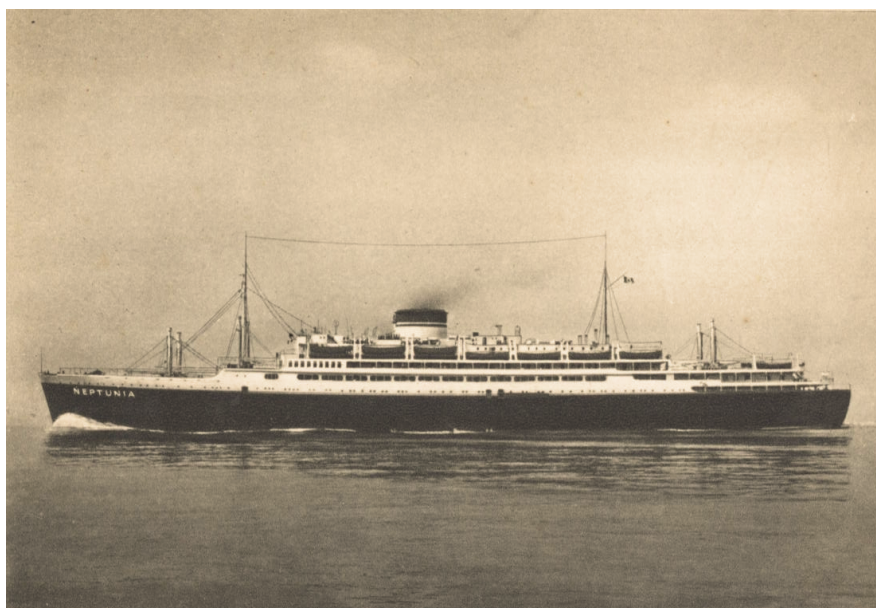


PAIX ET SÉCURITÉ INTERNATIONALES

07

2019



JOURNAL OF INTERNATIONAL LAW
AND INTERNATIONAL RELATIONS



ISSN 2341-0868

DOI: http://dx.doi.org/10.25267/Paix_secu_r_int.2019.i7

Citation: NAGORE CASAS, M., «The Instruments of Pre-border Control in the EU: A New Source of Vulnerability for Asylum Seekers?», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 161-198.

Received: 03 October 2019

Accepted: 08 November 2019

THE INSTRUMENTS OF PRE-BORDER CONTROL IN THE EU: A NEW SOURCE OF VULNERABILITY FOR ASYLUM SEEKERS?

Maria NAGORE CASAS¹

I.- INTRODUCTION: SECURITIZATION OF BORDERS AND VULNERABILITY OF ASYLUM SEEKERS. II.- THE MAIN EU AND MEMBER STATES' INSTRUMENTS OF PRE-BORDER CONTROL. III.- COMPATIBILITY OF THE INSTRUMENTS OF PRE-BORDER CONTROL WITH THE INTERNATIONAL PROTECTION OF REFUGEES AND THE PRINCIPLE OF *NON-REFOULEMENT*. IV.- CONCLUSION.

ABSTRACT: This article explores the system of pre-border control instruments that have been implemented by the EU and Member States in order to prevent asylum seekers from accessing the EU territory. The main argument is that these instruments constitute a new source of vulnerability for asylum-seekers and refugees. The article analyses some of the main passive and active measures of interception of refugees (EU Visa Regime, carrier sanctions, Immigration Liaison Officers and interception at sea) and the main legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement*.

KEY WORDS: pre-border control, refugees' vulnerability, EU Visa Regime, carrier sanctions, Immigration Liaison Officers, interception of refugees at sea.

LOS INSTRUMENTOS DE PRE-CONTROL FRONTERIZO EN LA UE: ¿UNA NUEVA FUENTE DE VULNERABILIDAD PARA LOS SOLICITANTES DE ASILO?

RESUMEN: Este artículo explora el sistema de instrumentos de pre-control fronterizo que han sido implementados por la UE y sus Estados Miembros con el fin de evitar el acceso de los solicitantes de asilo al territorio de la UE. El principal argumento es que estos instrumentos constituyen una nueva fuente de vulnerabilidad para los refugiados y solicitantes de asilo. El artículo analiza algunas de las principales medidas activas y pasivas de interceptación de refugiados (Régimen Europeo de Visados, sanciones a los transportistas, Oficiales de Enlace de Inmigración e interceptación en el mar) y los principales problemas que plantean respecto de su compatibilidad con el marco jurídico internacional de protección de los refugiados, en especial, con el principio de *non-refoulement*.

PALABRAS CLAVE: pre-controles fronterizos, vulnerabilidad de los refugiados, Régimen Euro-

¹ Lecturer (Profesora Doctora Encargada) in International Law and International Organizations, University of Deusto. The research leading to these results has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (project n° 320000). This article draws from *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, FRAME Deliverable No. 11.3 available at <<http://www.fp7-frame.eu/reports/>>.

peo de Visados, sanciones a los transportistas, Oficiales de Enlace de Inmigración, interceptación de refugiados en el mar.

LES INSTRUMENTS DE PRÉ-CONTRÔLE FRONTALIER DANS L'UE: UNE NOUVELLE CAUSE DE VULNERABILITÉ POUR LE SOLICITANT D'ASILE?

RÉSUMÉ: Cet article examine le système d'instruments de pré-contrôle frontalier mis en place par l'UE et ses États membres avec la finalité d'éviter l'accès des solicitants d'asile au territoire de l'UE. L'argument principal développé dans cet article est que ces instruments constituent un nouveau cause de vulnérabilité pour les réfugiés et solicitants d'asile. L'article analyse quelques des principales mesures actives et passives d'interception des réfugiés (Régime Européen des Visas, sanctions contre les transporteurs, officiers de liaison d'immigration et interception des réfugiés en mer) et les problèmes que posent en relation avec son compatibilité avec le cadre juridique international de protection des réfugiés, en particulier, le principe de non-refoulement.

MOT CLÉ: pré-contrôle frontalier, vulnérabilité des réfugiés, Régime Européen des Visas, sanctions contre les transporteurs, officiers de liaison d'immigration, interception des réfugiés en mer.

I. INTRODUCTION: SECURITIZATION OF BORDERS AND VULNERABILITY OF ASYLUM SEEKERS

One of the most controversial issues regarding the legal protection of refugees is the determination of the exact scope of States' obligations towards them, in particular, towards those who have not yet crossed the State of destination's borders. Governments, international organisations, scholars and policy-makers' views on the territorial scope of these obligations differ due, among other reasons, to the lack of clarity regarding paramount elements of the legal framework to be applied, such as the status of individuals under international law, the way in which international treaties should be interpreted or under which circumstances the obligations of States vis-à-vis individuals are engaged.² States tend to consider that their obligations to protect do not arise until the refugee has crossed their frontiers, while at the same time their involvement in extraterritorial activities aimed at preventing refugees from reaching their territories has increased significantly.

There are many cases in practice which illustrate the tension between States' obligations to protect and their deterrence activities. To cite but a few examples in case law, according to the UK government, the posting of immigration officers in a foreign airport in order to refuse leave to enter into

² GIL BAZO, M. T.: "The Practice of Mediterranean States in the context of the European Union" s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited", *International Journal of Refugee Law*, N° 18(2-3), 2006, pp. 571, 571-572.

the UK to undesired passengers was not contrary to the 1951 Refugee Convention.³ In *Hirsi Jamaa and Others v. Italy*, the Italian government argued that systematic “push-backs” of Libyan migrants in foreign territorial waters were lawful under the bilateral agreements signed between Italy and Libya between 2007 and 2009.⁴ In *J.H.A. v. Spain*, the Spanish government argued that the interception of a boat in the territorial waters of a third country did not amount to an exercise of jurisdiction.⁵ These are just a few examples of the externalisation of border control activities by States, as well as their attempt to consider these activities lawful and respectful of their legal obligations under the international regime of protection of refugees, in particular regarding the principle of *non-refoulement*.⁶

Despite this attempt by States to pretend to be in compliance with international refugee law, many commentators postulate that the increasing extra-territorial activity of States has the intention of precisely avoiding their obligations of protection once the individuals manage to cross their frontiers.⁷ States have developed a complex system of deterrence measures, which in practice impede any contact by refugees with the territory of the receiving State. It is thereby often argued by NGOs and scholars that there is a huge

³ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

⁴ European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR (GC) 23 February 2012) para 92.

⁵ Committee against Torture, *J.H.A. v Spain*, Communication no 323/2007, CAT/C/41/D323/2007, para 6.1.

⁶ This principle is laid down in Article 33.1 of the Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 (Refugee Convention).

⁷ GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., “Non-Refoulement in a World of Cooperative Deterrence”, *Columbia Journal of Transnational Law*, n° 53, 2015, p. 235; GOODWIN-GILL, G.S. and MCADAM, J., *The Refugee in International Law*, Oxford University Press, 3rd edn, 2007, pp. 369–371; GUILD, E. and BIGO, D., “The transformation of European Border Controls” in RYAN, B. and MITSILEGAS, V. (eds.) *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010, p. 257; DEN HEIJER, M., *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, p. 166; MORENO LAX, V., “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, *International Journal of Refugee Law*, n° 23(2), 2011, p. 174;

gap between the rhetoric of States and their attitudes in practice.⁸ On the one hand, States are pledging their commitment to refugee law, but on the other, they are not keen to assume obligations in practice. This “schizophrenic attitude” of States towards international refugee law has given rise, in the words of Gammeltoft-Hansen and Hathaway, to the “politics of non-entrée” aimed at “ensuring that refugees shall not be allowed to arrive.”⁹

In addition to “politics of non-entrée”, several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: “outsourcing, externalisation, offshoring or extra-territorialisation of migration management; external migration governance; remote migration policing”;¹⁰ “de-territorialization of border control”;¹¹ “politics of extraterritorial processing”;¹² “neo-refoulement”;¹³ or “limes imperii”.¹⁴ All of these terms refer to the various types of interception measures used by States against asylum-seekers and refugees, measures which are usually developed by the wealthiest States, notably the United States, Australia, Canada and EU Member States.

Many factors explain State engagement in extraterritorial activities. Among them, one which has to be mentioned in order to frame the discussion is that in the post-9/11 context asylum is increasingly categorised as a

⁸ GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*; GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*; DOCTORS WITHOUT BORDERS, *Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe’s Doorstep*, MSF, 2009; CEAR (COMISIÓN DE AYUDA AL REFUGIADO) EUSKADI, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy*, CEAR, 2012.

⁹ GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*, p. 241.

¹⁰ These terms are listed by DEN HEIJER, M., *op. cit.*, p. 3. See also MCNAMARA, F., “Member State Responsibility for Migration Control within Third States — Externalisation revisited”, *European Journal of Migration and Law*, n° 15, 2013, p. 326.

¹¹ TREVISANUT, S., “The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea”, *Leiden Journal of International Law*, n° 27, 2014, p. 661.

¹² AFEFF, K.F., “The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific”, *Refugee Studies Centre Working Paper*, n° 36, 2006, p. 2.

¹³ HYNDMAN, J., and MOUNTZ, A., “Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe”, *Government and Opposition*, n° 43(2), 2008, p. 249.

¹⁴ DEL VALLE GÁLVEZ, A., “Unión Europea, Crisis de Refugiados y Limes Imperii”, *Revista General de Derecho Europeo*, n° 38, 2016, p. 1.

“security issue”, including by the EU Member States. This has caused a shift from legal discourses based on the protection of refugees to “more geopolitical projects based on security.”¹⁵ The legal dimension of refugee protection based on the guarantees provided by international instruments has given way to a political dimension where the priority is the management of migrant flows in regions of origin and preventing asylum seekers from reaching the territories of states.¹⁶ This “securitization of asylum” has always been present in the EU Schengen Acquis. A recent example is found in European Council Conclusions of 20 June 2019 where the European Council establishes a “New Strategic Agenda 2019 – 2024.” One of the four main priorities for the EU in this period is “protecting citizens and freedoms” which implies ensuring the integrity of EU’s territory. According to the European Council: “We need to know and be the ones to decide who enters the EU. Effective control of the external borders is an absolute prerequisite for guaranteeing security, upholding law and order, and ensuring properly functioning EU policies, in line with our principles and values.”¹⁷

The “near-obsession”¹⁸ of States with migration control contrasts with the human needs and vulnerability of asylum seekers. The main argument of this article is that the “politics of non-entrée” constitutes in itself another source of vulnerability for asylum-seekers. In addition to the causes of persecution in their own countries and the “contextual” and “compounded” vulnerability they face,¹⁹ asylum seekers’ vulnerability is exacerbated by some of the pre-border control instruments that will be analysed here. One alarming example is the direct relationship between migration control and hu-

¹⁵ HYNDMAN, J., and MOUNTZ, A., *op. cit.*, pp. 249 and 251.

¹⁶ HYNDMAN, J., and MOUNTZ, A., *op. cit.*, pp. 250–252; DEL VALLE GÁLVEZ, A., *op. cit.*, p. 13; and VALSAMIS, M., “Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State”, *Indiana Journal of Global Legal Studies*, n° 19(1), 2012, pp. 3 and 45–59.

¹⁷ European Council meeting (20 June 2019), EUCO 9/19, Annex “A New Strategic Agenda 2019 – 2024”, pp. 6 – 7.

¹⁸ GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*, 235- 236.

¹⁹ MUSTANIEMI-LAAKSO, M., “Vulnerability in EU policies on asylum and irregular migration” in FRAME Deliverable 11.3, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, 11-24, <<http://www.fp7-frame.eu/reports/>>.

man smuggling, which has been denounced by several authors and NGOs.²⁰ This phenomenon has been described as “a never-ending race between border authorities and ever more inventive human smugglers,” which in practical terms implies that for each loophole closed by border authorities two new modes of unauthorised entry come up.²¹ In addition, the urgency of some EU Member States to combat irregular migration has exposed refugees to serious risks by giving rise to episodes of non-rescue, disputes over responsibility towards refugees and diversion of ships to third countries’ ports.²² This has unfortunately been the central dynamic regarding the rescue operations in the Mediterranean Sea during this summer.²³

According to the Red Cross some EU migration policy choices expose refugees to great vulnerabilities along their way to the EU and Schengen area, notably violence and human-trafficking and dangerous journeys to reach the EU’s external borders²⁴ The use by migrants of dangerous routes to Europe in the absence of regular and safer migration opportunities has been indeed considered a violation of the right to life.²⁵ The Commissioner for Human Rights of the Council of Europe identified the journey of migrants to Europe as one of the points in the migration cycle where vulnerability is greatest and alerted that one of the drivers of vulnerability is the “excessive use of force by law enforcement officials charged with border control.”²⁶

Furthermore, it must be stressed that the most urgent need of refugees is to secure entry into a territory where they can find safety from the circum-

²⁰ CEAR, *op. cit.*, 9.

²¹ GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*, pp. 235 and 237.

²² MORENO LAX, V., *op. cit.*, p. 174.

²³ BBC NEWS MUNDO, “Es infame el silencio de Europa: Open Arms y Ocean Viking, los barcos que deambulan por el Mediterráneo llenos de migrantes (y la respuesta de los países involucrados)”, 13 August 2019; RTVE NOTICIAS, “El Open Arms atraca en el puerto de Lampedusa con 83 migrantes a bordo tras 19 días de incertidumbre”, 20 August 2019.

²⁴ RED CROSS EU OFFICE, “Addressing the Vulnerabilities linked to Migratory Routes to the European Union” RCEU 12/2015-002 Position Paper 1.

²⁵ European Parliament, Directorate-General for External Policies, *Migrants in the Mediterranean: Protecting human rights* (Study by COGOLATI, S., VERLINDEN, N., and SCHMITT, P.), 2015, EP/EXPO/B/DROI/2015/01, p. 30.

²⁶ COUNCIL OF EUROPE, COMMISSIONER FOR HUMAN RIGHTS, “The Human Rights of irregular migrants in Europe”, CommDH/IssuePaper N° 1, 2007, pp. 3 and 8-9.

stances that led them to flee. Restrictions to this basic need may have serious consequences for refugees' protection: refugees denied entry into a country are likely to be returned to the risk of persecution in their countries of origin or to be condemned to "perpetual orbit" in search of a State which allows them to enter.²⁷

In spite of the increasing contextual and compounded vulnerabilities of asylum seekers, these State practices pose a variety of legal issues as they challenge not only the international legal framework for the protection of refugees, notably the principle of *non-refoulement*, but also well-established human rights such as the right to freedom of movement²⁸ and the right to leave any country, including one's own country.²⁹ States that through these measures obstruct access to asylum procedures or impose barriers on the individual's right to leave any country may breach their obligations under the Refugee Convention and the human rights treaties to which they are party. In addition, it is necessary to recall that all EU Member States are parties to the ECHR and consequently they are bound by the jurisprudence of the ECtHR regarding vulnerability of asylum-seekers. According to the ECtHR their vulnerability is "inherent in his situation of asylum seeker."³⁰ This involves that every asylum-seeker must be deemed to be vulnerable, regardless their particular circumstances. They are vulnerable because of their belonging to this group and States should consider this inherent vulnerability when implementing their policies.³¹

The aim of this article is to analyse some of these instruments of pre-border control implemented within the EU in order to assess to what extent they

²⁷ James C. HATHAWAY, J.C., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 279.

²⁸ *Universal Declaration of Human Rights* (UDHR), adopted by resolution 217 A (III) of the UN General Assembly in Paris on 10 December 1948, art 13(1).

²⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art 12(2) and UDHR, art 13(2).

³⁰ *M.S.S v. Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011).

³¹ BRANDI, U. and CZECH, P., "General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?" in IPPOLITO, F. and IGLESIAS SÁNCHEZ, S., *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, 2015, pp. 249-251.

generate or increase refugees' vulnerabilities and to discuss some of the legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement* set forth in the 1951 Refugee Convention and some of the main human rights law instruments. These problems will be addressed in section III below, whilst section II will provide an overview of some of the main instruments of pre-border control carried out by the EU and the Member States. Finally, section IV will provide some conclusions.

II. THE MAIN EU AND MEMBER STATES' INSTRUMENTS OF PRE-BORDER CONTROL

At the EU level, extraterritorial practices to control borders have to be historically framed in the process of European integration and the abolition of internal borders to facilitate the freedom of movement of persons, capital and goods. Once an internal space without borders was created, the protection of this space against the entrance of undesired categories of persons, capital and goods became a clear priority within the EU.³² As the Preamble of the 2006 Schengen Borders Code (SBC) stated, "the creation of an area in which persons may move freely is to be flanked by other measures" and "the common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure."³³

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

³² GIL BAZO, M.T., *loc. cit.*, pp. 571 - 572.

³³ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), preamble para 2, repealed by Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) OJ L77/1.

“incremental and invisible policy wall around the EU”.³⁴ In the 1994 Communication on Immigration and Asylum Policies the European Commission identified three main elements of these policies: “Taking action on migration pressure, “Controlling migration flows” and “strengthening integration policies for the benefit of legal immigrants.”³⁵ The protection of refugees and other persons in need of international protection were addressed within the second area (controlling migration flows) along with admission policies and measures to fight against illegal migration. This threefold distinction between “legal immigration”, “illegal immigration” and “asylum” has characterised this area of European policy since its very beginning. Border control and other migration enforcement measures reflected this distinction.³⁶ However, one of the main flaws in the European immigration and asylum policy is precisely the lack of an effective distinction between these different categories in the context of the current mixed flows of migrants.³⁷

The 1994 immigration and asylum policy proposal relied on strong cooperation with the countries of origin of refugees. This external dimension of the policy has since been present in all the EU’s policy formulation documents: the Tampere European Council of October 1999,³⁸ the 2004 Hague Programme,³⁹ the 2005 Global Approach to Migration,⁴⁰ the 2008 European

³⁴ HYNDMAN, J., and MOUNTZ, A., pp. 249, 252 and 262.

³⁵ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final.

³⁶ According to COM(94) 23 final, para 70: “The first task in controlling migration is to formulate basic principles in order to reflect the distinction between migration pressure and other forms of migration. Admission policies will necessarily represent this distinction: they cannot be purely restrictive as they should respect international obligations and humanitarian traditions in general. Hence, controlling migration does not necessarily imply bringing it to an end: it means migration management.”

³⁷ DEN HEIJER, M., *op. cit.*, pp.165–166.

³⁸ Council, Tampere European Council 15 and 16 October 1999. Presidency Conclusions.

³⁹ Council of the EU, The Hague Programme: strengthening freedom, security and justice in the European Union [2004] 16054/04 JAI 559.

⁴⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “The Global Approach to Migration and Mobility” [2011] COM(2011) 743 final.

Pact on Immigration and Asylum,⁴¹ the 2010 Stockholm Programme,⁴² and the 2015 European Agenda on Migration.⁴³ An important feature of the EU's immigration and asylum policy is precisely the distinction between the internal and the external dimensions of this policy. In parallel to the system of rules which sets forth entry conditions into the EU, admissibility criteria and enforcement measures, laid down mainly in the SBC and the Common European Asylum System, the EU has developed an external dimension of this policy which comprises, on the one hand, a set of instruments based on the remote control of the EU's external borders ("Integrated management of the external borders") and, on the other hand, those measures aimed at enhancing the capacity in third countries to "handle migratory flows and protracted refugee situations" (External Asylum Policy).⁴⁴

The instruments which will be discussed in this section respond to the concept of "Integrated Management of the External Borders". This concept was first established by the European Commission in its 2002 Communication entitled "Towards Integrated Management of the External Borders of the Member States of the European Union",⁴⁵ and subsequently adopted by the Justice and Home Affairs Council in its "Plan for the management of the external borders of the Member States of the European Union".⁴⁶ The concept refers to the establishment of a "framework of an integrated strategy which takes progressively into account the multiplicity of aspects to the management of the external borders" of the EU.⁴⁷ Three specific compo-

⁴¹ Council of the EU, European Pact on Immigration and Asylum [2008] 13440/08 ASIM 72.

⁴² European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

⁴³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

⁴⁴ European Council, The Stockholm Programme, *op. cit.*, para 6.2.3.

⁴⁵ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament "Towards Integrated Management of the External Borders of the Member States of the European Union" [2002] COM(2002) 233 final.

⁴⁶ Council of the European Union, "Plan for the management of the external borders of the Member States of the European Union" [2002] 10019/02.

⁴⁷ COM(2002) 233 final, para 6.

nents can be identified in this strategy: (i) a common corpus of legislation, in particular the SBC; (ii) operational cooperation between EU Member States, including cooperation implemented through Frontex, and (iii) solidarity between Member States by means of the establishment of an External Borders Fund.⁴⁸ This strategy is strongly focused on ensuring security at external borders and is based on the idea that border controls are more effective if they are implemented across the various stages of an immigrant's travel towards the EU.⁴⁹

On 15 December 2015 the European Commission adopted a new set of measures to manage Europe's external borders, including the creation of a European Border and Coast Guard⁵⁰ and a European travel document for the return of illegally staying third-country nationals.⁵¹ In addition, on 6 April 2016, the Commission adopted its Communication entitled "towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe."⁵² In this Communication, one of the most controversial "new generation measure", that is, the signing of a Joint Action Plan with Turkey in October 2015 in the current context of the Syrian refugee crisis in

⁴⁸ Council of the European Union, Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting Brussels, 4–5 December 2006, p. 1.

⁴⁹ DEN HEIJER, M., *op. cit.*, p. 172; ACOSTA SÁNCHEZ, M.A. and GONZÁLEZ GARCÍA, I., "Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 05.09.2012, Parlamento c. Consejo C-355/10, 'Código de fronteras Schengen - Decisión 2010/252/UE - Vigilancia de las fronteras marítimas exteriores - Normas adicionales sobre la vigilancia de fronteras - Competencias de ejecución de la Comisión - Alcance'. Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución", *Revista de Derecho Comunitario Europeo*, n° 47, 2014, pp. 270 - 271.

⁵⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2015] COM(2015) 671 final, 2015/0310 (COD). The European Border and Coast Guard Agency (Frontex) was finally established by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard.

⁵¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals [2015] COM(2015) 668 final, 2015/0306 (COD).

⁵² European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final.

Europe, was deemed as a “legal channel of resettlement” and a “mechanism to substitute irregular and dangerous migrant crossing from Turkey to the Greek islands”.⁵³ The EU-Turkey Joint Action Plan⁵⁴ was highly criticised because it ignored the conditions of poverty suffered by the over 2 million refugees that Turkey had already received, as well as Turkey’s poor human rights record and its inadequate asylum system. In fact, by the end of 2015 forced returns by Turkey of refugees and asylum-seekers to Syria and Iraq were reported.⁵⁵

Despite criticism, this Plan was confirmed on 16 March 2016 by means of the controversial “EU - Turkey Statement” which included eight new lines of action, among them, the return to Turkey of all new irregular migrants crossing from Turkey into Greek Islands and the resettlement from Turkey to the EU of one Syrian for every Syrian being returned to Turkey from Greek Islands, taking into account the UN Vulnerability Criteria.⁵⁶ The implementation of the EU -Turkey Statement has been deemed by the EU as a success. According to the European Commission, in March 2019 irregular arrivals remain 97% lower than the period before the Statement became operational.⁵⁷ This Statement has implied a significant shift in the external dimension of the EU’s migration policy which is increasingly oriented towards the conclusion of agreements with the States of origin. Indeed, in the Malta Declaration of the European Council of 3 February 2017, the key measure is the intensification of cooperation with countries of origin or transit, in order

⁵³ European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14-15.

⁵⁴ European Commission, “EU-Turkey joint action plan” [2015] MEMO/15/5860, 1–2.

⁵⁵ AMNESTY INTERNATIONAL, *Amnesty International Report 2015/16: The State of the World’s Human Rights* (Amnesty International 2016), 43. See also CEAR, *Lesbos, “zona cero” del derecho de asilo*, CEAR, 2016, 33 and RED CROSS, “The EU-Turkey migration deal: a lack of empathy and humanity – Opinion of 23 Red Cross National Societies”, 2016.

⁵⁶ European Council, EU-Turkey statement, 18 March 2016, Press Release 144/16.

⁵⁷ European Commission, “EU – Turkey Statement. Three years on”, March 2019.

to “contain (in these countries) illegal flows to the EU.”⁵⁸ In particular, the focus is now on strengthening relations with Libya.⁵⁹

1. PASSIVE AND ACTIVE INTERCEPTION

Although there is not an internationally accepted definition of “interception”, the Executive Committee of the High Commissioner’s Programme in 2000 proposed one, which is often referred to by scholars.⁶⁰ According to the proposed definition, interception comprises “all measures applied by a State, *outside its national territory*, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.”⁶¹ This definition, which highlights the extraterritorial character of the interception measures, encompasses both “physical or active measures” of interception, such as interception of boats at sea, and “passive or administrative measures”, such as the deployment of immigration control officers in foreign countries, visa requirements, carrier sanctions or financial and other assistance to origin or transit countries. The structure of this section will follow this distinction between *passive* and *active* measures of interception.

A. PASSIVE MEASURES OF INTERCEPTION

a. The EU Visa Regime

The EU has established a common visa policy for stays in the territories of the Member States not exceeding three months in any six-month period.⁶²

⁵⁸ European Council, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, para 2.

⁵⁹ Malta Declaration, para 5 – 6.

⁶⁰ MORENO LAX, V., “Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees”, *European Journal of Migration and Law*, n° 10, 2008, pp. 315, 322 and 323; GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*, 371-372.

⁶¹ Executive Committee of the High Commissioner’s Programme, Standing Committee, “Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach” [2000] EC/50/SC/CRP:17, para 10, emphasis added.

⁶² Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1.1 (“Visa Code”).

The Visa requirements were first established in the Convention Implementing the Schengen Agreement (CISA),⁶³ and subsequently governed by Article 5 of the 2006 SBC which stated the general entry conditions which must be fulfilled by third-country nationals to be allowed entry into the Schengen area.⁶⁴ Regulation 2018/1806 (Visa Requirement Regulation) lists the non-EU countries whose nationals must be in possession of a visa when crossing the external borders of the EU. This is the so-called “black list” of Annex I of the Visa Requirement Regulation, whereas Annex II lists the countries whose nationals are exempt from requesting a visa (“white list”).⁶⁵ A considerable number of “refugee-producing” countries are included in the black list, for example, Afghanistan, Iraq, Somalia, Sudan and Syria.

Regulation 2018/1806 does not include any reference to refugees or asylum seekers. Only, with respect to “recognized refugees”, it is established that they will be required to obtain a visa or be exempt from it, depending on whether the third country in which they reside and that have issued their travel documents is included in the black list or the white one.⁶⁶ That is, even refugees who have been formally recognized as such by a third State are required to have the mandatory visa if they come from a blacklisted country. Regarding refugees not formally recognized, the regulation is silent.

In addition to the lists, certain procedures and conditions for issuing short-stay visas, transit visas through the territory of the Member States and transit visas through the international areas of airports have been also harmonized in EU law. This harmonization has been carried out mainly through the 2009

⁶³ The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and French republic on the gradual abolition of checks at their common borders, [2000] OJ L239/19. Article 5, which states the general requirements for aliens to be granted entry into the Schengen area was repealed by Article 39.1 of the Schengen Borders Code.

⁶⁴ Regulation (EC) No 562/2006, art. 5, repealed by Regulation (EU) 2016/399, which states these conditions in article 6.

⁶⁵ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 (codification) [2018] OJ L303/39.

⁶⁶ Regulation (EU) 2018/1806, Preamble (8) and art. 3.2.

Visa Code.⁶⁷ This Code does not recognize refugees a special status neither. It is applicable to those nationals subject to the obligation to obtain a visa in accordance with the list of countries provided by Regulation 2018/1806.⁶⁸ Therefore, refugees are granted in this Code the same treatment as nationals of the State in which they reside, regardless of their recognition as refugees. It does not include any reference to refugees who have not been yet formally recognized. Likewise, the Schengen Borders Code also requires holding a visa to nationals of any country that is blacklisted.⁶⁹ The first conclusion thus far is that visas are required to refugees under the same conditions as any other third-country national. The question is then what is the applicable regime to those refugees not holding a visa who manage to reach the border of the country of destination. In these cases, according to the SBC and the Visa Code, States may authorise refugees to enter their territory, “if a visa is issued at the border.”⁷⁰ However, since the fulfilment of the requirements to obtain a visa pose serious difficulties for refugees, SBC states that refusal to entry “shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection.”⁷¹

The key issue is whether this provision exempt refugees from the need to obtain a visa: on the one hand, it seems that the visa requirement is mandatory for refugees, since no exception is established for them in the rules that specifically regulate the visa requirement in the EU. On the other hand, however, the refusal to enter shall respect the right of asylum and international protection. Thus, although the Visa Code does not grant favourable treatment to asylum seekers or refugees, implying that in principle they are to comply with the requirements on the same footing as any national of a blacklisted State, they are exempt from the visa requirement according to the SBC. The paradox then is that refugees are not exempt from holding a visa until the very moment when this requirement is enforced, that is, when it is

⁶⁷ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1.1 (“Visa Code”).

⁶⁸ Visa Code, art 1.2.

⁶⁹ Regulation (EU) 2016/399, art. 6.1.b.

⁷⁰ SBC, art. 6.5.b; Visa Code, art. 35 and 36.

⁷¹ SBC, art 14.1.

checked whether the person complies with the entry conditions established in the SBC.⁷²

In the view of some scholars,⁷³ it should be understood that refugees are exempted from the obligation to obtain a visa, since this is what is most consistent with other applicable rules, including art. 5 of the CISA⁷⁴ and art. 4 of the SBC.⁷⁵ This interpretation is also consistent with national norms, among them, Spanish rules on foreigners, which provide that entry requirements are not applicable to foreigners who apply for the right to asylum at the moment of entry in the Spanish territory.⁷⁶

Nevertheless, even if we accept this interpretation, difficulties in accessing international protection remain for refugees. Firstly, they are not exempted from the visa until the very moment they are ready to cross the external borders of the Union, that is, when entry conditions established in the SBC and the internal laws of the States are triggered. In sum, if the legal consequence of the joint reading of the previous rules is that refugees do not have to obtain a visa, it is difficult to understand why the Visa Code does not establish an explicit exception in that regard.

Secondly, this must be examined in the light of the practices of Member States and the instruments they use to implement entry conditions. What state practice shows is that the standard procedure for carriers and officials deployed in foreign airports and borders is checking that individuals hold a visa, without any consideration of the rights of asylum seekers or refugees. Thus, standard procedures could be highly problematic if the checks are not accompanied by proper guarantees for refugees.⁷⁷ Moreover, the SBC requires other entry conditions that refugees are unlikely to fulfil, notably documents in which they have to justify the purpose and conditions of the stay and that

⁷² DEN HEIJER, M., *op. cit.*, 173–174.

⁷³ *Ibid.*; MORENO LAX, V., *op. cit.* (2008), 327–328.

⁷⁴ CISA, art. 5.2: “These rules shall not preclude the application of special provisions concerning the right of asylum.”

⁷⁵ SBC, art. 4: “in the application of this Regulation, the Member States shall act in full respect of the (...) applicable international law, including the Convention on the Status of Refugees made in Geneva on July 28, 1951; of the obligations related to access to international protection, especially the principle of non-refoulement, and of fundamental rights”.

⁷⁶ Ley orgánica 4/2000, de 11 de enero, de extranjería, art 25.3.

⁷⁷ DEN HEIJER, *op. cit.*, 173–174.

they have sufficient means of subsistence for the duration of the stay and for the return to their country of origin.⁷⁸

Finally, Member States are free to create more favourable conditions for asylum-seekers through the issuing of visas with limited territorial validity based on humanitarian grounds, national interest or because of international obligations⁷⁹ and the regulation of long stay visas subject to their domestic procedures and rules. The interpretation of “international obligations” was a key issue in the request for a preliminary ruling submitted to the Court of Justice of the EU by the Belgium Conseil du Contentieux des ‘Etrangers in the case *X and X vs. Belgium* but the Court, against the opinion of the Advocate General, refused to address this question on the grounds that the visa application submitted by a Syrian family was outside of the scope of the Visa Code.⁸⁰

b. Carrier sanctions

As explained above, the mere fact of not holding a visa does not in itself prevent access to the EU. Asylum-seekers could present themselves at the EU external borders and make an asylum claim that has to be examined by national authorities of the Member States, which are subject to the obligation of *non-refoulement*. However, the visa requirement has to be analysed in close connection to the EU’s carrier sanction system, which has transformed the visa requirement into a “precondition” which precludes individuals from even leaving their country of origin.⁸¹

Article 26 of the CISA lays down the duty of Member States to incorporate into their national laws three kinds of obligations for carriers which bring third country nationals by air, sea or land to the external borders of the EU: (i) the obligation to assume responsibility for aliens who are refused entry into the territory of one of the Member States and to return them to the third State from which they were transported or which issued their travel documents or any other third State “to which they are certain to be

⁷⁸ SBC, art 5.1.c.

⁷⁹ Visa Code, art. 25.

⁸⁰ Judgment of the Court (Grand Chamber) of 7 March 2017, *X and X v État belge*, C-638/16 PPU, C:2017:173.

⁸¹ GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., “The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU”, *European Journal of Migration and Law*, n° 10, 2008, pp. 439, 450–451.

admitted”,⁸² (ii) the obligation to check that aliens are in possession of the travel documents required for entry into the territory of the Member States, and (iii) the obligation to pay financial penalties in case they fail to meet their control obligations.

Article 26 CISA and the Preamble of Directive 2001/51/EC, which complements Article 26, set forth that the application of these provisions is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees.⁸³ Thus, as a matter of principle, carrier sanctions regimes shall respect international refugee obligations. Notwithstanding this, some problems have to be underlined in practice.⁸⁴ First, the regime depends on the assessment by private carriers of whether passengers who claim asylum have a founded claim. The issue is that frequently they lack proper expertise and training. Second, limitations of time and the expedient nature of boarding procedures make it unlikely that private carriers undertake assessments seriously. Third, in order to avoid fines and return obligations, private carriers tend to rely exclusively on the examination of travel documents, without any consideration of asylum claims. Fourth, if carrier sanctions regime should not prejudice asylum seekers and refugee rights, one possible interpretation is to consider that asylum seekers fall outside the scope of the regime. Thus, carriers would be allowed to board individuals without travel documents provided that they file an asylum claim when arriving at the EU’s external border. However, it is argued that such an interpretation would make the carrier regime prone to abuses if every undocumented migrant claims asylum. Fifth, there is not uniformity in the implementation of sanctions by Member States. Some Member States impose sanctions on carriers regardless of the involvement of refugees, some release carriers from the

⁸² Article 26.3 establishes some exceptions in cases of land border traffic.

⁸³ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45, Preamble, para 3.

⁸⁴ MORENO LAX, *op. cit.*, pp. 326–327; DEN HEIJER, *op. cit.*, pp. 174–177; GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., *op. cit.*, pp. 439 and 451. See also SCHOLTEN, S. and MINDERHOUD, P., “Regulating Immigration Control: Carrier Sanctions in the Netherlands”, *European Journal of Migration and Law*, n° 10, 2008 and BASARAN, E., “Evaluation of the Carriers’ Liability Regimen as Part of the EU Asylum Policy under Public International Law”, *Uluslararası Hukuk ve Politika*, n° 15, 2008.

sanctions if individuals are admitted to asylum procedures, and others release them only if asylum seekers are granted refugee status.

Along with this potentiality of the EU's carrier sanctions systems to preclude asylum seekers from accessing EU territory, another problematic issue is that this measure implies a "privatisation of migration control" where state functions are assumed by private companies which are not directly bound by international human rights standards and usually act on economic grounds which prompt private carriers to be cautious and reject any doubtful passenger.⁸⁵

c. Immigration Liaison Officers (ILOs) in third countries

A third mechanism that plays an important role in preventing asylum seekers from entering the EU is the deployment of officials of the destination country in the country of origin or transit, usually at their airports or consulates. What is most remarkable of this mechanism in the EU context is the multiplicity of bodies and networks established. First, Council Regulation 377/2004 created a network of "Immigration Liaisons Officers" (ILOs) in order to coordinate the activities of the EU Member States' officers posted in non-EU States.⁸⁶ Second, on 27 May 2005 seven EU Member States signed a Convention aimed at the stepping up of cross-border cooperation (the Prüm Convention), which envisaged, in compliance with the ILO Regulation, the secondment of "document advisers" to States deemed as origin or transit countries for illegal immigration.⁸⁷ Third, Regulation 1168/2011 authorised Frontex to send liaison officers to third States which were integrated into

⁸⁵ GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., *op. cit.*, pp. 439 and 451.

⁸⁶ Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network L 64/1, OJ L64/1 (ILO Regulation), amended by Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network, [2004] OJ L141/13, repealed by Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), OJ L 198/88 (ILO Regulation).

⁸⁷ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005, Arts 20 and 21. Bulgaria, Estonia, Finland, Hungary, Romania, Slovakia and Slovenia are also parties to this Convention which was incorporated into EU law by

local or regional ILOs networks.⁸⁸ The role of Frontex Liaison Officers was reinforced in the reform of the agency in 2016 that allowed Frontex to assign these officers also in the Member States, in order to “supervise the management of external borders”.⁸⁹ Finally, in response to the tragic situation in the Mediterranean Sea the European Council decided in 2015 to deploy “European Migration Liaison Officers” (EMLOs) in certain key countries.⁹⁰ This decision was subsequently confirmed by the European Migration Agenda and the EU Plan of Action against Migrant Smuggling adopted by the Commission in 2015.⁹¹ By January 2017, the European Union already had thirteen European Liaison Officers deployed in “priority third countries”⁹².

Considering the challenge of coordinating the activities of these bodies of liaison officers deployed by different competent authorities and of avoiding overlaps of mandates and tasks, the EU has recently approved a new Regulation establishing a network of “European Immigration Liaison Officers” (ILO Regulation).⁹³ The new Regulation 2019/1240 establishes a formal governance mechanism (Steering Board) composed of representatives of Member States, the Commission and EU Agencies (Frontex, Europol and EASO) in order to enhance coordination and to optimise utilisation of ILOs.⁹⁴

Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-Border Crime, [2008] OJ L 210/1.

⁸⁸ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1, amended by Regulation 1168/2011, OJ L3014/1, art. 14.3.

⁸⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L251/1, art. 8.1.c) and 12.

⁹⁰ Special meeting of the European Council, 23 April 2015 – statement. Press release.

⁹¹ COM(2015) 285 final, pp. 6-7.

⁹² European Commission, “DG HOME hosts European Migration Liaison Officers (EMLOs)” (Press Release), 18 de enero de 2017.

⁹³ Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast).

⁹⁴ Regulation 2019/1240, art. 7.2.

The main concern for the protection of refugees presented by this mechanism is the lack of clarity regarding the tasks the officials are entrusted with. The new ILO Regulation essentially maintains the same task scheme than Regulation 377/2014: (i) to establish and maintain contacts with the competent authorities and relevant organizations operating within the third country; (ii) collecting information in certain “concern issues” such as composition of migratory flows and migrants’ intended destination, routes used by migratory flows to reach the territories of the Member States, the existence, activities and *modus operandi* of criminal organisations involved in the smuggling of migrants; (iii) coordinating among themselves and with relevant stakeholders regarding the provision of their capacity-building activities to the local authorities; (iv) rendering assistance in establishing the identity of the different type of migrants and sharing information within networks of ILOs and with Member States’ authorities in order to prevent and detect illegal immigration and combat smuggling of migrants and trafficking in human beings.⁹⁵

Although according to these tasks ILOs should not influence the sovereign tasks of the host countries, in practice they impede individuals from exiting the country, either directly or through advice or recommendation to carriers or authorities in the country of origin or transit.⁹⁶ Among the functions listed in article 3 there is no mention of their role regarding international carriers’ activities. However, article 5.1.d) of Regulation 2019/1240 states that they shall “coordinate positions (among ILOs networks and with officials deployed by third States) to be adopted in contacts with commercial carriers.” The nature of the “contacts” with carriers is controversial since they are receiving the advice from an official of a State that is entitled to fine them if they fail to check whether individuals hold the required documentation to enter into the EU.⁹⁷ In addition, the lack of transparency regarding the activities of these officials has been denounced, since no public information is provided in connection with them. The 2004 ILO Regulation envisaged

⁹⁵ Regulation 2019/1240, art 3.3 – 3.6.

⁹⁶ GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., *op. cit.*, pp. 439 and 452; WEINZIERL, R. and LISSON, U., *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, 2007, pp. 27-28; GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*, pp. 235 and 253.

⁹⁷ McNAMARA, F., *op. cit.*, pp. 319 and 330.

biannual reports to the Council and the Commission but these reports were classified. Indeed they have been removed from new Regulation 2019/1240.

Finally, one of the main issues regarding the protection of asylum seekers, namely the total disconnection of Regulation 377/2014 from refugee rights and from the need to comply with the relevant EU law on border control and visas, has been partially addressed in the new ILO Regulation. According to article 3.6.b) ILOs “may” render assistance in “confirming the identity of persons in need of international protection for the purposes of facilitating their resettlement in the Union, including by providing them, where possible, with adequate pre-departure information and support.” Although this is a positive improvement it is surprising that this is the only task that Regulation 2019/1240 has established on a discretionary basis. Moreover, we must wait to see how this provision is implemented in practice.

Lastly, a brief mention to the controversial judgement of the UK’s House of Lords in *Roma Rights* has to be made, since it is a good example to show how ILOs can affect refugees’ rights in practice. The issue under appeal was the lawfulness of the procedures adopted by British immigration officers temporarily stationed at Prague Airport. The appellants, six Czech nationals of Romani ethnic origin, intended to leave the Czech Republic and enter into the UK but were refused permission to leave the country by the British immigration officers. This judgement is one of the most controversial in connection with the territorial scope of the Geneva Convention relating to the Status of Refugees, since the House of Lords argued that the duty of *non-refoulement* was applicable exclusively to those refugees who had managed to enter the territory of the State. Consequently, according to the House of Lords the Geneva Convention contracting States do not have legal duties towards refugees who find themselves outside their territories or at their frontiers.⁹⁸

B. ACTIVE INTERCEPTION: INTERCEPTION AT SEA AND THE ROLE OF FRONTEX

A traditional form of non-arrival policy is the interdiction of migrants on the high seas or in the territorial waters of third countries. This is the paradigmatic example of active interception. Not only have the EU Member

⁹⁸ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, 14–16.

States been engaged in these types of practices, so has the EU itself as well, through joint operations coordinated by Frontex.

There are three main categories of extraterritorial strategies deployed by the EU and the EU Member States to intercept refugees and migrants by sea: joint operations in territorial waters of third countries, based on agreements (usually under the “shiprider model”) that allow EU Member States to participate in border patrols in the territorial waters of third countries of origin of refugees and migrants;⁹⁹ “push-backs” or interdiction and summary returns of migrants to third countries;¹⁰⁰ and rescue operations followed by disembarkation in a third country. The main issue regarding rescue operations is the identification of the place of disembarkation of the rescued passengers, especially in those cases where, as we have witnessed recently, coastal states do not accept such disembarkation in their ports and the dispute among States results in long negotiations during which the most basic needs of the refugees and migrants are not provided for.

Frontex is currently running three permanent operations in the EU Member States where the migratory pressure is higher (Greece, Italy and Spain). Approximately, 1,500 border guards are deployed in these operations, along with vessels, planes, helicopters, patrol cars and other equipment.¹⁰¹ The participation of Frontex in operations of interception of refugees at sea raises also a variety of complex legal issues. One of the main concerns is the protection of human rights in these operations. There is a lack of clarity in connection with how the protection guarantees set out by the EU and international legal framework can be applied to these operations and how compliance with these standards can be monitored. Besides, there have been reported violations of human rights in areas covered by Frontex joint ope-

⁹⁹ This model involves the boarding by third countries’ officials in EU Member States’ vessels with the exclusive competences to decide on the boarding of vessels and the arrest of individuals on them. For example, Frontex operation Hera III, hosted by Spain, envisaged the placement of Senegalese and Mauritanian agents on EU Member States’ vessels with similar competencies.

¹⁰⁰ The prominent example is the Italian push-backs of migrants to Libya and Algeria. See the Memorandum of understanding of 2 February 2017 on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic.

¹⁰¹ Operations *Indalo* (Western Mediterranean), *Themis* (Central Mediterranean) and *Poseidon* (Easter Mediterranean). See FRONTEX, *2018 in Brief*, Frontex, 2018, pp- 8-9.

rations, for example, in connection with the practices of Greece, Italy, Spain and Cyprus.¹⁰² Moreover, Border control operations coordinated by Frontex at sea might push refugees to choose more risky routes in their travel to Europe's shores. A study by the Spanish Commission for Refugee Assistance (CEAR) showed that Frontex operations off the coast of the Greek island of Lesbos blocked the northern route from Turkey to this island (9 km) and as a consequence, refugees were diverted to a more dangerous and longer route (21 km), which exposed them to great vulnerabilities.¹⁰³

Another issue is the attribution of responsibilities and the identification of the real role of Frontex in the interception of refugees. This lack of clarity in Frontex mandate was one of the objectives to be addressed by the reform of the Agency in 2016. Regulation 2016/1624 considerably increases the number of tasks attributed to Frontex on the grounds of a very extensive notion of "European integrated border management."¹⁰⁴ Besides, whereas previous Regulation 2007/2004 stated that only the States were responsible for the control and surveillance of external borders,¹⁰⁵ article 5 of the new Regulation lays down that this is a "shared responsibility of the Agency and of national authorities responsible for border management." In Frontex words, for the first time, the Agency acts as an "operational arm of the EU" and as "an even closer partner for the Member States."¹⁰⁶ However, despite the expectations generated the new Regulation has not definitively clarified the issue. Indeed, after including the notion of shared responsibility, article 5 establishes that "Member States shall retain primary responsibility for the management of their sections of the external borders" and "shall ensure

¹⁰² HUMAN RIGHTS WATCH, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, Human Rights Watch, 2011; COGOLATI, S., VERLINDEN, N., and SCHMITT, P, *op. cit.*, 31. See also BALDACCINI, A., "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea" in RYAN, B. and MITSILEGAS, V., *op. cit.*, pp. 243–244; and MORENO LAX, V., *op. cit.* (2011), pp. 174, 184.

¹⁰³ CEAR, *Lesbos, "zona cero" del derecho de asilo*, CEAR, 2016), p. 9. WILLIAMS, K. y MOUNTZ, A., "Rising tide. Analyzing the relationship between externalización and migrant deaths and boat losses", in ZAIOTTI, R., (ed.), *Externalizing Migration Management. Europe, North America and the spread of «remote control» practices*, Routledge, 2016, pp. 31–49.

¹⁰⁴ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

¹⁰⁵ Regulation 2007/2004, art. 1.2.

¹⁰⁶ FRONTEX, *Annual Activity Report 2017*, Frontex, 2018, p. 7.

the management of their external borders” while Frontex “shall support the application of Union measures relating to the management of the external borders by reinforcing, assessing and coordinating the actions of Member States.” We may question what is then the meaning of shared responsibility since States are the “primary” responsible and the Agency’s role is limited to “supporting, reinforcing and coordinating” its actions. In sum, this provision perpetuates the old distribution of responsibilities between the agency and the States. Therefore, one of the main criticism of the new *European Border and Coast Guard* established by Regulation 2016/1624 is that “it is only a name.”¹⁰⁷ In sum, the absence of clarity in connection to the exact scope of Frontex’s mandate makes it extremely difficult to establish which authority should be held responsible for the protection of the individuals intercepted.

III. COMPATIBILITY OF THE INSTRUMENTS OF PRE-BORDER CONTROL WITH THE INTERNATIONAL PROTECTION OF REFUGEES AND THE PRINCIPLE OF NON-REFOULEMENT

As explained, the EU Member States, individually or under the umbrella of the EU’s strategy on integrated border management, are increasingly undertaking interception measures, both passive and active, outside their territories and territorial seas, with the purpose of forcing refugees back to their places of origin or the territory or territorial waters of other states. These strategies result in refugees being denied any direct contact with the receiving state and, as a consequence, protection of their rights.¹⁰⁸ In the light of international standards for the protection of refugees, these measures might imply an unjustified restriction on the “right to seek asylum” as well as an infringement of the principle of *non-refoulement* laid down in Article 33 of the 1951 Refugee Convention. The key question then is to determine the territorial scope of states’ obligations toward refugees, namely whether the duty of *non-refoulement* is extraterritorially applicable.

¹⁰⁷ CARRERA, S. and DEN HERTOG, L., “A European Border and Coast Guard: What’s in a name?”, *CEPS Paper in Liberty and Security in Europe*, n° 88, 2016, pp. 1-19.

¹⁰⁸ HATHAWAY, J., *op. cit.*, p. 279.

1. EXTRATERRITORIAL APPLICABILITY OF NON-REFOULEMENT PRINCIPLE

The duty of *non-refoulement* is the cornerstone or centrepiece of the international refugee protection regime.¹⁰⁹ Since the Refugee Convention does not guarantee a right to “obtain” asylum, the *non-refoulement* principle constitutes the ‘strongest commitment that the international community of States has been willing to make to those who are no longer able to avail themselves of the protection of their own government’.¹¹⁰

Unlike other articles of the Refugee Convention, which require refugees to be inside the territory of the receiving state in order to grant them the rights set out in the Convention,¹¹¹ Article 33 does not contain any spatial or territorial limitation. However, nor does the Refugee Convention contain a duty of States to protect refugees’ rights in the world at large.¹¹² This apparent ambiguity in the determination of the territorial scope of the duty of *non-refoulement* has led some States to deny its extraterritorial applicability. One of the most prominent cases of denial of the extraterritorial applicability of the duty of *non-refoulement* is the US Supreme Court’s decision in the case *Sale v Haitian Centers Council* where the Court argued that the Geneva Convention could not impose “uncontemplated” extraterritorial obligations on those who ratify it through “no more than its general humanitarian intent.”¹¹³

In the same vein, the UK’s House of Lords denied in *Roma Rights* the application of the duty of *non-refoulement* towards those refugees who ‘seek entrance into the territory’ but have not yet managed to enter into the territory.¹¹⁴ The particularity of this case was that, like other passive measures

¹⁰⁹ GAMMELTOFT-HANSEN, T., *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011, p. 44.

¹¹⁰ Ibid, 44. See also UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 5 and WOUTERS, K., *International Legal Standards for the Protection from Refoulement*, Intersettia, 2009, p. 33.

¹¹¹ For example, arts 17-19 on gainful employment, 21 on housing and 24 on labour legislation and social security.

¹¹² GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., *op. cit.*, p. 258.

¹¹³ United States Supreme Court, *Sale, acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.* (1993) 509 U.S. 155 (1993), 183.

¹¹⁴ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 17 (*Roma Rights*).

previously examined (for example, carrier sanctions and visa regimes), the claimants were intercepted before leaving the country, so they failed to meet one of the requirements for the Refugee Convention to be applicable, that is, to be “outside the country of his nationality [...] or the country of his former habitual residence.”¹¹⁵ The House of Lords did not accept a “purposive interpretation” of the Convention based on its humanitarian objects and denied the extraterritorial application of Article 33.¹¹⁶

Despite this restrictive understanding of the territorial scope of the Refugee Convention, in particular of the duty of *non-refoulement*, a significant number of scholars¹¹⁷ contend that the duty is applicable not only within the territory of the State and at its border, but also in relation to any refugee *subject to or within the jurisdiction of the state*. This position incorporates the interpretation of the *refoulement* prohibition within the broader framework of the extraterritorial applicability of international and regional human rights instruments, in particular regarding its understanding of the concept of jurisdiction. In the view of Hathaway, certain Convention rights, among which is the principle of *non-refoulement*, are not subject to any territorial limitation. The obligation of States to respect these rights arises wherever “a State exercises effective or de facto jurisdiction outside its own territory” either by State agents themselves, by private companies hired by governments, or by officials of a transit country acting on behalf of a destination State.¹¹⁸ This opinion is also supported by Goodwin-Gill and Mc Adam, who postulate that Article 33 does not require any physical presence in the territory, but prohibits the return of refugees “in any manner whatsoever” irrespective of the place where the relevant action occurs (at border posts, at transit points, in international

¹¹⁵ Refugee Convention, art. 1.A.2.

¹¹⁶ *Roma Rights*, para 18. The claim was, nevertheless, successful because the House of Lord considered that the pre-clearance procedure was discriminatory on racial grounds.

¹¹⁷ There are also contrary opinions. See, ROBINSON, N., *Convention Relating to the Status of Refugees. Its History, Significance and Contents*, Institute of Jewish Affairs, 1952, p. 29.; GRAHL-MADSEN, A., *Territorial Asylum*, Stockholm: Almqvist & Wiksell International, 1980, p. 40; AGA KHAN, S., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, “Legal Problems Relating to Refugees and Displaced Persons”, *Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, n° 149 (I), 1976, pp. 287-352 and 317-318.

¹¹⁸ HATHAWAY, *op. cit.*, pp. 335–342.

zones, beyond the national territory of the States, etc.).¹¹⁹ These authors go further, pointing out that the principle of *non-refoulement* has crystallised into a rule of customary international law, binding on all states whether or not they are parties to the Refugee Convention. The core content of this customary rule is the “prohibition of return in any manner whatsoever of refugees to countries where they may face persecution”¹²⁰. The territorial scope of this rule is informed by this essential purpose of the prohibition, thus regulating state action “wherever it takes place.”¹²¹

This is also the view of the UNHCR in its Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the Refugee Convention, which stresses the paramount importance of the concept of jurisdiction in the sense that the States are bound by Article 33 wherever they exercise *effective jurisdiction*.¹²²

In sum, there are strong legal grounds to admit the extraterritorial application of the duty of *non-refoulement*. However, there are significant gaps in the protective scope of Article 33 which have special relevance here. First, the duty of *non-refoulement* does not cover cases of mass influx of refugees insofar as it threatens the ability of the State to protect its national interests. But most importantly, the duty of *non-refoulement* does not limit passive measures of interception such as visa controls, carrier sanctions or ILOs, since refugees are not allowed to leave the territory of their own states. As the *Roma Rights* case shows, one compulsory requirement for refugees to be protected is that they actually leave their countries. Until and unless this requirement is met they are not entitled to the protection of Article 33.¹²³ With the aim of overcoming this second restriction, it has been argued that States must interpret treaties, including the duty of *non-refoulement* laid down in the Refugee Convention, in good faith, according to the principle of *pacta sunt servanda* as stated in Article 26 of the Vienna Convention on the Law of Treaties. This argument was re-

¹¹⁹ GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*, p. 246.

¹²⁰ *Ibid.*, p. 248.

¹²¹ *Ibid.*

¹²² UNHCR, *op. cit.*, para 43.

¹²³ HATHAWAY, J.C., *op. cit.*, p. 367. See also GOODWIN-GILL, G.S. and MCADAM, *op. cit.*, p. 385.

jected, though, by the House of Lords in *Roma Rights* insofar as interpreting a treaty according to its wording cannot be contrary to good faith.¹²⁴

2. RESPONSES TO THE GAPS IN THE PROTECTION OF REFUGEES

The above mentioned gap in the protection offered by the Refugee Convention has been referred as an “intractable dilemma” to the extent that as long as States do not find themselves bound by a duty to allow refugees to seek asylum in other countries, it is extremely difficult to find a proper response in international law to those measures of passive interception which “imprison would-be refugees within their own States.”¹²⁵ Some alternative responses are exposed in following sections.

A. ARTICLE 31 OF THE REFUGEE CONVENTION

Article 31 of the Refugee Convention prohibits States from imposing penalties on those refugees that enter irregularly into their territories. This provision implies an acknowledgement that due to the circumstances that lead refugees to escape they are not usually in possession of the documentation required to enter into the country. Read in conjunction with Article 33 and the right to leave a country and seek asylum, which will be discussed below, this article upholds the recognition of the right of refugees to obtain temporary admission in the territory of a state in order to have access to refugee status determination procedures.¹²⁶ According to the UNHCR, this is necessary in order to give effect to states’ obligations under the Convention, meaning that they must at least grant asylum-seekers, access to their territories and to fair and efficient asylum procedures.¹²⁷

However, despite the clarity of the wording of Article 31, this article has been disregarded in practice by States. Refugees who, according to this article, enter into a country without holding proper documentation frequently suffer from the so called “imputation of double criminality”, that is, they become under domestic law the “unlawful non-citizen” who has entered irregularly

¹²⁴ *Roma Rights*, para 19.

¹²⁵ HATHAWAY, *op. cit.*, p. 368.

¹²⁶ GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*, pp. 384-385.

¹²⁷ UNHCR, *op. cit.*, para 8.

and is “aligned with crime” by national authorities and the media so that his or her claim is assumed to be illegitimate.¹²⁸

B. THE DUTY OF NON-REFOULEMENT IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

This second alternative provides strong arguments for reinforcing the Refugee Convention’s duty of *non-refoulement*. The major human rights treaties have also established *non-refoulement* obligations for States, either through explicit provisions such as Article 3 of the Convention against Torture (CAT), Article 22(8) of the American Convention on Human Rights, and Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, or indirectly by means of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, such as Article 3 of the ECHR and Article 7 of the ICCPR. With regard to the scope of obligations under Article 3 ECHR and Article 7 ICCPR, as construed by the Human Rights Committee and the ECtHR, they also encompass the prohibition of exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country through their extradition, expulsion or return.¹²⁹

Unlike Article 33 of the Refugee Convention, these standards of human rights law do not require the refugee to be outside of his or her country in order to trigger the State’s duty of *non-refoulement*. Thus, ILOs in foreign airports or airline carriers who refuse embarkation to individuals at risk of persecution in the country they wish to leave could be considered a breach of the *non-refoulement* obligations of destination States, as stated in human rights instruments.¹³⁰

In addition, international bodies in charge of interpreting these instruments have been much more prone to the applicability of the *non-refoulement* obligations of States in an extraterritorial context. One central case is the

¹²⁸ GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*, pp. 384–385. See also HATHAWAY, *op. cit.*, pp. 370–371.

¹²⁹ In this regard, see HUMAN RIGHTS COMMITTEE, General Comment n° 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session, 1992, para 9; and *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 123.

¹³⁰ GOODWIN-GILL, G.S. and MCADAM, J., *op. cit.*, pp. 385–387; HATHAWAY, *op. cit.*, pp. 368–369.

ECtHR decision in the case of *Hirsi Jamaa and Others v Italy*.¹³¹ The case was brought by 11 Somali nationals and 13 Eritrean nationals who were part of a group of about two hundred individuals who, departing from Libya, attempted to reach the Italian coast by boat. They were intercepted on the high seas by three ships from the Italian Revenue Police and the Coastguard, transferred to Italian military ships where their personal effects and documentation were confiscated, and returned back to Tripoli.¹³² The ECtHR found that the interception of the vessels by the Italian authorities constituted an exercise of extraterritorial jurisdiction by Italy, triggering its obligations under the Convention.¹³³ In particular, the Court, although recognising the rights of States to establish their own immigration policies, considered that the removal of aliens in the context of interceptions on the high seas with the aim of preventing them from reaching the borders of the state or pushing them back to another state constituted an exercise of jurisdiction which engaged Italy's responsibility.¹³⁴ The Court stressed that "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention" and that treaties must be interpreted in good faith bearing in mind the object and purpose of the treaty.¹³⁵

The Committee against Torture has also established the extraterritorial jurisdiction of States engaged in the interception of boats on the high seas. In the *Marine I* case¹³⁶ a Spanish maritime rescue tug, in response to a distress call sent by the vessel *Marine I*, which carried 369 immigrants from

¹³¹ See BOLLO AROCENA, M.D., "Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso *Hirsi Jamaa y otros c. Italia*" in TORRES BERNÁRDEZ, S. (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez*, Iprolex 2013, p. 647; and MORENO LAX, V. "*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review*, n° 12(3), 2012, p. 574.

¹³² *Hirsi Jamaa*, para 9–11.

¹³³ *Ibid*, para 178.

¹³⁴ *Ibid*, para 180.

¹³⁵ *Ibid*, para 179.

¹³⁶ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, (*Marine I*). See WOUTERS, K, and DEN HEIJER, M., "The *Marine I* Case: A Comment", *International Journal of Refugee Law*, n° 22(1), 2009.

various Asian and African countries, towed *Marine I* from international waters towards the Mauritanian coast. Diplomatic negotiations began between Spain, Senegal and Mauritania regarding the fate of the vessel, and an agreement was reached by Spain and Mauritania eight days after the interception, during which time the ships remained anchored off the Mauritanian coast. Following the agreement, the passengers were disembarked in Mauritania and the Spanish national police force proceeded to identify them. During the recognition procedure they declared that they were fleeing persecution in India as a result of the conflict in Kashmir. The passengers were placed in a former fish processing plant under Spanish control throughout the repatriation process.¹³⁷ The claimants alleged a violation of Article 1 of the Convention against Torture on the grounds that their treatment by the Spanish authorities amounted to torture and of Article 3 because, if returned to India, they would be subjected to torture or cruel, inhuman and degrading treatment.¹³⁸ During the complaint procedure Spain denied its jurisdiction over the passengers because the incidents took place outside Spanish territory.¹³⁹ However, the Committee considered that Spain had *de facto* jurisdiction over the persons on board *Marine I* “from the time the vessel was rescued and throughout the identification and repatriation process.”¹⁴⁰ The exercise of extraterritorial jurisdiction of the state in cases of interception in territorial waters of a third state was also postulated by the Committee against Torture in the *Sonko* case, brought against Spain.¹⁴¹

C. THE RIGHT TO LEAVE ANY COUNTRY

The right to leave any country including one’s own is laid down in several human rights instruments, namely, Article 13(1) of the Universal Declaration of Human Rights, Article 12 ICCPR, Article 2 of Protocol 4 of the ECHR, Article 22 of the American Convention on Human Rights, and Article 12(2) of the African Charter on Human and Peoples’ Rights. It is not an absolute right and the above mentioned provisions establish limitations on grounds

¹³⁷ *Marine I*, para 2.1 – 2.6.

¹³⁸ *Ibid*, paras 3.1–3.3.

¹³⁹ *Ibid*, para 6.1.

¹⁴⁰ *Ibid*, para 8.2.

¹⁴¹ Committee against Torture, *Fatou Sonko v Spain*, Communication no. 368/2008, CAT/C/47/D368/2008, para 10.3.

such as national security, public order or the needs of a democratic society. However, as the Human Rights Committee has pointed out, restrictions of this right must be “provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.” Further, they must respect the principle of proportionality, be the least intrusive instrument to achieve the desired result, and be proportionate to the interest to be protected.¹⁴² Immigration controls that restrict an individual’s rights to leave do not meet these requirements.¹⁴³

Nevertheless, there is no international mechanism to implement this right. Thus, there are no legal provisions which require the right to leave to be complemented by a “duty to admit” by other States. It has been considered, then, an “incomplete right” since there is not a correlative obligation on other States to allow entry to individuals other than their own nationals.¹⁴⁴ However, in the context of refugee protection some scholars refer to the “right to leave to seek asylum from persecution”. In this particular context they contend that the right encompasses a correlative duty on other states, which consists of the prohibition of controlling the movements of persons in a manner that frustrates attempts to find effective protection.¹⁴⁵

IV. CONCLUSION

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

¹⁴² Human Rights Committee, General Comment no 27, Freedom of movement (Article 12), 1999, CCPR/C/21/Rev.1/Add.9, paras 11–18. See also MORENO LAX, V., *op. cit.* (2008), pp. 351–353.

¹⁴³ GOODWIN-GILL, G.S. and McADAM, J., *op. cit.*, pp. 381–382; DEN HEIJER, M., *op. cit.*, 246–247.

¹⁴⁴ GOODWIN-GILL, G.S. and McADAM, J., *op. cit.*, 382–383. See also MORENO LAX, V., *op. cit.* (2008), pp. 353–354.

¹⁴⁵ *Ibid*; DEN HEIJER, *op. cit.*, p. 246.

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

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

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

Problems in the identification of vulnerable refugees are exacerbated through the deployment in countries of origin of ILOs whose role and status is very controversial. They are not supposed to have any influence on the

control tasks carried out by sovereign host countries, but in practice their “advice or recommendation” to carriers or local authorities is crucial in order to prevent individuals from exiting the country concerned. Furthermore, no public information regarding their activities is provided, which has been the object of strong criticism.

Moreover, some legal instruments that create these instruments fail to consider the special vulnerabilities of refugees and include sometimes apparently contradictory rules. For example, the Visa Code does not exempt refugees from the visa requirement yet the SBC includes such an exemption, so a paradox is created due to the fact that refugees are not exempt from holding a visa until the very moment when this requirement is enforced in border or boarding checks.

Finally, the panorama of interception measures at sea is not at all encouraging. Due to the circumstances in which refugees are forced to travel, their vulnerability is especially pronounced in this context. They must frequently face high levels of violence, extortion and exploitation during their journeys. Moreover, a direct relationship between the reinforcement of migration controls and the increase in human smuggling has been reported. The main concern regarding these operations at sea is that in many cases they are in direct conflict with the Refugee Convention, notably with the prohibition of the States parties to return refugees to places where they face persecution. Regarding operations coordinated by Frontex the 2016 Regulation has not clarified the distribution of responsibilities among the Agency and the Member States whereas problems of human rights protection are still denounced in these operations.

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

Responses to these challenges must be found in legal, policy and practical scenarios. Some legal responses to the lack of protection of refugees, notably regarding the gaps in the Refugee Convention, have been pointed out in this article. Among them, international human rights law provides one of the strongest tools to protect refugees against the implementation of “non-entrée policies” by states. In addition, the EU and the EU Member States should put in place legal avenues to make it possible the enjoyment of refugee’s right to seek asylum in the EU, such as the concession of humanitarian visas, the exemption of visa requirement for certain vulnerable groups, the simplification of asylum procedures and the documentation required to asylum-seekers, or the possibility of submitting asylum claims in embassies located in third countries or to officials carrying functions extraterritorially. In the policy arena, EU Member States must find a balance between their legitimate right to control access to their territories and to combat terrorism, illegal migration and trafficking in human beings, and the international standards of protection for refugees. EU policies are so strongly focused on security issues and the fight against illegal immigration that fail to take into consideration refugee rights. Evaluations of the impact of the policies on refugee’s rights and safety are needed to avoid the exposure of refugees to more dangerous journeys to Europe. Humanitarian actors such as the Red Cross are calling Europe for the establishment of search and rescue operations in the Mediterranean Sea to put an end to the increasing number of deaths at sea.¹⁴⁶ Finally, EU instruments of pre-border control should be implemented in practice in a manner which incorporates enough guarantees to distinguish those who are in need of international protection and their specific vulnerabilities, and should not function as barriers to the right to seek asylum. Asylum claims should be individually examined, which requires a limitation in the use of collective procedures such as visa regime and procedures and carrier sanctions, which involve in practice the externalisation of examination procedures to private companies.

¹⁴⁶ RED CROSS, EU OFFICE, “Addressing the Vulnerabilities linked to Migratory Routes to the European Union”, *RCEU*, n° 12/2015-002, Position Paper 6.

BIBLIOGRAPHICAL REFERENCES

- ACOSTA SÁNCHEZ, M.A. and GONZÁLEZ GARCÍA, I., “Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 05.09.2012, Parlamento c. Consejo C-355/10, ‘Código de fronteras Schengen - Decisión 2010/252/UE - Vigilancia de las fronteras marítimas exteriores - Normas adicionales sobre la vigilancia de fronteras - Competencias de ejecución de la Comisión – Alcance’. Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución”, *Revista de Derecho Comunitario Europeo*, n° 47, 2014, pp. 270 - 271.
- AFEEF, K.F., “The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific”, *Refugee Studies Centre Working Paper*, n° 36, 2006.
- AGA KHAN, S., United Nations High Commissioner for Refugees, “Legal Problems Relating to Refugees and Displaced Persons”, *Recueil Des Cours, Collected Courses of The Hague Academy of International Law*, n° 149 (I), 1976.
- BALDACCINI, A., “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea” in *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010..
- BASARAN, E., “Evaluation of the Carriers’ Liability Regimen as Part of the EU Asylum Policy under Public International Law”, *Uluslararası Hukuk ve Politika*, n° 15, 2008.
- BOLLO AROCENA, M.D., “Push Back, expulsions colectivas y non refolement: Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia” in TORRES BERNÁRDEZ, S. (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez*, Iprolex 2013.
- BRANDL, U. and CZECH, P., “General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?” in IPPOLITO, F. and IGLESIAS SÁNCHEZ, S., *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, 2015.
- CARRERA, S. and DEN HERTOOG, L., “A European Border and Coast Guard: What’s in a name?”, *CEPS Paper in Liberty and Security in Europe*, n° 88, 2016, pp. 1-19.
- DEL VALLE GÁLVEZ, A., “Unión Europea, Crisis de Refugiados y Limes Imperii”, *Revista General de Derecho Europeo*, n° 38, 2016.
- DEN HEIJER, M., *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, p. 166
- GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., “The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU”, *European Journal of Migration and Law*, n° 10, 2008.
- GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., “Non-Refoulement in a World of Cooperative Deterrence”, *Columbia Journal of Transnational Law*, n° 53, 2015.
- GAMMELTOFT-HANSEN, T., *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011.
- GIL BAZO, M.T., “The Practice of Mediterranean States in the context of the European Union’s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited”, *International Journal of Refugee Law*, n° 18(2–3), 2006.

- GOODWIN-GILL, G.S. and McADAM, J., *The Refugee in International Law*, Oxford University Press, 3rd edn, 2007.
- GRAHL-MADSEN, A., *Territorial Asylum*, Stockholm: Almqvist & Wiksell International, 1980.
- GUILD, E. and BIGO, D., “The transformation of European Border Controls” in RYAN, B. and MITSILEGAS, V. (eds.) *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010.
- HYNDMAN, J., and MOUNTZ, A., “Another Brick in the Wall? Neo-Refolement and the Externalization of Asylum by Australia and Europe”, *Government and Opposition*, n° 43(2), 2008..
- HATHAWAY, J.C., *The Rights of Refugees under International Law*, Cambridge University Press, 2005..
- McNAMARA, F., “Member State Responsibility for Migration Control within Third States — Externalisation revisited”, *European Journal of Migration and Law*, n° 15, 2013.
- MORENO LAX, V., “*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?”, *Human Rights Law Review*, n° 12(3), 2012.
- MORENO LAX, V., “Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees”, *European Journal of Migration and Law*, n° 10, 2008.
- MORENO LAX, V., “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, *International Journal of Refugee Law*, n° 23(2), 2011.
- MUSTANIEMI-LAAKSO, M., “Vulnerability in EU policies on asylum and irregular migration” in FRAME Deliverable 11.3, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, 11-24, <http://www.fp7-frame.eu/reports/>.
- ROBINSON, N., *Convention Relating to the Status of Refugees. Its History, Significance and Contents*, Institute of Jewish Affairs, 1952.
- SCHOLTEN, S. and MINDERHOUD, P., “Regulating Immigration Control: Carrier Sanctions in the Netherlands”, *European Journal of Migration and Law*, n° 10, 2008.
- TREVISANUT, S., “The Principle of Non-Refolement and the De-Territorialization of Border Control at Sea”, *Leiden Journal of International Law*, n° 27, 2014.
- VALSAMIS, M., “Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State”, *Indiana Journal of Global Legal Studies*, n° 19(1), 2012.
- WEINZIERL, R. and LISSON, U., *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, 2007.
- WILLIAMS, K. y MOUNTZ, A., “Rising tide. Analyzing the relationship between externalización and migrant deaths and boat losses”, in ZAIOTTI, R., (ed.), *Externalizing Migration Management. Europe, North America and the spread of «remote control» practices*, Routledge, 2016.
- WOUTERS, K. and DEN HEIJER, M., “The *Marine I* Case: A Comment”, *International Journal of Refugee Law*, n° 22(1), 2009.
- WOUTERS, K., *International Legal Standards for the Protection from Refoulement*, Intersettia, 2009.



JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

SOMMAIRE / Janvier -Décembre 2019 / N° 7

ÉTUDES

Mar CAMPINS ERITJA

Transboundary Water Resources in Central Asia and its Impact in the Emergency of Conflicts Affecting Regional Stability

Eric TREMOLADA ALVAREZ

The Land and Maritime Delimitation of the Court of The Hague in the Affairs of Costa Rica v. Nicaragua, in Light of Their Proposals (February 2, 2018)

Karouma OMAR

Mutualisation des Puissances et Sécurité en Afrique: pour une approche néopragmatiste du rôle du droit

Alejandro del VALLE GÁLVEZ

The Refugee Crisis and Migration at the Gates of Europe. Deterritoriality, Extraterritoriality and the Externalization of Border Migration Controls

Maria NAGORE CASAS

The Instruments of Pre-border Control in the EU: A New Source of Vulnerability for Asylum Seekers?

NOTES

Inmaculada GONZÁLEZ GARCÍA

Immigration in Spain: Migratory Routes, Cooperation with Third Countries and Human Rights in Return Procedures

Mohamed REDA NOUR

Géopolitique de l'Intelligence Artificielle : Les enjeux de la rivalité sino-américaine

Diego BOZA – Dévika PÉREZ

New Migrant Detention Strategies in Spain: Short-Term Assistance Centres and Internment Centres for Foreign Nationals

Ahmed IRAQI

L'investissement direct étranger en tant que facteur géopolitique du Soft Power marocain en Afrique : réflexion interprétative

Angeles JIMENEZ GARCIA-CARRIAZO

Small Island, Big Issue: Malta and its Search and Rescue Region – SAR

Javier BORDON

The European Union and the Egyptian Neighbour: Assessing the Characterization of Resilience as and External Action Priority

AGORA

Claudia JIMÉNEZ CORTÉS – Montserrat PI LLORENS

Diffusion of Research Results 'Research Projects on Immigration and Human Rights : CIMCETT PROJECT'

Luis ROMERO BARTUMEUS

¿Sobrevivirá el Plan Mares al Plan Integral de Seguridad Marítima? La falta de doctrina estratégica española hacia el área del Estrecho de Gibraltar

DOCUMENTATION

Lorena CALVO MARISCAL

Relación de Tratados, Acuerdos no Normativos, Memorandos de Entendimiento y Comunicados Conjuntos España-Marruecos, 2018-2019

BIBLIOGRAPHIE CRITIQUE

DIAZ PERALTA, E., El matrimonio infantil y forzado en el Derecho Internacional. Un enfoque de género y derechos humanos, ed. Tirant Lo Blanch, Valencia, 2019. Par Marta REINA GRAU

OANTA, G. (Coord.), El Derecho del mar y las personas y grupos vulnerables, Bosch Editor, Barcelona, 2018. Par Annina BÜRGIN

TABLEAU D'ÉQUIVALENCE DES POSTES UNIVERSITAIRES

Tableau d'équivalence des postes Universitaires – Tabla de equivalencia de cargos académicos – Academic Ranks