proposed programme intends, accordingly, to provide a framework for the development of a common EU approach to resettlement, seeking to involve more Member States in these activities. Collaterally, it is expected that the global humanitarian profile of the Union will be enhanced and that access to asylum will be organised in an orderly way. In particular, the Commission anticipates that coordination with the Global Approach to Migration will be ensured through the identification of common resettlement priorities on the basis not only of humanitarian considerations, but also on broader political grounds.⁵¹

Participation in the programme is conceived of as voluntary and following an incremental approach, so that the scope of the commitments undertaken by the participating Member States progressively broadens. The scheme consists of four components: the definition of common annual priorities; the financial underpinning of an improved European Refugee Fund;⁵² strengthened practical cooperation under the aegis of the forthcoming European Asylum Support Office;⁵³ and regular assessment through periodical evaluations. The common identification of resettlement priorities will be carried out by a *Resettlement Expert Group*, composed of representatives of all the Member States, the Commission, and other stakeholders. The group will meet regularly, exchange information and discuss specific needs. On that account, the Commission will prepare a draft decision on the common priorities.

The programme represents an important step for the Union, supported by a strong

⁴⁸ Underpinning the proposal see: MIGRATION POLICY GROUP (2003), *Study on the Feasibility of Setting Up Resettlement Schemes in EU Member States or at EU Level, Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, Brussels: European Commission, available at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm.

⁴⁹ Commission Staff Working Document accompanying the Communication of the Commission on the establishment of a Joint EU Resettlement Programme (Impact Assessment), SEC(2009) 1127, 02.09.2009.

⁵⁰ Joint EU Resettlement Programme, note 15, p. 5.

⁵¹ *Ibid.*, p. 10.

⁵² Proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme “Solidarity and Management of Migration Flows” and repealing Council Decision 2004/904/EC, COM(2009) 456, 02.09.2009.

⁵³ Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM(2009)66, 18.02.2009 [*EASO* hereinafter].

institutional consensus, which has to be commended. However, considering its aspirations and characteristics, the instrument suffers from a series of structural shortcomings. First, one may wonder whether the financial means proposed to be allocated will suffice to achieve the ambitious goals defined in the proposal. Second, it is not planned for the countries from which refugees will be resettled to partake in the consultations on the basis of which common European priorities are going to be identified. Yet, if the Union is to demonstrate global solidarity, better results may be yield through a multilateral collaborative approach which takes good account of those third countries' needs and capacities. Finally, the adequacy of factoring political considerations in the determination of resettlement priorities, at the detriment of exclusive humanitarian concerns, may be questioned. The appropriateness of the desired consistency of the Joint Resettlement Programme with the Global Approach to Migration is thus open to criticism.⁵⁴

4.2. EU Regional Protection Programmes:

The objective the *EU Regional Protection Programmes* pursue, as submitted by the Commission in 2005, is to address protracted refugee situations in a comprehensive and concerted manner. Both countries of origin and transit are targeted. The aim is to create the conditions for “durable solutions” to thrive, enhancing the ability of the countries concerned to provide “effective protection” in their territories. Simultaneously, it is also expected “to enable those countries better to manage migration”.⁵⁵

These programmes have been designed as a “tool box” of actions aiming at capacity building, “deliver[ing] real benefits both in terms of protection offered to refugees and in their support of existing arrangements [...]”.⁵⁶ Flanking these activities, EU Member States may engage in a voluntary resettlement commitment to show solidarity in the provision of durable

⁵⁴ Expressing similar concerns see: Report on the proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme “Solidarity and Management of Migration Flows” and repealing Council Decision 2004/904/EC, A7-0125/2010, 29.04.2010; Report on the establishment of a joint EU resettlement programme, A7-0131/2010, 03.05.2010; UNHCR (2007): *Response to the Green Paper on the Common European Asylum System*, at 45; available at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>; AMNESTY INTERNATIONAL (2007): *Response to the Green Paper on the Common European Asylum System*, at 44, available at: http://www.aie.u.be/static/documents/2009/AIResponse_EASOPProposalApr09.pdf; ECRE (2007): *Response to the Green Paper on the Common European Asylum System*, at 46; available at: <http://www.ecre.org/files/ECRE%20Green%20paper%20response%20final%20-%20Read%20only.pdf>.

⁵⁵ EU Regional Protection Programmes, p. 3.

⁵⁶ Ibid., p. 4.

solutions at the global scale. However, these initiatives have to be financed through existing budgetary lines. No new financial instruments have been introduced to underpin the Regional Protection Programmes.⁵⁷

Since 2007, two pilot projects have been launched. The first focuses on Tanzania, hosting “the largest refugee populations in Africa”,⁵⁸ whereas the second covers Moldova, Belarus, and Ukraine, which together constitute a major transit region towards the EU. Not only humanitarian but also political considerations were contemplated in the selection of these two locations by the Commission and the Member States.⁵⁹

Similar concerns to those stated with regard to the EU Joint Resettlement Program can be expressed here.⁶⁰ Regional Protection Programmes risk dwelling excessively on migration management priorities, at the expense of genuine humanitarian considerations. An external evaluation of both programmes has been carried out in 2010, concluding that “their impact was limited due to limited flexibility, funding, visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries”.⁶¹ Nevertheless, the Commission has proposed to continue the existing programmes and to extend them “to two new regions, namely North Africa (Egypt, Libya, Tunisia) and the Horn of Africa (neighbouring countries of Somalia, namely Kenya, Djibouti and Yemen)”.⁶²

4.3. Offshore Processing: An *Ad Hoc* Protection Programme in Libya?

There have been numerous initiatives to extraterritorialise refugee status determination procedures off Europe. Most recently the French Delegation has submitted a proposal to the EU Presidency to tackle the “Migration situation in the Mediterranean”, which includes an offshore component that should provide an “innovative solution for access to asylum”.

The proposal is threefold. In the first place, a partnership is to be established with

⁵⁷ Ibid.

⁵⁸ Ibid., p. 7.

⁵⁹ Ibid., p. 5.

⁶⁰ UNHCR (2005): *Observations on the Communication on Regional Protection Programmes*, available at: http://www.refugeelawreader.org/inventory.d2?start=600&target=search&i_doctype%5B%5D=0; AMNESTY INTERNATIONAL (2005): *EU Regional Protection Programs : Enhancing protection in the region or barring access to the EU territory ?*, available at: <http://refugeelaw.qeh.ox.ac.uk/pdfs/ai-eu-on-rpps-october-2005.pdf>; DE VRIES, K. (2007): “An Assessment of ‘Protection in Regions of Origin’ in Relation to European Asylum Law”, *EJML*, Vol. 9, 83-103.

⁶¹ Although the evaluation has not been made publicly available, the Commission mentions it in its *First Annual Report on Immigration and Asylum* (2009), COM(2010) 214 final, 06.05.2010, p. 6.

⁶² Commission Staff Working Paper *First Annual Report on Immigration and Asylum* (2009), SEC (2010) 535 final, 06.05.2010, p. 38.

countries of origin and transit, particularly with Turkey and Libya, concerning border surveillance and the fight against illegal immigration and organised crime. The second prong aims at enhancing FRONTEX's resources and capacities, so that the Agency can intervene anywhere at sea "to cope with crisis situations at the maritime borders".⁶³ The final leg of the initiative purports to provide access to international protection, while deterring irregular immigration. Two "innovative solutions concerning asylum"⁶⁴ have been envisaged. The first alternative is that an "*ad hoc* protection programme" is established in Libya, in cooperation with relevant organisations, and with the financial support of the EU. The programme presupposes that persons intercepted at sea would be returned to Libya for processing by the UNHCR. Reception in Libya would be supported by the IOM. At the end of the process, EU Member States "would undertake to receive persons recognised as refugees and requiring resettlement on a long-term basis".⁶⁵

As designed, the plan prompts a range of fundamental questions. First, the point of the legal responsibility for those intercepted and repatriated to Libya has not been addressed. Nonetheless, it is well established in international law that EU Member States would not be able to eschew their legal responsibilities through delegation to other countries or international organisations.⁶⁶ It also remains unclear in the proposal which is the law that the proponents consider applicable to this exercise. In any event, an across-the-board exclusion of EU legislation does not seem possible.⁶⁷ Third, selecting the addressees on the basis of their migratory route may amount to a penalty under article 31 of the 1951 Geneva Convention, and possibly also to discrimination among refugees in breach of article 3 of the same instrument. With regard to the transfer to Libya of those intercepted at sea, it is to be noted that *automatic* deportation without a possibility of prior individual recourse may violate effective remedy standards.⁶⁸ Once in Libya, reception conditions should ensure compliance

⁶³ Migration situation in the Mediterranean, p. 4.

⁶⁴ *Ibid.*, p. 6.

⁶⁵ *Ibid.*

⁶⁶ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, UNGA A/56/49(Vol.I)/Corr.4. For commentary see: GOODWIN-GILL, G. S. (2007): 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', *U.T.S. Law Review*, Vol. 9, 26-40.

⁶⁷ ECJ, *Ingrid Boukhalfa v Federal Republic of Germany*, C-214/94, [1996] ECR I-2253. For an extended analysis of this issue see: MORENO LAX, V. (forthcoming): "(Extraterritorial) Entry Controls and (Extraterritorial) *Non-Refoulement* in EU Law", *The External Dimension(s) of EU Asylum and Immigration Policy*, Bruxelles: Bruylant.

⁶⁸ Art. 13 ECHR as interpreted in ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22.09.2009 and references therein. In EU law, art. 47 of the EU Charter of Fundamental Rights, OJ C 83/389 of 30.03.2010,

with the ECHR and similar instruments. Finally, the issue of what happens to non-refugees should also be carefully examined. Non-removability on account of *non-refoulement* obligations ensuing from article 3 ECHR or from analogous human rights conventions may create insurmountable obstacles to the feasibility of the plan.⁶⁹

4.4. Asylum Visas: Protected-Entry Procedures⁷⁰ from Libya?

The second option advanced by the French solution to provide for access to international protection, while deterring irregular migration through the Mediterranean, is to offer “the possibility of introducing, in Member States’ diplomatic representations in Libya, and with the logistical support of the European Asylum Support Office [...] a specific procedure for the determination of applications for asylum”.⁷¹ A visa to come to Europe to have their claims assessed would be issued to those submitting applications that “did not appear to be manifestly unfounded”.⁷² The fair allocation among the EU Member States of those finally admitted would be ensured on the basis of a distributive key.

Similar difficulties to those posed by the *Ad Hoc* Protection Plan arise in this context, especially, in relation to the selection of addressees. If only “manifestly founded” cases are targeted, incompatibilities with the admissibility threshold established in Strasbourg jurisprudence may occur. The standard in article 3 ECHR cases is that of “arguability”, which is not always synonymous with “foundedness”.⁷³ Claims considered “arguable” in the first

constitutes the relevant provision. For an extended analysis on this point see: MORENO LAX, V. (2009): *Searching Responsibilities and Rescuing Rights: EU Border Controls and Maritime Interception at the Mediterranean Sea*, REFGOV Working Papers Series 2009.

⁶⁹ For similar criticism see: NOLL, G. (2003): “Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones”, *EJML*, Vol. 5, 303-341; GARLICK, M. (2006): “The EU Discussions on Extraterritorial Processing: Solution or Conundrum?”, *IJRL*, Vol. 18, 601-629; HURWITZ, A. (2009): *The Collective Responsibility of States to Protect Refugees*, Oxford: OUP, 78-87.

⁷⁰ For an overview of several systems of protected-entry procedures in Europe and beyond see: THE DANISH CENTRE FOR HUMAN RIGHTS (2002): *Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure*, Brussels: European Commission, available at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm. The term has resurfaced in the Policy Plan on Asylum, COM(2008) 360 final, 17.06.2008, § 5.2.3.

⁷¹ Migration situation in the Mediterranean, p. 6.

⁷² Ibid.

⁷³ SPIJKERBOER, T. (2009): “Subsidiarity and ‘Arguability’: The European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases”, *IJRL*, Vol. 21, 48-74; WOUTERS, K. (2009): *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia, at 333 ff.; MOLE, N. (2007): *Asylum and the European Convention on Human Rights*, Strasbourg: Council of Europe Publishing, at 67 ff.; HAMPSON, F. J. (1990): “The Concept of an ‘arguable claim’ under Article 13 of the European Convention on Human Rights”, *ICLQ*, Vol. 39, 891-899.

place have been dismissed as unfounded only after a thorough examination by the Court at the admissibility stage.⁷⁴ With regard to the procedural arrangements applicable in this framework, the French delegation seems to ignore the fact that access to appeals⁷⁵ and to judicial protection⁷⁶ would have to be guaranteed, both in law and in practice.

5. Conclusion: In Need of a Comprehensive Approach to Access International Protection in the European Union

To ensure access to protection to refugees and asylum seekers in transit, in view of the insufficiencies identified with regard to the instruments adopted or proposed so far, some actors, including the UNHCR, have concentrated on the formulation of solutions that take specific account of the mixed character of the flows. The *10-Point Plan of Action*, pleading for the incorporation of protection-sensitive components in systems of border surveillance and migration control,⁷⁷ constitutes a significant example.⁷⁸ In some countries, NGOs already work in tandem with governmental authorities and the UNHCR in the provision of independent monitoring of the measures taken at the border and in its immediate vicinity.⁷⁹ However, extraterritorial actions remain largely unchecked.

Considering that most of the measures pertaining to the Global Approach to Migration and the Integrated Border Management system that the Union is progressively developing are implemented abroad, there is a pressing need to take current proposals for protection-sensitive

⁷⁴ *Inter alia*, *T.I. v UK* (Dec.), Appl. No. 43844/98, 07.03.2000.

⁷⁵ See note 68 above.

⁷⁶ ECJ, *Unibet Ltd*, C-432/05, [2007] ECR I-02271 and references therein.

⁷⁷ The concept of 'protection-sensitive entry management systems' has been introduced by the European Commission in its Green Paper on the future Common European Asylum System, COM(2007) 301 final, 06.06.2007, § 5.3.

⁷⁸ UNHCR (2007): *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, available at: <http://www.unhcr.org/refworld/pdfid/45b0c09b2.pdf>.

⁷⁹ For two examples of tripartite arrangements of border monitoring see: The Hungarian Helsinki Committee/The Headquarters of the Border Guard of the Republic of Hungary/UNHCR (2006): *Tripartite Memorandum of Understanding on Modalities of Mutual Co-operation and Coordination to Support the Access of Asylum Seekers to the Territory of, and the Asylum Procedures of the Republic of Hungary*, available at: http://www.unhcr-budapest.org/hungary/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_HU_N/HUNtripartiteENG.pdf and *Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary - Report on the Border Monitoring Program's First Year in 2007*, available at: http://helsinki.webdialog.hu/dokumentum/Border_Monitoring_Report_2007_ENG_FINAL.pdf. See also The Bulgarian Helsinki Committee/The Chief Directorate Border Policy of Bulgaria/UNHCR (2010): *Tripartite Memorandum of Understanding on Modalities of Mutual Cooperation and Coordination to Support the Access of Persons Seeking Protection to the Territory of, and the Procedure for Granting Protection in the Republic of Bulgaria*, available at: <http://www.unhcr-budapest.org/images/stories/news/Tripartite%20MoU-ENG.pdf>.

entry-management a step forward. To wit, the differentiation of mixed flows should be introduced not only at the very external borders of the EU Member States, but extraterritorially as well, at every stage in which entry and pre-entry controls are carried out. To that end, all actors in a position to encounter refugees and asylum seekers in the course of their border or migration control activities should receive specific training in human rights and refugee law and work under clear instructions on how to handle *non-refoulement* and/or asylum claims. Adequate remedies and legal safeguards should be introduced, so that the EU Member States on behalf of which the controls are performed can meet their international obligations as appropriate.

With the Stockholm Programme calling on the European Commission “to explore [...] new approaches concerning access to asylum procedures”⁸⁰ and on the EASO “to develop methods to better identify those who are in need of international protection in mixed flows”,⁸¹ the right momentum may be gathered to launch a discussion on this proposal. In any event, the (extraterritorial) rights of refugees and asylum seekers should not be compromised by the (extraterritorial) intervention of the EU Member States. Otherwise, the “[Common European Asylum System] risks becoming meaningless if people who need asylum are *a priori* excluded from access to the EU”.⁸²

⁸⁰ The Stockholm Programme, Council doc. 17024/09, 02.12.2009, § 6.2.3.

⁸¹ Ibid., § 5.1.

⁸² VANDVIK, B. (2008): “Extraterritorial Border Controls and Responsibility to Protect : A View from ECRE”, *Amsterdam Law Forum*, Vol. 1, 27-35, at 27.