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## Corso di Laurea Magistrale in Relazioni Internazionali Comparate

Tesi di Laurea

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# Out of sight, out of mind: extraterritorial asylum policies in Australia and in the EU

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## Abstract

Lo scopo di questa tesi è analizzare le problematiche legali ed umanitarie derivanti dall'attuazione di politiche che mirano all'extraterritorializzazione dell'asilo.

I capitoli, suddivisi per temi, tratteranno separatamente le due aree di Australia ed Unione Europea. Il capitolo primo analizzerà le politiche extraterritoriali di asilo messe in atto in Australia, partendo dai primi anni del 2000 fino ai giorni nostri. Il focus del capitolo sarà la cosiddetta “Soluzione Pacifico”, adottata dal 2001 al 2007. In secondo luogo si analizzerà la più recente “Soluzione Malesia” e le ragioni che hanno portato il governo Gillard alla proposta della stessa.

Il secondo capitolo provvederà a studiare la situazione dell'Unione Europea. Dato che, ad oggi, non è stato possibile rintracciare un vero e proprio procedimento extraterritoriale per l'asilo messo in atto da parte dell'Unione, con questa tesi si è deciso di concentrare lo studio delle diverse misure che mirano alla de-territorializzazione degli obblighi internazionali di protezione spettanti all'UE ed ai suoi singoli stati membri. Tramite un excursus storico, quindi, questo capitolo analizzerà gli eventi di maggior rilievo che hanno condotto l'Unione Europea alla ricerca di soluzioni esterne in materia d'asilo. Saranno delineate le varie caratteristiche dei Programmi di Tampere, dell'Aja e di Stoccolma (quest'ultimo è tutt'ora in corso). In seguito, saranno analizzate le più importanti, ma fallimentari, proposte extraterritoriali di Gran Bretagna e Germania e verrà fornita una descrizione dettagliata sia delle pratiche dell'Unione che portano al non-ingresso dei richiedenti asilo, sia dei recentissimi sviluppi relativi all'agenzia FRONTEX.

Il terzo capitolo, infine, provvederà a dare un'idea dell'estensione dell'attuale trasferimento delle responsabilità di protezione verso Paesi terzi messo in atto dall'UE. Si parlerà di nozione di paese sicuro, di paese di origine sicuro e di paese super-sicuro, a cui seguiranno la definizione di “resettlement” e di accordi di riammissione. Per concludere, verrà fornita una panoramica sulle “partnership” strategiche con Libia e Marocco e saranno brevemente analizzati i recenti sviluppi in materia di rifugiati relativi alla Primavera Araba.

Dato l'attuale panorama internazionale, il focus della trattazione sono le politiche utilizzate da Australia ed Unione Europea, in quanto entrambe mirano all'impedimento dell'accesso ai loro territori da parte dei richiedenti asilo, attraverso l'attuazione, rispettivamente, di procedure d'asilo extraterritoriali e accordi di riammissione, comportando una drammatica erosione degli standard internazionali di protezione.

Durante la stesura di questa tesi, infatti, si è notato come sia Australia che Unione Europea mostrino tratti comuni a riguardo delle politiche extraterritoriali sui rifugiati.

1. Il primo elemento preso in considerazione è il trasferimento di responsabilità verso paesi terzi. Da una parte, Australia ha operato la “Soluzione Pacifico” dal 2001 al 2007, che consisteva nell'esternalizzazione ad altri Paesi degli obblighi internazionali del procedimento di protezione dei richiedenti asilo, così da prevenire l'accesso al territorio Australiano. In questo modo si negava l'accesso alla protezione del diritto d'asilo australiano ai potenziali rifugiati<sup>1</sup>.

Nel contesto dell'Unione Europea, d'altro canto, le operazioni RABIT e le operazioni congiunte attraverso FRONTEX<sup>2</sup> forniscono un esempio di complicato trasferimento di responsabilità dal punto di vista della legge internazionale. Infatti, grazie a queste operazioni, le guardie di frontiera degli stati membri sono autorizzate ad operare nel territorio degli stati partner e in acque internazionali: vengono così attuati controlli prima della frontiera, che mirano ad intercettare migranti e richiedenti asilo senza distinzione, e che finiscono col rendere quasi impossibile per i rifugiati l'accesso alla protezione. Non bisogna dimenticare, a questo proposito, che lo status di rifugiato è dichiarativo<sup>3</sup> e non costitutivo, in quanto ogni individuo che rientri nelle definizioni fornite dagli strumenti internazionali è considerato rifugiato, anche senza riconoscimento ufficiale.

In questa sede, è importante ricordare che alla scelta di attuare strumenti di protezione extraterritoriale debba corrispondere necessariamente un'estensione dello

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<sup>1</sup> Vedi Mcnevin, Anne “Border Policing And Sovereign Terrain: The Spatial Framing Of Unwanted Migration In Melbourne And Australia”, In Globalizations, Vol. 7 No. 3, 2010, pp. 407-419

<sup>2</sup> Vedi le altre pratiche descritte nel capitolo II.

<sup>3</sup> Vedi quanto dichiarato da UN High Commissioner for Refugees, “Note on Determination of Refugee Status under International Instruments, 24 August 1977, EC/SCP/5, available at: <http://www.unhcr.org/refworld/docid/3ae68cc04.html>

stato di diritto (rule of law) oltre le frontiere dello stato stesso<sup>4</sup>. Come scaturisce da questo studio, invece, sia l'Unione Europea che Australia prediligono il concetto di controllo a distanza, che rischia di trascurare platealmente la nozione di giurisdizione secondo il diritto internazionale<sup>5</sup>. Infatti entrambe sostengono l'idea che gli obblighi di protezione internazionale che ogni stato deve rispettare nei confronti dei rifugiati siano intrinsecamente collegati al territorio soltanto<sup>6</sup>. In linea con gli studiosi di diritto internazionale, la tesi qui proposta sostiene, invece, che ogni tentativo di evitare il rispetto della protezione dell'asilo e dei diritti umani finisca con l'ignorare irreparabilmente il concetto di giurisdizione, il quale si applica a maggior ragione se il nesso territorio-sovrantà è debole o non esistente. In questo modo dovrebbe essere assicurato il rispetto dell'obbligo internazionale anche in caso di atti compiuti extraterritorialmente, così da evitare, in ultima istanza, l'assurda creazione di veri e propri "buchi" nel diritto internazionale<sup>7</sup>.

E' inoltre fondamentale ricordare che né la Convenzione dei rifugiati né il suo Protocollo<sup>8</sup> proibiscono o approvano esplicitamente le politiche che forniscono protezione altrove: come molti hanno notato<sup>9</sup>, queste politiche che danno luogo ad una protezione al di fuori dello Stato che dovrebbe fornire rifugio non sono di per sé in conflitto con il *τέλος* della Convenzione, purchè vengano assicurati ai rifugiati tutti i diritti previsti dagli Articoli della stessa. Per esempio, come specificato nel Michigan Guidelines on Protection Elsewhere<sup>10</sup>, premesso che la Convenzione non sembra prevedere la delega delle responsabilità ad attori internazionali non statali, risulta lampante che l'esternalizzazione e il trasferimento della protezione dei rifugiati possa essere attuata tra stati soltanto. In secondo luogo, è preferibile che lo stato ricevente i

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<sup>4</sup> Vedi ad esempio Rijpma, Jorrit J. And Cremona, Marise "The Extra-Territorialisation Of Eu Migration Policies And The Rule Of Law" Eui Working Paper, Law 2007/01

<sup>5</sup> Focarelli, Carlo "Lezioni di diritto internazionale / Prassi", CEDAM, 2008

<sup>6</sup> Vedi Gil-Bazo, Marià-Teresa "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" *Ijrl* 2006, pp. 571-600

<sup>7</sup> Vedi, ad esempio Wilde, Ralph "Legal "Black Hole"?: Extraterritorial State Action And International Treaty Law On Civil And Political Rights" *Michigan Journal Of International Law*, Vol. 26, No. 3, 2005, pp.739 – 806

<sup>8</sup> Vedi Convention relating to the Status of Refugees, 1951, and the Protocol relating to the Status of Refugees, 1967 (Introductory note by Guy S. Goodwin-Gill) available at <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>

<sup>9</sup> Hathaway, James C. , Haines Rodger P.G., Foster Michelle "The Michigan Guidelines On Protection Elsewhere" Adopted 3 January 2007

<sup>10</sup> See *ibidem*.

rifugiati trasferiti sia firmatario della Convenzione dei Rifugiati ed il suo Protocollo. Nel caso ciò non fosse possibile, diventa imprescindibile che lo stato ricevente osservi il diritto internazionale almeno sul piano pratico; per quanto riguarda gli accordi formali di riammissione, questi non possono essere considerati sufficienti come base legale per un trasferimento attuato attraverso misure extraterritoriali, a meno che non venga fornito per tempo (prima della conclusione dell'esternalizzazione) un impegno, da parte dello stato ricevente, relativo al caso specifico in questione.

In breve, questo studio sostiene che l'Articolo 33 della Convenzione dei Rifugiati riguardante il divieto di *refoulement* si applichi extraterritorialmente e che implicitamente imponga obblighi legalmente vincolanti nell'attuare la determinazione di status di rifugiato anche al di fuori del territorio dello stato ricevente<sup>11</sup>: proprio per questo l'Alto Commissariato delle Nazioni Unite per i Rifugiati (ACNUR, UNHCR in inglese) non ha fin'ora escluso categoricamente la possibilità di attuare procedure di attestazione di status extraterritorialmente, purchè vengano assicurati certi requisiti fondamentali<sup>12</sup>. Infatti, un rifugiato ha diritto a diversi vantaggi derivanti dal riconoscimento del suo status, i quali danno vita ad una precisa qualità di asilo<sup>13</sup>: per questo, quando si tenta di esternalizzare le responsabilità di protezione è importante assicurare che la qualità della protezione fornita dallo stato ricevente non sia inferiore a quella che dovrebbe essere fornita dallo stato che compie l'esternalizzazione, dato che molti dei diritti previsti dalla Convenzione dei Rifugiati non sono da intendersi in termini assoluti, ma come rapportati ai diritti di cui godono i cittadini dello stato che concede l'asilo<sup>14</sup>.

Un altro punto da considerare quando uno stato affronta il trasferimento di responsabilità verso altri stati è l'equilibrio di poteri, spesso iniquo, tra stato ricevente e stato che avvia il trasferimento: questa tesi ha osservato come l'idea Europea di

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<sup>11</sup> Vedi Erika Feller, citata in European Parliament Doc. 11304 "Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers", 2007. Vedi anche, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, 179, July 2004

<sup>12</sup> Vedi UNHCR Protection Policy Paper "Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing", November 2010

<sup>13</sup> Come sarà studiato in questa tesi, James Hathaway ha fornito una spiegazione di approccio incrementale ai benefit a cui i rifugiati hanno diritto, suddivisi secondo il loro grado di permanenza nello stato che fornisce loro la protezione. Vedi Hathaway, James C., Haines, Rodger P.G., Foster, Michelle "The Michigan Guidelines On Protection Elsewhere" Adopted 3 January 2007

<sup>14</sup> Ad esempio, il diritto all'educazione, al lavoro, alla libertà di movimento... Vedi sopra.



“conditionality” basato sull'approccio del bastone e della carota<sup>15</sup> si sia rivelata utile nel forzare il partner ad accondiscendere alla volontà degli stati membri. Tuttavia la priorità data agli stati più vicini geograficamente<sup>16</sup>, la negligenza in fatto del rispetto dei diritti umani da parte del partner ed il mancato riconoscimento dei bisogni primari di quest'ultimo potrebbe rivelarsi fallimentare e forse contrastare il fine ultimo della cooperazione, soprattutto quella in campo extraterritoriale.

Da questo punto di vista, sia Australia che l'UE hanno fallito nel prendere in considerazione i problemi profondi affrontati dai partner, spesso già soffocati oltre misura, prima di proporre soluzioni di regionalizzazione del procedimento di attestazione dello status dei rifugiati. E' necessario assicurare una protezione effettiva e, soprattutto, va implementato un vero meccanismo di “divisione del fardello” (burden-sharing).

Il resettlement da paesi terzi, sebbene venga riconosciuto come strumento volto a rafforzare il “burden-sharing” internazionale dei rifugiati, si sta sempre più configurando come sostitutivo della ricezione degli arrivi spontanei<sup>17</sup> dei richiedenti asilo a causa della regionalizzazione. Il resettlement sta diventando, cioè, strumento attraverso il quale gestire le migrazioni e grazie al quale vengono attuate vere e proprie politiche di spostamento, e non più divisione, del fardello.

Di questo si son accorti molti stati partner, che hanno protestato veementemente<sup>18</sup>, rifiutando apertamente di attuare il procedimento di attestazione dello status di rifugiato all'interno della regione di origine: infatti la gran parte dei rifugiati nel modo si trova già bloccata all'interno della propria regione di origine. In questo senso, il caso della Tanzania illustrato in questa tesi mostra come l'attuale regime di controllo a distanza possa facilmente essere capovolto quando vengono astutamente imitate le politiche dell'Unione<sup>19</sup>.

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<sup>15</sup> Guild, Elspeth “The Europeanisation Of Europe’s Asylum Policy.” *Ijrl*, Vol. 18 No. 3, 2006, pp. 630-651

<sup>16</sup> Vedi “Analysis of the external dimension of the E.U.’s asylum and immigration policies”-summary and recommendations for the European Parliament, PE 374.366 , 2006

<sup>17</sup> Vedi Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, *The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)*”, *Refugee Survey Quarterly*, Vol. 29, No. 1, 2010, pp. 92-119.

<sup>18</sup> Loescher e Milner hanno studiato la reazione negativa durante l' UNHCR intergovernmental meeting del marzo 2003, *Convention Plus*. See Loescher, Gil And Milner, James “The Missing Link: The Need For Comprehensive Engagement In Regions Of Refugee Origin” *International Affairs* Vol. 79, Issue 3, May 2003, pp- 595-617

<sup>19</sup> Vedi Betts, Alexander And Milner. James “The Externalisation Of EU Asylum Policy: The Position

Tuttavia esistono differenze nell'atteggiamento degli stati verso i partner: da una parte, infatti, l'Unione Europea ha attuato una serie di misure nei paesi di transito Marocco e Libia, dall'altra Australia ha puntato l'attenzione su politiche di procedimento d'asilo extraterritoriali in paesi terzi non collegati in alcun modo con i richiedenti asilo ivi trasferiti, per i quali questi ultimi non sono mai transitati.

Decisamente lungi dall'essere equo, l'equilibrio di poteri tra stati contraenti e riceventi risulta essere diverso in ciascuno dei due casi qui considerati: come mostrato nel capitolo I di questa tesi, sia Nauru che Papua Nuova Guinea sono paesi quasi totalmente dipendenti dall'Australia e, perciò, sicuramente inclini ad accettare qualsivoglia proposta unilaterale da parte del partner.

D'altro canto, Libia e Marocco sono stati capaci di maggior nerbo e fanno sfoggio di una più profonda interdipendenza nelle contrattazioni con il partner Unione Europea e con i suoi stati Membri. Il risultato che ne consegue è un maggior peso specifico e più ampio margine di manovra nelle contrattazioni<sup>20</sup>: grazie a questo dialogo, seppur iniquo, sulle politiche extraterritoriali, la collaborazione europea con gli stati partner ha raggiunto un alto livello di coinvolgimento nell'area Mediterranea non riscontrabile, invece, nell'area della Soluzione Pacifico<sup>21</sup>.

Infine, Australia ha perseguito unilateralmente le sue politiche di protezione extraterritoriale, mentre i diversi stati membri hanno presentato le loro proposte nel forum sopranazionale dell'Unione Europea, hanno agito attraverso FRONTEX, e, forse proprio per questo, hanno fallito. Secondo Carl Levy<sup>22</sup>, poi, le proposte di protezione d'asilo extraterritoriale in Europa potevano difficilmente finire in altro modo, poiché erano prova della contraddizione alla base della politica europea: l'Unione, infatti, non si è ancora accettata come area di immigrazione, a differenza

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Of African States”, Compas Working Paper 36, Oxford, 2006

<sup>20</sup> Afeef, Karin, Fathimath, “The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific” Rsc Working Paper No. 36, University Of Oxford 2006

<sup>21</sup> Riportiamo qui il paradossale risultato che, secondo Afeef e Gibney, potrebbe nascere dalle politiche extraterritoriali dell'asilo. Secondo i due autori, infatti, l'extraterritorialità potrebbe dar luogo ad una maggiore diffusione dei diritti umani. Vedi ibidem. Ad ogni modo, è d'obbligo sottolineare che, sebbene ai fini di questa trattazione Marocco e Libia siano analizzati come un unico gruppo, in realtà una fondamentale differenza tra loro resta. Dal punto di vista della legge dei rifugiati, infatti, Marocco è firmatario della Convenzione, mentre la Libia si è sempre rifiutata di farlo.

<sup>22</sup> Vedi Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)”, Refugee Survey Quarterly, Vol. 29, No. 1, 2010, pp. 92-119.

dell'Australia, e ad oggi non ha attuato un sistema di resettlement a livello Europeo che accetti rifugiati dall'estero. In poche parole, l'Unione Europea cerca lavoratori immigrati a basso costo, ma allo stesso tempo rifiuta la necessaria integrazione di questi ultimi nella società<sup>23</sup>.

2. Dopo aver affrontato il discorso del trasferimento della responsabilità di protezione, passiamo ora al secondo elemento comune nel modo in cui Australia ed EU hanno dato il via a politiche d'asilo extraterritoriali, cioè il concetto di paese terzo sicuro ed altri cavilli legali.

L'operazione chirurgica Australiana di recisione di migliaia di isole dalla zona di migrazione è stata attuata proprio per creare una barriera all'accesso dell'asilo. Infatti gli studi compiuti in questa tesi mostrano come l'approdo su una zona recisa diventi strumentale per la creazione di una nuova categoria legale, la "offshore entry person" (OEP, l'individuo entrato in zona offshore). L'OEP si vedrà negato il diritto di chiedere rifugio e gli sono sottratti il diritto di revisione giudiziale e di procedimento equo dell'eventuale status di rifugiato.

Un risultato simile è raggiunto dall'Unione Europea, che, invece, espande i suoi confini ulteriormente nel Mediterraneo: controlli prima della frontiera ed interdizioni sono attuati attivamente in acque internazionali e in posti di imbarco agli aeroporti<sup>24</sup>, riuscendo nell'intento di impedire l'accesso al suolo dei suoi stati membri e, di conseguenza, alla loro asilo. Inoltre il sistema Dublino II sposta la protezione di responsabilità agli stati membri lungo la frontiera esterna dell'Unione, secondo il criterio di primo paese d'accesso (ammesso che il richiedente asilo non possa essere preventivamente rimandato in un paese partner all'esterno dell'UE grazie alla nozione di terzo paese sicuro<sup>25</sup>). Mentre è ampiamente riconosciuto che la Convenzione dei Rifugiati escluda dall'asilo quegli individui che stiano già godendo di un più alto livello di protezione in altri stati<sup>26</sup>, non si trova in essa alcuna base legale per le

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<sup>23</sup> Van Buuren Jelle "Gli Immigrati Respinti Verso"Paesi Terzi Sicuri",Le monde diplomatique,

<sup>24</sup> Mcnevin describes the new border as target-oriented and fluctuating. See Mcnevin, Anne "Border Policing And Sovereign Terrain: The Spatial Framing Of Unwanted Migration In Melbourne And Australia" In Globalizations, Vol. 7 No. 3, 2010, pp. 407-419 territory's edge.

<sup>25</sup> Garlick, Madeline "The Eu Discussions On Extraterritorial Processing: Solution Or Conundrum?" International journal refugee law Vol. 18 No. 3, 2006, pp. 601- 629

<sup>26</sup> L'asilo viene escluso quando il livello di protezione fornito dall' altro stato è uguale a quello di cui godono i cittadini di quello stesso stato. Foster, Michelle "Protection Elsewhere: The Legal

nozioni di terzo paese sicuro<sup>27</sup> (e, in ogni caso, l'uso attuale delle politiche di asilo extraterritoriali mirano ad un diverso scopo rispetto alla Convenzione).

Secondo quanto detto fin'ora, quindi, Australia ed Unione Europea costituiscono un chiaro esempio del trend attuale dei paesi industrializzati<sup>28</sup> a ricorrere a nozioni di paesi terzi, anche quando è provato che il livello di protezione offerta dallo stato ricevente sia di gran lunga inferiore a quanto richiesto dalla Convenzione.

Quindi, viene sostenuto in questa tesi, l'utilizzo corrente di concetti di terzo paese sicuro è necessario ed essenziale per sorreggere l'impalcatura della struttura di protezione altrove, per impedire l'accesso alla protezione e nel traslare le responsabilità internazionali lontano dalle nazioni industrializzate<sup>29</sup>.

Sia i singoli stati membri che Australia stanno cercando nuovi mezzi per eludere i loro obblighi internazionali di protezione, valutando quest'ultima nozione solo da un punto di vista strettamente legato al link territorio-sovrantà, nonostante l'attuale dottrina dei diritti umani riconosca che il concetto di giurisdizione sia applicabile ben oltre i confini territoriali dello stato<sup>30</sup>.

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Implications Of Requiring Refugees To Seek Protection In Another State” In Mich. J. Int’l L. Vol.28 2006-2007, pp. 223-286

<sup>27</sup> Il concetto quindi si basa su una lettura letterale della Convenzione, che supporta la concezione di asilo fornita a rifugiati che provengano direttamente dal paese di persecuzione e ai rifugiati richiedenti asilo nel primo paese possibile. Secondo molti studiosi, tuttavia, il concetto di terzo paese sicuro può essere considerato come violazione dell'articolo 31 della Convenzione stessa, poiché costituirebbe una penalità imposta sul modo di ingresso del richiedente asilo nel territorio dello stato dove si chiede asilo. Kneebone, Susan “The Legal And Ethical Implications Of Extraterritorial Processing Of Asylum Seekers: The ‘Safe Third Country’ Concept.” In Studies In International Law: Forced Migration, Human Rights And Security, Edited By Jane Mcadam. Portland: Hart Publishing, 2008, Pp. 129-154

<sup>28</sup> Per esempio oggi vengono attuate restrizioni geografico-territoriali dell'obbligo di non-refoulement, in chiara contravvenzione della pratica e dottrina internazionale, che sostiene come questo obbligo si applichi ovunque uno stato eserciti la sua giurisdizione. Vedi parte B “Extraterritorial applicability of Article 33 (1) of the 1951 Convention” in UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007

<sup>29</sup> Ad esempio in questa tesi viene richiamata l'attenzione sul cavillo fornito in sede del caso Sale v. Haitian Centres Council, quando il significato comune del verbo francese “refouler” fu tralasciato per ricorrere invece al significato extra-ordinario e ai lavori preparatori della Convenzione dei rifugiati. Solo così fu trovata giustificazione per i respingimenti americani nei confronti delle navi haitiane. L'unica opinione contraria fu sostenuta da Justice Blackmun, che affermò con forza come il divieto di refoulement contenuto nella Convenzione dei Rifugiati sia lampante e non ambiguo. Sale v. Haitian Centres Council, INC., 509 U.S. 155 (1993)

<sup>30</sup> Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 1216, 2005; vedi anche paragrafo 109 del “Legal consequences on the construction of a wall in the OPT”, in cui la corte internazionale di giustizia riconobbe esplicitamente che la giurisdizione si applichi anche extraterritorialmente, a maggior ragione se si considera lo scopo del trattato. “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, 179, July 2004

3. In conclusione, il terzo tratto comune che sarà qui considerato è l'idea, ormai assai diffusa, dell'efficienza e dei costi dell'asilo. Usata come giustificazione per mettere in atto requisiti d'accesso più restrittivi e valutazioni più rigide, il concetto di efficienza fa parte dei discorsi retorici che promuovono politiche di protezione nella regione di origine e procedimenti extraterritoriali. Tuttavia è importante sottolineare come quella dell'efficienza sia una giustificazione puramente politica, che non trova fondamento alcuno nei diritti umani.

La premessa su cui si basa il discorso sull'efficienza dell'asilo nasce dalle spese esose che gli stati affrontano nell'accoglienza dei richiedenti asilo, che, invece, stando alla logica del nord globale, potrebbero essere meglio allocate se indirizzate verso il rafforzamento delle disposizioni di protezione dei rifugiati nelle regioni di origine e in terzi paesi sicuri<sup>31</sup>. Ad esempio il documento del 2003 della Gran Bretagna “New International approaches to Asylum Processing and Protection” era imperniato sul presunto fallimento dell'attuale sistema internazionale di protezione, fallimento a sua volta collegato alla iniqua distribuzione nel mondo degli aiuti economici per i rifugiati.

In quel documento si faceva riferimento ad una spesa di oltre \$10,000 all'anno per gli stati industrializzati ed era brutalmente comparata ai \$50 che l'ACNUR spende ogni anno per ciascun singolo rifugiato del mondo<sup>32</sup>: in questa tesi verrà dimostrato come questo ragionamento sia fallace, come supportato in primo luogo dalle spese extraterritoriali Australiane<sup>33</sup> e i \$5 miliardi promessi a Gheddafi<sup>34</sup> per garantire il suo appoggio nelle misure europee di prevenzione dell'accesso all'asilo.

Inoltre è importante sottolineare che il fardello dei rifugiati portato sulle spalle

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<sup>31</sup> Questa fu la premessa su cui fu fondata la proposta del 2003 della Gran Bretagna. Si veda il capitolo II. Tuttavia l'esempio della “Soluzione Pacifico” mostra come questa premessa fosse infondata, poiché ad esempio nel paragonare i procedimenti di attestazione dello status offshore e in terraferma, fu calcolata una spesa di AU\$65 al giorno a Sidney, AU\$ 236 era la spesa a Cocos Island e AU\$293 su Christmas Island. Saunders, citata dall' European Parliament “Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers”, Parliamentary Report, Doc. 11304, 13 June 2007 available at: <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11304.htm> last accessed 7 September 2012

<sup>32</sup> <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldselect/ldcom/74/7415.htm>

<sup>33</sup> Fu stimato che le spese extraterritoriali fossero cinque volte maggiori che sulla terraferma. Si veda nota 31 e <http://www.theaustralian.com.au/news/nation/offshore-option-five-times-dearer/story-e6frg6nf-1225983879727>

<sup>34</sup> Si veda capitolo III e [http://it.wikisource.org/wiki/Trattato\\_Di\\_Amicizia\\_Partenariato\\_E\\_Cooperazione\\_Tra\\_La\\_Repubblica\\_Italiana\\_E\\_La\\_Grande\\_Giamahiria\\_Araba\\_Libica\\_Popolare\\_Socialista](http://it.wikisource.org/wiki/Trattato_Di_Amicizia_Partenariato_E_Cooperazione_Tra_La_Repubblica_Italiana_E_La_Grande_Giamahiria_Araba_Libica_Popolare_Socialista)

di Australia ed UE non è solo puramente monetario, poiché nel dibattito dell'asilo questi alti costi percepiti comprendono anche costi sociali e quelli derivanti dal contesto politico. Tuttavia, come dimostrato in questo studio, i paesi in via di sviluppo stanno in realtà affrontando sfide ancor più problematiche sia nel lungo che nel breve periodo, poiché stanno già ospitando la maggior parte dei rifugiati del mondo e, oltretutto, non dispongono dei mezzi adatti e necessari per affrontare e contenere i costi sociali e politici che scaturiscono da questa situazione.

Secondo gli autori, dal punto di vista del diritto dei rifugiati, Australia ed UE dovrebbero considerare non solo la qualità dell'asilo<sup>35</sup> fornita negli stati riceventi le politiche extraterritoriali, come già detto in precedenza, ma anche la presunta equipollenza della protezione nella regione di origine e del sistema di resettlement, rispetto all'accoglienza degli arrivi spontanei dei richiedenti asilo<sup>36</sup>. Il ricorso a partnership con paesi che forniscono un basso livello di asilo svela la volontà di Australia ed UE di utilizzare questi stati come deterrente, come stati cuscinetto<sup>37</sup> nei confronti di tutti quei rifugiati e richiedenti asilo che cercano di raggiungere le coste Europee ed Australiane.

Questa tesi dimostra come i concetti di terzo paese sicuro, gli accordi di riammissione, la recisione di parte del territorio e le politiche extraterritoriali in generale stiano modificando la forma del sistema internazionale di asilo, erigendo nuove (fittizie) barriere geografiche e restrizioni nei confronti dei rifugiati. Il risultato, in una parola, è il cosiddetto “*neo-refoulement*”<sup>38</sup>, un nuovo *refoulement* che impedisce ai richiedenti asilo e rifugiati ciò che di diritto spetterebbe loro grazie alla Convenzione dei rifugiati, cioè, innanzi tutto, l'accesso alla protezione.

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<sup>35</sup> Si veda prima, nota 9.

<sup>36</sup> Betts, Alexander “What Does ‘efficiency’ Mean In The Context Of The Global Refugee Regime?” “Compas Working Paper No. 9, University Of Oxford, 2005

<sup>37</sup> On the illegality of the recourse to offshore deterrence see Hathaway, James C. “The false panacea of offshore deterrence”, 2006 available at <http://www.fride.org/publication/89/other-publications>

<sup>38</sup> Hyndman, Jennifer And Mountz, Alyson “Another Brick In The Wall? Neo-Refoulement And The Externalization Of Asylum By Australia And Europe” In *Government And Opposition*, Vol. 43, No. 2, 2008, Pp. 249–269

## Introduction

Our feelings of belonging to one nation are suddenly awakened by the pride of winning a soccer match, but in our everyday life we easily forget all the implications that the Westphalian order brings with it.

We are living in a world made of sovereign nation-states, each of which exerts its control over its own territory and over its own population, which in turn should carry its own identity, history, language and, in many instances, religion.

Therefore, territory is one of the main characteristics defining State sovereignty and exclusive control over a delimited territory<sup>39</sup> is the essential prerequisite in order to gain recognition as a State among the international community<sup>40</sup>, and thus being primary subjects of international law. This subjectivity comes, however, with responsibilities.

Indeed, the State has the duty to protect those inside its territory, or at least its own citizens. Therefore, reinforcing the idea of belonging is of utmost importance, in order to define who are the nationals of the State and thus will have their rights recognized and the others who, instead, are left outside of the territory and are granted different entitlements.

Keeping in mind this link between the State, its territory and its primary position *vis-à-vis* the international community, let us move on to look at the current international panorama. The idea of modern State seems to be in crisis today. After the break up of the balance provided during the Cold War, we are living in a global world, crossed by hardly-manageable migratory flows.

The state and its government face new challenges and more and more try to adapt their shape<sup>41</sup> and stretch their powers further, attempting to survive. Hence, State's sovereign control is not solely understood as being exerted on territorial areas anymore, but increasingly there is a perceived need of control and manage flows

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<sup>39</sup> See Focarelli, Carlo "Lezioni di diritto internazionale / Prassi", CEDAM, 2008

<sup>40</sup> See for instance, chapter II "Membership", United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

<sup>41</sup> For an overview of the state's borders erosion see: Cuttitta, Paolo "Points And Lines: A Topography Of Borders In The Global Space" "Ephemera Vol.6, No.1 (2006), Pp. 27-39

that are running through the State's soil.

In brief, governments and states are going extraterritorial, in other words they are looking for new solutions through which expanding their functions abroad. The engagement in activities abroad usually results in the erosion of human rights guarantees, since these new venues can evade scrutiny and are likely to represent greater risks of violations. Especially in the context of the utopian management of the so-called “mixed flows”<sup>42</sup>, governments are engaging in extreme measures against “the others” in the attempt to prevent asylum-seekers from accessing their territories and to regulate the movements of unwanted migrants.

On the one hand states maintain the right to enforce law within their own borders and also to control entries. However, on the other hand they are bound by international refugee law and international human rights treaties. Hence, also when moving away from their territories, states' actions trigger the concept of jurisdiction under international law.

Therefore, when searching for new extraterritorial venues, governments are nevertheless constrained in their acts, being allowed to operate legally only without breaching the right of potential refugees to seek asylum as those fleeing from persecution and in some cases generalised violence. Among the global North states, the results of reconciling these (apparently) schizophrenic imperatives are unilateralism and burden-shifting in the field of asylum: increasingly, entry restriction provisions and cuts to the levels of welfare provisions to asylum-seekers are mandated.

At the very core of the current refugee regime<sup>43</sup> lies a paradox, only partially solved by the famous *non-refoulement* principle<sup>44</sup>, which acts as a bulwark of the

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<sup>42</sup> As most international law scholars abundantly stress, migrants and refugees are to be treated differently. See, for instance, <http://www.unhcr.org/pages/4a16aac66.html>

<sup>43</sup> The cornerstones of the actual refugee regime are the 1951 Geneva Convention Relating To The Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and its Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>44</sup> The non-refoulement principle is enshrined in Article 33 paragraph 1 of the 1951 Refugee Convention and states that: “No Contracting State shall expel or return ( “refouler” ) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The principle is accepted as being a norm of customary international law and is therefore binding on all states, including those that did not sign the Refugee Convention. See UNHCR, “State of the World’s Refugees”, Oxford, Oxford University Press, 2006



international refugee protection regime and at the same time stresses the right to seek asylum. Indeed, even though Article 14 paragraph 1 of the 1948 Universal Declaration of Human Rights states that “*Everyone has the right to seek and to enjoy in other countries asylum from persecution*”<sup>45</sup> there is no substantive right to asylum in international law. Namely, given the right to leave one's country, there is no corresponding obligation for the State to process asylum-seekers nor to grant them asylum, somehow underlining the primary importance of sovereignty compared to the individual in the international scenario.

Moreover, due to the lack of binding enforcement mechanism, the 1951 Geneva Convention<sup>46</sup> and the UNHCR' s Executive Committee display themselves as toothless tiger, since they cannot put into force anything more than moral persuasion or advice, while trying to convince states to cooperate and find a way to reach a more sustainable and equitable asylum regime<sup>47</sup>.

### **International scenario: an overview of the last two decades**

What pushed states and governments in recent decades to change direction in the field of refugee system, if there ever was a change of direction and finally, what does extraterritorial asylum mean in the actual global context?

As Crisp suggests<sup>48</sup>, the actual challenges to asylum are not new since states, as the other international actors, are simply playing their own games. In other words, they will try to bend the rules of the international refugee regime when it best suits them. It is therefore hard to say when exactly the alleged asylum paradigm shift took

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<sup>45</sup> UDHR, United Nations General Assembly, 10 Dec. 1948, UN Doc. A/810. See also art 13 paragraph 2, which declares the right to leave one's country.

<sup>46</sup> Convention relating to the Status of Refugees, 1951, and the Protocol relating to the Status of Refugees, 1967 (Introductory note by Guy S. Goodwin-Gill) available at <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>

<sup>47</sup> At the present time Southern states are esteemed to host over 80% of the world's refugees, since usually they remain within their region of origin. See “Development Assistance And Refugees : Towards A North-South Grand Bargain ?”, Refugee Studies Centre Policy Brief No. 2 (RSC: Oxford), 2009

<sup>48</sup> “We should not imagine that there was ever a golden age of asylum” Crisp, Jeff “A New Asylum Paradigm? Globalization, Migration And The Uncertain Future Of The International Refugee Regime”, Working Paper No. 100, New Issues In Refugee Research 2003

place<sup>49</sup>, although it is widely recognized that after the end of the Cold War and the collapse of the bipolar-balance of the world the ideological added value of refugees suddenly disappeared. Indeed, donor states were not interested in finding potential allies against communism through the instrumental use of refugee assistance programmes anymore.

Therefore, after the fall of the Iron Curtain and the subsequent introduction of pluralistic system of governments, it is noteworthy that the issue of refugees was covered with many layers of political veils. Caught between large numbers of arrivals, at first coming directly from the wars in Croatia and Bosnia in the early 1990s, later on escaping from the ethnic cleansing and generalised violence in Kosovo during 1998-1999, and the mounting security interest of the EU Member States (as they were the main destinations for refugees fleeing the wars), governments felt pushed to enforce more effective external border controls with the aims of reassuring their domestic electorates, while the internal abolition of border controls on movement of person had already been put into effect in the European Union<sup>50</sup>.

Quite predictably, in the 1990s in that area the number of persons seeking asylum skyrocketed, reaching the height of 675,460<sup>51</sup>, thus paving the way for the increasingly restrictive measures adopted by Western States, which wisely seized the occasion and translated the discourse into a crisis of control. Hence, facing the difficulty in preventing the arrival of more foreigners, there was a race-to-the-bottom regarding recognition rates, and even though in the last years numbers of arrival did not reach the peak of 1990s, quite the contrary since a steady decline took place<sup>52</sup>, new measures have been added to the already strict ones, such as carrier sanctions, extended visa regulations, documentation checks at the airports, readmission agreements with sending and transit countries, mandatory detention, restriction on the

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<sup>49</sup> See Noll, Gregor, "Vision Of The Exceptional" Working Paper 2003 and Schuster, Liza "The Realities Of A New Asylum Paradigm" Compass, Working Paper No.20, University Of Oxford 2005

<sup>50</sup> See chapter II and the Schengen Convention, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common borders.

<sup>51</sup> Bright, Martin "Asylum Crisis Hyped in Europe, Says UN", The Observer, 2 June 2002.

<sup>52</sup> In the Eu from January to September 2005 it was recorded a 16% drop in the number of asylum-seekers compared to the same period in 2004, and even a 32% fall compared to 2003. See "UNHCR, 'Asylum Levels and Trends in Industrialized Countries — Third Quarter 2005'", January 2006, table 1.

freedom of movement, restrictive social welfare provisions, distorted interpretation of the Refugee Convention and so on. However, it is important to underline that the number of asylum applications is only partially influenced by government control devices. Other factors, such as changes conditions in countries of origin or transit, the impossibility to get a work or a family reunion visa or rendering the paths to regularisation more difficult are among the condition which lead to an increase in asylum applications.

Moreover, the world economic recession of the late 1970s forced states to reduce incentives to accept migrants. As a consequence of this, at the state level is argued that a widespread abuse of the asylum door is taking place, governments and media put into play a shift in the political terms when referring to refugees, maintaining that large numbers of those who apply for asylum are “*jumping the queue*”<sup>53</sup> or “*bogus refugees*”.

This negative connotation (and the hyped size) added when depicting asylum-seekers, suggests that those fleeing from persecution and claiming asylum are not bona fide refugees, but merely economic migrants who, attracted by the pull-factors of wealthy countries, are trying new channels to entry into the State's borders. Therefore, they represent a threat to the welfare state. Moreover, adding that only less than a third of all the applicants are eventually granted some form of protection, it is not surprising that this highly politicised discourse has been spreading quite easily world-wide, slimming down an always-more-blurred distinction between asylum-seekers and migrants.

By the same token, the act of portraying asylum-seekers as a threat is useful when governments are seeking a legitimization for enacting extraordinary measures, thus creating an almost-permanent national security emergency and enforcing ad hoc security agendas<sup>54</sup>.

Therefore, exclusion at the borders and non-entrée practices reiterate the idea of clash between the inside and the outside, which is now managed by the state with the

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<sup>53</sup> See Gelber, Katharine, “A Fair Queue? Australian Public Discourse On Refugees And Immigration” In Journal Of Australian Studies, Vol. 27 No. 77, 2003, Pp. 23-30

<sup>54</sup> For instance last spring Franco Frattini, the Italian Foreign Minister, suggested the arrival on the EU shores of a “biblical exodus”, a flood of 200,000 or 300,000 migrants. See the interview available at <http://it.euronews.com/2011/02/23/immigrazione-frattini-l-europa-intervenga/> last accessed 22 July 2012 Furthermore, note that depicting asylum-seekers as a security threat has a performative element, it produces the effects it names.

introduction of a thinner of rule of law and a tougher use of many latest-technologic Big Brothers against “the others”. Both Australia and the EU<sup>55</sup> rely largely on technology to intercept, single out and tow back asylum-seekers, while allegedly enforcing human security at the expenses of human rights. Hence, without thinking to the implication this systematic use of databases and information exchanges might mean, especially regarding the utmost importance data protection rules mean for asylum-seekers and refugees, the principle of proportionality and the protection of fundamental rights are eroding.

In addition, even more interesting for the scope of this thesis, is the actual willingness to share this technocratic power with transit, buffer and third countries, which instead resulted in a complete failure. Contrary to any prevision, the use of the latest technological device seems only to stimulate asylum-seekers in finding new way round to these barriers, even though this means risking their lives in extremely dangerous journeys .

Along with the “securitization” of asylum<sup>56</sup>, many suggested that western countries should put forward increasingly creative offshore policies, in addition to the restrictive asylum policies enacted so far, which had failed to drastically cut the numbers of new asylum applications.

It would be misleading, however, to think that these attempts are brand-new<sup>57</sup>. In fact, the United Nations High Committee for Refugees (UNHCR) has so far sought restlessly to find innovative solutions to the perceived never-ending problem of refugees and already in 1993 the UN High Commissioner for Refugees Mrs. Sadako Ogata proposed the “preventive protection” concept, which marked a sudden shift in refugee policy. Choosing this wording, indeed, she underlined the idea of the “right to remain” in the region of origin, which is in open contrast to the traditional and up-till-then dominant concept of the “right to leave” and the view that refugee protection has necessarily to be found away from the source of persecution, as endorsed in the

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<sup>55</sup> See, for instance, Australia's controversial use of youtube videos in order to prevent arrivals, or the several SIS I and II, EURODAC, CIS, Europol Computer System and VIS used by EU.

<sup>56</sup> See instead Boswell and Afeef, who deny the securitization of asylum in their articles: Boswell, Christina “ Migration Control In Europe After 9/11: Explaining The Absence Of Securitization” *Jcms* Volume 45. Number 3. Pp. 589–610, 2007 and Afeef, Karin Fathimath, “The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific” *Rsc Working Paper No. 36*, University Of Oxford, 2006

<sup>57</sup> The first offshore proposal was put forward in the mid 1980s in the European context: Denmark wanted the establishment of a UN processing centres in asylum-seekers' region of origin.

UDHR and in the Refugee Convention.

Noticing the diminishing political and strategic value of granting asylum, coupled with the increasing costs of asylum processing and the specular image of declining public acceptance of refugees, Mrs. Ogata suggested a solution that stands out for its preventive and containment approach, while trying to contain the possible future human catastrophes. Sadly these very same words, preventive protection and human containment, will enact a reverse self-fulfilling prophecy, as we all recall. In July 1995 Srebrenica was invaded and its Muslim population was killed by Serb militias, proving that protection in the region is not bullet-proof. Moreover, it was shown that preventive protection could enable a dangerous shift away of protection from legal ground, in the first place under the Refugee Convention, to a political ground supported by the UN Security Council<sup>58</sup>. Furthermore, by the early 2000s, regional protection programmes and extraterritorial safe zones were proposed as models of a more equitable burden sharing. Governments in the global North stuffed the partner states with increasing funds in return for readmission and safe country agreements, in the attempt to find reassurance that their alleged national security interest was paramount compared to the refugee protection regime<sup>59</sup>. They thus changed the shape of the asylum system, extra-territorializing it, somehow marking the dawn of the asylum system as we know it.

Lastly, it is fundamental to stress the importance of the concept of efficiency related to the refugee discourse. In 2003 Caroline Flint stated<sup>60</sup>: *“Western states spend annually around \$10 billion on less than half a million asylum seekers, most of whom are not in need of international protection. By contrast, the UNHCR supports 12 million refugees and five million internally displaced persons in some of the poorest countries in the world on a budget of only \$900 million.”* Therefore, the high political cost of running domestic asylum system might perhaps have pushed governments to seek more efficient solutions.

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<sup>58</sup> See Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)”, *Refugee Survey Quarterly* 29 (1) pp92-119(2010)

<sup>59</sup> William Walters introduces the concept of “domopolitics” and finds that security measures extend well beyond the political borders of each nation-state. See Walters, William “Secure borders, safe haven, “domopolitics” in *Citizenship Studies*, 8:3, 237-260, (2004)

<sup>60</sup> Examination Of Witnesses (Questions 59-79), Wednesday 29 October 2003 available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldselect/lddecom/74/3102903.htm> last accessed 15 June 2012

Indeed, the concept of efficiency was borrowed by economic language and has so far had a deep rhetorical connotation, since it functions as a legitimizing device for “new” attempts, such as unilateral approaches to asylum processing, extra-territorial policies and protection in the regions of origin. Behind this powerful mask, Western states seem to be more concerned with the pursuing of a cheaper solution in the short-run, thus forgetting the high financial, social and political cost that the shifting of the “refugee burden” to the global South might cause in the long-run, considering that a significant turn in the perception of the costs of providing asylum is likely to take place in these regions<sup>61</sup>.

### **What do we mean by extraterritorial asylum?**

For the purposes of this study, the extraterritorialisation or de-territorialisation of asylum is understood as the implementation of policies operated both by the European Union, intended as a whole or by each of its Member State, and by Australia. These policies, related, for instance, to the processing of asylum claims and/or the provision of effective protection, result in the translation of the asylum function beyond the territory of the State where initially asylum-seekers tried to apply for protection. Notwithstanding the great difference in their shape, these policies are nevertheless aimed at reaching a restriction of the actual number of asylum claims of those, who trying to flee from persecution, will apply for protection inside a global North country. With the shifting abroad of the refugee framework, offshore policies allow governments to put into force a circumvention and minimization of their international obligation vis-à-vis to the Refugee Convention. Therefore, instead of reinforcing it<sup>62</sup> they undermine the international protection regime, subcontracting it

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<sup>61</sup> See Betts, Alexander And James Milner. “The Externalisation Of Eu Asylum Policy: The Position Of African States”, Compas Working Paper 36, Oxford, 2006

<sup>62</sup> As it was wisely noted, these policies are often presented under the guise of solidaristic or deeply rooted into human right and liberal thinking, which aim at addressing root causes and provide aid to strengthen the development and protection in certain areas of the world and to prevent forced secondary flows; this is also enshrined in UNHCR initiatives such as Strengthening Protection Capacity or Comprehensive Plan of Action . See, for instance, Afeef, Karim Fathimath, “The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific” Rsc Working Paper No. 36, University Of Oxford, 2006. and Haddad, Emma “The External Dimension Of Eu Refugee

to third countries. These developments, hence, are controversial, since fundamental features of the asylum regime might fall.

Hence, the rationale underlying the carrying out of extraterritorial policies is the perceived and supposed “legal black hole” existing in international law, which allows states to perpetrate in these venues “extra-legal” measures that they would not be allowed to enact in their own territory<sup>63</sup>.

The reasoning behind the recourse to these “new” practices appears to be that, as long as these policies do not violate the prohibition of *refoulement*, governments perhaps feel free to send refugees and asylum-seekers somewhere else, to other states, regardless of whether third countries are signatories of the Refugee Convention<sup>64</sup>. Indeed, this is possible since there is no explicit prohibition of protection elsewhere practices in the Geneva Convention, neither does the Convention provide guidelines on what might be considered entry or arrival into the territory of the signatory states, nor does it give an international standard for the processing and treatment of asylum-seekers<sup>65</sup> outside their territorial borders. In other words, it is maintained that the Refugee Convention has a territorial application and, therefore, states do their best to de-territorialize protection in preventing the access to their territories of the unwanted ones.

The result is twofold. Firstly, this thesis demonstrates the extension of the European Union borders<sup>66</sup>. The externalisation of asylum in the EU is made up with two interrelated features, indeed : on the one hand preventive measures which are aimed at reducing the pull-factors that lead people to move are enacted, and thus the

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Policy: A New Approach To Asylum? ” In Government And Opposition, Vol. 43, No. 2, Pp. 190–205, 2008

<sup>63</sup> See Wilde, Ralph 'Legal “Black Hole”?: Extraterritorial State Action And International Treaty Law On Civil And Political Rights’ Michigan Journal Of International Law 26(3), (2005), Pp.739 – 806 :his writings show that for what concerns ICCPR and ECHR it is not possible to avoid human rights obligations when searching for an extraterritorial venue.

<sup>64</sup> Notice the idea of extraterritorial practices v. state jurisdiction and the discourse on the attempt of extraterritorialisation to evade not only human rights responsibilities, but also the rule of law in Rijpma, Jorrit J. And Cremona, Marise “The Extra-Territorialisation Of Eu Migration Policies And The Rule Of Law “ Eui Working Paper, Law 2007/01

<sup>65</sup> The Executive Commissioner of the United Nations High Commission for Refugees (UNHCR) in his recommendations “Handbook on Procedures and Criteria for Determining Refugee Status” 1977 sets minimum requirements for the determination procedures but admits that it is not possible to ask for identical processing requirements

<sup>66</sup> In the words of the European Union, new migration policies are labelled “external dimension”.

root-cause approach will be deployed, such as reception in the region<sup>67</sup>. On the other hand, however, it was noticed an increasing use of remote-control measures, which are enacted by the export of forms of control provisions, such as interception at sea, and instruments facilitating the return of the asylum-seekers to third countries, such as safe country arrangements<sup>68</sup>. Moreover, both preventive and remote control policies are intended to create a ring of almost-permanent camps<sup>69</sup> inside buffer zones located in the southern Mediterranean, while offering help in training mutual border guards, providing aid to install surveillance technology, strengthening the information exchange and make thicker the net of Immigration liaison officers (ILOs).

Secondly, Australia tries instead to cut off its migration zone, in other words it excludes parts of its territory from the state (for the purposes of preventing migration and asylum-seekers' arrivals) and then puts into practice a peculiar exclusionary practice, i.e. offshore processing<sup>70</sup>. Since 2001, indeed, Australia diverted all boat-people to offshore detention centres and, at the same time, it enacted onshore restrictive practices such as mandatory detention, limited access to judicial review and temporary protection visas.

In both the EU and Australia cases there is the attempt to shrug off states' territorial jurisdiction and to avoid international duties, especially if we bear in mind that the Geneva Convention actually provides a full set of guarantees owed to the refugee and that are incremental, since they depend on the degree of presence on the territory of the provider state.

In conclusion, as it was contended by Hyndman and Mountz<sup>71</sup>, Australia and the European Union are championing the practice on “*neo-refoulement*”. In other words,

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<sup>67</sup> The EU Regional Protection Programme will be described in chapter III.

<sup>68</sup> See respectively chapter II, .3.(non entrée practices) and chapters III.

<sup>69</sup> On the contrary the image of the camp evokes the idea of a phenomenon usually characterised by a limited time frame and that represent an exceptional solution: instead when related to nowadays discourse the camp or processing centre carries a new taste of expanded latitude, putting before state security to human security. See Schuster, Liza “The Realities Of A New Asylum Paradigm”Compas, Working Paper No.20, University Of Oxford 2005 see also Noll's idea of state of exception.

<sup>70</sup> Offshore processing per se is not a new practice, since it was widely implemented during resettlement operation, for instance when the Vietnamese boat-people were waiting to be processed before being resettled to third countries such as Australia, Us and Canada. The novelty of Australia's offshore processing stands in the fact that it was not used in a real crisis situation, although the catastrophe was felt and cried out by the 2001 government. See chapter I.

<sup>71</sup> Hyndman, Jennifer And Mountz, Alyson “Another Brick In The Wall? Neo-Refoulement And The Externalization Of Asylum By Australia And Europe” In Government And Opposition, Vol. 43, No. 2, 2008, Pp. 249–269



this new *refoulement* shows the current way of preventing asylum-seekers and refugees from making any attempt to lodge claims of protection inside their territory, forcibly returning them to countries of origin and transit.

## Scope of the study

Having analysed the meaning of extraterritorial asylum, let us move on to examine the scope of this thesis.

Although to date there are no concrete proposals for offshore processing application at a European Union level, nevertheless the EU and Member States so far have sought inspiration in the Australian model. Therefore, extraterritorial asylum processing outside the EU seems to be not to far away in the future.

In this study both the European and the Australian landmark example are approached, in order to depict the attitude showed in the last decades by the international community in general. Indeed, since the protection of refugees is invoked mainly through ad hoc decision made by governments and it is realized either offshore, or through bilateral readmission agreements, it can be argued that in the last years the discourse on asylum has been conceived as a state-focused discourse in the framework of international relations, and not from a legal point of view.

Australia and the European Union stand on the same tightrope, which is now harsher than ever, due to an increasing fast updating of people smuggling and trafficking networks. As tightrope walkers states are trying to find a balanced solution between protection of genuine refugees and deterrent measures, in order to repel those who are not in need of asylum guarantees.

However, the irregular crossing of states' borders shall in no way impede access to fair refugee status determination<sup>72</sup>.

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<sup>72</sup> Goodwin-Gill, Guy “Refugees And Responsibility In The Twenty-First Century: More Lessons Learned From The South Pacific”, *Pacific Rim Law & Policy Journal*, Vol. 12, 2003, pp.23-47

## Structure of the study and terminology

This dissertation will be divided into three chapters.

The first chapter will provide an outline of past and present extraterritorial asylum policies implemented by Australia. Focussing on the so-called Pacific Solution, which lasted from 2001 to 2007, the study will analyse the main events leading the Gillard Government to a new Malaysia Solution.

The second chapter will instead focus on the EU. As it was previously said, no real extraterritorial processing of asylum claims has been enacted by the Union, yet. Nevertheless, it is possible to find various measures aimed at de-territorialising the European Union's and Member states' international protection obligation. This chapter will, therefore, provide an historical *excursus*, analysing the major events that led the Union to pursue the externalisation of asylum. Hence, outlining the main features of the Tampere, Hague and ongoing Stockholm Programmes, it will be given an account of the most important (failed) extraterritorial proposals addressed by the UK and Germany. Lastly, an in-depth overview of the non-entrée practices implemented at the EU level will be provided, taking into account the latest developments regarding the FRONTEX agency.

The third chapter will suggest to what extent the EU is currently transferring its international protection responsibilities to third countries. The notions of safe country, safe country of origin and super-safe country will be addressed; they will be followed by the definition of readmission agreements and resettlement. In conclusion, an overview of the partnership between two of the most strategic EU partner states, namely Libya and Morocco, will be provided. Moreover, a brief description of the most recent developments regarding the Arab Spring in relation to refugees and asylum-seekers, without pretending to be exhaustive, will be given.

Another premise is needed here: according the international instruments of protection<sup>73</sup>, the refugees status is a declaratory one. In other words, any person meeting the criteria outlined in these international instrument of protection is deemed

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<sup>73</sup> UN High Commissioner for Refugees, Note on Determination of Refugee Status under International Instruments, 24 August 1977, EC/SCP/5, available at: <http://www.unhcr.org/refworld/docid/3ae68cc04.html>

to be a refugee, whether his/her status is officially recognised or not.

Throughout this dissertation, the terminology used will be as close as possible to that found in official documents. Therefore, while authors may prefer the use of term “irregulars” and “undocumented” when referring to asylum-seekers and migrants, the choice of writing the negative-depicted terms such as “illegal”, “out of law”, “bogus asylum-seekers”, “queue-jumpers”, and so on will be preferred, in order to give a more accurate account of the current international panorama of the asylum .

By the same token, while “partnership” is the preferred term in the EU official documents when addressing the agreements with third countries, it is important to keep in mind the (often) uneven and arm-twisting relations that links Member states to their Mediterranean partners. The same can be said for the countries involved in the Pacific Solution and in the Malaysia Solution, where the specific term “partnership” was substituted by the less-misleading words “agreement” and “memorandum of understanding”.

Last but not least, the term “third country” refers to those countries which are neither countries from where the refugees originated, nor countries providing first asylum. While the term is often confused with “third world country”, the two meaning may not always coincide from an asylum law point of view.

## Chapter I - Extraterritorial asylum policies in Australia

### 1. Background to Australia's actual asylum regime: from the “White Australia” policy to M.V. Tampa

From the first decades of the twentieth Century, Australia had been implementing severe immigration controls that were based on ethnic and racial discrimination: this was the so-called “White Australia” policy<sup>74</sup>, which found its exemplification for instance in the Immigration Restriction Act of 1901, with its famous dictation test<sup>75</sup>, eventually abolished in 1958. Subsequently in 1973 the Whitlam Labour government formally dismissed the “White Australia” policy by proceeding in the direction to remove racial discrimination. It started recognising Aboriginal rights to self-determination<sup>76</sup>, although the land issue continued to be unresolved, being perpetrated through the principle of *terra nullius*, i.e. the concept of which British settlers took advantage after their arrival in 1788 and dismissed only in early 1990s.

The following governments kept on stressing multiculturalism also due to the increasing economical relations with non-European countries: indeed, since the 1980s Asia became the main source of immigrants.

In the field of asylum since 1945 Australia opened its doors to more than half a million refugees<sup>77</sup>, despite its never-ending fears of being taken over by immigrants.

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<sup>74</sup> The “White Australia” policy is usually traced back to the 1850s, when governments in Victoria and New South Wales limited Chinese immigration; the first steps toward the abolition of racial discrimination started after the end of World War II, when the then Prime minister accepted the admission of Japanese war brides. See <http://www.immi.gov.au/media/fact-sheets/08abolition.htm> last accessed 7 September 2012

<sup>75</sup> The Immigration Restriction Act 1901 also consisted in a difficult European language test in the attempt to exclude non-white applicants, those less-educated and leave out non-Europeans from admission. See Peyser, Emily C. "Pacific Solution"? The Sinking Right To Seek Asylum In Australia” 11 Pac. Rim L. & Pol'y J. 429 2002

<sup>76</sup> Formal citizenship rights were first granted to Aborigines only in 1967, thanks to a referendum which eliminated differentiating clauses of the Australian Constitution. For a study of how the dichotomy inclusion-exclusion regarding Australian citizenship was translated from Aborigines to refugees see Tazreiter, Claudia “History, Memory And The Stranger In The Practice Of Detention In Australia”, Journal Of Australian Studies, Vol. 26, No. 72, 2002, pp. 1-12

<sup>77</sup> See Magner, Tara “A Less Than 'Pacific' Solution For Asylum Seekers In Australia”, 16 Int'l J. Refugee L. 53, 2004

Australia's refugee programme, named Humanitarian Programme, historically consisted of both onshore protection and overseas resettlement<sup>78</sup>. The latter is the preferred approach by governments, because of its easiness in managing the otherwise spontaneous arrivals, perhaps unmasking the real aim of those policies: resettlement acts as an excuse to implement stricter control and entrance requirements, in order to channel the irregular arrivals' flows into an easier-manageable tool.

In Australia the resettlement approach (and protection in general) had been adopted on an ad hoc basis until the 1970s, when it was systematically conceived for the first time in response to refugee crises in South-east Asia but started to collapse at the end of the 1980s, as it proved to be insufficient to handle the influx when significant numbers of “boat-people” reached Australia's shores. Needless to say, unexpected arrivals were welcomed with hostility and were seen as utterly threatening.

Australia started to turn its back on asylum-seekers from 1989 when, as a reaction to the sudden increase of the second wave of unauthorized arrivals, mainly from People's Republic of China<sup>79</sup> and Cambodia<sup>80</sup>, the Liberal-National Party Coalition introduced since the early 1990s various forms of deterrence measures, such as legislative

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<sup>78</sup> We would like to underline that Australian overseas resettlement comprises both UNHCR's resettlement and the so-called Special Humanitarian Program (SHP), which is a programme targeted to assist resettlement of people not considered refugees under the legal definition of the Convention. See further, this chapter.

According to UNHCR, resettlement is not only expression of international solidarity, it is also a durable solution. Under the UNHCR's resettlement programme, states are not obliged to resettle refugees and nevertheless, resettlement shall not become a substitute tool for other protection interventions, i.e. accepting refugees for resettlement shall not provide the excuse for enacting stricter policies aiming at preventing access or diverting direct arrivals of asylum-seekers. Quite the contrary, resettlement, in UNHCR's view, should be a tool to reinvigorate asylum and international protection duties. See UNHCR “Resettlement Handbook - Division of International Protection” Geneva, Revised Edition July 2011. Under the 2009-2010 Australian Humanitarian Programme out of a total of 13,770 visas, 32.9 per cent was granted under the onshore component, whereas 67.1 per cent under the offshore component: this latter data is split between a 38.6 per cent of Asia/Pacific applicants, followed by 31.8 per cent of Middle East/South West Asia applicants, 29.2 Africa region applicants and the remaining Europe/Americas 0.4 per cent. See “Australia's Humanitarian Program 2011-12 and beyond” Discussion Paper, Australian Government, Department of Immigration and Cultural Affairs, December 2010. See further note 10

<sup>79</sup> See

[http://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/BoatArrivals#\\_ftn3](http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/BoatArrivals#_ftn3) See also Peyser, Emily C. “ 'Pacific Solution' ? The Sinking Right To Seek Asylum In Australia” Pac. Rim L. & Pol'y J., Vol. 11, 429 2002, pp 431-460

<sup>80</sup> The first Cambodian arrivals flee after the coming into power of Pol Pot in 1975 and they peaked in the 1980s see [http://www.dfat.gov.au/geo/cambodia/cambodia\\_brief.html](http://www.dfat.gov.au/geo/cambodia/cambodia_brief.html)

provisions aimed at restricting judicial review<sup>81</sup>; mandatory detention for those who arrived without proper documentation and visas<sup>82</sup> and the creation of a two-tier visa protection programme, as those who arrived onshore without a visa would be granted a three-year temporary protection visa (TPV)<sup>83</sup>, systematic re-assessment and review of refugee status, while those who were selected from abroad<sup>84</sup> would be awarded with permanent protection visa.

To sum up, after the expanded role of judicial scrutiny during the 1980s<sup>85</sup>, that marked a shift away from the predominance of bureaucracy in asylum and immigration matters thanks to the emerging political power of ethnic minorities<sup>86</sup>, the

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<sup>81</sup> Already in 1989 the Migration Legislation Amendment Act limited judicial review by introducing a statutory merits review system; moreover the further limited judicial review was enacted by introducing a restricted federal court jurisdiction on migration decisions.

<sup>82</sup> Non-citizens who reached Australia without a visa are subjected to mandatory detention and removal from the country, see sections 189 and 198 Migration Reform Act 1992. Unauthorized arrivals were detained in the outback, in sites such as Woomera and Baxter. Note that according to Article 31(1) of the Refugee Convention, states shall not dictate penalties on the mode of entry.

<sup>83</sup> Up until 1999 all non-citizens recognized as refugees were all entitled to permanent residence. However, from that moment unauthorized arrivals and boat people in general were no longer to be granted access to permanent residence benefits nor to the consequent right to family reunification; they enjoyed limited access to social security, health benefits and education system. Indeed, the government amended the Migration Regulation of 1994 and the first Border Protection Act was passed, so that even asylum-seekers who had an established refugee status, but nevertheless entered without valid documentation, gained a TPV, "subclass 785 visa". The TPV expired after three years and then the asylum-seeker is obliged to re-apply for asylum protection, with the consequential reassessment of status and clearly doubling government's expenditures: this system was first intended as a disincentive to the recourse of people smugglers. See [http://www.immi.gov.au/media/fact-sheets/68tpv\\_further.htm](http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm) last accessed 7 September 2012. The TPV provision was finally abolished in August 2008 and Australia returned to a permanent protection system for recognised refugees.

<sup>84</sup> UNHCR's resettlement programme first examines the applicant eligibility for refugee status, i.e. criteria are assessed under the Refugee Convention. Notwithstanding the mandate to provide protection enshrined by the Refugee Convention, UNHCR sometimes broadens protection also to categories of people not mentioned in the Convention, such as persons affected by generalised violence, armed conflict or serious restriction to their freedom, despite the fact that most states do not recognise refugees outside the definition provided by the Refugee Convention. These additional categories are covered by regional refugee instruments addressing protection problems in Latin America and Africa, the first of such instruments being the 1969 Organisation of African Unity Convention governing specific aspects of refugee problems. Nowadays there are 25 states providing resettlement under UNHCR's programme, Australia being one of the most active with over 700,000 refugees resettled since 1946. See UNHCR "Resettlement Handbook -Division of International Protection" Geneva, Revised edition July 2011

<sup>85</sup> It is important not to overstate the role of human rights in Australia's national policy: the scope of the Human Rights act of 2004 is quite limited and although being a signatory of the International Bill of Human Rights, which is related to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, its two optional protocols and the International Covenant on Economic, Social and Cultural Rights, it is widely known that Australia did not incorporate any human rights instrument into its domestic legislation and so they are not legally binding. See further note 92.

<sup>86</sup> See above, note 3

government reversed the course and started a re-bureaucratization and reinforcement of the executive in order to impede judicial review in asylum matters: Australia firmly wants to pick refugees up from abroad for resettlement, while restricting human rights to flee from one own' s country and the refugee's free choice of where to submit asylum applications, in blatant breach of international human rights standards.

Indeed, despite the small size of actual numbers of spontaneous arrivals compared to the ones in other industrialized asylum-provider states<sup>87</sup>, in the last twenty years the focus of Australia' s asylum regime was no more based simply on racial policies, as it was during the early twentieth century, instead it has been refined and now governments underline the importance of border control and of the management of flows, suggesting, albeit indirectly, that these policies are fully justified because they maximise the economic value of the migration and asylum programme. From being one of the generous leaders among refugee destination before the 1990s, Australia's domestic legislation now enacts other countries' self-defence mechanism that sum up to the draconian polices put into force before, dangerously crossing the edge of breaching international treaties and duties.

As many NGOs and human rights institutions complained<sup>88</sup>, breach and lowering of international human rights standards, resulting in the erosion of rights to access protection for direct arrivals is increasing after the government implemented mandatory detention of those reaching Australian shores without documents, the excision of certain islands and the implementation of offshore processing.

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<sup>87</sup> For instance, in fiscal year 2000-2001 the government expected around 8,000 boat people to come, but actually only 4,141 arrived. See Magner, Tara "A Less Than 'Pacific' Solution For Asylum Seekers In Australia", 16 Int'l J. Refugee L. 53 2004. Moreover in 2009 Australia intercepted 2,750 unauthorised persons at sea and, although it is true that there has been so far a significant increase in arrivals by boat during 2010, when in fact circa 6,800 were intercepted, this number cannot rival with the flows registered for instance in Europe, where in 2008 it is well above 50,000 taking into account southern States only. See "Asylum seekers: what are the facts?" Background note written by Phillips Janet, Social Policy Section, Department of Parliamentary service, 14 January 2011. According to UNHCR's statistics, in 2010 274,710 asylum claims were lodged in Europe (a +19 per cent increase was recorded in 2011), whereas Australia and New Zealand recorded 12,980 claims (-9 per cent in 2011). As a comparison, in 2011 Italy's share of the global number of applications is 8 per cent, instead Australia reached 3 per cent. See UNHCR "asylum level and trends in industrialised countries", Statistical overview of asylum applications lodged in Europe and selected non-European countries, 2012 available at <http://www.unhcr.org/statistics> last accessed 7 September 2012

<sup>88</sup> See for instance Human rights watch "By Invitation Only. Australia Asylum Policy" Vol. 14, No. 10 (C) – December 2002; See also the Australian Human rights commission [http://www.humanrights.gov.au/human\\_rights/immigration/index.html](http://www.humanrights.gov.au/human_rights/immigration/index.html) last accessed 7 September 2012

## 1.1 *Casus belli*: the Tampa Incident

The term “Tampa incident” refers to the international stand-off that started on 26<sup>th</sup> August 2001, when the Norwegian freighter MV Tampa rescued 433 people, mainly originating from Afghanistan<sup>89</sup>, from a sinking Indonesian ferry located in international waters between Australia's Christmas Island<sup>90</sup> and Indonesia: the Captain, Arne Rinnan, began to head towards Indonesia and eventually issued a distress signal<sup>91</sup>, that was ignored by Australia. Therefore, he took the boat into Australian territorial waters on August 29, but stopped near Christmas Island only 4 miles away from the coast, because he was forbidden by the Australian authority to move any closer to the island.

In the meantime Australia repeatedly refused to admit the ship into its territorial waters on the basis that it was in Indonesia's Search and Rescue zone and contended that Tampa was originally directed towards that archipelago. Within two hours Prime Minister John Howard ordered that the Tampa be boarded by Australian Defence Force's Special Air Service (SAS) and justified the order by saying that the ship had on board unlawful non-citizens without valid visa to enter. However, the real purpose was to hold migrants on board in order to prevent them from setting foot on Australia's soil: in fact although the stand-off took place inside Australia's maritime territory, the rescued did not touch its soil defined as Australia's “migration zone” in

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<sup>89</sup> Since 1999 a “fourth wave” of unauthorised arrivals from Afghanistan, Iraq, Iran, Pakistan and Sri Lanka started, mainly signalling the recourse to people-smuggling. Indeed, the Pacific Solution resulted as the attempt to stop the arrivals of Iraqi and Afghani asylum-seekers on the Australian coasts: the peak of boat arrivals was recorded in 1999 and 2000, when quota 4,000 in Iraqi and Afghani applications was exceeded, although we underline that this number represented less than 4 per cent of the global applications (100,000) lodged in developed countries in the same years. See “Asylum Levels and Trends in Industrialised Countries”, UNHCR, 2006.

Moreover, during the financial year 2000-2001 a 50 per cent increase in asylum applications (reaching quota 13,000) was recorded, and the government fuelled the rhetorical idea of being taken over by an invasion of migrants, although actual numbers in other western countries far outweighed Australian ones. Tampa incident and the racist discourse on asylum-seekers is understood as being a political manoeuvre to gain re-election. See <http://www.worlddialogue.org/print.php?id=251> See also “Boat arrivals since 2000”, in “Boat arrivals since 1967”, available at: [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/BoatArrivals](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals) last accessed 7 September 2012

<sup>90</sup> Christmas Island is an Australian territory in the Indian Ocean and it is only 210 miles south from Indonesia's Java, but is more than 1,750 km away from the mainland.

<sup>91</sup> MV Tampa was designed to host 50 crew members only.



the Migration Act 1958<sup>92</sup> and therefore were not allowed to claim protection.

Another purpose was to provide medical assistance in order to nullify the distress signal and to let the Tampa proceed. On the one hand Norway stressed the deteriorated medical conditions of the passengers, on the other hand Australia ignored the claim that it was violating international maritime law<sup>93</sup>, but ultimately on 2 September the migrants were transferred to the better medical-equipped HMAS Manoora.

On 31 August the Norwegian ambassador went onboard of the MV Tampa and later handed out a letter that stated there were refugees onboard and a case was filed the same day to the Federal Court of Australia<sup>94</sup> in order to prevent any removal of the Tampa from Australian territorial waters: later in September the single Judge North gave his ruling, noticing that the government unlawfully restricted the migrants' freedom of movement<sup>95</sup>, and decreed to release them on mainland, allowing the subsequent application for refugee status. Ahead it will be shown that the government promptly appealed to this decision.

On 1<sup>st</sup> of September, the Australian Prime Minister publicly announced that arrangements were finally signed with Nauru and New Zealand, after other failed negotiations with Fiji and Kiribati. Thanks to this agreement 150 migrants were to be taken to New Zealand<sup>96</sup> and the remaining ones were to be brought to Nauru to process their asylum claims; if the latter were found to be refugees, they would then be resettled in Australia or in other states with an operative resettlement programme.

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<sup>92</sup> The ship has to be in a port to be inside the migration zone.

<sup>93</sup> International maritime law allows ships in distress to reach the nearest port of call. See further chapter 2.3.4. interception at sea

<sup>94</sup> The main arguments made by Vardalis were that the Migration Act 1958 regulating immigration in Australia allowed the government to detain unauthorised arrivals, and nevertheless it granted rights to those detained, such as the right to apply for a protection visa and to seek asylum; as a consequence of this, those detained were to be taken to the mainland, where they could be properly processed. Secondly in case the Migration Act 1958 did not apply to the circumstances, it was clear that the government was unlawfully and arbitrarily detaining the asylum-seekers onboard. On the contrary, the government refused the reasoning and maintained that the unlawful non-citizens were free to leave (live?) anywhere else but Australia and that the government held the prerogative to expel them, notwithstanding the lack of a statutory power for their detention. See paragraphs 35 and 35 (9) VCCL vs. MIMA, 2001, Federal Court of Australia, FCA 1297, 11 September 2001; Available at: [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1297.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html)

<sup>95</sup> See *ibidem*, paragraphs: 45, 81, 169 and 170. See in particular paragraph 80, where Judge North underlines that the presence of armed SAS troops onboard likely forced the rescuees to act as they were told.

<sup>96</sup> See <http://www.theaustralian.com.au/national-affairs/tampa-refugees-resurface-as-kiwis/story-fn59niix-1226117936857>

According to the agreement, Australia was to pay for the processing costs and for the build up of detention centres in Nauru<sup>97</sup> and HMAS Manoora was ordered first to head towards Papua New Guinea (PNG), since the solicitor General informed the Court of an arrangement with that country struck on the 2<sup>nd</sup> September, but later it was ordered to proceed directly towards Nauru.



Source: UNHCR, *Global Insight digital mapping – 2003*

On 22<sup>nd</sup> September, the appeal took place<sup>98</sup> and this time the Full Court of the Federal Court held that the government did not detain the asylum-seekers nor restricted their freedoms, providing a few sentences related to Australia's international obligations under refugee law<sup>99</sup> stating that the only relevant obligation to respect was *non-*

<sup>97</sup> The costs of the buildings and housing detainees in Nauru remains unclear. However, news reported that the cost of processing and detaining asylum-seekers on Nauru and PNG was valued around three times that of processing asylum seekers on the mainland. See “Asylum Seekers Costing Australia Three Times More to Process Offshore” Asia Intelligence Wire, 17 April 2002.

<sup>98</sup> The government filed the appeal on 12th September stating that the unlawful non-citizens were not detained by the SAS troops, but in truth it was Captain Rinnan who was detaining them. Furthermore they were not detained because they were free to choose between going to Nauru or New Zealand and, lastly, their detention was self-inflicted, as they should have foresaw the situation in which they would have found themselves when they threatened to commit suicide on Mv Tampa if not taken to Australia. See *Ruddock v. Vadarlis*, 2001, Federal Court of Australia, FCA 1329, 18 September 2001. Available at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1329.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1329.html) last accessed 7 September 2012

<sup>99</sup> The majority held that the government unquestionably has the ability to enact a power with gatekeeping function, since, being absent a clear statutory extinguishment, the executive power of government would naturally comprehend the prerogative to prevent access of non-citizens, as the

*refoulement*<sup>100</sup>.

Later that month, on 26<sup>th</sup> September, with barely half a day of debate, the Parliament issued several pieces of legislation<sup>101</sup> that were a clear reaction to the event that took place in the United States on September 11<sup>th</sup> and to the other boat-people arrivals during the same month. Moreover the legislation was extremely useful to Howard, who was in need of support for his re-election campaign and who successfully managed to ride the subsequent anti-refugee discourse.

The legislative changes operated with the Border Protection Bill 2001 not only retroactively validated Australia's modus operandi in providing a statutory framework for the government's previous actions, clearly in line with the Full Court of the Federal Court's decision, but it also cancelled the right to judicial appeals for boat people to federal courts, while the same process is still available to asylum-seekers who submit their claims within Australia's territory. It granted immigration officers a broader spectrum of power over people rescued both within and outside Australia's jurisdiction, since it prohibited class actions, judicial review and restricted the time limits for assessing refugee status<sup>102</sup> but not least it empowered the Prime Minister to excise several coastal territories from Australian migration zone, such as Ashmore

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power to decide who comes to Australia is a central prerogative in national sovereignty. Judge French furthermore did not recognise the Migration Act of 1958 as abrogating the prerogative power of the executive of preventing entrance of non-citizens to Australia (the executive power is enshrined in Section 61 of the Commonwealth of Australia Constitution Act, and is conferred to the Queen and the Governor-General as the Queen's representative). He finally held that no detention was put into place. See *Ibidem*, paragraph 193, 201 and 215. Chief Justice Black dissented and recognised the parliament's prerogative to define national interest: in issuing the Migration Act legislation, the Parliament enacted a comprehensive statutory regime supplanting the prerogative power to expel non-citizens, which indeed was used for the last time in 1771. In his view, therefore, the unregulated executive power lapsed and the government did not exercise a statutory power. See *ibidem*, paragraphs 23, 44 and 61.

<sup>100</sup> See *ibidem*, paragraph 203. Judge French he contended that no breach of the international customary law of non-refoulement took place.

<sup>101</sup> See Border Protection (Validation and Enforcement Powers) Act, 2001 (Australia); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001, which amended Migration Act, 1958 paragraph 46A; Migration Legislation Amendment Act, No. 1, 2001; Migration Legislation Amendment Act, No. 3, 2001; Migration Legislation Amendment Act, No. 5, 2001; Migration Legislation Amendment Act, No. 6, 2001; and Migration (Judicial Review) Act, 2001

<sup>102</sup> The executive power was increased at the expense of the judiciary, see Part 8 of the Migration Act 1958. Removal of the right to judicial review of all migration and refugee decisions in all but exceptional circumstances was accepted as well as banning class or representative actions in migration cases and imposing mandatory, non-extendable time limits on applications to the High Court.

Reef, Cartier Islands, Cocos (Keeling) Islands and Christmas Island<sup>103</sup>, in order to prevent boat arrivals from gaining access to Australian asylum process.

This radically innovative policy, known as “Pacific Solution”, is an extraordinary but not unique example in the context of international state arrangements and of extraterritorial asylum practices, since it takes its inspiration from the “offshore interdiction programme” put into force by the US resulting in the push-backs of Haitian boat-people in the 1990s.

### **1.1.1 Pacific Solution: a copy and paste from the U.S. Idea**

In September 1981 the Reagan administration created the Haitian Migrant Interdiction Program through the Presidential Proclamation and Executive Order. The programme ordered the United States coast guard to stop and board suspicious and not-flagged vessels and to operate an extraterritorial screening onboard. However, at the same time it was quite careful both in stating that the interdiction measures were to be operated outside U.S. territorial waters and it required to observe international obligations with the Executive Order under the Convention towards refugees, in order to not forcibly send them back to the country from which they had fled.

This first phase of the interdiction policy went on for ten years, until September 1991, when the Haitian President democratically-elected Jean-Bertrand Aristide was overthrown in a coup d'état: many thousands of Haitian fled by sea and the U.S. President George W. H. Bush built camps for them in Guantanamo Bay, Cuba. In May 1992 President Bush gave way to the indiscriminate interdiction of all Haitian boat-people in high seas and thus they were returned forcibly, without granting them the possibility of claiming asylum in the U.S. The Kennebunkport Executive Order became famous as a “textbook case of *refoulement*”<sup>104</sup>, since also bona fide refugees were returned as a result of the interdiction programme.

As in the Australia's Ruddock v. Vadarlis case, also in this instance the judiciary power did not provide any help in contrasting the measures taken by the government:

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<sup>103</sup> In June 2002 and July 2005, more territories were excised from the migration zone, covering more than 4,891 islands. These “excised offshore places” still belong to the “migration zone”.

<sup>104</sup> See Harold Hongju Koh cited in Magner, Tara above, n. 7.

quite the contrary, in *Sale v. Haitian Centres Council*<sup>105</sup> the Supreme U.S. Court held that the Refugee Convention and its Protocol did not apply extraterritorially nor outside the state's borders, thus eventually legalizing the interdiction programme.

In particular, the Court stated that the *non-refoulement* principle did not operate beyond U.S. territory and in the high seas, as in the case in question. Moreover the Supreme Court supported this ruling taking into account the *Travaux Préparatoires* of the Refugee Convention, stressing that the French verb “*refouler*” holds a particular meaning of “to expel from the frontier” thus stating that the prohibition from *refoulement* applies only to those already within the territories of the State party to the Convention. This ruling was regarded as extremely controversial from an international law point of view, given the fact that it failed to recall that the reading contravenes Article 31 of the Vienna Convention on the Law of Treaties<sup>106</sup>. It especially overlooked the ordinary meaning of the Treaty that does not recognize the nature of customary international law of the *non-refoulement* principle, which prohibits unambiguously the act of repelling “*in any manner whatsoever to the frontiers of territories where the life or freedom of those claiming asylum would be threatened*”<sup>107</sup> and thus regulates state's action anywhere it might take place, because what might concur in establishing *refoulement* is not from where the refugee is eventually returned, but to which country he/she is forcibly sent back.

This attempt to grant domestic legality to questionable practices proved to be really influential, since in Australia, as it will be explained below, the judicial power failed to intervene. The United States controversial experience taught a lot to Australia's parliament: during the debate about the issue of the Border Protection Bill 2001, briefing papers containing the U.S. high seas interdiction measures were handed out and thus one could easily state that similarities did not come by chance, although there are no records of forced returns of asylum-seekers from PNG or Nauru to

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<sup>105</sup> *Sale v Haitian Centres Council, Inc.*, 113 Supreme Court 2549 (1993).

<sup>106</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (1969). See section 3 in general on treaty interpretations. Article 31 states that treaties should be interpreted in bona fide, according to the ordinary meaning of the words used and finally to take into account the *τέλος* of the treaty; Article 32 allows to have recourse to secondary sources only when the primary means of treaty interpretation might result either in an absurd or in an unreasonable reading.

<sup>107</sup> For an overview see Goodwin-Gill, Guy “Refugees And Responsibility In The Twenty-First Century: More Lessons Learned From The South Pacific”, *Pacific Rim Law & Policy Journal*, Vol. 12, 2003, pp.23-47. A norm to be recognized as a norm of customary international law has to be accepted by the majority of the states (general praxis) and has to carry *opinio juris ac necessitatis*.

countries where they could fear persecution<sup>108</sup>. Even if Australia was to follow the pre-Kennebunkport interdiction and screening policies, its Pacific Solution remains controversial, since those intercepted were not returned to their countries of origin, but they were still forcibly taken to “declared countries” and their claims were assessed outside Australia by the UNHCR.

### 1.1.2 Life after Tampa: the Pacific Solution

In October 2001, Australia's former Prime Minister John Howard declared: ‘We will decide who comes to this country and the circumstances in which they come’<sup>109</sup>.

Indeed the Pacific Solution was conceived mainly to stem the flow of the secondary movers, i.e. in the case in question, it was directed to deter asylum-seekers or refugees who make their way to Australia from countries such as Indonesia<sup>110</sup>: the majority of the Tampa's boat-people in fact came from Afghanistan, which in 2001 produced a diaspora of circa 900,000 people, and from the Middle East in general. They only subsequently transited in Indonesia, where they could easily rely on people-smugglers to reach Australia's shores.

The Australian government already entered into negotiations with the south-east asian country<sup>111</sup> in the attempt to minimize those onward movements, although its efforts resulted unsuccessful since Indonesia proved to be unable to stop those flows and at the same time it was unwilling to take the intercepted ones back, as it considered them to be Australia's own responsibility<sup>112</sup>.

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<sup>108</sup> The Memorandum of Understandings contained non-refoulement clauses plus there was no evidence that either country ever refouled any person.

<sup>109</sup> John Howard at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001. See <http://www.pandora.nla.gov.au/pan/10052/20030821-0000/www.pm.gov.au/news/speeches/2001/speech1311.htm> last accessed 16 July 2012

<sup>110</sup> Another common first destination country, when fleeing from persecution in Middle East is Malaysia, where temporary admission is granted to refugees from other Islamic countries. This fact was surely taken into account, as we will see, from the Gillard government, when drafting the deal with this State in May 2011.

<sup>111</sup> In 2000 the two countries negotiated an arrangement on smuggling and trafficking of people and Australia was funding Indonesia regarding the costs of processing refugees. However, Indonesia is not a state party to the Refugee Convention. See Kneebone, Susan “‘The Pacific Plan: The Provision Of ‘Effective Protection’?” In *International Journal Refugee Law*, Vol. 18, No. 3-4, 2006, Pp. 696-721

<sup>112</sup> The reason of the rejection stated by Indonesia is reflected in the international condemnation of the

The Tampa affair decreed blatantly the failure of the policies described above and was followed by the so-called “Pacific Solution”, later on labelled the “Pacific Strategy”: the terms refer to a wide spectrum of interdiction, disruption and deterrence measures, such as the already-mentioned excision, and several legislative changes, that were active since early September 2001 till late 2007.

Essentially the implications arisen from the implementation of extraterritorial asylum processing will be taken into account. The prevention of lodging valid claims on Australia's migration zone through the excision of islands more affected by boat arrivals found justification in an extended reach of the safe third country notion, which was defined as “declared country”<sup>113</sup> in the Migration Amendment Act 2001.

Firstly, we should underline that the Act boosted the provision of safe third country, so that it carried the meaning that other countries bear the burden of processing asylum claims, i.e. Australia starkly supported its deflection of asylum-seekers to third countries. Relying on the idea that if secondary movers could find protection in other countries, then they should have asked protection in those countries<sup>114</sup>, Australia suggests that asylum-seekers are engaging in further movements towards south in the attempt to jump the alleged resettlement queue<sup>115</sup> and

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“Pacific solution”, as we will see further. Indeed, Indonesia is hosting already several thousands of refugees and asylum seekers. In one of the latest news report, the south-east Asian Country stated its need to protect its border and sovereignty, clearly mimicking Australia's attitude on border protection. Suggesting the opening of Australian doors and threatening the worsening of its bilateral relation, Indonesia revived the motto “not your waiting room” and stressed that, since the 5,000 and more refugees awaiting in Indonesia for resettlement or other durable solutions are willing to reach that country, it is Australia's duty to relieve its burden. See <http://www.smh.com.au/opinion/political-news/indonesia-calls-on-australia-to-lift-refugee-intake-20120713-2218j.html> last accessed 7 September 2012.

<sup>113</sup> A “declared country” is specified by the Minister of Immigration in writing as a country that “(1) provides access for persons seeking asylum, to effective procedures for assessing their needs for protection; and (2) provides protection for persons seeking asylum, pending determination of their refugee status; and (3) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (4) meets relevant human rights standards in providing that protection...” See Migration Amendment 2001 supra, note 28.

<sup>114</sup> The amendment states that Australia does not have protection obligations to a non-citizen who “has not taken all possible steps to avail himself or herself of a right to enter and reside in (...) any country apart from Australia, including countries of which the non-citizen is a national.” See Migration Act 1958, section 36(3).

<sup>115</sup> We would like to stress that there is no queue for resettlement whatsoever: the analogy of queue-jumping asylum-seekers was introduced in the Australian political discourse to subtly evoke the idea that spontaneous arrivals are not deeply in need, as they would “take advantage” of undertaking dangerous and life-risking travel routes in order to gain aid faster than those waiting “orderly in line” for UNHCR's refugee assessment in other countries. Notwithstanding the fact that resettlement process is long and it can last years, this idea of jumping the queue is twice as

in search for a better migration outcome.



Source: <http://nicholsoncartoons.com.au/howard-tampa-refugees-queue-jump-asylum-550.html>

In theorizing the safe third country notion, therefore, Australia discourages this alleged forum shopping made by secondary movements of refugees and it accepts to shoulder its international responsibility only if no other solution somewhere else can be found, enacting peculiar and questionable burden-sharing policies.

Secondly, a restricted meaning of protection comes into play. According to section 36 (2) of the Migration Act, if an asylum-seeker enjoyed effective protection<sup>116</sup> elsewhere, then Australia is lifted of its international duties and smartly buys them out to agencies, such as the International Organization for Migration and UNHCR, which respectively try to manage the housing of asylum-seekers and

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appalling, since firstly it suggests that spontaneous arrivals are not genuine refugees, and secondly it undermines the internationally-recognised process of accepting onshore application for asylum. Moreover, we showed before how the Migration Act already penalises asylum applications of unauthorised arrivals, since it deleted the right to be granted a judicial appeal, it annulled judicial reviews and curtailed time limits of refugee status assessment. See Gelber, Katharine, "A Fair Queue? Australian Public Discourse On Refugees And Immigration" In *Journal Of Australian Studies*, Vol. 27 No. 77, 2003, Pp. 23-30

<sup>116</sup> See further, chapter II, note 11. Legomsky gives an exceptional overview of effective protection, see Legomsky, Stephen H., "Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" in *International journal of refugee law*, Vol. 15, No. 4, 2003, pp. 567-677



processes asylum claims outside Australian domestic legal framework.

Moreover, in determining whether the asylum applicant had effective protection somewhere else, Australia applies a factual and practical test, i.e. instead of relying on the legal obligations and formal adherence that country took on when signing the international treaty, Australia prefers taking into account the third country's actual practice towards refugees<sup>117</sup>. Since the Department of Immigration and Multicultural Affairs (DIMIA) in its manual for procedures<sup>118</sup> stressed that the effective test could also be passed when relating the claim to a third country to which the applicant did not have any link, the Australian notion of third country results even stricter than the European one<sup>119</sup> and is scathingly criticized by the UNHCR<sup>120</sup>.

In addition, this restricted effective protection concept fails to consider whether the declared country in question is safe from the point of view of relevant violations of human rights other than Article 33 of the Refugee Convention: indeed international refugee protection is made up of much more than *non-refoulement* and it does include other human rights provisions according to the degree of relationship or status of the refugee in the State<sup>121</sup> in which the claim of asylum is lodged, following the rationale “the higher the better”.

In fact those rights follow a hierarchy of human rights from the very basic ones, such as the right to life and liberty to the more sophisticated social and economical rights, that are granted only when the refugee becomes settled in the country of asylum.

Basic rights and procedural requirements, such as Article 33 (1) *non-refoulement*, Article 3 non-discrimination, Article 16 (1) free access to court and Article 31 non-

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<sup>117</sup> For instance, Australia's partner in crime, Indonesia, did not sign the Refugee Convention, but became party to the International Covenant on Economic, Social and Cultural Rights and to the ICCPR, in order to meet the requirements to gain Asian Development Bank loans. See Taylor, Savitri “Protection Elsewhere/Nowhere” in *International Journal of Refugee Law*, Vol. 18, No. 2, 2006, pp. 283-312

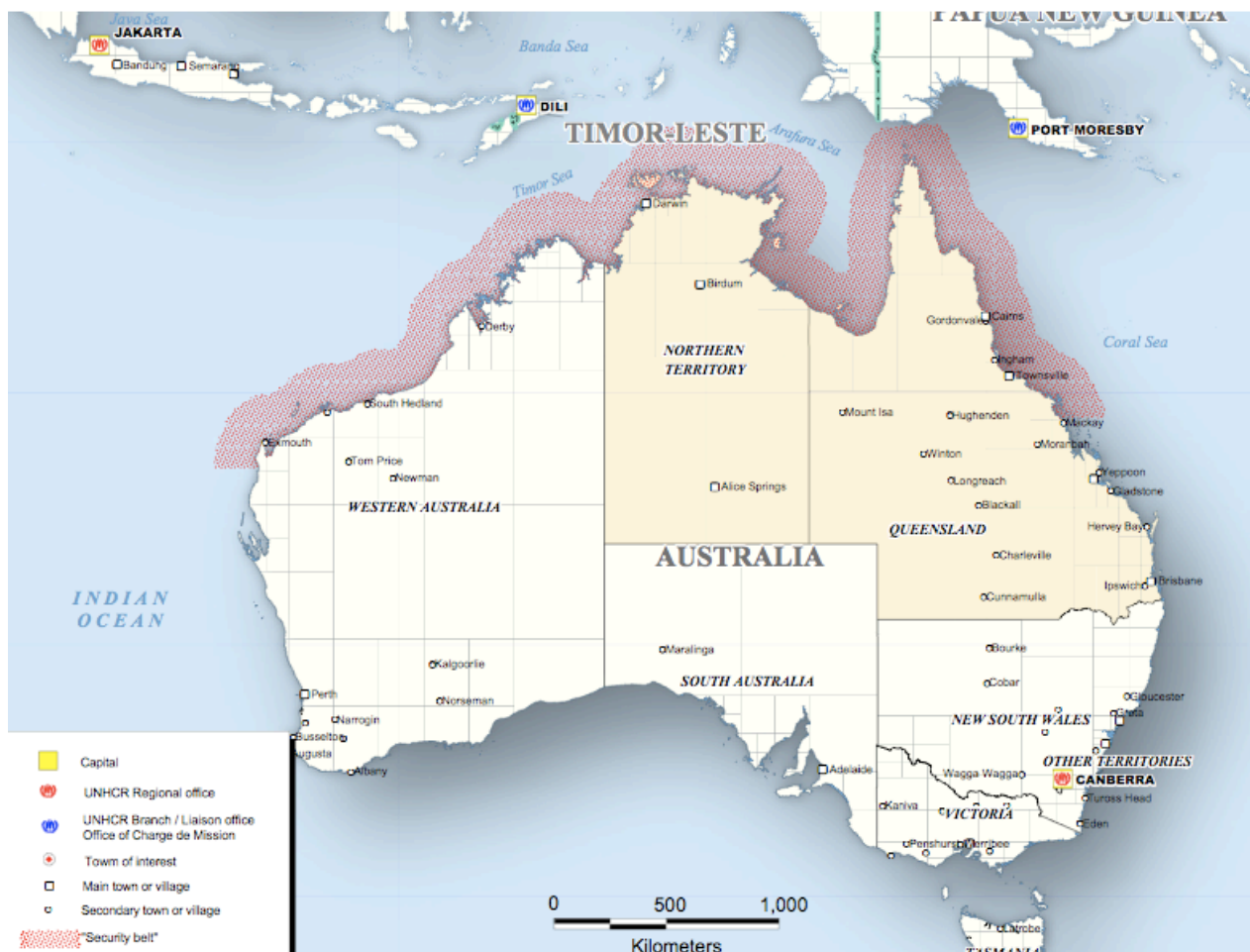
<sup>118</sup> See Department of Immigration, Procedures Advice Manual 3: Refugee Law Guidelines, July 2005, paragraph 12.2.1. No determination of status is provided if effective protection was enjoyed elsewhere, thus, because of the missing merits assessment, the risk of creating chain refoulement or refugee in orbit situations is high.

<sup>119</sup> In fact, even the European Asylum Procedures Directive states that the application of the safe third country concept should be subjected to the existence of a link between the asylum-seeker and the third country concerned. See Chapter 3.1, safe third country concept.

<sup>120</sup> According to UNHCR the ‘safe third country’ provision has initially developed out of state practice and cannot extend to include a country to which the person does not have previous links, unless a written guarantee of protection is provided.

<sup>121</sup> See Hathaway, James C. “The Rights of Refugees under International Law”, Cambridge University Press, Cambridge, 2005.

penalisation<sup>122</sup> are core rights and they rest with all refugees, in recognition of the idea that the refugee status is declaratory, i.e. an asylum-seeker is a refugee from the very moment that he/she flees his/her country of origin, but his/her status becomes effective only when it is internationally recognized.



*Australia's excision zone as November 2003. Source: UNHCR, Global Insight digital mapping*

Finally, always thanks to the Migration Amendment Act 2001, the category of “offshore entry person” (OEP)<sup>123</sup> made its first appearance on stage. Indeed every asylum-seeker or migrant, who is an unlawful non-citizen without a valid visa and

<sup>122</sup> See Convention relating to the Status of Refugees, 1951, and the Protocol relating to the Status of Refugees, 1967(Introductory note by Guy S. Goodwin-Gill) available at <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html> last accessed 7 September 2012

<sup>123</sup> Unlawful non-citizens who first entered Australia at an “exercised offshore place” are labelled Offshore Entry Person (OEP). Section 46 A of the Australian Migration Act 1958 invalidates visa applications made by OEPs, excluding automatically all OEPs. However, an offshore entry person is permitted to apply for a visa only if the Minister for Immigration personally lifts the bar (subsection 46A of the Migration Act) on this prohibition, but this power is non-reviewable, non-compellable and thus is extremely discretionary: as April 2004, it had only been exercised twice.

landed on an excised zone<sup>124</sup> will be labelled as such and will not have his/her asylum claims processed according to Australian national law, will not be permitted to apply for a protection visa<sup>125</sup> or allowed to challenge his/her detention or transfer to a declared country, but instead will be sent to a safe third declared country.

This exclusion from Australian onshore legal system of protection regime creates, according to many, a double standard, since, compared to the one on the mainland, in the declared country a lower standard of asylum processing is carried out. Indeed, denying the right to access lawyers and an independent judicial review<sup>126</sup> might not only account for another discriminatory system, that sums up to the TPV and visa one, but might also constitute a breach of the international refugee law, since it is aimed at penalizing refugees and asylum-seekers on the basis of their alleged “illegal” entry into Australian territory, albeit forgetting that non-penalization Article 31 (1) of the Refugee Convention clearly prohibits signatory states from engaging in punitive measures.

Although the application of this article extra-territorially is not as clear-cut as inside the signatory country, nevertheless states action is constrained by other principles of international law when operating offshore such as, among others, articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>127</sup> and the notion of jurisdiction or de facto control on extraterritorial actions, that operates as an extension of the territorial-sovereignty link. Thus, notwithstanding it is true that Australia has no responsibility on ships in high seas, the interdiction of entry may engage its international obligations when assessed that the ships carries bona fide asylum-

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<sup>124</sup> Note that the Vienna Convention Law of Treaties states in article 29 that the Treaty is binding for the entire territory of the ratifying state, thus making excision questionable under international law; if a State wanted to derogate from its obligations, it would need to withdraw from that treaty entirely (if this was possible) or it would need to have entered a reservation in relation to a specific part only during the ratification. Both withdrawal or reservation require that the treaty allows for this in clear letters. We underline, moreover, that the European Court of human rights in deciding *Amuur v. France* ruled that it was invalid to deny access to domestic court on the justification that the asylum-seekers had reached an “international zone”. See *Amuur v. France*, 17/1995/523/609, Council of Europe; ECHR 25 June 1996

<sup>125</sup> The protection visa is the way in which Australia implements its obligation under the refugee convention and its 1967 protocol.

<sup>126</sup> According to Report No. 56, 2003–2004 “Management of the Processing of Asylum Seekers”: “...Judicial reviews evaluate the lawfulness of administrative decisions. In general terms, a decision is unlawful if it is made without authority or if the decision-maker’s authority has been exceeded.”

<sup>127</sup> See International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Dec. 16, 1966. Article 6 of that instrument states the right to life; Article 7 enshrines the right not to be subjected to cruel, inhuman or degrading treatment or punishment.

seekers, since it would be unthinkable if there was a legal vacuum in international law.

By the same token, we cannot forget to mention “Operation Relex”<sup>128</sup>, started on early September 2001; this is the code-name that was given to several deflection operations of the Australian Defence Force in support of Indonesia<sup>129</sup> in managing detained push-backs and tow-backs and in assisting voluntary returns. Unfortunately not much is known on the practical outcomes of the operation, since the report does show in detail the actual number of prevented departures of Suspected Entry Vessels (SIEVs), but does not provide details on the final outcomes for the ones towed back. Operation Relex and the following Operation Relex II<sup>130</sup> might well constitute a breach of the *non-refoulement* obligation under the Refugee Convention, albeit not directly but without doubt at least constructively, since it gave power to Australian authorities to move and detain suspicious ships which might be contravening the Migration Act<sup>131</sup>, both within or outside Australian territorial waters, without prior assessment of refugee status. This is true especially in light of the fact that Indonesia is not a state party to the Refugee Convention. Indeed, UNHCR has a Regional Office in Jakarta, where it is actively operating in absence of national refugee procedures and domestic legislation. Therefore, the agency tries to act as a stopgap under its mandate, as it is the sole provider of assistance and refugee status assessment to asylum-seekers and durable solutions to refugees<sup>132</sup> in Indonesia.

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<sup>128</sup> On 28 August 2001, Admiral Barrie, Chief of the Australian defence Force (ADF), under instruction from Federal Cabinet, issued the order to provide sea patrol and detect, intercept and warn vessels that carry unauthorized arrivals in order to deter SIEVs from introducing into Australia's territorial waters. On 3<sup>rd</sup> September 2001 the first Operation Relex began, which, thanks to the amendment to the Migration act of 26<sup>th</sup> September, authorized the tow backs of SIEVs to the edge of Indonesian territorial waters. See Taylor, Savitri, above note 44.

<sup>129</sup> In 2000, Australia signed a Regional Cooperation Arrangement (RCA) with the International Organization for Migration (IOM) and Indonesia: the government passed the buck of responsibility for the care of those deflected to the International Organisation for Migration (IOM). In fact, under the RCA, Indonesians have the duty to intercept alleged asylum-seekers who might try to reach Australia's shores and signal them to IOM, which in turn manages those who wish to make asylum claims to the Indonesia UNHCR Regional Office in Jakarta. IOM activities related to RCA in Indonesia are funded by Australia and it continues providing material assistance throughout the assessment process. See also previous note 43.

<sup>130</sup> On 17 July 2006 the first Operation Relex II commenced and substituted the “old” Operation Relex, as part of the navy and ADF general “Operation Resolute”, which among the others, operated also in Operation Cranberry against illegal fishing and smuggling. Operation Relex II is still ongoing. See [http://www.navy.gov.au/Operation\\_Resolute](http://www.navy.gov.au/Operation_Resolute) last accessed 16 June 2012

<sup>131</sup> For example bringing a person, who does not hold a valid visa into the migration zone accounts as violation of the Migration Act.

<sup>132</sup> See <http://www.unhcr.org/pages/49e488116.html> last accessed 7 September 2012

## **2 Offshore processing in Nauru and Papua New Guinea: a new era**

We should now analyse the legal and economical consequences of the institution of the offshore processing on the two declared countries Nauru and PNG (Papua New Guinea).

Immediately following the Tampa incident, Australia negotiated Memorandum of Understanding with the UNHCR, IOM, Nauru and PNG: the UNHCR was to conduct refugee status determination of half of the MV Tampa asylum-seekers brought to detention centres in Nauru, while in the end it processed 301 persons from the MV Tampa plus another 228, on an exceptional basis<sup>133</sup>.

Australia considered then all of the other asylum claims from boat people taken to Nauru and PNG<sup>134</sup>: arrangements were struck in order to transfer any boat arrival from Christmas Island to detention centres on Manus Island and Nauru, where it would be processed. It is important to stress that under the Pacific Strategy detention was not only mandatory, but also not able to be reviewed and prolonged: only a few of those rescued by the Tampa achieved an outcome by the end of 2002, although this did not happen for each asylum-seeker detained on Nauru and Manus Island, notwithstanding the Memorandum of Understanding where it is stated that Australia will leave no one on Nauru<sup>135</sup>, only if no one among other countries was willing to provide resettlement<sup>136</sup>.

It remains difficult to know what exactly happened in the offshore processing centres, due to the secrecy of the places and the impossibility for the press to reach the

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<sup>133</sup> The UNHCR Office accepted a formal request from Nauru to conduct the assessments, although at that time Nauru was neither part of the Refugees Convention nor a signatory of its Protocol: the UNHCR accepted to process Tampa's asylum-seekers although this was not its preferred option.

<sup>134</sup> It is fundamental to underline that PNG is a signatory state and thus has obligations under the Refugees Convention. Asylum-seekers taken there could have lodged their claim to the PNG government, however PNG has no domestic refugee status determination, as it has not put into place the necessary system to assess and process asylum claims, nor did it enact a domestic refugee legislation and it has made significant reservations to the obligations contained in the Convention.

<sup>135</sup> "Memorandum of Understanding (MOU) between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues"

<sup>136</sup> Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries. See also: [http://www.dfat.gov.au/media/releases/foreign/2001/fa177\\_01.html](http://www.dfat.gov.au/media/releases/foreign/2001/fa177_01.html) last accessed 7 September 2012

locations and to gain passes to interview asylum-seekers. In both Nauru and Manus Island they were held in detention with few rights, unable to contact the outer world and any attempt made by public interest advocates to get in touch with them was vain, since PNG prohibited access to Manus Island and Nauru refused constantly to grant entry visas<sup>137</sup>.

Therefore, we can observe how financial aids clash with human rights guarantees of the receiving states and it can be argued that Australian control over offshore detention and processing amounted to a “de facto jurisdiction”, in the sense that Australia held the sole responsibility for the determination of asylum claims at these facilities, although it did its best to distance itself from the widespread criticism that followed.

Those brought to declared countries were interviewed by Australian DIMIA officers, who should have considered any protection claim against Refugees Convention criteria: facts show that reality was different. In the first place, to those who were deemed as offshore entry persons and who were taken to offshore processing centres were denied access to independent legal assistance and thus this meant a disadvantage for their asylum claims.

Moreover, although the DIMIA officers who carried on processing in declared countries were chosen among the officers who used to make decisions regarding onshore protection visas, however they were forbidden from applying national law and case law, as they were requested to do in the case of onshore decision making. If the applicant was found not to be a refugee, the procedure applied offshore fell short of international standard of properly procedural fairness, since the review authority was not an impartial tribunal, different to the one who gave the first decision, but a further assessment of the claim was offered by another DIMIA officer, albeit diverse and senior.

Needless to say, it is this lack of independent review mechanism, added to the existence of a different processing course, that caused several errors in the decision making. As Mary Crock noticed, there was an interesting disparity in recognition rates data when comparing the UNHCR and DIMIA processing for the same ethnic groups

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<sup>137</sup> Both Nauru and PNG enshrine a prohibition of arbitrary detention in their constitution and each country has a Bill of Rights.

in respect to Nauru: according to UNHCR official 2002 statistics, a rate of circa 84 per cent of Iraqi asylum-seekers was recognized as refugee<sup>138</sup> while DIMIA data showed an approval rate as low as 53 per cent. The same could be said when looking at Manus Island, where the recognition rate was around 76 per cent in May 2002. In both islands UNHCR Iraqis refugee approval appeared to be in line with onshore results, where an 80 per cent result was recorded. In truth, this is perfectly in line with Australian government reasoning, i.e. the Pacific Solution was useful also to lower recognition rates, which on the mainland are said to be too generous compared to UNHCR standards<sup>139</sup>.

This gap in recognition rates supports without further doubts the existence of the already noticed two-tiered refugee standard, although we shall recall what the main problem under the Pacific Solution was, i.e. erosion of the right to access asylum procedures. Indeed, according to Marr and Wilkinson's research<sup>140</sup>, over 2,500 asylum-seekers from Afghanistan and Iraq are estimated being deflected in the first three years of Pacific Solution.

Apart from the extent to which the Pacific Solution breached international law, its economic cost should not be forgotten. According to a Minister's press release<sup>141</sup>, the overall funding for a four year operation of offshore processing was calculated around 129.3 million AU\$ for the period 2002-2003, plus AU\$ 270 million allocated for constructions and operating costs on Cocos-Keeling Island and Christmas Island. Therefore, the same period budget allocation of 2.8 billion AU\$ over four years means an expenditure of circa AU\$ 700,000 for each of the 4,000 asylum-seekers

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<sup>138</sup> At this point of our analysis, it is of utmost importance to underline that UNHCR accepts as refugee qualifying criteria flight from generalised violence and internal conflicts, a criteria usually not enshrined in the 1951 Refugee Convention, but usually fostered by instruments of regional Convention, such as the OAU Convention and the Cartagena Declaration on Refugees. Due to the lack of enclosure of this criteria in the Refugee Convention, states are not obliged to accept it when assessing refugee status determination: as a consequence of this, we argue that part of the variation in recognition rates is linked to the different evaluating criteria between those utilised by UNHCR and those supported by Australia.

<sup>139</sup> Minister Ruddock claimed in late 2001 that Iraqi asylum-seekers were "six times more likely" to gain recognition in Australian mainland than through UNHCR. See Crock, Mary "In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law In The Management Of Refugee Flows", *Pac. Rim L. & Pol'y J.* Vol.12, No.49, 2003, pp 49-95

<sup>140</sup> See Marr and Wilkinson, as cited in Kate, Mary-Anne "The provision of protection to asylum-seekers in destination countries" Working Paper No. 114, *New Issues In Refugee Research*, UNHCR 2005

<sup>141</sup> Minister for Immigration and Multicultural and Indigenous Affairs, Ministerial Press Release No. 33 of 2002: *Offshore Processing Developments and Related Savings*

who might have come by boat to Australia, while the Australian government in the same financial year allocated 7.3 million AU\$ to UNHCR to address root causes<sup>142</sup>. The disproportion is evident, since, in comparison, Australia gave only 30 cents to help each of the 23 million refugees in the world. Moreover, offshore processing accounted for most of the refugee budget increase in financial year 2002-2003, reaching the peak of 1.2 billion AU\$<sup>143</sup>, since AU\$ 403 millions were destined for offshore processing solely in Nauru and PNG<sup>144</sup>.

The relation that links Australia with the two declared countries Nauru and PNG<sup>145</sup> shall now be outlined: both declared countries suffered of a significant low bargaining power mainly because of their colonial past and their still existing economic dependency vis-à-vis to Australia.

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<sup>142</sup> See Refugee Council of Australia, Reflections on the 2002-2003 Federal Budget, May 2002, as cited in "Australia's Refugee And Special Humanitarian Program: Current Issues And Future Directions Views From The Community Sector", February 2006

<sup>143</sup> AU\$455 million was given to processing in excised locations, such as Christmas Island, from 2002 and 2006. See Betts, Alexander, "The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR", *Refuge*, Volume 22, No. 1, 2004, pp. 58–70. In 2002-2003 offshore processing on excised territories was AU\$ 81.9 million and allowed the processing of 4,500 claimants; AU\$ 75.4 million was granted for building Reception and Processing Centre on Christmas Island. See, Portfolio Budget Statements 2002-2003, Department of Immigration and Multicultural Affairs, pp. 70, 71, 72 and 73. Available at <http://www.immi.gov.au/about/reports/budget/budget02/>. See also Oxfam "A price too high: the cost of Australia's approach to asylum-seekers", The Australian Government's policy of offshore processing of asylum seekers on Nauru, Manus Island and Christmas Island - a research project funded by A Just Australia, Oxfam Australia and Oxfam Novib, August 2007.

<sup>144</sup> Instead, the Department of Immigration and Multicultural and Indigenous Affairs underlined that savings were expected to result in onshore processing costs thanks to the increased operations offshore. The total onshore savings available for offshore Pacific Solution were AU\$28 million during 2001-2002 and circa AU\$86 million in 2002-2003. See [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=maritime\\_ident\\_ctte/report/c11.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=maritime_ident_ctte/report/c11.htm) The government stressed that the decrease in onshore protection places to 1,000 places (84 per cent reduction) compared to the 6,300 of the year 2001-2002 was the result of successful offshore policies to reduce unauthorised arrivals. The onshore reduction was somehow balanced by an increase in number of Special Humanitarian Programme (resettlement) components of the Australian Humanitarian Programme. See <http://www.immi.gov.au/about/reports/annual/2002-03/report27.htm> The government, therefore, maintained that resettlement and offshore processing help to line up and to cream off non genuine refugees. Indeed, it keeps on stressing that the offshore resettlement programmes outweighs Australia's commitment to uphold international protection obligations. See <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>

<sup>145</sup> It is true that also New Zealand was part of the offshore processing related to the Tampa affair, but since its relations to Australia are different and on a basis of a same level, New Zealand will not be part of this discussion.



## 2.1 Nauru

Nauru is a twenty-one square kilometre island with 12,000 inhabitants: its phosphate<sup>146</sup>-rich soil was depleted by a German-British mining consortium at the start of the twentieth century and during World War I Nauru was occupied by the Australian army. Later on, in 1920, Australia took on the administrative power on the island. The joint venture between U.K., New Zealand and Australia, the Phosphate Company, extracted most of Nauru's reserves between 1920 and 1968, when the island gained its independence. By the late 1980s Nauru's phosphate reservoirs were almost empty and the country so far depended mainly on Australian aid. In the 1990s, Nauru tried to get back its fair share of profits, as well as the compensation for damages Australia caused while mining: it took Australia to the International Court of Justice and the latter accepted to pay 57 million AU\$ immediately and 50 million in twenty years, but the lack of other venues rendered the country almost bankrupt by the year 2000.

Australia was well aware of the economic situation in which Nauru was and thus it seized the opportunity of offering development aids in exchange for offshore processing straight after the Tampa crisis. Indeed, there was a steady increase in Australian foreign aid towards the little island during the period of offshore processing. In the period 2000-2001 the total aids was 3.4 million AU\$, but after Tampa and the Memorandum of Understanding between Australia and Nauru was officially signed, the budget reached the peak of 22 million AU\$<sup>147</sup>.

On 10 September 2001, Nauru agreed to sign a Statement Principles and first Administrative Agreement with Australia and accepted not only to host 283 out of 433 of the Tampa boat people and 237 others intercepted by the ADF, but subsequently it also signed the first Memorandum of Understanding that increased Nauru's hosting capacity up to 1,500 asylum-seekers and replaced the previous agreement. The Memorandum also provided that the International Organisation for Migration (IOM) was to administer the management of detention centres, while actual

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<sup>146</sup> Phosphate is used as fertiliser. See <http://www1.american.edu/ted/NAURU.htm> last accessed 7 September 2012

<sup>147</sup> As noticed by Tara Magner (above, note 7 and 31), the total amount of 30 million AU\$ that Australia provided to Nauru for the assistance given in the offshore processing is even larger than all the development aids paid to the same island between 1993 and 2001.

security in camps was outsourced to a private company, the Chubb Protective services, in cooperation with IOM, Australian Protective Services (APS) and Nauru Police Force. Australia provided 20 million AU\$, covered the costs of building the centre and the running of detention facilities and it paid for IOM's services contract with the Australian government. On 9 December 2002 a second MOU with the Australian government was signed, extending the value of aids to 30 million AU\$ for the financial year 2002-2003 and the time length until June 2003. It was then further extended in February 2004<sup>148</sup>, while the most recent agreement<sup>149</sup>, following the election of Kevin Rudd as Australia's Prime Minister in 2007, came to an abrupt end<sup>150</sup> on 30 June 2007. The last 89 asylum-seekers residing in Nauru offshore processing centres were finally resettled in Australia by February 2008. At last it should be underlined that Nauru signed the Refugees Convention in June 2011 and thus it was not a state party during the Pacific Solution. In this case, the link between acceptance and cooperation of the third provider country and an increased level of aids is strong and undeniable<sup>151</sup>.

## **2.2 Papua New Guinea (PNG)**

As well as Nauru, PNG is an Australian ex-colonial territory. During the late nineteenth century it was mainly annexed to the British empire whereas the north-eastern part was given to Germany, forming the British New Guinea and the German New Guinea respectively. Following the German defeat in World War II, the League of Nations gave Australia a mandate over that territory and the region was renamed “Territories of Papua New Guinea”, thus becoming an Australian trust territory until

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<sup>148</sup> Memoranda of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues dated 11 December 2001, 9 December 2002 and 25 February 2004.

<sup>149</sup> Memorandum of Understanding between Australia and Nauru for Australian Development Assistance to Nauru and Cooperation in the Management of Asylum Seekers dated 20 September 2005.

<sup>150</sup> The detention centre accounted for almost 20% of Nauru GDP, which is around \$25 million. See: <http://news.theage.com.au/world/nauru-hit-by-detention-centre-closure-20080207-1qs6.html> last accessed 16 June 2012

<sup>151</sup> In July 2008 Australia provided AU\$ 29 million Memorandum of Understanding in Official Development Assistance to Nauru [http://www.foreignminister.gov.au/releases/2008/fa-s122\\_08.html](http://www.foreignminister.gov.au/releases/2008/fa-s122_08.html)

its independence in 1975. The country faced some political turmoil in the 1980s and later on a secessionist movement started by the Bougainville Revolutionary Army in 1988.

Like Nauru, post-independence PNG also faced economical challenges: Australia at times not only provided up to 50 per cent of the government budget but besides it constituted the only provider of military aid to the country. Needless to say therefore, the country largely relied on the help of the southern neighbour, although it is harder to find a clear link between financial dividends and succeeding cooperation in extraterritorial processing on Australia's behalf, as in the Nauru case. In fact the new official aids granted from Australia to PNG stayed somewhat constant compared to the pre-Pacific Solution ones, even when considering that PNG is the first receiving country for Australian foreign aid, with circa 300 million AU\$ per year.

When on 11 October 2001 Papua New Guinea (PNG) agreed to sign the Memorandum of Understanding (MoU)<sup>152</sup> proposed by Australia, the country accepted to host 225 asylum-seekers and had to think about hosting further more groups of migrants in exchange for more than 20 million AUD\$. In January 2002 a second Memorandum of Understanding was signed and this time PNG was to build a detention facility on its territory in order to host 1000 asylum-seekers<sup>153</sup> for up to six months or as short as necessary to process their asylum claims. Already in 2003 the PNG offshore processing centres were mothballed and, as in the case of Nauru, Manus Island detention centres were finally shut down in March 2008.

Among other arrangements between Australia and PNG, it is worth citing the 2004 Enhanced Cooperation Programme, by which Australia provides capacity building assistance in all PNG governmental measures, and the December 2005 Australia- PNG-IOM Memorandum of Understanding on the Care, Protection and Voluntary Return of Certain Irregular Migrants from PNG, thanks to which IOM, funded by Australia, provided shelter, medical assistance and food and engaged in voluntary repatriation.

Moreover PNG received from Australia 20 million AU\$ to engage in a defence forces

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<sup>152</sup> Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues dated 11 October 2001.

<sup>153</sup> The arrangements in PNG are reported to have cost in excess of AUD 24 million, with the number of asylum seekers a mere 446. See Savitri ,Taylor supra, note 44 and 55.

reform before the Tampa incident and it is therefore at least plausible that PNG's long-standing economic dependence on Australian help, or as it was called, neo-colonial domination<sup>154</sup>, might have assured the country's willingness to cooperate on asylum processing offshore, since an eventual repercussion after refusing Australia's request could have proved unsustainable for the PNG government. Indeed, trade data also underline the little bargaining power held by PNG v Australia: Australian export towards PNG reached 1,272 million AU\$ in the financial year 1997-1998 and although this result is not comparable, for instance, to the European export market in the same year, which was worth 10,232 AU\$, it gives an idea of the importance for PNG of reassuring a trade partner like Australia when answering to its offshore asylum processing request, given the absence of any other bargaining chip showed by the PNG side.

In conclusion, it is worth underlining that under the Pacific Strategy only 4.3% of those found to be genuine refugees were resettled in countries other than Australia and New Zealand<sup>155</sup>, as opposed to the burden-sharing rationale implicit in the Solution proposed by the Howard government. In our opinion, this simply revealed and reflected the international condemnation of the Pacific Solution. Indeed abundantly clear resulted Australia not successfully outsourcing its own international protection obligations, as other states refused to consider Australia's processing and resettlement responsibility as being their own.

Secondly, we point out that 9 out of 10 unlawful non citizen arrivals in Australia during the fiscal year 2002-2003 were granted asylum<sup>156</sup> and this data cannot stand with the government's claim that boat people were not bona fide refugees, but merely queue-jumpers in search for better asylum venues.

Thirdly, it is important to clarify that all the other Pacific Islands that refused Australia's proposal of offshore processing programme, among which there were Fiji,

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<sup>154</sup> See Connell cited in Afeef, Karin, Fathimath, "The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific" Rsc Working Paper No. 36, University Of Oxford 2006

<sup>155</sup> See Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. According to the most recent report, 61 per cent of a total of 1,637 refugees detained in Nauru and PNG centres was resettled in Australia. See Senator Evans, Chris, "Last refugees Leave Nauru", Media Release, 8 February 2008.

<sup>156</sup> See <http://www.immi.gov.au/about/reports/annual/2002-03/> last accessed 7 September 2012.

Tuvalu, Palau and East Timor, were systematically left out from the 2001 Australian foreign aid programme and thus it is out of question that the high economic dependence of Nauru and PNG played a great role in coming to terms with their southern neighbour and in finally assuring to take on responsibility for detention of asylum-seekers.

Moreover it is accepted by all scholars that agreements signed with Nauru and Manus Island were made in a short-term perspective. Offshore processing policies did not display sustainable costs in the long run and each piece of the puzzle shows how the measures taken originated from the panic caused by Tampa and the following boat-people incidents. Several times both UNHCR and IOM declined to process for resettlement any more asylum-seekers sailing in the Pacific towards Australia after Tampa.

Briefly, extraterritorial processing policies never showed a permanent guise, although Howard government ignored, or pretended, to keep on ignoring the violations of international standards perpetrated through the Pacific Solution.

After the 2007 Australian federal election, according to the newly-elected Rudd government, offshore processing facilities were to be put in a in stand-by mode<sup>157</sup>, waiting for new boat people to be processed if necessary, although it is acknowledged that the deterrence measures put into force since September 2001 were not completely fruitless. At first DIMIA and Australian Federal Police were worried that excision could have provided incentives for unauthorised boat-people to come closer to Australian mainland, however, as shown in the table below, the number of boat arrivals was equal to zero in financial years 2002-2003 and 2004-2005.

*Boat arrivals since 2000*

<i>Financial year</i>	<i>Number of boat arrivals</i>	<i>Total boat-people's arrival</i>
2000–01	54	4137
2001–02	19	3039
2002–03	0	0

<sup>157</sup> In February 2008 the last asylum-seekers were transferred from Nauru to the mainland.

2003–04	3	82
2004–05	0	0
2005–06	8	61
2006–07	4	133
2007–08	3	25

<i>Year</i>	<i>Number of boats</i>	<i>Number of people</i>	<i>Number of people (with crew)</i>
2008–09	23	985	1033
2009–10	117	5327	5609
2010–11	89	4730	4940

<i>Year, updated 9 July 2012</i>	<i>Number of boats</i>	<i>Crew</i>	<i>Number of people (excludes crew)</i>
2011–12	110	190	7983

Source: "Boat arrivals since 1967", available at:

[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/BoatArrivals](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals)

Finally and related to the non-permanent aspect of the Solution, it should be considered that the Pacific Strategy constituted a brilliant piece of political spectacle. The then Prime Minister John Howard was desperately searching for a third term re-election and opinion poll ratings were not on his side up due to the Tampa affair in early September 2001, federal elections forthcoming in November<sup>158</sup>. The Pacific Solution suddenly became a hot electoral topic and Howard proved to be able to create an election issue out of an immigration and border control problem: pursuing offshore and extraterritorial asylum policies, he showed the Australian public that his government's strategy was still able to react rapidly in crisis situations<sup>159</sup> and was able to exert an effective control over borders, regardless of secondary or primary movers. It could be argued that this reasoning lies at the core of Australian objections to onshore processing, i.e. more than the allegedly queue-jumpers and secondary

<sup>158</sup> This strategy paid off: polls showed a 77 per cent support to Howard's decision to refuse asylum-seekers entrance to Australia and he managed to ride this anti-refugee wave.

<sup>159</sup> The famous accident of the SIEV 4 once again reflects the skilful ability of the Howard government to bend facts to his will. Pictures of boat-people throwing their children in the sea in the attempt to force the ADF to take them onshore, were made public. After the November 2001 election, an inquiry instituted by the Opposition and the Senate discovered that the story was false and showed that the Howard government had misrepresented facts to its own political advantage.

movers, offshore strategy is the way to exert control and manage who “comes to this country and the circumstances in which they come”<sup>160</sup>.

### **3 The Pacific Solution strikes back: the new government struggles to keep its promises**

After the November 2007 Federal election, the new Rudd (Australian Labor party ALP) Government strived hard to end the Pacific Strategy and the then Minister for Immigration and Citizenship, Senator Chris Evans, in February 2008 proudly announced to the nation the imminent closure of offshore facilities and the arrival to the mainland of the last asylum-seekers from Nauru<sup>161</sup>. The news was in line with the ALP National Platform, adopted in April 2007, which declared that “Labor will end the so-called Pacific Solution”<sup>162</sup>.

However, the Labor did not repeal the provisions of the Migration Act and instead merely recycled that Solution, since it “will continue the excision of Christmas Island, Cocos (Keeling) Island and Ashmore Reef from Australia's migration zone”<sup>163</sup>. The announced reversal course started in May 2008, making public the Federal Budget provisions. Among other measures, there was an increase in Australia's intake under the Humanitarian Programme<sup>164</sup>, reaching quota 13,507 in

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<sup>160</sup> See John Howard, *supra* note 36.

<sup>161</sup> “The Pacific solution was a cynical, costly and ultimately unsuccessful exercise introduced on the eve of a Federal election by the Howard government.” See Senator Evans, Chris in “Last Refugees Leave Nauru”, Media Release 8 February 2008

<sup>162</sup> See section 154. page 222 of the National Platform and Constitution, formally embraced during the 44<sup>th</sup> National Conference in Sydney, 27-29 April 2007, see also pages 206, 221, 223. Document available at: [www.alp.org.au](http://www.alp.org.au) last accessed 15 June 2012.

<sup>163</sup> See *ibidem*, section 158 page 223

<sup>164</sup> We already briefly described Australia's Humanitarian Programme (see note 5) regarding the offshore protection (resettlement programme), i.e. Special Humanitarian Programme (SHP). Since Australian SHP works concomitantly with UNHCR's resettlement programme and the two could be easily merged, we shall stress that asylum-seekers being selected through UNHCR's resettlement programme procedures are not allowed to ask to be resettled in a specific country, whereas under the Australian SHP asylum-seekers ( and his/her immediate family members) subjected to violation of human rights can apply to be resettled directly in Australia. Once found an Australian citizen, permanent resident, an organisation based in Australia or an eligible New Zealand citizen to propose them and willing to economically support them, the application for resettlement can be lodged. One point deserves a special focus: notwithstanding the fact that most international instruments underline the essentiality of family for human beings, and especially when thinking about refugees, defining the term “family” is not an easy task, since what is understood as family

2008-2009<sup>165</sup> and a re-development of the criticized centre in New South Wales, the Villawood Immigration Detention Centre (IDC). The South Australian Woomera and Baxter IDC in the outback were closed and the controversial regime of Temporary Protection Visas (TPVs) was abolished<sup>166</sup>.

On 28 July 2008, Minister Evans declared the new Australian mandatory detention policies, which remained essential to pursue an effective border control yet excluded children<sup>167</sup> and, if possible, their families. All unauthorised arrivals, each non-citizen, who may represent a risk for the community and unlawful non-citizens, who did not comply with visa requirements were subjected to mandatory detention in order to carry out health, security and identity controls. Detention in IDC was in theory considered a last resort and for the shortest time possible and therefore regular review of length and conditions of detention were provided. The government also proposed a community-based detention strategy onshore, which provided for the person to be released in the community until his/her status was assessed.

Finally on 31st March 2008 IOM operated the closure of Nauru and Manus Island offshore processing centres<sup>168</sup> and symbolically ruled the end of the Pacific

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varies greatly all over the world. The support of a family member in the arrival country results to be of primary importance for integrating resettled refugees, while on the other hand, suffering from family separation can have the opposite effect. Dependent children (those under 18 years of age or those psychologically, financially or physically dependent), the de facto partner or the spouse, one depending relative of the breadwinner or the spouse are referred by UNHCR as “family units” to Australia, i.e. are allowed to apply with the principal applicant. However, the Australian understanding of family members put heavy restrictions on the refugee's choice of who to include in the resettlement application, as only immediate family members (spouse or de facto partner, dependent child or parent) are eligible and the applicant for Humanitarian Programme shall notify the existence of the Immigration Department before the granting of refugee status or humanitarian visa. The specification of the “split family provision” greatly impacts the reconfiguration of the family once arrived in Australia. Moreover, family reunion can also be completed under the SHP programme only if well founded fears of persecution is proved for each family member. See McDonald-Wilmsen, Brooke and Gifford, Sandra M. “Refugee resettlement, family separation and Australia’s humanitarian programme”, UNHCR research paper no. 178, 2009. In 2010-2011 8,971 visas were granted under the offshore component of the Humanitarian Programme, 4,828 under the onshore one. See <http://www.immi.gov.au/media/fact-sheets/60refugee.htm#c> last accessed 7 September 2012

<sup>165</sup> Senator Chris Evans said the Humanitarian Program would be increased to up to 6,500 offshore refugee places, focusing on refugees coming from Africa, Middle East and Asia with an increase of 500 places to assist people escaping from the conflict in Iraq.

<sup>166</sup> New asylum-seekers who engage Australian protection obligations can now be granted a Permanent protection Visa. Cfr. Note 5, this chapter.

<sup>167</sup> Cfr. section 5AA of the 1958 Migration Act. It states detention for minors is intended as a last resort measure. According to DIAC annual report 2010-2011: “The Christmas Island IDC is used to accommodate single men. Children, women, families and vulnerable clients are accommodated at the low-security construction camp.”

<sup>168</sup> See Crean, S. and Gillard, Julia, “Protecting Australia and Protecting the Australian Way: Labor’s



Solution. Both buildings were converted to classrooms or other useful buildings for the respective governments<sup>169</sup>. ALP divested the Nauru and Manus Island offshore processing centres, along with the several changes in immigration policies, marking a further shift away from certain of the previous government directives.

At that time, Australia's policy turnaround sent a strong message to other countries willing to pursue the same offshore strategies, stating that extraterritorial processing schemes were not viable under international law, since they breach state protection obligations while negating fundamental national safeguards, albeit Christmas Island was still part of the excised territories<sup>170</sup> introduced under the Howard government and thus its Immigration Detention Centre was intended to become the focal processing centre for unauthorised boat-people. Indeed, as the then Minister for Immigration and Citizenship stated, excision and offshore processing on Christmas Island were instrumental to send strong signals to people smugglers. The asylum claims of unauthorised arrivals were to be processed on that Island and, thanks to the re opening of the Immigration Detention Centre built by the Howard government<sup>171</sup>, Christmas Island will dispose of an increased hosting capacity<sup>172</sup>.

### **3.1 Offshore processing on excised territories: Christmas Island**

If on one side under the Labour government the formal policy reversal, pictured above, took place, on the other it is recognised that Rudd learnt a lot from his predecessor, introducing a legal limbo which is constituted with an excision element yet without the exile abroad, which characterized the precedent Pacific Solution. It is the same old story.

Before, as explained above, the Offshore Entry Person was not permitted to apply for a protection visa unless the Minister lifted the bar and, therefore, he/she had

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Policy on Asylum Seekers and Refugees” (Policy Paper 008, ALP, December 2002) at i-ii.

<sup>169</sup> Australia maintains beds in offshore detention centres “in a contingency state” at the cost of AUD\$ 1 million per month, ready to be open in a month's notice. See Hyndman, Jennifer And Mountz, Alyson “Another Brick In The Wall? Neo-Refoulement And The Externalization Of Asylum By Australia And Europe” In *Government And Opposition*, Vol. 43, No. 2, 2008, Pp. 249–269

<sup>170</sup> The excision did not cancelled Australia's sovereignty on the islands in question and it had no impact on the residents of that area, nor did it change customs, quarantine and fishing legislation.

<sup>171</sup> The first temporary facilities were built by late 2001 at Phosphate Hill, but in March 2002 the government started replacing them with new processing and reception centres which could host up to 1,200 people and in June 2002 a contract was signed for the actual construction. In 2007 the Department of Immigration And Citizenship (DIMIA became the DIAC) finished the building of centres. A few refugees were processed in Christmas Island, but on an ad hoc basis.

<sup>172</sup> See Senator Evans, Chris in “Last Refugees Leave Nauru”, Media Release 8 February 2008 .

no legal way to seek protection under the Refugee Convention in Australia. The Rudd Government was now clear in prohibiting OEPs' entry in Australia and thus prevented their onshore Refugee Status Determination (RSD) process, although it insisted restlessly that the procedure would be compliant with Australia's international obligation under the Refugee Convention. The clash generated from these two converse objectives was first solved with the transfer of asylum-seekers to IDC on Christmas Island, where they would be detained and processed, secondly with the creation of a new RSD, which was non statutory and not judicially re-viewable.

Howard's legacy is clearly alive in this processing system which discriminates on the modality and venue of arrival of asylum-seekers. Rudd's non-statutory asylum processing for OEPs on excised territory was called Refugee Status Assessment (RSA)<sup>173</sup> and it resulted in a two-tiered determination process and was designed to be operative outside Australian domestic law constraints<sup>174</sup>.

In fact, notwithstanding the fact that the RSA in some aspects was specular to the RSD<sup>175</sup>, it nonetheless proved to be inferior first in the uncertain criteria for decision making, since nothing ensured that asylum claims were taken into account according to Australia's international obligation under refugee protection<sup>176</sup>; second for the highly discretionary nature of the process as a whole<sup>177</sup> and third in the quality

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<sup>173</sup> RSA was enforced since 2008 and lasted until February 2011. It permitted mandatory detention without discriminating between woman and children. The government later on changed it into the Protection Obligations Determination (POD) from 1<sup>st</sup> March 2011 after the High Court cases of M61 and M69.

<sup>174</sup> As noticed by the High Court in the M61/2010E v Commonwealth 272 ALR 14, (2010) HCA. See also *The Economist*, 16 December 2010. Available at <http://www.economist.com/node/17733127> see further note 120.

<sup>175</sup> The RSA procedures were copied from the onshore Protection Visa determination procedures: RSA was carried out by a RSA officer of the DIAC and his decision was then subjected to Independent Merits Review by a reviewer. See the Refugee Status Assessment Procedures Manual (March 2010), RSA Manual.

<sup>176</sup> Australian case law on its international obligation, the Migration Act, the Migration Regulation 1994 and the other relevant obligations, resulted not binding due to the non statutory nature of the RSA. The Manuals and Guidelines for RSA and IMR were created to provide guidance, although they were drafted many times and it was not possible to enforce them domestically: in the IMR book it was stated, for instance, that case law on the interpretation of the Refugee Convention may provide guidance. It is important to note that, paradoxically, an OEP asylum-seeker could have obtained a more favourable outcome than a person subject to the onshore scheme, if the RSA officer applied articles form the Refugee Convention. This is due to the 2001 strict amendment of the Migration Act, aimed at reducing a generous interpretation of the Refugee Convention.

<sup>177</sup> The Minister's power under Section 46A of the Migration Act is non-reviewable and not compellable: he is not obliged to exert his prerogative. When the bar is lifted, The OEPs is not automatically granted a visa, but he/she is entitled to apply for one. The Minister also appoints Independent Reviewers to a Refugee Status Assessment Review Panel (RSARP); therefore, the

itself of the decision making, since it provided limited access to merits review<sup>178</sup>, to statutory judicial review and to legal assistance<sup>179</sup>. The fact that under this extremely discretionary process a really high proportion of asylum claims is concerned is noteworthy: according to the DIAC annual report of 2009-2010<sup>180</sup> circa 55 per cent of protection visas granted concerned OEPs.

The RSA rationale was further explicated with the government's decision in April 2010 to suspend asylum processing for refugee applicants coming from Afghanistan and Sri Lanka<sup>181</sup>, with the result of 901 asylum-seekers<sup>182</sup> being detained indefinitely on Christmas Island. This decision was said to take into account the evolved circumstances in their country of origin, the lowering approval rates for some groups of asylum-seekers and higher safe returns to their countries of origin. This was implemented for several months<sup>183</sup>, both for offshore and onshore applicants. Needless to say, it affected primarily asylum-seekers processed and detained on Christmas Island, where the excision rendered the implementation of the suspension easier, especially when thinking of the lack of safeguards outlined above.

Together with concerns related to the discretionary aspect of the excised RSA, other doubts were raised regarding the fact that the administrative processing was also lacking safeguards preventing the possibility of *refoulement*<sup>184</sup>. According to

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review of negative assessment lacks autonomy and the RSRP cannot change DIAC decisions nor concede a visa, as it happens with the Refugee Review Tribunal onshore. Senator Evans himself stated he was uncomfortable with the high discretion that power gave to him, because it lacked accountability and transparency.

<sup>178</sup> An independent contractor company engages IMRs and their tenure is unclear. The whole process before the M61 High Court case used to go under a quality assurance check before notifying the asylum-seekers about the outcome and it ended up in actual recommendations and suggestions on what to write.

<sup>179</sup> OEPs can receive legal assistance through the Immigration Advice and Application Assistance Scheme, which nevertheless is composed by migration agents and only a few qualified lawyers, as stated in the IMR Guidelines manual. Moreover, the OEPs have to bear the cost of the procedures related to non-IAAS advice, such as transportation.

<sup>180</sup> See DIAC annual Report 2009-2010, see pages 112, 119. DIAC granted 3,858 visas of which 2,126 were granted to OEPs.

<sup>181</sup> This is probably due to the fact that Australia does not recognise generalised violence as one of the refugee assessing criteria. See UNHCR "Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees" Reissued Geneva, December 2011

<sup>182</sup> By 30 June 2010 759 Afghan and 142 Sri Lankan asylum-seekers were in Christmas Island's IDC.

<sup>183</sup> Newly-appointed Prime Minister Gillard lifted the suspension for Sri Lankan and Afghan claimants respectively on July and September 2010, recalling that an asylum determination should be carried out taking into account the personal history of the claimant.

<sup>184</sup> As was analysed, the Refugee Convention is not binding for RSA officers, IMR reviewers and also for the Minister.

Background note No. 14, 2011, 73 per cent of the 2,914 RSAs between 2009-2010 resulted in granting refugee status and 44 per cent of the 572 review requests of primary negative outcomes resulted positive<sup>185</sup>, but in 2010-2011 there was a significant increase in refusals to Afghan and Sri Lankan nationals applicants<sup>186</sup>. By the same token, the imposition of a processing scheme which is clearly envisaged as inferior may amount to penalty and, therefore, could be seen as violating Article 31 (1) of the Refugee Convention. In fact, the wording “coming directly” does not prohibit the application of this Article to secondary movers, instead they may be asked to provide a “good cause” for their onward movement, such as threat to their life.

Since all OEPs are transferred to Christmas Island, whether they be secondary movers or not, they are not actually given the opportunity to justify or explain their reasons for leaving, notwithstanding the fact that Australia is surrounded by few signatory states.

In its Submission to the Senate Inquiry, the UNHCR supported the view that processing sea arrivals through inferior standards might amount to penalty and discrimination<sup>187</sup> and thus breaches Refugee Convention when it affects those coming directly from danger<sup>188</sup>.

In conclusion, according to scholars<sup>189</sup>, the draft of the Refugee Convention suggests that penalties are generally prohibited when imposed in a special contest, for instance the irregular entry or presence of the refugee.

The Australian excision scheme precisely reflects this idea, since on the one hand it discriminates and imposes penalty to asylum-seekers on the basis of their mode of entry and thus we are in front of the blatant violation of Article 31 (1), while on the other the deterrent rationale implicit in the excision does not meet the “reasonable and

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<sup>185</sup> See “Asylum seekers and refugees: what are the facts?” background note No.14, Parliamentary library, Parliament of Australia, 2011

<sup>186</sup> On 27 May 2010 Mr Metcalfe reiterated this view in L&C No.23, after expressing his concerns about Budget estimates 2010-2011.

<sup>187</sup> Prohibition from discrimination is also found in Article 26 of the ICCPR, which is broader in scope and geographical reach compared to Article 3 of the Refugee Convention: the latter envisages discrimination on the basis of “race, religion or country of origin” solely.

<sup>188</sup> See UNHCR Submission to the 2006 Senate Inquiry, 22 May 2006.

<sup>189</sup> For a study in depth, see Foster, Michelle And Pobjoy, Jason “A Failed Case Of Legal Exceptionalism? Refugee Status Determination In Australia’s ‘Excised’ Territory” In International Journal Of Refugee Law Vol. 23 No. 4, 2011, Pp. 583–631

objective” criteria necessary to avoid non discrimination<sup>190</sup>. In fact, excision measures lack reasonable basis upon how to distinguish between unlawful arrivals that reach mainland and unlawful arrivals that reach excised territories<sup>191</sup> and although excision may be necessary for deterrence, it proved not to be sufficient.

### **3.2 RSA and Christmas Island: the High Court enters the game**

As we underlined, Australia is the only democracy among Western states which does not have a human rights instrument<sup>192</sup> and therefore the international obligation Australia should observe when referring to refugees and asylum-seekers is not enforceable, since they cannot be compelled into domestic fora.

Without surrendering to this, refugee advocates turned to national remedies, as in November 2010 for the landmark High Court Case Plaintiff M61 v Commonwealth<sup>193</sup>. Australia's High Court ruled against the legislation which excised Christmas Island and the other offshore places as a migration zone. Indeed, the High Court unanimously ruled that it had jurisdiction to review IMR decisions. Therefore, OEPs are entitled to access the courts and the court stated that in various points the

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<sup>190</sup> As specified by Human Rights Committee, General Comment 18, “non discrimination”, 1989, UN doc .HRI/GEN/1/Rev.7, 11 October 1989

<sup>191</sup> The non-statutory process is applied irrespective of whether an OEP is taken to the mainland: the government maintains that OEPs do not lose their status when transferred to onshore detention facilities.

<sup>192</sup> Moreover Australia does not incorporate all the rights contained in the Refugee Convention and other human rights instruments into domestic legislation: it is true that the Migration Act incorporated the definition of “refugee” in Section 36, however, the remaining rights under the Convention are not contemplated. Other human rights instruments are incorporated into specific pieces of domestic legislation, nevertheless there is no overall human rights legislation. See also note 6.

<sup>193</sup> The boat people known as M61 (the name of the applicant cannot be revealed for protection reasons) arrived at Christmas Island, where he was detained, and where he lodged an asylum claim. His protection requests were rejected both at the RSA and IMR stages. Therefore he turned to the High Court and challenged the negative outcomes. The Court found that the IMR were falling short of international standards, as the manuals recommended not to follow the Australian case law on refugee claims. It declared that it was a non-statutory process and, finally, that reviewers were not bound by the Migration Act. It moreover ruled that, since the assessment was being carried out, the detention of the applicant under the Migration Act was lawful and, therefore, the RSA and IMR processes were statutory. The Court found that reviewers were not respecting principles of procedural fairness and that reviewers failed to take into account one of the claims for protection based on his fear of persecution under the Refugee Convention. See M61/2010E v Commonwealth 272 ALR 14, (2010) HCA. See also *The Economist*, 16 December 2010. Available at <http://www.economist.com/node/17733127> last accessed 15 June 2012

IMR process did not operate according to procedural fairness under common law regarding OEPs, with the consequent incurrence into jurisdictional mistakes. Moreover, the High Court's decision rejected the characterisation of the RSA process as being non-statutory thus destroyed in part the Labor's attempt to create an effective system outside the domestic one and guarantee-full RSD processing.

This ruling was instrumental in raising protests calling for the end of the excision policy: coupled with the finding that offshore refugee processing on excision soil is five times more expensive than onshore detention and processing<sup>194</sup>, the Rudd government changed the name of the RSA into Protection Obligation Determination from March 2011. It was intended to diminish the existing process, because it merged the previous full initial assessment and separate independent review of negative ones into a single integrated process of judicial review and moreover did not change the discretionary basis on which the process was standing<sup>195</sup>.

Moreover, the Rudd government was already suffering for low rates in public opinion polls, mainly because of the perceived softening of border protection measures. Indeed, in the financial year 2009-2010 there were 4,591 asylum claims in Australia from boat-people, compared to only 690 applications lodged in the previous year.

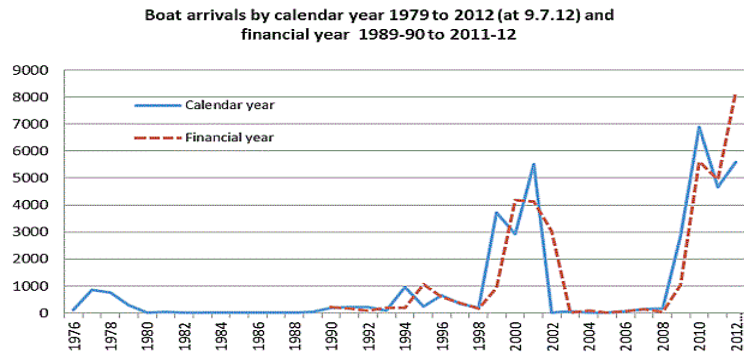
#### **4 Gillard government fosters a Regional Solution**

Ms. Julia Gillard replaced Mr. Rudd as leader of the Australian labour Party on 24<sup>th</sup> June 2010, therefore replacing him also as Prime Minister.

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<sup>194</sup> In June 2009, the government signed a five-year contract with Serco, the new private provider of the detention services. According to the Annual Reports, in 2009-2010 3,425 IMAs were held in Christmas Island detention centre and onshore detention facilities, with a total expenditure of AUD\$ 8.79 million. During the financial year 2010-2011 there were 6523 IMAs between onshore and offshore facilities and the expenditure raised to AUD\$ 17.272. See annual reports 2008-2009, 2009-2010, 2010-2011. See also the comparison of AUD\$471.18 million cost of offshore processing with a 2010-2011 budget allocation for onshore detention facilities of only AUD\$93.76 million. The Australian, 8 January 2011 available at: <http://www.theaustralian.com.au/news/nation/offshore-option-five-times-dearer/story-e6frg6nf-1225983879727> last accessed 15 June 2012.

<sup>195</sup> What have been addressed are the questions related to the quality of decision making and the criteria to apply, nevertheless the question arisen by violation of Article 31 and 33 of the Refugee convention and article 26 of the ICCPR was left untouched.



*Source: Parliament of Australia 2012*

[http://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/BoatArrivals](http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/BoatArrivals)

Due to an increasing number of boat arrivals<sup>196</sup>, re-labelled as Irregular Maritime Arrivals (IMAs) since 2008, Gillard revealed in July 2010 that the Australian government had began negotiations with regional neighbours in the attempt to find a solution to refugee's secondary movements. Latest arrivals revived the debate on border control, management and prevention of influx of boat people. The Australian proposal on the table was the establishment of a Regional Processing Centre, where asylum-seekers would be received.

During her speech at the Lowy Institute, the newly appointed Prime Minister suggested that the regional centre was to be set up in East-Timor<sup>197</sup>, without having entertained proper consultation with that country. This possibility caused widespread anxiety in the region, not least because of the resurfacing of the Howard government's Pacific Solution theme of protecting Australia's border from asylum-seekers in the

<sup>196</sup> Between early 2008 and the end of 2010, Australia received 9,422 asylum-seekers arrived in Australia by boat. The effects of the rhetorical link between IMAs and threat is shown in a survey conducted in July 2010: negative public sentiment is clearly showed, as the 2010 opinion poll presented. 75 per cent of the Australian population was concerned about unauthorised arrivals by boat; 38 per cent of the Australians believed that irregular maritime arrivals constituted a tenth of the annual immigration intake and 10 per cent of those interviewed thought it was at least half. Instead the correct figure of the migration and humanitarian programs for 2009-2010 was 2.9 per cent. This distortion happened because of the continue sensationalized focus on the method of arrival, the constant labelling of IMAs as “queue-jumpers”, “illegals” and “terrorists”. See McKay, Fiona H., Thomas, Samantha L. And Kneebone, Susan “It Would Be Okay If They Came Through The Proper Channels’: Community Perceptions And Attitudes Toward Asylum Seekers In Australia”, *Journal Of Refugee Studies*, Vol. 25, No. 1, 2011, Pp.113-133

<sup>197</sup> Prime Minister Julia Gillard, ‘Moving Australia Forward: respecting fears, moving forward with facts’, speech at the Lowy Institute, Sydney 6 July 2010, <http://www.pm.gov.au/node/6876>. Note also how history repeats itself: East Timor refused Howard's proposal in 2001 after MV Tampa, See “The Pacific Plan: The Provision Of ‘Effective Protection?’” In *International Journal Refugee Law*, Vol. 18, No. 3-4, 2006, Pp. 696-721.

stretch to find a partner state where an offshore resettlement centre could be built.

Prime Minister Gillard did not outline her proposal in detail, albeit stressing that the policy was not a new Pacific Solution, but a “*sustainable, effective regional protection framework*”<sup>198</sup>: the aim was the removal of incentives to travel with people smugglers' help, reducing to a minimum onshore processing of unauthorised arrivals, since reaching the mainland would only assure a trip back to the regional processing centre<sup>199</sup>. In face of the East-Timorese President José Ramos-Horta's unwillingness to host the project, Gillard redirected her pilot-project and concluded bilateral arrangements with neighbour countries PNG<sup>200</sup> and Malaysia<sup>201</sup>.

#### **4.1. Malaysian Solution, i.e. what you get from a recycled Pacific Solution**

On 25th July 2011, the Australian Gillard government and Malaysia signed an arrangement<sup>202</sup> thanks to which Australia was to bring asylum-seekers to Malaysia<sup>203</sup> in exchange for refugees who already had their status determined by UNHCR in Malaysia.

This arrangement, compared to the Pacific Solution, tries to respond to the reasons that push asylum-seekers and recognised refugees to flee from Malaysia and adds 4,000 resettlement places<sup>204</sup> in the next four years in Australia, although at the same time it shows worrying deficiencies and lacks of legitimacy when it forcibly transfers asylum-seekers from Australia to Malaysia.

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<sup>198</sup> See <http://inside.org.au/regional-cooperation-and-the-malaysian-solution/> last accessed 1 July 2012.

<sup>199</sup> See Gillard's speech at Lowy Institute, above note 142.

<sup>200</sup> On 19<sup>th</sup> August 2011 the Minister for Immigration and Citizenship, Chris Bowen, publicly announced the signature of the MOU in agreement with PNG, with the aim of establishing an assessment or relocation facility on Manus Island which should be complementary to the Malaysia arrangement. It will provide more disincentives to resort to people smugglers and embark in perilous journeys.

<sup>201</sup> See <http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-4>

<sup>202</sup> See “Arrangement Between The Government Of Australia And The Government Of Malaysia On Transfer And Resettlement” signed in Kuala Lumpur, 2011.

<sup>203</sup> The arrangements stated that Malaysia was to accept up to 800 asylum-seekers at clause 4 (1), while Australia was to resettle 4,000 refugees in four years, see Clauses 1 (2) and 7 (2) *ibidem*.

<sup>204</sup> In the financial year 2010-2011 13,779 visas were granted under the Australian Humanitarian Programme, 8,971 of which were assigned through offshore resettlement programmes and 4,828 through onshore asylum programmes. See DIAC “Fact Sheet 60- Australia's Refugee and Humanitarian Program” Available at <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>



In fact, section 198 A (1) of the Migration Act allows for the transfer of the OEP to a declared country<sup>205</sup> for processing, which in turn does not provide long-term asylum, instead it constitutes a sort of transit processing centre, i.e. each asylum-seeker transferred to a declared country will be further resettled. The problem here is the transfer of responsibilities from Australia to Malaysia. Under section 75 of the Migration Act, Australian jurisdiction is not present when it is not involved in the refugee determination process and it is also noteworthy that the actual arrangement with Malaysia is not binding<sup>206</sup>.

While Refugee Convention does not expressly prohibit the transfer to a transit or third country as well as to signatory States of the Convention<sup>207</sup>, the transfer nevertheless leaves international responsibilities intact, as the European Court of Human Rights recently ruled in the case of *MSS v. Belgium*<sup>208</sup>. When transferring to an intermediary country, the sending State must make sure that the receiving one provides sufficient guarantees against the onward direct or indirect removal of the asylum-seeker without prior assessment of the risks he/she might face. Moreover, the control of the actual implementation of those minimum requirements is not easy in the Asiatic region, where there is a low State accession to the Refugee Convention and where it is clear that the mere existence on paper of asylum law is not enough: verifying the State in question's actual asylum practice is unavoidable, as well as taking into account current legislation regarding fundamental provision related to fair procedures and merit reviews.

All of the above does not apply to Malaysia, which is not a State party of the Refugee Convention. It has no refugee status determination processing, protection nor

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<sup>205</sup> The country has to be declared by the Minister in writing, See Section 198 A (3) (a), Migration Act 1958.

<sup>206</sup> See clause 16 of the Arrangement, *supra* note 129.

<sup>207</sup> It is important to stress that Article 33 of the Refugee Convention applies extraterritorially, where a signatory state exerts its jurisdiction. See Foster, Michelle "Protection Elsewhere: The Legal Implications Of Requiring Refugees To Seek Protection In Another State" In *Mich. J. Int'l L.* Vol.28 2006-2007, pp.223 and UNHCR "Advisory opinion on extraterritorial application of Non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", 2007, which states that without doubt Article 33 constrains states' decisions to move to an intermediary country. Document available at <http://www.unhcr.org/refworld/docid/45f17a1a4.html>

<sup>208</sup> *MSS v Belgium and Greece*, Application No. 30696/09, European Court of Human rights, Grand Chamber, 21 January 2011, 342.

recognition of domestic law provision<sup>209</sup>: for these reasons, UNHCR has to provide for RSD processing in that country, although several times the agency recognised how difficult it was to fulfil its mandate because it cannot provide an equal substitution to refugee protection afforded by a State. As stated by the UN human Rights Committee in its concluding observation, a State party of the Refugee Convention should get assurance about those deemed to be expelled to another State and must implement mechanisms that will ensure compliance from the receiving State<sup>210</sup>.

Lastly, Australia's plan to create broad harmonized regional processing schemes clashes with the actual European panorama, where the difficulty to overcome regional differences even when agreeing and complying with the application of minimum standards of asylum procedures is glaringly obvious.

Once again, the Australian High Court tried to throw a monkey wrench in the government's work.

The group of Plaintiffs<sup>211</sup> arrived on Christmas Island in early August 2011 and submitted the protection claims. Since they were declared to be Offshore Entry Persons and Section 198 A of the Migration Act provides for the removal of the OEP to a country for which the declaration is in force<sup>212</sup>, they were to be taken to Malaysia, pursuing the arrangement struck with that country in July 2011.

The injunction from removal was granted and the Plaintiffs maintained that the declaration under Section 198 A (3) was not valid, because provision under section 198 a (3) (a) was not respected.

Indeed on 31th August 2011 the Court noticed that the formulation of the wording of Section 198 A (3) indicated the need for assessing the legal framework of Malaysia, whereas the Minister based her declaration on expectations and believed that the country would comply with international protection standards<sup>213</sup>.

Recognising that not always the commitment to uphold relevant international protection standards are mirrored in state practice, the July 2011 declaration,

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<sup>209</sup> Malaysia does not display a non-refoulement obligation nor has it ratified other human rights treaties: other concerns rise with the way in which asylum-seekers will be treated in Malaysia and the actual access to other relevant rights, such as education, health care, work...

<sup>210</sup> Human Rights Committee, Concluding observations, Sweden (79), UN. Doc. A757/40 Volume I 2002.

<sup>211</sup> See Plaintiff M70/2011 v Minister for Immigration and Citizenship, HCA 32, 2011. Available at <http://www.hcourt.gov.au/cases/case-m70/2011>

<sup>212</sup> See 198A subsection 3, Migration Act 1958. see before, note 130.

<sup>213</sup> See Plaintiff M70 supra, note 138, paragraphs 60-61.

therefore, was lacking the jurisdictional facts to make it valid and it was deemed to not be sufficient to evaluate the extent to which protection obligations in Malaysia are respected. The Court showed how under the Migration Act, Section 198 A (3) the Minister was required to declare in writing that basic refugee protection requirement was met before the actual transfer took place, instead the Minister had signed the Agreement with Malaysia on the same date it declared that country.

Thus the central argument was whether that declaration was lawful or not: a majority of 6 to 1 agreed that the Minister's declaration had been made without power and thus it was considered not valid<sup>214</sup>. The Court ruled not to remove the group of asylum-seekers to Malaysia until final determination of their application.

After this cold shower, Ms. Gillard replied in less than a fortnight, announcing that the government was not ready to shelf its ideas and wanted to override this ruling with a new legislation, which could enable the moving of IMAs to third countries where processing could finally be fulfilled.

The Migration Legislation Amendment (Offshore Processing and other Measures) Bill 2011 was introduced on 21<sup>st</sup> September 2011 to the Parliament. The only condition for the Minister's power was that he/she has to think<sup>215</sup> of Australia's national interest when designating the offshore processing country. However, the Bill did not pass and the Opposition, lead by Tony Abbot, called for a return to the "oldie but goldie" Pacific Solution and processing in Nauru<sup>216</sup>, forgetting about the High Court's most recent decision which might question the lawfulness of that option. The Gillard government, without thinking twice, rejected Nauru as an option for offshore processing, because it proved to be too expensive and it was not effective as

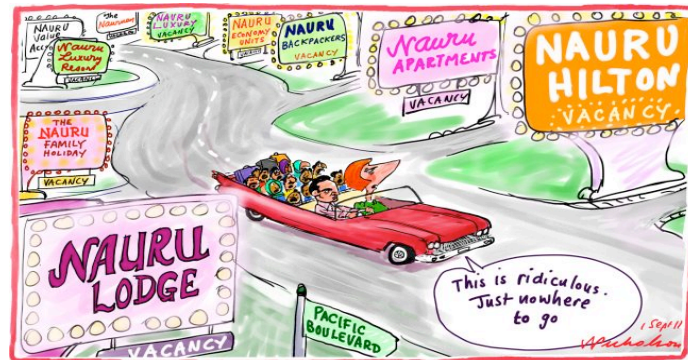
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<sup>214</sup> The declaration was considered invalid for the reasons outlined above: Malaysia was not Party of the Refugee Convention and the Arrangement signed was not legally binding. Moreover, Malaysia was not going to carry out the processing, instead the Court underlined the binding nature of providing access to effective refugee status determination procedures and as well insisted that practical implementation of this provision was fundamental. In brief, Malaysia was not meeting the international obligations' requirements and thus the plaintiff was not to be transferred there. See Plaintiff M70/2011 v Minister for Immigration and Citizenship, HCA 32, 2011.

<sup>215</sup> See Migration Legislation Amendment (Offshore Processing and other Measures) Bill 2011, Section 198 A B (1), (2), (3) and (4) where it is declared that the designated country shall give assurance against refoulement, it shall provide a RSD processing and that this assurance could be not binding.

<sup>216</sup> The Coalition restlessly supported the return to Nauru processing regime, arguing that it was a powerful deterrent in stopping boat arrivals. Tony Abbot proposed the amendment to the government's Bill which stressed that offshore processing was to take place only in third states Party of the Refugee Convention, as Nauru signed it in June 2011. However, Gillard disagreed and thus lost the opposition's necessary support to pass the 2011 Bill.

a deterrent during the Pacific Solution, since, as presented above, most of the asylum-seekers hosted there were resettled to Australia in the end.



Source: <http://nicholsoncartoons.com.au/bowen-gillard-pacific-solution-malaysia-collapse-nauru.html>

The Australian regional processing proposal provides little assurance<sup>217</sup> that those transferred will effectively find protection in Malaysia. It recalls the UK's 2003 transit processing centres to be placed outside the EU, when the House of Lords European Union Committee expressed concerns on the basis that it did not provide sufficient safeguards<sup>218</sup>.

Who is mimicking who?

<sup>217</sup> To know more about the status of the progress so far achieved in agreeing the Migration Legislation Amendment (The Bali Process) Bill 2012 see: [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4747](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4747) last accessed 7 September 2012.

<sup>218</sup> See further Chapter 2.2.1, Uk new vision.

## Chapter II - How to externalise asylum: the European Union policies

### 1 Pre-Tampere Asylum policies: asylum under the 3rd Pillar

Let us begin this chapter by analysing asylum policies from the early Nineties. Asylum issues in the European Union were conceived under the Third pillar of cooperation within Justice and Home Affairs (JHA). This three pillar-structure was introduced by the Maastricht Treaty<sup>219</sup> signed in 1992, establishing the European Union. While external relations of the Union were put under the Second Pillar, with the Common Foreign Security Policy, the Third pillar was instead conceived to incorporate free movement of people and cooperation in the field of justice, police, migration and asylum into the Schengen area<sup>220</sup>.

The JHA cooperation was characterized by intergovernmental collaboration within a constitutional framework and was highly private. Indeed, the Council was to decide on matters by unanimity voting, whereas the European Court of Justice (ECJ)<sup>221</sup> and the European Parliament were completely excluded from JHA<sup>222</sup>. Therefore, according to many, cooperation under the JHA shield was displaying a democratic deficit<sup>223</sup>: the European Commission was only able to play a limited role,

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<sup>219</sup> The Maastricht Treaty attempted to formalise and institutionalise asylum and immigration cooperation in Europe bringing these matters under the European Community law. See Noll Gregor , "Vision Of The Exceptional" Working Paper 2003

<sup>220</sup> According to many, the first important intergovernmental cooperation on asylum in Europe started in 1985 when Germany, Belgium, Holland, Luxembourg and France signed the Schengen Agreement. Since the disappearance of internal borders, there accent has been on asylum issues, migration and cooperation on external borders control. This trend was also more present after the Single European Act created the single market in 1987, when asylum and immigration became the core venues for intergovernmental cooperation. See Noll Gregor , "Vision Of The Exceptional" Working Paper 2003. Moreover, the Schengen intergovernmental framework for cooperation on asylum was formalised and replaced in 1990, when Member States agreed on the first European measure dealing with asylum law, the Dublin Convention, specifically directed towards the determination of which Member State is responsible for asylum claims. The Convention was separated from the EC framework and was incorporated into European law in 2003 with the Dublin II Regulation.

<sup>221</sup> The ECJ had limited jurisdiction and therefore, the JHA did non have judicial accountability.

<sup>222</sup> The European Parliament was given only a consultative role. See Guiraudon, Virginie "European Integration and Migration Policy: the implications of Vertical policy-making" paper presented in the panel Migration, citizenship and race in the EU June 3-6 1999, Pittsburgh, p.a.

<sup>223</sup> JHA's decision-making and legal instrument caused externalities such as lack of transparencies,

since it withheld the prerogative of initiative with member states<sup>224</sup>.

By the same token, it has often been underlined how the Council's unanimity requirement procedure easily used to lead negotiations to a lowest common denominator rationale<sup>225</sup> and it was likely to result in a cul-de-sac. Hence, it followed that JHA cooperation was seen as a strategic venue for judicial and police officials, where they could cooperate on border control and asylum policies without being scrutinized by the public opinion<sup>226</sup>.

European asylum policies had gained momentum during the 1991 Yugoslav crisis, generating fears in Member States of being overwhelmed by a hardly-manageable flood of asylum-seekers, because of the immediate vicinity of the European Community. Therefore, the safe third countries concept and the safe countries of origin provision were introduced into the *acquis* for the first time. Bearing in mind the fear of uncontrolled immigration, the 1992 European Council in Edinburgh discussed for the first time the endorsement of external aspects of migration and asylum policies, introducing idea of readmission agreement. In that venue, Member states agreed on a declaration of principles governing actions towards migration and asylum issues in relation to the EC's external policy<sup>227</sup>.

It was in 1993 when United Nations High Commissioner for Refugees Ms. Sadako Ogata introduced the “preventive protection” concept, which in Europe was endorsed through the 1994 Commission Communication to the Council and the European Parliament on Immigration and Asylum Policies<sup>228</sup>. This document departed from the Community's up-till-then unilateralism and outlined the need for a “comprehensive

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legal guarantees and coherence. See Guild Elspeth, Carrera Sergio And Balzacq Thierry “The Changing Dynamics Of Security In An Enlarged European Union” Challenge Research Paper No.12, 2008

<sup>224</sup> Only visa policy for third country nationals became a Community competence. See Rijpma, Jorrit J. And Cremona, Marise “The Extra-Territorialisation Of EU Migration Policies And The Rule Of Law” Eui Working Paper, Law 2007/01

<sup>225</sup> The requisite of unanimity for the Council negotiations in policy areas of legal migration lead to the adoption of lowest common denominators, shaping the EU law according to member States' interests and priorities, at the expenses of real common and coherent European measures.

<sup>226</sup> Boswell, Christina, “The ‘External Dimension’ Of EU Immigration And Asylum Policy” In International Affairs Vol.79 No. 3, (2003), pp. 619-638

<sup>227</sup> The Edinburgh conclusions mistakenly envisaged that the new Pillar structure would be able to serve as a framework for coordinating asylum and refugee policy with economic cooperation and foreign policy. However, no specific objectives were outlined until the Tampere Council.

<sup>228</sup> COM (94) 23 final, Brussels, 23 February 1994. the Commission stated that thanks to the Treaty on European Union and the creation of the third pillar, the EU has the institutional means to pursue a comprehensive approach and enact the coordination of foreign, economic, asylum and migration policy.

approach” in controlling migration and asylum flow, linking these issues with external policies and adopting a root-cause approach towards migration and asylum (in line with the 1992 Edinburgh Council document). The Commission communicated that the root cause approach should be taken into account when referring to humanitarian assistance, human rights, security, trade and development policies; in other words, it was to be combined with all European external policies.

Notwithstanding the efforts put into the endorsement of a preventive approach in relation with third countries thanks to the 1994 Communication, the focus in migration control and asylum have so far mainly showed a security aspect. As Michael Samers<sup>229</sup> showed, the Commission recognized the need for a “comprehensive approach”, although, at the level of policy-making, it proposed a management of migratory flows within a security frame, since JHA officials meeting were more easily in line with the externalisation of control, as it will be explained later in this chapter.

As a result, JHA and its internal problems were only in part addressed by the 1997 Amsterdam Treaty, which officially made migration and asylum policies a matter of EU concern, transferring them away from the purview of Member States and redirecting the interest on a preventive approach, as Boswell<sup>230</sup> has showed.

## **1.1 Treaty of Amsterdam 1997**

In 1997, the Treaty of Amsterdam enacted the Area of Freedom, Security and Justice (AFSJ), binding the internal market (an area without controls on movement of people and goods<sup>231</sup>) to an environment where European citizens were able to enjoy freedoms in a secure environment. Cooperation within JHA was developed as a way to provide internal security and, at the same time, to compensate for the abolition of inner border

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<sup>229</sup> Samers studied the policy developments related to the use of “soft law” measures as a way to get geopolitical control in “illegal” migration to Europe. See Samers, Michael “An Emerging Geopolitics Of ‘illegal’ Immigration In The European Union”, *European Journal Of Migration And Law*, Vol. 6, No. 1, 2004, Pp 23-41

<sup>230</sup> See Boswell, Christina, “The ‘External Dimension’ Of EU Immigration And Asylum Policy” In *International Affairs* Vol.79 No. 3, (2003), pp. 619-638

<sup>231</sup> We shall underline that the Amsterdam Treaty integrated the Schengen provision into the European legal order.

controls created with the Schengen Convention<sup>232</sup>. As a consequence, internal consolidation was characterised by a prominent external policy agenda. hence, the AFSJ started leaning towards an external dimension, since the achievement of solutions seemed quicker and more probable when national interests were easily mobilized against perceived threats<sup>233</sup>.

The entry into force on 1<sup>st</sup> of May 1999 of the Treaty of Amsterdam consequentially transferred competencies in the field of asylum, migration and civil cooperation from the Third Pillar to the new Title IV<sup>234</sup> of the Treaty Establishing the European Community (TEC). In other words, the JHA was split and asylum issues came under the first Pillar of the European Community<sup>235</sup>, involving a shift away in asylum matters from the intergovernmental cooperation to the EU communitarian competence. As it was already noted, community legislative competences under Title IV were not exclusive, i.e. the community institutions (The European Commission, the European Parliament and the European Court of Justice) were not invested with a total transfer of power from Member States. Quite the contrary, as both powers were to be exercised concurrently, unless the EC had enacted legislations pre-empting

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<sup>232</sup> Inside the Schengen area, the delete of checks inside the internal border was seen as fundamental and the abolition of inner border reached its completion in 2008.

<sup>233</sup> The deep impact of this foreign policy agenda is due to the widespread vision that threats are coming from the outside of the AFSJ, i.e. outside the European Union: therefore, it is becoming less distinct the division between external and internal security. In this external policy agenda, European neighbourhood policy became central. See Lavenex, Sandra "EU External Governance In 'wider Europe'", *Journal Of European Public Policy*, Vol. 11, No. 4, 2004, pp. 680-700

<sup>234</sup> Title IV of the Treaty Establishing the European Community (TEC) "Visas, Asylum, Immigration and Other Policies related to the Free Movement of Persons". Title IV represented a modernised third pillar dealing with the remaining issues of judicial and police cooperation on criminal matters: EC competences thus included, under title IV the matters related the crossing of internal and external borders, visas (articles 61(1) and 62(2)EC), legal and illegal immigration (article 63(3)EC), asylum (articles 63(1) and (2) EC) and administrative cooperation in the related areas (article 66 EC). Title IV did not confer express external competencies in policies related to migration, although the European Court of Justice, following the revolutionary AETR case, elaborated a doctrine on implicit competences related to external dimension: readmission agreements have been decided on the basis of Article 63 (3) EC, even if this provision did not refer expressly to the conclusion of international agreements; this happened because the signing of such agreements is a fundamental mean to reach repatriation, the objective of that Article.

<sup>235</sup> The transfer to the First Pillar gave the Commission an expanded role in starting policies and in coordinating them with development policies, as well under the first Pillar: it was allowed to propose Directives to the Council, i.e. measures binding to the results to reach, although national authorities were free to decide methods and forms; it acquired competences to negotiate agreements with third countries on asylum and immigration matters, on behalf of Member States. In 1998 the JHA Council decided that all agreements between third countries and the Union have to include clauses on compulsory readmission.



Member States' power<sup>236</sup>. Notwithstanding the decree of a five-year transitional period, requiring unanimity voting for the Council in consultation with the European Parliament and the Commission<sup>237</sup>, in actual fact the Community Institutions were still dependent, in the field of asylum and legal immigration, on Member States, which were deciding on unanimity consensus and not QMV<sup>238</sup>. However, the reforms permitted by the Amsterdam Treaty caused a slightly positive improvement of the rule of law in the asylum field, since the Treaty rose accountability and transparency, giving the EU institutions a major role<sup>239</sup>. Indeed, for the first time the EU gained time legal competence to engage in cooperation in the JHA area with third countries.

Along with the shift of competencies, Article 63 of the Amsterdam Treaty<sup>240</sup> also mandated common policies aimed at harmonizing Member States' asylum law and practices inside the AFSJ. To overcome issues on visa, immigration, asylum and other matters related to free movement of persons, and to provide a consistent refugee determination process and the very same level of protection throughout Europe, a set of basic minimum standard in key areas was to be found. Therefore, the Treaty demanded for legally binding Community instruments on:

- the granting of temporary protection in the event of mass influx<sup>241</sup>;

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<sup>236</sup> As it was the case with short term visas, Article 62(2) b EC, where the competence became exclusive for the Community.

<sup>237</sup> Article 67 (1) of the EC treaty states that “During a transitional period of five years following the entry into force of the Amsterdam Treaty, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament”. The Commission continued sharing the right of initiative with Member States until 2004 when it obtained exclusive right of initiative and the European Parliament continued to be consulted, shifting to the procedures of co-decision only for visa rules procedures. The QMV was meant to accelerate the move towards the Common European Asylum System (CEAS). Article 67 (2) holds that after this period of five years the Council shall act on Commission's proposal; the Council shall take a decision unanimously after consulting the Parliament with a view to providing for immigration and asylum to be governed by the co-decision procedure, as decided in Article 251 EC Treaty.

<sup>238</sup> Indeed, the area of legal migration as stated in Article 63 (3) a EC Treaty, was the only Title IV field still not benefiting of QMV: we have to wait until 2005 for the use of QMV and the co-decision procedure. See Balzac, Thierry And Carrera, Sergio “The Hague Programme: The Long Road To Freedom, Security And Justice”, In “Security versus freedom?: a challenge for Europe's future”, edited by Thierry Balzacq and Sergio Carrera. - Aldershot, Hampshire - Burlington, VT : Ashgate, 2006 , pp 1-32

<sup>239</sup> As Staffan noted. See Staffan, Ida “Judicial Protection And The New European Asylum Regime” In European Journal Of Migration And Law, Vol. 12, 2010, pp. 273–297

<sup>240</sup> Article 63(1) required that all the measures adopted were to be in accordance with the Refugee Convention, its Protocol and all the other relevant international treaties.

<sup>241</sup> Directive adopted later on in 2001 as Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and

- reception conditions and entitlements of asylum-seekers in Member States<sup>242</sup>;
- the criteria addressing the qualification of refugees or other form of protection<sup>243</sup>;
- procedures aimed at dealing with asylum claims<sup>244</sup>.

Moreover, the Treaty called for instruments promoting a burden-sharing concept when receiving and bearing costs of refugees among Member States, namely the Refugee Fund<sup>245</sup>, which was created in 2000. Furthermore, it called for the establishment of fixed criteria for the determination of which, among Member States, is held responsible for carrying out asylum assessment when considering an application for an asylum claim submitted in a Member State by third country nationals (which was adopted with the Dublin II Regulation<sup>246</sup>).

All these measures constituted the first step toward the Common European Asylum System (CEAS), the process approved at the 1999 Tampere European Council. The CEAS is aimed at finding proper instruments for Member States and at providing for a full endorsement of the Refugee Convention principles<sup>247</sup>. It consists of Regulations, measures binding directly on Member States, and Directives, which bind Member States regarding required results.

Later in 2005, thanks to a clause inserted in the Nice Treaty of 2000<sup>248</sup>, the decision-

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bearing the consequences thereof, OJ No L 212/12, 2001.

<sup>242</sup> Measure adopted in the Council Directive 2003/9/EC of 27 Jan. 2003 laying down minimum standards for the reception of applicants for asylum in the Member States, OJ No L 31/18 ('Reception Conditions Directive'), 2003.

<sup>243</sup> Adopted as Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ No L 304/12, also known as "the Qualification Directive", 2004.

<sup>244</sup> Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 aka the "Asylum Procedures Directive", 2005. This directive was adopted notwithstanding European Parliament and UNHCR concerns for not being consonant with the Refugee Convention; it provides measure reinforcing the exclusion rationale and removals of asylum-seekers from the EU territory on the basis of safe third country concept and it does not provide any suspensive effect nor consideration of the protection claim.

<sup>245</sup> Council Decision 2000/596/EC of 28 Sept. 2000 establishing a European Refugee Fund, OJ No L 252/12, 2000.

<sup>246</sup> Council Regulation EC/343/2003 of 18 Feb. 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ No L 50/1 aka 'Dublin II Regulation', 2003.

<sup>247</sup> Presidency Conclusions, Tampere European Council, 15-6 October 1999

<sup>248</sup> With the signing of the Treaty of Nice in December 2000, it was paved the way to the European enlargement towards east; we should note that the enlargement added much fluidity to the process: candidate states were required to incorporate into their legislation the European asylum acquis and

making structure on migration and asylum matters changed and issues related to that area were decided on qualified majority voting (QMV), however excluding legal migration: this change meant a greater role in that field for the European Parliament and the European Court of Justice.

In conclusion, the Treaty of Amsterdam paved the way for the progressive moulding of the AFSJ. From that moment on, the political agenda deciding the EU action on asylum and migration issues has been outlined in multi-annual programmes, each lasting five years. The first such programme was the Tampere Programme, which took place from 1999 to 2004; the second was the Hague Programme, which ran from 2005 to 2010 and the last and still running is the Stockholm Programme, which will last until 2015. Lastly, The Lisbon Treaty, in force since December 2009, deleted the Pillar-structure and put measures and policies related to the creation of the European Union AFSJ under the Treaty on the Functioning of the European Union (TFEU), Part three, Title V.

### **1.1.1 1998, a troublesome year: the Kurdish avalanche and the Austrian Strategy Paper (July 1998)**

Having analysed the main features of the Treaty of Amsterdam in the field of asylum, let us move on to the main background events to the 1999 Tampere Council.

The first outstanding event is the late 1997-early 1998 Kurdish influx. Kurdish asylum-seekers were fleeing from Saddam Hussein's regime and, due to the harsh repression of PKK made by the Turkish government, transited through Italy and Greece in order to reach France and Germany. As a consequence, the international blame-shifting quarrel between Italy and Germany started.

At the core of the problem, lied the Convention on the application of Schengen Agreement<sup>249</sup> and its abolition of checks on the EU internal borders. Indeed, as it was observed above, the Schengen Provisions aimed at pursuing the free movement of

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to implement it in their legal systems.

<sup>249</sup> The Schengen acquis was born in 1985, as it was stated before, note 2. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common borders.

goods and individuals inside the Union. In particular, Title II, Chapter 7 of the Schengen Convention<sup>250</sup> outlined the rules for determining which Member state holds responsibility for examining asylum applications. While stating the observance of the principles of international protection deriving from the Refugee Convention and other relevant international instruments<sup>251</sup>, on the other hand the Convention increased the risk of refusing the examination of the asylum claims on the basis of legal loopholes solely<sup>252</sup>. Indeed, under this Convention the Member responsible of processing the claim is the state which first granted the residence permit or visa<sup>253</sup> to the applicant. As a consequence, the Convention allowed for a transfer of protection responsibility between Member states and, moreover, the Member state responsible of examining the asylum claims was also be held accountable for the rejection from the Union's border of the failed asylum-seekers<sup>254</sup>.

Having this background in mind when the wave of Kurdish asylum-seekers and immigrants reached the EU in late 1997<sup>255</sup>, Germany complained over the Italian inadequate implementation<sup>256</sup> of border controls as required by the Schengen Convention<sup>257</sup>. Furthermore, Austria re-installed border checks and some German politicians wanted the suspension of the Convention, suggesting that Italy was simply trying to pass the irregulars-back to northern countries<sup>258</sup>. The Italian prime Minister Prodi underlined instead that many of those arrived to Italy and Greece were bona fide refugees and the UNHCR deeply appreciated the Italian conducts, asking others

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<sup>250</sup> See articles 28-38 *Ibidem*. These provisions were drafted to delete both the alleged “asylum-shopping” and the “refugee in orbit” situations.

<sup>251</sup> See *ibidem*, article 28.

<sup>252</sup> As noted by Benedetti, the Schengen Convention enacted a procedural harmonisation to which did not correspond any substantial harmonisation of the asylum legislation of each Member state. The Convention harshly penalised asylum shopping, while at the same time it supported the national examinations of asylum claims, preserving the same different domestic entitlements. See Benedetti Ezio “Il diritto di asilo e la protezione dei rifugiati nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona” Cedam, pp.296, 2010

<sup>253</sup> See *ibidem*, article 30.

<sup>254</sup> Towle, Simon M. “Politica europea in materia di rifugiati: Schengen contro la Convenzione europea dei diritti dell'uomo”, in “Pace, diritti dell'uomo, diritti dei popoli”, anno IV, numero 2, 1990

<sup>255</sup> See Paolo, Valentino “Curdi, ora la Germania " avvisa " l' Italia”, *Corriere della Sera*, 3 gennaio 1998

<sup>256</sup> Italy allowed to irregular immigrant a 15-days period to leave the country, before enacting the expulsion. See “Per i profughi curdi Bonn sgrida l'Italia”, *La Repubblica*, 13 novembre 1997

<sup>257</sup> Italy acceded to the Schengen Convention in 1997. See “Le critiche sugli accordi di Schengen-Curdi, l'accusa tedesca sulle "frontiere colabrodo"” *La Repubblica*, 2 gennaio 1998

<sup>258</sup> Indeed, the largest Kurdish community in Europe is in Germany, followed by those in France and in Scandinavian Countries.

European Members to honour their protection responsibilities<sup>259</sup>.

A second landmark event to the Tampere Council of 1999 was the leaking of the Austrian Strategy Paper. In 1998, Austria held the Council Presidency and put forward a much-debated proposal on asylum and immigration policy. The Austrian Strategy Paper<sup>260</sup> underlined the European role in diminishing migratory pressures on the main country of origins of migrants, which included, among other measures, intervention in the country of origin, economic cooperation and bilateral relations, human rights' promotion and development aids. In sum, this paper linked the Third pillar with issues belonging to the Union's foreign policies area.

This Strategy Paper was built on the ideas put forward during the 1992 Edinburgh Council and the 1994 Commission Communication. It called for more efforts in contrasting illegal flows in cooperating with third countries, dividing them up into circles. Future European Member States composed the first circle, future prospective admission states and transit countries were the second circle (among which there were Mediterranean countries and previous-soviet countries) and the third circle was made up of sending countries.

While for the first and the second circle the measures proposed were well-known tolls of externalisation controls, for the third circle the preventive approach was preferred<sup>261</sup>. Several controversial actions were endorsed, such as rendering economic aids dependent on third states' efforts in reducing push factors, forced repatriation of illegals to third countries of origin, and military intervention to prevent migrants to leave, because their flows might destabilize Member States' national and security interests<sup>262</sup>. Indeed, at first this paper caused quite an international uproar.

Above all, amendments or replacement of the 1951 Refugee Convention were also suggested, highlighting the shift from the rule of law to politicized ground in European asylum policies: indeed, the Austrian Paper stated that the Convention was not updated and new solutions were needed, because asylum law was not sufficient

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<sup>259</sup> See "L'Onu loda l'Italia per l'apertura ai curdi", *La Repubblica*, 6 gennaio 1998

<sup>260</sup> Please note that the version mentioned in this note is not the July 1998 document: Council of the European Union, 'Note from Presidency to K4 Committee: Strategy Paper on Immigration and Asylum Policy', CK4 27, ASIM 170, 9809/98 (OR.d) Brussels, 1 July 1998

<sup>261</sup> See Boswell, *supra* note 231.

<sup>262</sup> Council of the European Union, 'Note from Presidency to K4 Committee: Strategy Paper on Immigration and Asylum Policy', CK4 27, ASIM 170, 9809/98 (OR.d) Brussels, 1 July 1998, paragraph 41.

anymore<sup>263</sup>.

As soon as the first draft leaked in September 1998, the Austrian Presidency re-drafted most of the controversial part of the Strategy Paper. As a consequence of this, it is difficult to find either the original July draft or the “softened” September 1998 version. However, this Paper influenced the EU asylum policy in the following years, enforcing the idea of finding external approaches in lieu of the “old” asylum law<sup>264</sup>.

### **1.1.2 December 1998, adoption of the HLWG at the General Affairs Council**

In the same year, under the Dutch Presidency<sup>265</sup> and perhaps prompted by the Austrian Paper, the High-Level Working Group (HLWG) on Asylum and Migration in the Council of Ministers was established, a cross-pillar task force with the aim of fulfilling the 1994 Commission's comprehensive approach through the outline of Action Plans and in cooperation with asylum-seekers and migrants sending countries.

The General Affairs Council first agreed on testing the Action Plan on Afghanistan, Albania, Somalia, Sri Lanka, Morocco and Iraq<sup>266</sup> and the HLWG was ordered to include both external and preventive cooperation with third countries. However, notwithstanding the endorsement of the root-cause approach in Action Plans, in actual fact the proposals focused on regional containment, i.e. policies to keep asylum-seekers in their country or region of origin. Indeed, since the HLWG was mainly composed of JHA officials, namely Council experts coming from home affairs ministers and national justice officers<sup>267</sup>, there are evidences that policy

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<sup>263</sup> See *ibidem*, paragraphs 27 transnational approach and 37 comprehensive approach.

<sup>264</sup> “The European Union's migration policy must obviously cover the following areas, irrespective of specific topical events and short-term developments (...) reform of the asylum application procedure and transition from protection concepts based only on the rule of law to include politically oriented concepts”. See *ibidem* paragraph 41

<sup>265</sup> Since it had been trying to develop preventive approach at the national level as well, it is important to underline that the proposal came from the Dutch government.

<sup>266</sup> HLWG was to assess the already in place action plan on migrants from Iraq.

<sup>267</sup> As Van Selm noted HLGW officials were “third pillar people talking about second pillar subjects, with the aim of doing work that is scheduled to fall under the first pillar”, since for instance HLWG decided on issues as humanitarian assistance, which was a first pillar affair, i.e. Commission. See Van Selm cited in Sterkx, Steven, “The Comprehensive Approach Off Balance: Externalisation Of EU Asylum And Migration Policy” Psw Paper 2004/4, Politike Wetenschappen, PSW Paper No.4 2004. In sum, it took place the transferral of domestic policies to the EU level, whereas the Commission was not really taken into account.

planning at this level was focused on domestic concerns of interior Member states' officials, subordinating root causes to unilateral tools of migration control.

Needless to say, this restricted view also implied limitations in Action Plans<sup>268</sup>, since, for instance, those on Afghanistan and Albania were handed out in late and the Action plan on Morocco was initially drafted without prior consulting the Moroccan government. These Action Plans were intended to take into account the socio-economical and political environment of migration and should have implemented usual policy tools such as readmission agreements, including initiatives to reinforce bilateral relations, and at the same time provide updated information, development aids and so on...<sup>269</sup>. Action plans provided also for the cooperation with governmental, intergovernmental, and non-governmental organisations and the UNHCR.

Moreover, the HLWG was economically dependent on the Commission Official of the Common Foreign Security Policy (CFSP) working on external and development policies to draft proposals on prevention. The Commission's Directorate-General for external relations (DG RELEX) and Development complained<sup>270</sup> about being left out from the drafting of HLWG Action Plans and at the same time protested on the HLWG's use of development budgets for the prevention management of migration flows.

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<sup>268</sup> HLWG Actions Plans were lacking of know-how and reaction capacity to developing conditions in the countries taken into account.

<sup>269</sup> In 1999 the HLWG produced a report fostering the use of trade sanction and development aids to pursue the European aim of managing immigration. Moreover it suggested also a comprehensive approach, since it put forward the proposal to consider Mediterranean and Balkan countries as partners in the fight against illegal immigration. Therefore, the union was to engage in management of migration flows and capacity-building abroad.

<sup>270</sup> Moreover, many in the DG for External relations and Development disagreed on the actual interpretation of the term "external dimension": their concerns regarding the development of the external dimension focussed on the possible negative impact on Member states' relations with third countries following the introduction the idea of migration prevention as development aim, the shift of focus on regions other than those interested by the actual development practices and the possible reorientation of development policies. According to Boswell, in actual fact those in the DG sided with the externalisation of control agenda proposed by JHA, in the attempt to avoid the merging of development and migration goals. See Boswell, Christina, "The 'External Dimension' Of Eu Immigration And Asylum Policy" In *International Affairs* Vol.79 No. 3, (2003), pp. 619-638

## 1.2 From Tampere to Stockholm: theories of extraterritorialisation

The combining of external relations with asylum and migration policies, namely the external approach to asylum, was formally endorsed at the Tampere European Council meeting, in October 1999, when the Common European Asylum System was launched<sup>271</sup>. The Presidency Conclusion, in fact, asked for strong external measures and provided that:

*(...)The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.<sup>272</sup>(...) All competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice.<sup>273</sup>*

The Heads of State and Government thus dusted off the idea of utilizing a “comprehensive approach”, since they realised that JHA's inner policy on asylum-seekers was to be placed side by side with external strategies<sup>274</sup> targeting root causes of migration in order to be more effective. Indeed, the need of an external policy on asylum<sup>275</sup> to be implemented on third countries' territories was a result of the inadequate national border control.

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<sup>271</sup> The aim of the CEAS is to harmonize asylum standards among member States in order to provide all over Europe the same standard and criteria for granting and ensuring protection to refugees: in fact up till that moment, refugee entitlements and recognition rates varied widely among Member states; thus, another reason to implement uniform methods was to reduce secondary movements and the so-called asylum-shopping inside the EU.

<sup>272</sup> See Section A Common EU Asylum and Migration Policy, section I “Partnership with Countries of Origin”, in Presidency Conclusions, Tampere European Council, 15 and 16 October 1999

<sup>273</sup> See section D “Stronger External Action” no. 59, *ibidem*.

<sup>274</sup> As exemplified by Trauner, in sum the EU JHA ministers were concerned by the closure of external borders and by keeping out problems; instead EU foreign and security policy was to enhance relations with third countries and regional integration. Trauner, Florian “The Internal-External Security Nexus: More Coherence Under Lisbon?”, Iss Occasional Paper No.89, March 2011

<sup>275</sup> The external dimension of asylum policy is often understood as a reaction to the inadequate domestic control-oriented agendas when facing unmanageable flows of asylum-seekers and migrants toward Europe. Member states have thus searched for a solution outside the EU external borders.



This was the start of a greater accent on the external aspect of asylum in Europe, although the comprehensive approach was never really defined in depth. Sometimes, instead of comprehensive, this approach is defined as balanced, cross-pillar, integrated or holistic: the main idea does not change and the link between cooperation and partnership with third countries, economic development, human rights and internal EU asylum policy is always present.

The guidelines for the Tampere Programme, lasting from 1999 to 2004, were included in the report adopted in 2000 at the Feira European Council. The external dimension of asylum and migration policy was intended as effective control both of the Union's external borders and of readmission agreements with countries where asylum-seekers' flows originate.

Above all, two different ideas were proposed during the Programme. As Christine Boswell observed, on the one hand there was the endorsement of a preventive type of policy: addressing root causes, providing closer access to protection in regions of origin and changing push factors are measures aimed at preventing the arrivals of flows of asylum-seekers. Therefore, policies of this kind are developed in measures such as IDEs, foreign policy tools or targeting development assistance (TDA).

On the other hand, under the Tampere programme the cooperation put forward consisted of externalisation of up-till-then national and usual measures of control on migration. In other words, third countries were to reinforce their borders with border control to prevent smuggling, illegal entries, and to enact readmission of illegal immigrants, whether they be other countries' nationals or their own.

The Tampere conclusions, therefore, conformed to the HLGW initiative and without doubt the externalising and securitarian approach<sup>276</sup> won over the preventive one. For instance, severe criticism<sup>277</sup> from non-governmental organisations and the

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<sup>276</sup> This favouring securitarian measures is not new to Member States, which already in the 1970s, during the oil crisis, introduced severe policies and terminated labour supply agreements in place with sending countries.

<sup>277</sup> The HLWG responded to criticism stating that they were lacking proper funds to implement at best Action Plans; for this reason as well, out of the B7, destined to cooperation with third countries, the new budget line B7-677 was created to give support and implement Action Plans on asylum and migration plans with third countries; it was destined 10 million in 2001, 12.5 in 2002 and it grew to 30 million in 2003. The new AENEAS budget line covered the period from 2004-2008, with a total amount of 250 million available to support third countries in managing migratory flows and in helping them to spur conclusion of readmission agreements and helping them to cope with the consequences of readmission. Official Journal Of The European Union, Regulation (EC) No491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a

European Parliament spread out of the implemented HLWG Action Plans, when they were first presented at the December 2000 Nice European Council. In particular the overt lack of dialogue<sup>278</sup> was underlined, as well as lack of coordination with third countries and the great preference showed for the security dimension.

Indeed, the actual nature of the Action Plan seemed different from the outlined comprehensive approach, giving predominance to readmission agreements and other measures aimed at preventing and impeding the entrance of asylum-seekers into the European Union's territory.

It was clear that Member States<sup>279</sup> were primarily concerned with their own security, rather than with co-development and implementation of the much-talked root-cause approach. In other words, the focus was shifted to containment in the region of origin.

### **1.2.3 Laeken and Seville European Council**

During the December 2001 Laeken European Council, a report was produced evaluating the implementation of the Tampere programme up until that moment. The European Council first stressed that a greater emphasis should be given to migration control at all stages, namely in transit, in origin countries and at the Union's outer border. Moreover, Laeken Conclusions in 2001<sup>280</sup> called for the implementation of an action plan aimed at merging migration and asylum policies into European external relations; finally it was underlined that Community Readmission agreements were to be decided with third countries, since asylum and migration issues were to be integrated in the already-in-force relations with third countries.

In the Laeken conclusions, the externalization of control was predominant, while the Commission failed to propose any preventive policy, with only a section showing a root-cause approach under the section “partnership with countries of origin”. For the first time, terrorism and illegal migration were conceived as a threat

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programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS) published 18 March 2004, L 80/1.

<sup>278</sup> For a brief account of the Moroccan Action Plan see further, Chapter III.

<sup>279</sup> See the arguments we outlined before regarding the HLWG officials.

<sup>280</sup> Council of the European Union, Presidency conclusions, Laeken, 14 and 15 December 2001

to European security<sup>281</sup>.

The Seville European Council Presidency Conclusions of June 2002<sup>282</sup> restated once again the importance of cooperation with origin and transit countries<sup>283</sup>. In the detailed recommendations, emphasis was once again on combating illegal immigration, on improving border controls and on readmission:

*(...) The European Council considers that combating illegal immigration requires a greater effort on the part of the European Union and a targeted approach to the problem, with the use of all appropriate instruments in the context of the European Union's external relations. To that end, in accordance with the Tampere European Council conclusions, an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union's constant long-term objective. (...) The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.*

*34. The European Council stresses the importance of ensuring the cooperation of countries of origin and transit in joint management and in border control as well as on readmission. Such readmission by third countries should include that of their own nationals unlawfully present in a Member State and, under the same conditions, that of other countries' nationals who can be shown to have passed through the country in question.*<sup>284</sup>

Indeed, the European Heads of State at Seville declared that each future cooperation or association with third countries shall include a compulsory readmission clause for illegal immigrants<sup>285</sup>. The EU proved willing to provide assistance in helping third states in readmitting their own and other countries' nationals; the rationale according to which future relations with the European Union were dependent on the adequate cooperation provided by the partner state was supported and, lastly, the negative conditionality principle was endorsed.

To be more precise, the negative conditionality concept was discussed in the

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<sup>281</sup> See Bilgin, Pinar And Bilgiç, Ali, “Consequences Of European Security Practices In The Southern Mediterranean And Policy Implications For The Eu”, Inex Policy Brief No.12, 2011

<sup>282</sup> Council of the European Union, Presidency Conclusions, Seville, 21 and 22 June 2002

<sup>283</sup> It was already decided in 1999 that measures against illegal immigration would be expressed in all association or cooperation agreements, especially those concluded with countries of the ACP (Africa, Caribbean, Pacific), of the NIS (New Independent States) of Central Europe and Central Asia (Tacis Programme), of the MEDA programme (Mediterranean Countries), and the CARDS programme (Balkans)

<sup>284</sup> See “Integration of immigration policy into the Union's relations with third countries” in Presidency Conclusions, Seville, supra note 282

<sup>285</sup> For a more detailed study of readmission agreements, see Chapter III, paragraph 2 “externalisation through readmission agreements”

run-up to the summit, when Spain and the UK proposed to render development aid conditional to partner states' cooperation on the fight against illegal migration. However, this proposal was rejected, although the Seville Conclusions provided for a conditionality requirement: in the first place, the Council was to unanimously vote on the inadequate or lacking collaboration of third States in the joint management of asylum-seekers and migration flow. The Council then was empowered to take proper measures, although which measures were to be taken were not detailed, nor the ground on which assessing the inadequacy of the collaboration. Needless to say, this concept goes against the grain of the European Union partnership with transit and origin countries. Its results would prove to be highly contradictory, since the penalisation of cutting European aid, trades or investment on a developing country will simply result in the disposal of less resources by that third country when managing migration control. Ultimately, it is likely to push its population to move towards Europe<sup>286</sup>.

On the contrary, the Commission was adverse to Spain's and the UK's idea of conditionality and it launched its initiatives on prevention policies at the end of 2002, as requested by the Council. Behind this background there was an increased knowledge from the DG RELEX officials' side that they underestimated the political will behind the comprehensive approach and that they were losing opportunities to shape the migration control and prevention agenda. Indeed, formal and informal consultations took place on a closer level between the DGs officials and their Commission colleagues in JHA.

This intensive collaboration is reflected in initiatives directed towards prevention. For instance, the 2002 Commission Communication on “integrating migration issues in the European Union’s relations with third countries”<sup>287</sup> clearly showed the strategy considering root-approach measures to implement control on migration. The document endorsed for the first time the Commission's view that the external dimension was a tool to address root-cause approach, stressing protection and

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<sup>286</sup> See Peers Steve, “Readmission Agreements And EC External Migration Law”, Statewatch Analysis No. 17, 2003

<sup>287</sup> See in particular page 4 (2), section B, paragraph 8 “The longer term-addressing push factors” and Section II paragraph 4.2 Partnership with countries of origin and transit Communication from the Commission to the Council and the European Parliament, ‘Integrating migration issues in the EU’s relations with third countries’, Brussels, COM (2002) 703 final, December 2002

prevention as priorities.

Although the Commission was aware of the Council's priorities, it proposed a complementary approach conceived within already-existing development funds. Resources were to be split with already-existing development aids for sending countries, helping to accomplish the migration control aim, while at the same time it asked for new funds for new migration-oriented projects. Moreover, the Commission Communication asked the EU to keep in mind the leverage effect when negotiating readmission agreements with third countries. In other words, the EU should have taken into account sending and transit countries' problems<sup>288</sup>. This Commission's approach to the external dimension of asylum tried to bind partner countries in a partnership understood as beneficial for both sides.

Indeed, this new attempt was intended to avoid most of the side-effects of control policies and gave incentives to origin and transit countries to collaborate on migration and asylum issues, without ignoring the partners' needs. Quite the contrary, the Commission focussed on targeting development assistance as a way to reduce push factors and emigration drawbacks on the partner country's view, and at the same time it was intended as a long-term strategy management of migration flows, as an alternative to traditional migration control-based tools.

Among the advantages brought by the preventive approach, in comparison to a control-based one, is listed the following: it provides a long-run perspective, which does not stop to surface explanations for migration flows and, in contrast to externalisation and responsibility or control-shifting, it helps in building mutual beneficial relations with partners states.

From another point of view, the root-cause approach carries risks and problems as well, first of all because the impact of development strategies on migration management reduces migratory pressures in the long-term only, due to the “migration hump”<sup>289</sup>. Secondly, this approach assumes that partner countries will perform their

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<sup>288</sup> See *ibidem*, Section a, paragraph 11- Readmission agreements. Moreover the Commission country strategy paper 2002-2004 for Morocco envisaged measures aiming at the goal of reducing migratory pressures, keeping the population through the creation of employment in the northern provinces, the major region of emigration.

<sup>289</sup> Migration hump is a paradoxical phenomenon quite famous in economic literature. When considering the short-term, it is common that economical development, enacted by policies pursuing a decrease in migration in the long-run, leads instead to an increased migratory flux. See Andrea Stocchiero “Dossier : Politiche migratorie e di cooperazione nel mediterraneo”, CESpi 2001

tasks at best, i.e. that third countries will “properly” use development aids. Thirdly, the support given by the Commission to this preventive approach is conditional to the availability of extra funds and to the European Council's political pressure. Indeed, it is important to recall that the effectiveness of policies has to comply with domestic electoral pressures, which detain a key role and in turn are estimated by political indications from the Council when dealing with JHA matters.

Before moving on to the next paragraph, we would like to underline that already in 2002 the Commission proposed to include in the Union's budget a chapter headed “effective protection capacity in third countries”, somehow foreseeing the Hague programme's objectives. Here the idea of Transit Processing Centres in third countries<sup>290</sup> was discussed for the first time and it was stated that those centres were aimed at reducing secondary movements towards the European Union and at creating solid and efficient reception, processing and protection capabilities, including illegal immigrants pushed back from the Union.

#### **1.2.4 Thessaloniki European Council and the Commission Communication, 2003**

The Thessaloniki Conclusions<sup>291</sup> decreed a step forward compared to policies proposed during the Seville summit, since several readmission agreements were concluded. Moreover it was proposed to evaluate partner states' compliance with the agreements. Furthermore, Heads of State stressed their willingness to use biometric data in the EU, in order to find common solutions for documents of third country nationals, the Visa Information System (VIS), European passports and the Schengen Information System (SIS II). The latter system was built having in mind only 18 Member states and it was not intended to hold biometric data, such as fingerprints or facial pictures, since it technically processed alphanumerical information. Lastly, Conclusions called for the creation of a common asylum system and explicitly made

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<sup>290</sup> “Projects could also contribute to the creation of processing, reception and protection capabilities, including as regards persons returned from the EU.” See Strand B -International Protection in third countries in European Commission, DG JHA, Call for proposals 2003, Budget line ‘Cooperation with third Countries in the area of migration’, B7-667.

<sup>291</sup> Presidency Conclusions, Thessaloniki European Council, 19 June 2003.

references to provide access to effective protection.

A first Communication from the Commission “Towards More Accessible, Equitable and Managed Asylum Systems” of June 2003<sup>292</sup> suggested to shift the focus on action outside the Union, in a real burden and responsibility-sharing framework. Projects selected were carried out with the UNHCR's help, focusing on analyses of gap protection and on how to increase capacity-building of asylum in regions of origin. After the mandate from the Thessaloniki European Council, the Commission issued another Communication on “The Managed entry in the EU of Persons in need of international Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions”<sup>293</sup>. The Commission emphasised protection, attempting to show that a predominance of border control measures endangers asylum-seekers and refugees' entitlement to protection.

By the same token, the Communication focussed on regions of origin, proposing the endorsement of Regional Protection Programmes (RPP), aimed at eliminating protracted refugees situations<sup>294</sup> and at offering effective protection as close to countries of origin and as soon as possible<sup>295</sup>. States in the region of origin are helped in improving their governance, institution building, democratisation and infrastructures, thus the ultimate goal is rendering useless the onward movements to Europe of those in need of protection.

In conclusion, the measures towards asylum adopted under the Tampere programme focused on a lowest-common-denominator reasoning<sup>296</sup> and demanded an

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<sup>292</sup> Communication from the European Commission to the Council and the European Parliament, ‘Towards more accessible, equitable and managed asylum systems’ COM(2003)315 final, 3 June 2003.

<sup>293</sup> Communication from the Commission to the Council and the European Parliament, On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin. "Improving Access to Durable Solutions", COM(2004) 410 final, June 2004

<sup>294</sup> Protracted refugee situations are characterised by refugees living in a limbo, since they are neither able to return back home and nor are integrated in the community of protection nor can they find a resettlement country.

<sup>295</sup> In the words of Commissioner Vitorino, the aim is avoid the necessity for those in need of protection to move forward towards Europe, creating the proper infrastructure and procedures in third countries, making them “safe”. This rationale seems to be more apt in supporting the “legitimate” return to countries of origin. See Vitorino, Antonio, Commissioner responsible for Justice and Home Affairs in “The Future of the European Union Agenda on Asylum, Migration and Borders” Conference of the European Policy Center and King Baudouin Foundation Brussels, 4 October 2004

<sup>296</sup> See Levy, Carl, “The European Union After 9/11: The Demise Of A Liberal Democratic Regime.” Government And Opposition, Vol. 29, No. 1, 2005, pp. 26-59

increased partnership with countries of transit and origin, endorsing and fostering the safe third country concept. Even more worry-some, along with the principle of harmonisation, is the idea of mutual recognition of Member states acts: this concept provides that Member States accept each other's decisions and actions, suspending judgements and further inquiry. This reciprocity principle endangers refugees' right to protection, since it primarily aims at reinforcing legitimacy of state actions and solidarity among Members although disadvantages the individual, avoiding scrutiny of rule of law and conformity to international refugee law. Indeed, there is no possible challenge to the execution of the decision, since the mutual recognition principle is based on the assumption that all European Member States do comply with international human rights standards<sup>297</sup>.

Moreover, it is important to underline that refugee status determination should take into account primarily the safety of the asylum-seeker, not depending upon bilateral or international cooperation between states. If the latter case prevails, individual safety is subdued by national prerogative of the state where the asylum-seekers submitted the claim, as it is clear with the European Union and its good neighbouring States, notwithstanding the fact that many of them do not display an acceptable recording of human rights standards.

### **1.2.5 The Hague Programme “Strengthening Freedom, Security and Justice in the European Union”, 2004-2009**

The second framework developing the CEAS was decided by the European Council on 4 and 5 November 2004. The milestone Hague Programme<sup>298</sup> set the agenda for the following five years and identified two aspects related to asylum policy in Europe: it pushed for the completion of development of common policies started within the Tampere Programme, and it placed the accent on the external dimension of migration and asylum. To this ends a list of goals was drafted, among which we underline: the

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<sup>297</sup> According to Elspeth Guild, this model can be easily transferred to candidate member States and then to neighbouring states. See Guild, Elspeth “The Europeanisation Of Europe’s Asylum Policy.” *Ijrl*, Vol. 18 No. 3, 2006, pp. 630-651. See further, chapter III.

<sup>298</sup> The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005) OJ No. C 53/01 (‘The Hague Programme’).



assistance and partnership with third countries; an improved refugee protection and migration management capacities of partner states; the effective prevention of illegal migration; providing a solution to protracted refugee situations in offering access to durable solutions in the regions of origin or “at the earliest possible stage”<sup>299</sup>; building efficient border-control tools and studying the problem of return.

Shared responsibilities was once again stressed and during the Programme cooperation and two other main topics were discussed. Firstly the European Council provided concrete proposals on the establishment of Regional Protection Programmes in region close to those of origin or transit<sup>300</sup> of asylum-seekers, coupling it with the concept of safe third countries and countries of first asylum<sup>301</sup>, and to be implemented unilaterally or through readmission agreements. Secondly the possibility of management of arrivals was envisaged through the Protected Entry Procedures<sup>302</sup>.

Moreover, the European Council called for a study on the actual possibility of implementing a European-wide assessment of refugee claims and for the establishment of an European Asylum Office (EASO) coordinating Member states' asylum authorities. Lastly, the need to find an agreement on a EU-wide resettlement system for recognised refugees was stressed. Compared to the scant two paragraphs of the Tampere Conclusions, the eleven paragraphs drafted under the Hague Programme express the strong willingness of Member states in rendering concrete their proposals, addressing countries of origin and transit.

Notwithstanding the lack of official endorsement of extraterritorial processing, as included both in the 2003 UK and the 2004 German Interior Minister Schily' s proposals<sup>303</sup>, the Hague Programme suggested to launch a study examining the idea of a joint asylum processing system outside the Union's territory, complementing, at least on paper, the CEAS and observing international obligations<sup>304</sup>. In truth, the

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<sup>299</sup> See *ibidem*, section 1.6

<sup>300</sup> The EP clarified that any approach linked to the establishment of camps for protection or assessment of refugee status outside Europe amounts to off-shoring European international responsibilities towards persons in need of protections and, therefore, it is not acceptable. See *ibidem*, section 1.6.2. “partnership with countries and regions of origin”

<sup>301</sup> For a more detailed account see chapter III, further.

<sup>302</sup> See section 5.2.3 “facilitating a managed and orderly arrivals for those in need of protection” in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU COM (2008) 360 final

<sup>303</sup> For an account see further chapters 2.1 and 2.2

<sup>304</sup> Indeed see section 1.3. A Common European Asylum System in “The Hague Programme:

Hague Programme dedicated its efforts in moving asylum-seekers beyond European common external borders, onto third states' territories, careless of human rights standards. The external dimension of asylum now has stretched so far as to include the attempt of removal of asylum-seekers to countries on which soil their feet never stepped on<sup>305</sup>, as stated in the Returns Directive 2008. Moreover, existing legal provisions under the Dublin II Regulation shuffle responsibilities away to other states, and few hopes are resting with the amendments of the Dublin II Regulation, the Qualification, Procedures and Reception Directives.

Thanks to the November 2004 European Council, an important change in decision-making was operated. Instruments were now agreed upon under QMV<sup>306</sup> for the European Council and co-decision power for the Parliament, allowing the European Parliament<sup>307</sup> to veto legislation and propose amendments. QMV was mandated to come into effect in April 2005 and it was empowered for measures contained in Articles 63 (2) (b) and 63 (3) (b) of the EC treaty<sup>308</sup>, although it excluded issues related to legal migration. Nevertheless, these changes signalled a fortified supranationalism over national powers.

By the same token, cooperation on areas related to justice and security remained under title IV of the TEU, the third pillar, which was still in Ministers of Justice and Interior's hands and it was ruled by intergovernmental decision-making processes<sup>309</sup>. Always under the Hague Programme, the Commission gained the “sole right of initiative” in proposing new laws and became the Union's executive power<sup>310</sup>.

After the September 2001 attacks and bombings in Madrid in 2004, the Hague

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- strengthening freedom, security and justice in the European Union (2005/C 53/01)
- <sup>305</sup> See Article 3 (3) Directive 2008/115/Ec Of The European Parliament And Of The Council Of 16 December 2008 “On Common Standards And Procedures In Member States For Returning Illegally Staying Third-Country Nationals”
- <sup>306</sup> Qualified Majority Voting allows for the loss of national vetoes, permitted before with unanimity voting, i.e. negotiations are not held down anymore by reluctant Member states which veto on measures providing higher or more permissive provisions.
- <sup>307</sup> Co-decision power was intended to assure a stronger influence for the EP when proposing more expansive and binding legislations.
- <sup>308</sup> Article 63 (2) (b) concerns burden sharing among Members, while Article 63 (3) (b) concerns the topic of illegal residence and immigration”, covering repatriation issues as well.
- <sup>309</sup> As stressed by many, so far legislation on asylum in Europe is characterised by the low standards and the high discretion left to Member states. See Balzac, Thierry And Carrera, Sergio “The Hague Programme: The Long Road To Freedom, Security And Justice”, In “Security versus freedom?: a challenge for Europe’s future”, edited by Thierry Balzacq and Sergio Carrera. - Aldershot, Hampshire - Burlington, VT : Ashgate, 2006 , pp 1-32
- <sup>310</sup> This should permit the Commission to start discussion from a higher standards of provisions, contrasting the bargaining to the bottom of Member states .

Programme seemed to shift the balance from freedom to security<sup>311</sup>. The declared commitment to freedom and rule of law, democratic institutions and human rights, as supported by Tampere, was instead forgotten under the Hague Programme. The latter prioritised security, conceived as the answer to concerns of Member states' citizens prioritized over individual's liberties and security. Even more surprising is the fact that most security-linked measures, such as JHA information systems databases (VIS, SIS II, EURODAC), management of external border controls, readmission policies and measures against illegal immigration, were addressed under the title “Strengthening freedom”, thus suggesting that freedom of movements includes security, whereas only a brief paragraph was given to fundamental rights and the role of the European Court of Justice<sup>312</sup>.

In actual fact the European Council's willingness to share Member states' responsibilities for managing asylum-seekers with partner countries was emphasized like never before in the Union's Programme, stressing as well the willingness in recurring also to financial measures to complete Members' goals: migration was perceived as a non-traditional security threat<sup>313</sup>.

The Commission Communication 2005/184 issued the Action Plan implementing the Hague Programme, identified two priorities out of ten measures for the next five years: “migration Management: defining a balanced approach” and “A common asylum area:

establish an Effective Harmonized Procedure in accordance with the Union's Values and Humanitarian Tradition”. This Action Plan proposed studies on the implications of joint asylum processing within and outside Europe.

In the same year a Communication on Regional Protection Programmes was published and proposed to enhance effective protection in regions of origin, pushing countries of origin and transit to shoulder more responsibilities for refugee protection.

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<sup>311</sup> For an overview of the opposite thesis, i.e. of the absence of securitization, see Boswell “Migration Control In Europe After 9/11: Explaining The Absence Of Securitization” *Jcms* Vol. 45, No 3, (2007), pp. 589–610

<sup>312</sup> We should highlight, as Balzac and Carrera underlined, that the Programme put the ECJ in the section “Strengthening Justice”. See Balzac, Thierry And Carrera, Sergio “The Hague Programme: The Long Road To Freedom, Security And Justice”, In “Security versus freedom?: a challenge for Europe's future”, edited by Thierry Balzacq and Sergio Carrera. - Aldershot, Hampshire - Burlington, VT : Ashgate, 2006 , pp 1-32

<sup>313</sup> See Rijpma, Jorrit J. And Cremona, Marise “The Extra-Territorialisation Of Eu Migration Policies And The Rule Of Law “ *Eui Working Paper, Law 2007/01*

In September 2009 the Commission proposed a “Joint EU resettlement Programme”<sup>314</sup>, suggesting effective measures for cooperation between Member states. This resettlement scheme operates by voluntary decisions of Member states and it is aimed at helping vulnerable refugees in Chad, Kenya, Jordan and Syria. Nevertheless, Member states seemed more willing in accepting resettlement, when it took into account refugees already inside the European Union's borders, as it occurred with Malta; since this country was facing heavy problems arising from a disproportioned burden, a pilot resettlement project was started in June 2009.

The following conclusion can be drawn: up till the end of the Hague Programme, Member states seemed more interested in pursuing measures to improve protection capacities in third countries of origin and transit, whereas only in words they proved involved in achieving and in managing more organised arrivals with the PEP programme or resettlement. From our point of view, Europe shows that one of the aims of the external actions of asylum is linked to prevention of resettlement of refugees.

After the Hague Programme, instead, the aim of externalisation of asylum policies were clearly focused on the implementation of RPPs and resettlement programmes which, in turn were pledged by the UNHCR<sup>315</sup>. Indeed, the UNHCR stressed the need of developing a managed entry in addition to assuring access to protection in the EU; moreover the UN Agency remarked how arrangements with partner countries shall not change the EU Member states' commitments to protection obligations under international law.

### **1.2.6 Stockholm Programme, 2010-2015**

Under the Stockholm Programme<sup>316</sup> the CEAS should be fulfilled: it is forecast that a

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<sup>314</sup> Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme, COM(2009) 456 FINAL

<sup>315</sup> See UNHCR Observations on the Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes [COM (2005) 388 final, 1 September 2005]

<sup>316</sup> The Stockholm programme states once again the goals of the CEAS. See European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ 2010 C

European-wide asylum system, including common procedures and uniform refugee status, will be operative by the end of this year<sup>317</sup>. Moreover, this Programme emphasised solidarity and burden-sharing inside the EU, binding together even more the European Union immigration and asylum policies with its external relations<sup>318</sup>.

In actual fact, the adoption of the Qualification Directive and its contained minimum standards caused great variety of practices among Member States, in turn leading to divergence in refugees recognition rates and in unequal asylum costs. To address the uneven distribution of asylum-seekers between Member states the European Asylum Support Office (EASO)<sup>319</sup> was developed, based in Malta and operative since mid-2011. EASO is aimed at targeting the best practice, spreading it through practical cooperation activities on asylum, thus ensuring common procedures throughout the EU. In addition, this office is supporting Member states, in order to relieve pressure generating from disproportionate numbers in asylum claims: indeed, in 2013 it is claimed it will become a monitoring agency for burden-sharing and for resettlement of asylum-seekers inside and outside the EU. Although, as Carl Levy and Felicity Hattrell noticed<sup>320</sup>, the lack of any decision-making power for the EASO is in line with the tradition of intergovernmental collaboration, and this characteristic might affect the final purpose of harmonisation. In our opinion, therefore, it is unlikely that the EASO will in the end be invested of an effective capacity-building power relating to asylum and, hence, cooperation on reception is likely to happen in

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<sup>317</sup> The deadline for the CEAS was at first 2010. As ECRE stated in the same year, the CEAS seems to be a myth and not yet reality. Still a few years ago recognition rates among Member states varied deeply: in the period 2005-2005 a 63% of asylum-seekers from Russia were recognised refugees in Austria, but none in Slovakia; for the same period Malta recognised 98% of Somali asylum-seekers, UK 55% and Greece none. See ECRE “Comments From The European Council On Refugees And Exiles On The European Commission Proposal To Recast The Asylum Procedures Directive” May 2010

<sup>318</sup> See section 7 – Europe in a globalised world: the external dimension of freedom, security and justice which express that ‘internal and external security are inseparable’. The Stockholm programme states once again the goals of the CEAS. See European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ 2010 C 115/1.

<sup>319</sup> Regulation (EU) No 439/2010 Of The European Parliament And Of The Council Of 19 May 2010 Establishing A European Asylum Support Office (EASO)

<sup>320</sup> See Hattrell, Felicity, “Redefining The Limits Of Refugee Protection? The Securitised Asylum Policies Of The ‘Common European Asylum System’ “ National Centre For Research On Europe University Of Canterbury, December 2010 See also Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)”, Refugee Survey Quarterly, Vol. 29, No. 1, 2010, pp. 92-119

the sole form of exchange of information.

Moreover, it seems that, the EASO might also be a technical support regarding resettlement with third countries and this collaboration might as well be extended to International Organisations, such as IOM and UNHCR, although it is extremely unlikely that the UN Agency will ever abdicate its authority on the matter.

A notably recent development is the Evacuation Transit Centre (ETC) in Romania: several Member states used the facility to resettle categories of vulnerable refugees with urgent needs. The ETC made it easier and quicker to implement resettlement and it could serve as a pilot-project.

The Commission's Action Plan implementing the Stockholm Programme opens the way for a widened role of the ECJ and the EP: indeed, the Stockholm Programme is different from its predecessor in adding a section on Human Rights. In addition, the Treaty of Lisbon tried to enhance the Commission's role in external asylum policy and some improvement seemed to come through. Indeed, following the entry into force of the Lisbon Treaty, the ECJ jurisdiction over European asylum law was subsequently widened, FRONTEX Regulation was amended in late 2011, and amendments to the Dublin II Regulation, the Asylum Procedures Directive, the reception conditions directive, and the Qualification Directive are also likely to be. However, it is not yet clear whether the drawbacks entrenched in decision-making procedures will be addressed in practice, since procedures do not disappear, but need to be annulled, amended or repealed.

According to many, a new European external border was constructed in these years to keep asylum-seekers outside the inner European Union territory at all costs, especially when considering the low-quality refugee regime and low standards of protection offered by non-European countries, which nonetheless are part of Europe's Regional Protection Programmes and Action Plans. This ring of partner countries should be ultimately effective in helping refugees and asylum-seekers to receive, strictly outside the EU, some sort of protection, although this does not account for effective protection, as described in official international documents.

### **1.2.7 The Lisbon Treaty and asylum law**

En force since 2009, the Treaty of Lisbon<sup>321</sup> gave the Union legal personality and, most important of all, abolished the Pillar-structure. In other words, the third Pillar of criminal law and police was moved under the Title IV of the TEC, which concerned asylum and immigration. Moreover, the EU succeeded to the EC, renaming the TEC as the new “Treaty on the Functioning of the European Union” TFEU: the old Title IV of the TEC became Title V.

For the scope of this study, fundamental changes brought under the Lisbon Treaty modified decision-making and competences of JHA. Firstly, the ECJ acquired full jurisdiction on asylum and immigration law, expanding its role in this field. Secondly, co-decision and QMV were now involved in the adoption both of internal and external border controls, asylum and irregular migration policies. Lastly, consultation of the EP<sup>322</sup> and QMV applied to measures concerning administrative cooperation and legislation on visa and on common list of states whose nationals require visa to trespass Europe's member external borders.

Thanks to the Lisbon Treaty, QMV and co-decision procedure, renamed “ordinary legislative procedure”, embraced legal migration-related measures. Co-decision was extended also to measures related to visa list and formats, augmenting the EP power in that field: the EU and its Member states were given shared powers on JHA fields. Article 78(1)<sup>323</sup> of the TFEU underlined that the EU had to develop a common policy on asylum matters<sup>324</sup>, fully complying with the Refugee Convention and its Protocol and other relevant treaties. It is important to highlight that the obligation to observe these treaties derive now directly from the Treaty of Lisbon and no longer from singular Member states' international obligations.

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<sup>321</sup> The Treaty of Lisbon was signed at Lisbon, 13 December 2007 and entered into force 1 December 2009, OJ 2007/C 306/01

<sup>322</sup> The European Parliament (EP) gained legislative powers with the Lisbon Treaty and it is now an actor on the same level as the Council thanks to the co-decision (ordinary legislative procedures) on JHA: this is fundamental due to the EP's past role in spreading contrary opinions regarding external cooperation with third countries on JHA. Moreover, the EP can now veto international agreements.

<sup>323</sup> Article 78 (1) TFEU corresponds to the “old” Article 63(1) and asks for the adoption of EU-wide procedures for the refugee assessment, to be in line with the Refugee Convention and other international treaties

<sup>324</sup> As Peers noted, the Lisbon Treaty limited the Community to set minimum standards on asylum, thus rendering a common system harder to achieve. See Peers, Steve “Legislative Update: Eu Immigration And Asylum Competence And Decision-Making In The Treaty Of Lisbon” *European Journal Of Migration And Law*, Vol. 10, 2008, pp. 219–247

Another important change we would like to focus on, is the power to regulate the status of asylum. The phrase respected the exact title of the Refugee Convention and it was understood by scholars as enclosing the Convention's main theme, i.e. qualification of refugee and his/her status-attachment on the territory of the state granting asylum.

By the same token, the Treaty provided the controversial wording:

*“a status of asylum . . . valid throughout Union<sup>325</sup>”*

which, at first reading, seemed to provide some European-wide recognition of a Member state's single recognition of refugee qualification<sup>326</sup>.

Moreover, Article 78 (g) TFEU on partnership with third countries is a *lex specialis*, investing the EU with power to harmonise asylum fully. Article 80<sup>327</sup> on burden-sharing provided for implementation of immigration and asylum policies as governed by principles of fair sharing, solidarity<sup>328</sup> and responsibility, and taking into account financial implications as well. Furthermore, when taking into account irregular migration, the TFEU provided for a change of wording from “illegal” to “unauthorised” presence and expressly referred to removal; as we stated above, QMV and ordinary legislative procedure remained the decision-making rules.

Having analysed briefly the main implications of the Lisbon Treaty, let us move on to the next topic, the TFEU implications relating to the ECJ. The Court was given rule of competence in matters of asylum and immigration, addressing in part the absence of interpretation and guidance, which in turn disadvantaged the harmonization of policies in this field<sup>329</sup>. The role of the ECJ is still unclear, since on the one hand it considers the Refugee Convention as milestone of the international

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<sup>325</sup> See Article 78 (2) (a) TFEU

<sup>326</sup> EU institution decided to implement a eu-wide refugee status validity gradually, since the CEAS was not intended as implying the responsibility transfer for receiving and processing asylum claims. See . European Union and European Parliament, “Towards a Common European Asylum System: Assessment and Proposals-Elements to be Implemented for the Establishment of an Efficient and Coherent System”, September 2008

<sup>327</sup> The former 63 (b)

<sup>328</sup> The objective of solidarity between member states on asylum policies is set out in Article 67(2) (former 61 (2)) TFEU as well.

<sup>329</sup> See Staffan, Ida “Judicial Protection And The New European Asylum Regime” In European Journal Of Migration And Law, Vol. 12, 2010, pp. 273–297 Contra, we underline that ECJ annulled the Asylum Procedures Directive provision (Arts 29(1), (2) and 36(3), Directive 2005/85/EC) enabling the adoption of a common list on safe third countries and safe countries of origin, determining accelerated refugee determination procedures. Case C-133/06, European Parliament vs Council (2008) 2 CMLR 54.



asylum regime, but on the other it endorsed contestable measures of the Qualification Directive, not based on the Refugee Convention<sup>330</sup>. Another controversial issue is the role of the Commission: the expansion of Community method over internal security matters did not take place<sup>331</sup>. Quite the contrary, the end of the pillar structure under the Treaty of Lisbon created a widened inter-governmental approach to AFSJ. Unlike the EP in the post-Lisbon asset, therefore, the Commission has lost position vis-à-vis other actors in the field of external relations.

## **2 The EU framework: limiting or enabling extraterritorial asylum policies?**

The following paragraph will deal with one of the main questions of this thesis: did the peculiar European structure pave the way for extraterritorial asylum policies or did it succeed in limiting the spread of those practices?

A premise is needed. The two most salient European plans attempting to de-territorialise asylum protection obligation through the proposal of extraterritorial processing outside the boundaries of the Union will be described.

Compared to Australian extraterritorial asylum policies outlined in the first Chapter, the European Union's approach can be described as broader. Indeed, it focuses on several type of measures, extending from development assistance to origin and transit countries to creation of regional protection areas, whereas Australian policies proved, so far, more attached to the implementation of “mere” extraterritorial

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<sup>330</sup> As a consequence of this, categories such as those fleeing from generalised violence, usually not enclosed in the Refugee Convention, are covered by the Qualification Directive. Paradoxically, the ECJ confirmed that fundamental European freedoms, such as freedom of movements, do take precedence over fundamental rights when the two clash. When a Member state tries to push back or refuse to admit other countries' nationals it is allowed to do so in case of threat to public security, public health or public policy: the ECJ controls over these three exceptions.

<sup>331</sup> See Guild, Elspeth And Carrera, Sergio “Towards An Internal (In)security Strategy For The Eu?” Ceps January 2011

processing policies.

Nevertheless, both Australia and the EU Member states started their discussions on the premise that the international protection regime was failing, procedures for asylum processing were long and expensive and that a (cheaper) solution was needed to reduce numbers of asylum-seekers entering and lodging asylum claims<sup>332</sup>.

## 2.1 A vision for asylum-seekers

The first proposal we would like to include in our discussion is the 2003 “A New vision for Refugees”<sup>333</sup>, suggested by the UK Cabinet Office and Home Office. This policy paper took its main ideas from the concepts of safe havens<sup>334</sup> and protection in the regions of origin, although its final draft changed a lot of controversial terms in respect to the version leaked informally to *The Guardian*, especially following criticism from several NGOs. Officially, Prime Minister Tony Blair in March 2003 sent a letter to Greek Prime Minister Simitis, who was holding the EU Presidency, requesting discussion on ways to improve management of asylum-seekers at the European Council of Brussels<sup>335</sup>.

The UK proposal fostered two different kinds of centres, Transit Processing Centres (TPC), placed in transit countries, and Regional Processing Zones (RPZ)<sup>336</sup>, located in refugees and asylum-seekers' region of origin, closer to their home; yet,

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<sup>332</sup> Restrictive domestic policies for instance related to welfare, enacted by UK, were not powerful enough as deterrents, therefore, the emphasis was put on preventing access to the country: for this reason as well, controls were augmented outside countries of arrivals.

<sup>333</sup> The first version of the proposal was titled “A new vision for refugees”, UK Home Office, February 2003; it leaked as “Safe havens plan to slash asylum numbers”, *The Guardian*, 5 February 2003

<sup>334</sup> Already in February 2002 the UK government drafted the white paper “Secure Borders, Safe heavens” focused on discourse on citizenship, nationality and reform of the asylum system. Safe heavens in the “New vision” paper are intended as camps where it is provided safety and processing of asylum claims.

<sup>335</sup> This version was entitled “New international approaches to asylum processing and protection” and was presented in March 2003 to the European Council.

<sup>336</sup> As noted by Guy Goodwin-Gill, both TPC and RPZ were funded by UE, yet beyond jurisdiction of European courts. See Goodwin-Gill, Guy “The Extraterritorial Processing Of Claims To Asylum Or Protection: The Legal Responsibilities Of States And International Organisations” In *Uts Law Review*, Vol. 9 No. 26, 2007, pp. 25-40 For an overview of RPZ and its implications, see Chapter III, paragraph 3.1 “Resettlement and dangers of regionalisation”.

both featured processing loci in countries on the outskirts of Europe<sup>337</sup>, where asylum claims were to be assessed with a screening process<sup>338</sup>. Those granted refugee status would be subsequently resettled in a European State, while those screened out would have been returned to their countries of origin thanks to the chain of European readmission agreements.

This vision was even more reactionary than the Australian Pacific Solution, which, anyway, was clearly in drafters' mind<sup>339</sup>, because it instituted the immediate removal to offshore centres for each asylum-seeker<sup>340</sup> entering the UK or Member states' soil. Furthermore the rationale behind the “New vision” proposal suggests that the arrival state on which soil asylum-seekers arrive and which holds international protection obligations can be different from the state providing processing of asylum claims.

As Betts has described, extraterritorial processing enacted a detachment between the state accountable for asylum claims, which usually is the one paying for processing, and the state providing centres and territories on which the processing is translated. Thanks to the contractual relation between the two international subjects, the buck of asylum obligations is contracted out from the purchaser-state to the state-provider, which in turn will be monetarily compensated<sup>341</sup>. In this case “efficiency” is not only intended as a reduction of financial costs, but it also takes into account political and social perceived costs, which are different for each state and are offloaded to the provider as well .

Thanks to this system of forced transfer to effect offshore processing, states manipulate to their own advantage and inhibit the right of asylum-seekers to choose the destination country, without incurring in breach of international law obligations, since the country of arrival is deemed to be a “safe third country”. In sum, through the transfer of asylum-seekers extraterritorial processing easily induces the idea of a

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<sup>337</sup> Albania, Croatia, Tanzania, or Ukraine were proposed as possible venues where enact pilot projects.

<sup>338</sup> It was foresaw that the centres were managed by the IOM and the screening was to be carried out by UNHCR

<sup>339</sup> According to Noll, drafters were taking inspiration from the earlier Danish Proposal and UNHCR “2003 Agenda for Protection”, as well. See Noll, Gregor, “Vision Of The Exceptional” Working Paper 2003

<sup>340</sup> In truth a processing asylum application inside the UK was still offered to special groups such as disabled people, children and high-profile dissidents.

<sup>341</sup> For a complete and in-depth account on this topic, see Betts, Alexander “The Political Economy Of Extra-Territorial Processing: Separating 'purchaser' From 'provider' In Asylum Policy”, Working Paper No. 91, New Issues In Refugee Research (2003)

bigger proportion of the burden to be shifted, given the fact that perceived costs are exemplified by the very physical presence of asylum-seekers.

However, the UK proposal underestimated the power imbalance created by political and economic implications of extraterritorial processing. As it will be analysed, the European Union Member States in general try to use their asymmetric bargaining power when facing third countries, but they usually do not consider partner states' needs<sup>342</sup>.

Later on in June 2003, as we have said before, the Commission gave voice to these kind of concerns in answering the Council's request of exploring new approaches to international protection. The Commission Communication "Towards more accessible, equitable and managed asylum systems"<sup>343</sup> stressed how any new approach was not intended solely as a burden-shifting tool, which would undermine the pursuit of a CEAS, rather it was to be complementary to the existing asylum international system. The Commission contrasted the UK's new vision ideas putting forward proposals for a common EU resettlement scheme, emphasising the respect of Refugee Convention and the importance of burden-sharing with partner states. Moreover it discussed the possibility of a managed entry in the EU for asylum-seekers and the need for funding activities that could reinforce protection capacities in the regions of origin.

In June, during the Thessaloniki Council meeting, Sweden and Germany, among other Member states, categorically refused the UK's TPC vision. Germany actually named the UK proposal "Concentrations camps for refugees". Although in the end the idea was dropped, it died hard<sup>344</sup>: the same proposal was revived verbally in 2004 by the German interior Minister Otto Schily, who, in a supreme example of *volte face*<sup>345</sup>, supported the creation of the EU funded "camps" in North Africa.

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<sup>342</sup> See further chapter 3.

<sup>343</sup> Communication from the European Commission to the Council and the European Parliament, "Towards more accessible, equitable and managed asylum systems" COM(2003) 315 final

<sup>344</sup> According to Sterkx, indeed, the UK and the "coalition of the willing", among which there was the Dutch government, were carrying on pilot projects: for instance the Dutch government explained that cost was a key factor, comparing UNHCR costs to his governments' one. See Sterkx, Steven, "The Comprehensive Approach Off Balance: Externalisation Of Eu Asylum And Migration Policy" Politike Wetenschappen, Psw Paper No.4, 2004

<sup>345</sup> "Konzentrationslager für Flüchtlinge", literally "concentration camps for refugees" this is the way the Germans called the UK's TPCs proposal.

## 2.2 A “new” proposal

At the July 2004 JHA Council in Brussels, one month after the famous international stand-off of Cap Anamur incident<sup>346</sup> in the Mediterranean, the Italian<sup>347</sup> and German interior Ministers put forward the suggestion of establishing processing centres in transit North African states<sup>348</sup>. Notwithstanding the German staunch critique to the UK new vision, since it was argued that a network of safe areas would have brought those in need of protection dangerously closer to Europe, Schily sustained one year later that camps would have been useful in stopping people smugglers and in avoiding the useless risk of asylum-seekers' lives in the Mediterranean.

As with the UK proposal, once again this one had to pass under an elaborate re-wording process, as any reference to “camps” was eluded and it was replaced with the less evoking “reception facilities”<sup>349</sup>. The project stressed the need to engage in prevention measures in high seas in order to intercept asylum-seekers and migrants before entrance in the EU territorial waters and expressed that *non refoulement* provisions cannot be applied in international waters<sup>350</sup>. Furthermore it was envisaged that reception facilities were to be built in African states signatories of the Refugee Convention and which respect *non refoulement* in practice. The document, indeed,

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<sup>346</sup> This was famous as “the European Tampa Affair”: the German-registered ship rescued 37 people in June 2004 and discussions on responsibility for assessing refugee claims underlined Member states' reluctance in taking the burden: the incident occurred between Italy, Germany and Malta SAR zone and in the end it was decided to bring those rescued in Italy.

<sup>347</sup> Giuseppe Pisanu and the candidate EU Commissioner for JHA, Rocco Buttiglione were favourable to Schily's proposal. Schily discussed his proposal also at the German Bundestag. The Austrian Interior Minister endorsed the proposal as well, enlarging the discussion to Europe eastern borders: he proposed to put facilities to accommodate Chechen asylum-seekers in Ukraine, although Kiev refused. We find this episode enlightening regarding the risk carried by a lack of real involvement of third countries. See Garlick, Madeline “The EU Discussions On Extraterritorial Processing: Solution Or Conundrum?” International journal refugee law Vol. 18 No. 3, 2006, pp. 601- 629 For a more detailed account on relations of Member states and Italy in particular to North African partner states please see Chapter III, paragraph 4 “Libya, Morocco and the challenge of African states”

<sup>348</sup> The proposal was in fact at first given orally.

<sup>349</sup> We have to wait until September 2005 to get a clear idea of what Schily meant, when for the first time he wrote a press statement outlining his proposal publicly. The document was entitled “Effective protection for refugees, effective measures against illegal migration” Interior Ministry written press statement, 9 September 2005

<sup>350</sup> As translated by Garlick, supra Garlick, Madeline “The Eu Discussions On Extraterritorial Processing: Solution Or Conundrum?” International journal refugee law Vol. 18 No. 3, 2006, pp. 601- 629

stressed that no legal responsibility was resting upon Member states to admit asylum-seekers screened<sup>351</sup> in the North African states into their countries and by this it refused to recognise the responsibility arising with the principle of effective control over people, as conceived in international law.

Furthermore, in addition to stopping asylum-seekers movements towards Europe, it is also important to underline the economic reasons behind the choice of North African States as venues for the facilities. Indeed, in October 2004 the EU lifted the 11-year-long sanctions against Libya and from that moment on bilateral economic cooperation prospered. A few days after the end of the embargo, Chancellor Schröder agreed to sign a bilateral investment agreement and oil and gas concession were then granted to Wintershall, a German company present in the country since 1958. As investments need to be secured, several border surveillance agreements were signed and newly developed technological devices were tested in the Libyan desert<sup>352</sup>.

### **2.3 Is it easy to eject protection obligation from the European structure?**

We should try to keep in mind the Australian example as a comparison to the European structure. As noticed by Guild<sup>353</sup>, the process of de-territorialisation of sovereignty in the Union is fundamental. When territory is not conceived as one of the scope of sovereignty anymore, contemporaneously it will open up a way to exclude those protection duties linked to sovereignty.

Indeed, the European Union was first planned as a common market area to which the idea of monetary union was attached and, in order to pursue those objectives, Member states had to dismiss part of their sovereignty over their soils. Thus, when Member states' sovereignty was curtailed in the EU, the process entailing the re-spatialisation of international protection obligation started as well, since

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<sup>351</sup> We underline the huge discrepancy between screening and processing: the former does not compel states to consider genuine refugee claims, i.e. no formal refugee assessment will be carried out and it envisages a further transferral to safe countries.

<sup>352</sup> For a detailed and vivid account of the general framework, See Dietrich, Helmut, "The Desert Front - EU Refugee Camps In North Africa?" Statewatch 2004

<sup>353</sup> Guild, Elspeth "The Europeanisation Of Europe's Asylum Policy." *Ijrl*, Vol. 18 No. 3, 2006, pp. 630-651.

Members tried to control the process involving the EU refugee and asylum policy with the goal to save the remains of their sovereignty and, therefore, to keep control of their borders.

In truth, human rights were not really part of the original plan designed to create the European Union. It is only in 1991 and with the Maastrich Treaty that an explicit referral to Member state's international obligations and to the European Convention on Human rights is stated<sup>354</sup>.

For instance, the prohibition for asylum claimants of the right of free movement inside the EU<sup>355</sup> demonstrated that the Community included refugees only apparently in its system of rights, nevertheless attempted to exclude them, enacting territorial impediments and restrictions. Once the issue of refugees was addressed by the law, then, they started being physically excluded from the Union's territory. In fact, Guild observed how the refugee determination by the European state institutions was associated with the prerequisite certification of extra-EU imported goods<sup>356</sup>, i.e. the processing and determination of refugee status rests upon the Member state's territory of first arrival<sup>357</sup>. The internal market logic supported the split operated by Member states between certified, "DOP" refugees and asylum-seekers.

As it was illustrated before, this framework was combined with the three-Pillar structure ousting negatively the judicial review on policies adopted in the area of asylum, since the ECJ did not gain full jurisprudence to interpret and review legal matters on the topic until the entry into force of the Lisbon Treaty. Also the EP was excluded in part from the decision-making process because the co-decision procedure was not applicable until January 2005. Moreover, Member states' officials caused

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<sup>354</sup> Although in Articles 1 and 5 TEU Maastricht, the EC stated to support fundamental freedoms, democracy, respect of human rights and rule of law, it was only in 2001 that a regulation decreed the right for refugees to access to a fair and equal treatment in social security. Notwithstanding this, the ECJ stipulated that the regulation provided this for individual belonging to the social security system of more than a singular Member state, i.e. ruling out refugees, who are not entitled to the right of free movement.

<sup>355</sup> In August the German Rheinland-Pfalz granted freedom of movement to asylum seekers and it was the sixth German land to do so. In the other German landern asylum seekers have to stay within a defined geographic area. See <http://www.hrw.org/world-report-2012/world-report-2012-european-union>

<sup>356</sup> Guild, Elspeth "The Europeanisation Of Europe's Asylum Policy." *International journal of Refugee Law*, Vol. 18, No. 3, 2006, pp. 630-651

<sup>357</sup> Indeed the "Dublin System", i.e. the system borne with the Dublin convention of 1990, substituted by the Dublin Regulation of 2003, and supported by the EURODAC Regulation distributes among Member States the responsibility for protection of asylum-seekers on a territorial-criteria base.

much of the opacity when working on asylum matters.

According to Sterkz and Menz<sup>358</sup>, institutional and electoral dynamics within Member states influenced the process of Europeanisation of the policy agenda on asylum control instruments. In fact, at the national level, policy-making processes entail non-state actors, such as NGOs and associations, which exert influence and try to shape national interest. The domestic level constrained, since the 1980s, justice, immigration and interior ministers' willingness to restrict migration and asylum policies, whereas transnational cooperation among the EC Member states proved to be the perfect forum, free of political, institutional, judicial and public scrutiny on policy-making. At the Council of Ministers level, indeed, national governments could engage in negotiating for exceptions and save their interests, slow or stop European decision-making to bargain a fundamental provision at the domestic level in the meantime and finally they might try to transfer their domestic measures.

Before the entry in force of the Amsterdam treaty, intergovernmental cooperation<sup>359</sup> was useful, in an interior minister's view, in bypassing domestic blockades, i.e. national courts' opposition, NGOs and minority opposition, and neither the EP, the Commission nor the ECJ could intervene<sup>360</sup>. This “run to Europe” supports in the first place the securitization thesis of Guiraudon<sup>361</sup>, explaining how domestic actor pursue a vertical policy making through “venue-shopping”, to get rid of democratic institutions and pluralistic domestic arenas.

Secondly, as many observed<sup>362</sup>, the mechanism of European integration seemed to help policy-makers in pursuing a restrictive asylum agenda not only at the

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<sup>358</sup> See Sterkx, Steven, “The Comprehensive Approach Off Balance: Externalisation Of Eu Asylum And Migration Policy” in *Politike Wetenschappen*, Psw Paper No.4, 2004

See Menz, Georg “Stopping, Shaping And Moulding Europe: Two-Level Games, Non-State Actors And The Europeanization Of Migration Policies” In *Jcms* Vol. 49. No. 2, 2011, Pp. 437–462

<sup>359</sup> First attempts to pursue common European asylum and immigration policies, such as Dublin Agreement, were intended as balancing the disappeared internal border.

<sup>360</sup> It is observed that internationalisation, or, in our case, the run to Europe to suggest policies at supranational level, can paradoxically strengthen national governments' autonomy, because they avoid domestic obstacles, contradicting the conventional view that international cooperation means a loss in independence. This latter hypothesis claims that the loss of control and sovereignty transfer of Member states is a direct outcome of European integration. See furthermore note no.105.

For a good account on this topic, see also Abdelkhalik Nur, “Externalising Migration Policy: The European Union's ‘Global’ Approach”, *Mercury E-Paper* No. 4, September 2010, pp 1-25

<sup>361</sup> See Guiraudon, Virginie “European Integration and Migration Policy: the implications of Vertical policy-making” paper presented in the panel Migration, citizenship and race in the Eu June 3-6 1999, Pittsburgh, p.a.

<sup>362</sup> See for instance Boswell, Christina “Migration Control In Europe After 9/11: Explaining The Absence Of Securitization” *Jcms* Vol. 45, No 3, (2007), pp. 589–610



intergovernmental level, but also at the domestic level. National executive actors could easily overcome domestic institutional constraints and public scrutiny<sup>363</sup> by backing their claims with the need to be in line with the European “soft law” legitimacy<sup>364</sup>, to corner the domestic oppositions. For instance, taking into account European soft law and policy transfers, directives add vertical justification and legitimacy to domestic executives, while a horizontal policy transfer is enacted between Member states.

Moreover, as well as national institutions, another factor acts an impediment to national authorities in asylum policy-making, i.e. international institutions: international legal instruments and international Court's jurisprudence affect countries' international reputation and public scrutiny<sup>365</sup>. Further on, international norms are received into domestic institutions and national courts increasingly make references to international human rights law when drafting their decisions, thus at the same time protecting and consolidating international norms.

Thirdly, in the European process of regionalisation of refugee policy, asylum and migration control was farmed out from domestic venues to private entities, such as airline officials. The latter became empowered of immigration officials' prerogatives and curtailed the feeble possibility of spontaneous arrivals of asylum-seekers, as impediment to reach European Union legally; once legal routes towards Europe were blocked, the position of asylum-seekers was easily criminalised.

As it was observed already, the entry in force in 1999 of the Amsterdam Treaty changed the intergovernmental cooperation dynamics, although Member states were at first still dominant actors, notwithstanding the official introduction of QMV and co-decision in the area of irregular migration by 2005<sup>366</sup>. The logic of shaping asylum

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<sup>363</sup> Levy as well explains how the populist gap can influence centre right and centre left parties into embracing restrictive measures to gain wider electoral support. See Levy, Carl, “The European Union After 9/11: The Demise Of A Liberal Democratic Regime.” *Government And Opposition*, Vol. 29, No. 1, 2005, pp. 26-59

<sup>364</sup> “Ce lo chiede l' Europa” is still en vogue today. See De Zulueta, Tana “Ce lo chiede l'Europa” available at <http://www.ilfattoquotidiano.it/2012/02/22/chiede-leuropa/193023/>

<sup>365</sup> In Europe the European Court of Human Rights cannot grant asylum, although it can act as effective impediment from refoulement on signatory Member states.

<sup>366</sup> As we said before, the Treaty of Nice and the European Council decision 3004/927/EC translated QMV to all areas under Title IV apart from legal immigration. As Acosta Arcarazo observed, co-decision process in practice differs widely from the theory: the widespread use of informal trilogues, at first envisaged for non-contentious topics and aiming to find an agreement between the Council and the EP at the earliest possible stage, is an opaque process intended to reach a first

and refugee issues as a security threat was up till then decided by JHA officials<sup>367</sup>, who tended to favour Council deliberations on approximation and lowest common denominator rationale, instead of pursuing a real homogenisation. JHA is still a deep-transgovernmental area, nevertheless Commission and the EP have acquired more powers and liberal-democratic obstacles are now present at the constitutional EU level, thanks to the introduction of the Lisbon Treaty.

To summarise, the vertical push towards the European Union and intergovernmental cooperation was motivated by the desire to find a place where domestic obstacles could be circumvented.

Yet we should not forget that Europe is made up of both intergovernmental and supranational levels. The push outward, i.e. foreign policy collaboration on refugee and migration issues and extraterritorial asylum policies, was interpreted by Lavenex and Afeef<sup>368</sup> as a way for Member states to maximise outcomes derived from Europeanisation, in the attempt to reduce constraints derived from the deepened supranationalism and communitarisation of asylum matters after the Amsterdam Treaty.

The external dimension of European asylum policies thus circumvented internal constraints and became the focus of cooperation, seeking to engage third countries of origin and transit and emphasising management of asylum-seekers and migrants' flows. The Externalisation was realised through shifting migration and asylum control away from the European soil, introducing readmission agreements, safe third

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reading compromise behind closed doors. The risk is that, once reached the compromise, the EP usually accepts it without posing question, following the rationale "is better to have something than nothing at all" in order to avoid the eventual decision not to proceed or a tougher position of the Council. The co-decision as such does not account as fair procedure. See Acosta Arcarazo, Diego "The Good, The Bad And The Ugly In Eu Migration Law: Is The European Parliament Becoming Bad And Ugly? (The Adoption Of Directive 2008/115: The Returns Directive)" In In E. Guild, R. Cholewinski And P. Minderhoud (eds), *Citizens And Third Country Nationals: Examining Ten Years Of The Eu's Area Of Freedom, Security And Justice* (2011), pp 179- 205

<sup>367</sup> Instead at the Tampere Council there is still the official endorsement of human rights respect, because of the presence of centre-left government representatives.

<sup>368</sup> Lavenex argues that the incorporation of foreign policy into asylum matters and the resulting external agenda policy is understood as the natural continuation of the transgovernmental logic of cooperation, since restrictive aspects of control are highlighted. Moreover, she underlined how actions at the Eu level was instrumentally supported only when it represented a strategic advantage over bilateral or intergovernmental external relations. See Lavenex, Sandra "Shifting Up And Out: The Foreign Policy Of European Immigration Control." *West European Politics*, Vol. 29, No. 2, 2006, pp. 329-50. See also Afeef, Karin, Fathimath, "The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific" Rsc Working Paper No. 36, University Of Oxford 2006

countries provisions, carrier liability, liaison officers and so on. Moreover, external governance ensured third countries' collaboration through European enlargement policies, since governance by conditionality<sup>369</sup> and compulsory adoption of the EU (and Schengen) *acquis* proved to be useful tools in the pursue of strict immigration controls beyond European territory, on candidate members countries.

While the Union has recently started to pursue programmes in the area of external asylum and migration control, bilateral and intergovernmental approaches are still in far reach and each year acquire new countries and measures: especially, initiatives in these fields are based on long-standing relations between Member states and countries surrounding the Mediterranean.

So far, it is contended, the structure of the European Union impeded the implementation of controversial proposals, such as extraterritorial processing. Indeed, extraterritorial European policies are aimed at externalising asylum and immigration control, but their reach is different when compared to the Australian Pacific Solution. It is true that the UK's new vision and Schily's proposal were conceived in the same prospective as the Australian one, but in the latter case policies were implemented unilaterally, whereas the English and German ones had to be accountable to the supranational European framework. As suggested by Levy, the Refugee Convention in 2010 was still conceived as a point of reference for European politicians' democratic liberalism, and indeed it was defended. Therefore the EU's liberalism<sup>370</sup>, which is fundamental in the Union's soft power framework, undoubtedly contrasted the strive towards populism sprung with Australia's Pacific Solution. In brief, Extraterritorial processing camps were not feasible under EU.

We should underline, however, that the EU represents also the ad hoc venue for restrictive refugee policies, compared to the nation-state locus. The project of extraterritorial areas spread with multilateral and bilateral proposals and the EU kept

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<sup>369</sup> Conditionality exploit European bargaining power to force the third state to come to terms and meet European goals.

<sup>370</sup> European primary and secondary laws bind European border-control instruments to observe the principle of non-refoulement and, thanks to the Lisbon Treaty, agencies like Frontex or illegal push-backs operated by Member States are scrutinized by the ECJ: there is no way out to international legal protection obligation of Member states, not even when attempting to go extraterritorial. See Case of Hirsi Jamaa and Others v. Italy, Application no. 27765/09, decided 23 February 2012. See Van Buuren Jelle "Gli Immigrati Respinti Verso"Paesi Terzi Sicuri", *Le monde diplomatique*,

control of this supranational intergovernmentalism<sup>371</sup> process, exemplified by the “agentification” of the JHA: the FRONTEX personifies this asset, as the agency depends completely on Members support for guards and ships in order to implement policies.

The reason why this resulted as the preferred approach lies in the legal and political difficulties in accomplishing the formalised European and communitarian provisions, added by the lack of a binding burden-sharing system between European states.

Public scrutiny and domestic judicial review still cannot control many of the developments taking place in the European asylum policy, because discussions are carried out in secrecy<sup>372</sup> and without respecting the commitment to the rule of law, especially when involving controversial talks with partner states such as Libya, which did not sign the Refugee Convention. For instance, when in early 2011 the “Arab Spring” was blooming, some European leaders expressed mixed feelings and warned citizens about the possibility of being testimony of a “*biblical exodus*”<sup>373</sup>: they were worried for the crashing down of the useful buffer zone created with countries of origin and transit.

In sum, conflicting trends of liberal and restrictionist ideas are present in the refugee regime of the EU and, in the end, the lack of integration inside the Union might as well turn out as a halt for the development of the project of a supranational

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<sup>371</sup> Supranational intergovernmentalism is explicated as the supranational conducts reflected by Member states in their own policy-making. See Riekmann, S. Puntscher as cited by Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)”, *Refugee Survey Quarterly*, Vol. 29, No. 1, 2010, pp. 92-119 Furthermore, according to Levy, the confusion related to the extent of legal responsibilities of singular Member under international and European treaties for the eventual detention and deterrence of asylum-seekers outside European borders is paramount.

<sup>372</sup> See the discussion on trilogues we outlined before, note 128. Moreover Guild et alia noted that the Commission as well is at the earliest stage suggesting low standards in the attempt to anticipate the negotiations in the Council and aiming at consensus: this allows to grant concessions to Member states regarding common standards, flattening initiatives on national priorities. The resulting minimum standards authorise the recourse to the obvious exceptions by domestic authorities. By the same token, notwithstanding the several consultation engaged by the Commission with civil society and major stakeholders, a deficit was noticed in the follow-up process, combined with the gap in respecting the fundamental rights and rule of law when taking into account border management on irregular migrants. Guild, Elspeth, Carrera, Sergio And Faure, Atger Anaïs, “Challenges And Prospects For The Eu’s Area Of Freedom, Security And Justice: Recommendations To The European Commission For The Stockholm Programme” Ceps Working Document No. 313, April 2009

<sup>373</sup> It was Franco Frattini, the Italian Foreign Minister, expecting a flood of 200,000 or 300,000 migrants. See the interview available at <http://it.euronews.com/2011/02/23/immigrazione-frattini-l-europa-intervenga/> last accessed 22 July 2012

extraterritorial processing<sup>374</sup>. In our opinion, nevertheless, the very same European structure of institution itself might provide the key to implement restrictionist policies and extraterritorialising asylum protection obligation measures, when acting outside judicial review and public scrutiny, in a climate of perpetual emergency status.

### **3 Non-entrée practices**

We shall now turn our attention to European measures producing the externalisation of asylum. Through the creation of a border control system which prevents the entrance of asylum-seekers and migrants, the EU moves its boundaries further, while at the same time it is transferring its responsibilities under an international protection regime to third countries. In this paragraph the main features of policy measures constituting the so-called non-entrée regime enacted by Europe will be analysed, while Chapter III we will sketch the responsibility relocation and transferral operated by the EU towards countries of origin and transit<sup>375</sup>.

The non-entrée system is made up of several filtering techniques, such as border-control measures, interception measures and carrier sanctions, which aim at the physical containment<sup>376</sup> and prevention of would-be asylum-seekers from coming to European soil through the externalisation of tools and provision usually put into force at the domestic level. More frequently, these measures are rhetorically disguised as a “preventive approach” that address root-causes, although such initiatives have not yet been carried out, since containment strategies are far more implemented than the

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<sup>374</sup> To read more reasons for the failure of the European supranational extraterritorial processing, see Chapter III.

<sup>375</sup> This relocation of responsibility is enacted through provision, backed by the safe third country concept, on the return of asylum-seekers and irregular migrants to countries of transit and origin.

<sup>376</sup> This containment feature is fostered, for instance, in the Commission Communication 2003, underlining the necessity for EU to help third countries in developing an efficient asylum system, in order to transform them into safe country of asylum. See Communication from the European Commission to the Council and the European Parliament, ‘Towards more accessible, equitable and managed asylum systems’ COM(2003) 315 final, June 2003.

preventive ones<sup>377</sup>.

The main region of application of non-entrée policies is the Mediterranean, especially after the new access of Eastern and Central states turned the eastern border into a European buffer zone. Following the reasoning that de-territorialisation of sovereignty is linked to de-territorialisation of protection, it is easy to understand the fundamental importance those strategies of prevention gain from Member states' point of view, which are seeking a way to enjoy their sovereignty without respecting the corresponding duties of protection.

In this non-entrée regime, the FRONTEX Agency plays a major role, although its operations have raised various concerns<sup>378</sup> regarding the compatibility of the mandate with European international protection responsibilities<sup>379</sup>.

#### **2.4.1 Carrier sanctions**

The Directive regulating carrier sanction was issued by the European Council in 2004<sup>380</sup>: it prescribes penalties for up to € 500,000 and requires them to bear all the costs deriving from the forced return of the irregular passenger. The idea of instituting carrier sanction dates back to the Schengen Convention of 1990<sup>381</sup>. Sanction consists in outsourcing legal responsibility to transportation companies, co-opting them in the process of control and the management of asylum-seekers and migrants, forcing them to return passengers without proper visas and paying a penalty if found

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<sup>377</sup> See Betts, Alexander "The Political Economy Of Extra-Territorial Processing: Separating 'purchaser' From 'provider' In Asylum Policy" Working Paper No. 91, *New Issues In Refugee Research* (2003)

<sup>378</sup> Among others, the UNHCR noted that interception measures deny refugees access to protection or might result in their forced return to non-safe countries. See UNHCR, "The State of the World's Refugees 2006: Human Displacement in the New Millennium" <http://www.unhcr.org/4a4dc1a89.html> last accessed 22 July 2012

<sup>379</sup> As explained by Andreas Fischer-Lescano, both European primary and secondary law oblige border-control bodies to respect the principle of non refoulement, whereas officials, even when operating extra-territorially, are bound by international law. In brief, subcontracting the control of borders to the FRONTEX agency did not thinned EU obligation to protect. See Fischer-Lescano, Andreas, Löhr, Tillmann, And Tohidipur, Timo, "Border Controls At Sea: Requirements Under International Human Rights And Refugee Law", *International Journal Of Refugee Law*, Vol. 21, 2009, pp. 256-296

<sup>380</sup> Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 2004

<sup>381</sup> For an account of Schengen provisions, see before.

breaching the law.

Indeed, as underlined by the EP<sup>382</sup>, the effect of those sanctions is privatising ID documents and visa controls through placing the responsibility on each employee of the company, while trying to prevent unwanted entries<sup>383</sup>, in a way creating discriminatory practices. This is problematic, since in the first place private carriers are neither trained to carry out an adequate profiling in refugee protection, nor are they under the same judicial constraint as the domestic migration control agencies, Secondly, but more importantly, no legal alternative is possible, apart from newly-conceived PEPs, for those fleeing urgently from their country of origin. Hence, carrier amount to a barrier for refugees and asylum-seekers who do not meet the necessary pre-condition of entry and makes the criminalisation of asylum-seekers easy.

It is fundamental to stress how the farming out of functions to private agents does not constitute a loss of control, quite the contrary. The outsourcing to carrier companies helps officials in extending their control outside their national borders, in line with the reasoning that the Europeanisation of decision does not overlap with a real delegation of decision-making.

#### **2.4.2 Immigration Liaison Officers Network**

The Immigration Liaison Officers (ILOs) network was first envisaged in the Council Regulation of 2003<sup>384</sup> and consists of the transferral of surveillance and identification technologies and skills to third countries. Officials from European Member states are posted to countries of transit and origin's airports and “hot spots”, they contribute to the prevention of irregular immigration and management of regular migration. Their tasks are to keep contacts with authorities of partner states, or with international

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<sup>382</sup> See “ Analysis of the external dimension of the EU’s asylum and immigration policies’ -summary and recommendations for the European Parliament” PE 374.366

<sup>383</sup> As underlined by Guiraudon, the carrier sanction strategy also consent lower controls at the border itself, although augment the pre-border checks and profiling in “risk countries”. Indeed, carrier sanction seems to be targeted at asylum-seekers, since in the absence of border checks those who were not granted a visa would still have a chance to claim asylum after entry. Visa sanctions thus focus on migrants in general. See Guiraudon, Virginie “Enlisting Third Parties in Border Control. A Comparative Study of its Causes and Consequences” in *Borders and Security Governance, Managing borders in a globalised world*, ed. Marina Caparini and Otwin Marenin, 2006, pp 79-96

<sup>384</sup> Council 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, OJ L 141, 2011

organisations and also to return irregular immigrants. ILOs work in airports and no provision is specifically directed to protecting asylum-seekers and refugees' rights.

### 2.4.3. Protected Entry Procedures

The Protected Entry Procedures (PEPs) were proposed with the 2003 Commission Communication as part of a “comprehensive approach” as they intended to be complementary to a territorial asylum system, i.e. asylum is granted in the EU embassy without putting the asylum-seekers' life at risk with hazardous journeys. It is the embassy itself which is meant to process asylum claims and, if the need of protection is recognised, safe travel to the host country is assured. Basically, the idea was to create “asylum visas”, adding protection to visa policies and enacting a platform for regional presence in areas of departure.

The PEP proposal is not yet endorsed, although it was proposed again by the 2004 Commission Communication<sup>385</sup> and, more recently, the European project “Exploring new forms of access to asylum procedures E.T. Entering the territory”<sup>386</sup> is giving new life to the idea of managed entry procedures.

Nevertheless, according to the above-mentioned parliament analysis<sup>387</sup> PEPs are highly contradictory, since the danger of substituting PEPs to the existing asylum system is real and they were envisaged as relying on the compliance of third states, which instead proved to be reluctant in holding a commitment of accepting those returned. In absence of a common agreement on this issue, PEPs are an instrument which Member states can implement via consular and diplomatic offices and the Commission can decide their enforceability at the EU level on an emergency basis<sup>388</sup>.

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<sup>385</sup> Communication from the Commission to the Council and the European Parliament, On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin. "Improving Access to Durable Solutions", COM(2004) 410 final, June 2004

<sup>386</sup> This Project ended in March 2012 and was implemented by the CIR- Italian Refugee Council in partnership with ECRE, NGOs and research institutes from Bulgaria, Austria, Cyprus, Greece, Denmark, Italy, Malta, Netherlands and Spain.

<sup>387</sup> See “ Analysis of the external dimension of the EU’s asylum and immigration policies’-summary and recommendations for the European Parliament” PE 374.366

<sup>388</sup> Morgades, Sílvia “The Externalisation Of The Asylum Function In The European Union” In Shaping The Normative Contours Of The European Union: A Migration-Border Framework (CIDOB), Sept. 2010. See moreover section 35 of the Communication from the Commission to the Council and the European Parliament, On the Managed Entry in the EU of Persons in Need of



#### 4 State protection responsibilities according to the law of the sea

Keeping in mind the primacy of international law obligation over any other legislation issued at the national level<sup>389</sup>, therefore the EU legislation also comes second<sup>390</sup>, we shall underline that, in face of the absence of a right to receive asylum, nevertheless binding international protection obligations are conceived as related to the state's jurisdiction<sup>391</sup>. This concept envisages human rights' protection even when exercised outside of the state's territories, namely extraterritorially, as long as the state in question exerts effective control over a person or on another state's territory, or it exerts control and competence over a state body<sup>392</sup>.

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International Protection and the Enhancement of the Protection Capacity of the Regions of Origin. "Improving Access to Durable Solutions", COM(2004) 410 final, June 2004

<sup>389</sup> Article 26 Vienna Convention on the Law of Treaties states that *pacta sunt servanda*; Article 27 states that a State party will not make an instrumental use of its domestic law to justify its failure in complying with international treaty provisions. See United Nations Convention on the Law of Treaties, signed at Vienna 23 May 1969, Entered into force in 1980.

<sup>390</sup> Furthermore Refugee Convention, its Protocol and other relevant treaties act as source of principles of Union law, since all EU Member states ratified them, i.e. the Union has to take into account international treaties as legally binding when issuing secondary law: each law adopted by the EU shall comply with international standards.

<sup>391</sup> The European Court of Human Rights (ECtHR) stated that the jurisdiction concept, as expressed in Article 1 ECHR, well expands beyond national soil of EU Member states, in case actions exercised by state authorities produce effect outside their own boundaries. See *Case of Loizidou v. Turkey*, Preliminary Objections, Application No. 15318/89, 23 March 1995.

The ICJ as well affirmed that obligations apply wherever a state exerts effective jurisdiction, i.e. *de jure* or *de facto* effective control over a territory or a person in the "Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", ICJ Gen. List No. 131, 9 July 1994

<sup>392</sup> In the famous *Banković* case, related to the killings resulting from the bombing of a TV station during the UN Kosovo intervention, the ECtHR recalled jurisdiction as limited by the other state's sovereign territorial rights and did not find a clear jurisdictional link between victims and States and found the application inadmissible, due to the fact taking place in the then Federal republic of Yugoslavia, not within the ECHR legal space. In sum, the Court held that the application of the European Convention on Human Rights and in particular Article 1, to secure rights to everyone within the jurisdiction of a State, could not be adapted according to the circumstances into question. See Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case *Banković and Others v. Belgium and 16 Other Contracting States*. By contrast, several times after the *Banković* case, the ECtHR established that competence and control over a person or a state's body amounted to exercise jurisdiction, recalling that this concept is not limited to application on Member states' national territories: rights contained in the ECHR can be "divided and tailored". See, for instance, *Al-Skeini and Others v. the UK Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, available at: <http://www.unhcr.org/refworld/docid/4e2545502.html> last accessed 22 July 2012 See also Extra-territorial jurisdiction of ECHR States, Fact sheet- extraterritorial

Nevertheless, states attempted to circumvent international obligations issuing ad hoc legislations, such as excision of part of their soil<sup>393</sup>, or the creation of international zones at airports<sup>394</sup>. Restlessly, the European Court of Human Rights stated that it was unthinkable to have a human rights black hole in international law<sup>395</sup>, hence justifying extraterritorial applicability of obligations under international law.

So far, the application of human right obligations seemed to be problematic when taking into account states' actions on the sea: when and how is effective control exerted on high seas? Is a Member state accountable for a breach of international law happening on countries of origin and transit's territorial seas?

As stated in Article 2, paragraph 1 of the United Nations Convention on the Law of Sea (UNCLOS)<sup>396</sup> state's sovereign territory is intended as domestic soil, internal waters and territorial seas of coastal states; Article 3 defines territorial sea as breadth of water extending for 12 nautical miles off the coast, as reflecting customary international law.

Inside the European sovereign territory, i.e. EU's soil and territorial sea, the *non-refoulement* principle<sup>397</sup> applies, even when contrasting with national legislation. Furthermore, notwithstanding Schily's claim that protection obligations under international law are not applicable on the contiguous zone or high seas, i.e. the area extending beyond the territorial sea<sup>398</sup>, in truth Member states provide contrasting

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jurisdiction, European Court of Human Rights, December 2011

<sup>393</sup> As we studied in the Australian case : the Migration Amendment Act 2001 excised several island inside the 12 nautical miles zone. This attempt to circumvent international obligations was done in violation of Article 27 on customary international law (see before note 150) and Article 29 of the Vienna Convention on the Law of Treaties (see further).

<sup>394</sup> For instance, ECtHR ruled in *Amuur v. France* that the non-refoulement principle applies in the international zones at the airport, since they are not extraterritorial loci. This is true also when taking into account the Vienna Convention on the Law of Treaties, Article 29, stating that international treaties shall be binding on the entire territory of the contracting State. See *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996

<sup>395</sup> For instance, in the *Issa & Ors v. Turkey* (Judgment), (2004), ECtHR, Application No. 31821/96, the ECtHR affirmed that extraterritorial actions are not intended as overriding human rights obligations, since Article 1 ECHR is read as prohibition of any action taken in another state's territory, when the same action would be not allowed on a Member state soil.

<sup>396</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), entered into force in 1994

<sup>397</sup> We will take into account the non-refoulement concept specifically as intended in the Refugee Convention, Article 33, paragraph 1.

<sup>398</sup> As we saw before, the German Minister affirmed that predominant legal opinions and state practice sustain a non-applicability of the non-refoulement concept on high seas because they are extraterritorial. See above, note 114.

opinions on the matter<sup>399</sup>. Recent legal opinion is in line with the UNCHR and EX. COM.'s view that Article 33 paragraph 1 of the Refugee Convention<sup>400</sup> applies extraterritorially as well as on state's soil, since this reasoning is in line with the teleological interpretation of the Refugee Convention and contrasts the opportunity to override international human rights obligations with extraterritorially-shifted state's actions.

Furthermore, the European Court of Human Rights explicitly recognised the extraterritorial reach of the ECHR when a link is assured between the violation of person's right and the state's flag sovereignty. Indeed, according to Fischer-Lescano<sup>401</sup>, the ECHR<sup>402</sup> the *non-refoulement* concept applies to any migration control measure for border control actions on international waters.

When border controls are carried out in the third country's 12 miles zone, a distinction is needed between the same third country's nationals, to whom *non-refoulement* is usually not applicable and others, who instead are in a country of transit: since during migration control operation only pre-screening is available and it is unlikely to carry out a complete assessment of refugee status<sup>403</sup>, the *non-refoulement* principle applies, since protection has to be ensured. Indeed, refugee processing onboard is not appropriate, since the proper guarantees in line with international standards cannot be provided.

In brief, tow backs, escort backs, turn backs or transfers to third countries are actions entailing jurisdiction where human rights and refugee right shall be observed.: When border control measures are enacted, a clear territorial link is established and, therefore, legal obligations arise from the relation with the territory concerned. These

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<sup>399</sup> Indeed, UK opinion is following the USA Sale judgement and Australian case law on this matter, thus agreeing with the German Minister.

<sup>400</sup> We shall underline that the Banković rationale does not apply here, since border control tools are always linked to the territory of EU Member states.

<sup>401</sup> Fischer-Lescano, Andreas, Löhr, Tillmann, And Tohidipur, Timo, "Border Controls At Sea: Requirements Under International Human Rights And Refugee Law", International Journal Of Refugee Law, Vol. 21, 2009, pp. 256-296

<sup>402</sup> European Convention on Human Rights and Fundamental Freedoms, 1950, entered into force 3 September, 1953

<sup>403</sup> We stress once again that profiling does not amount nor replaces refugee status determination, which entails submission of protection claims to a professional body, individual overview of the procedure, providing a written decision to claimants and providing an independent review of negative decisions. It is of utmost importance assuring the confidentiality of informations. See UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV

obligations are binding also when Member states transfer responsibility under international law to third states enacting migration controls, as ECtHR ruled in the *Xhavara* case<sup>404</sup>. Italian government agencies carried out border control measures in Albanian territorial waters, and the Court found that, indeed, Italy's jurisdiction and then Italian international responsibility was operating, even if in fulfilling the agreement on border control measures with Albania.

Furthermore, under the law of the sea, i.e. UNCLOS, SOLAS<sup>405</sup> and SAR<sup>406</sup> treaties, the captain of the ship is obliged to render assistance, regardless of the nationality of the vessel in distress, and to lead the ship to a “place of safety”, usually intended as “next port of call”<sup>407</sup>. The problem here arises as to what happens after rescue, in other words what can be considered a place of safety for asylum-seekers in distress at sea, since a place is deemed safe only when *non-refoulement* provision is guaranteed, in order to avoid disembarkation in places where refugees' life could be threatened and to avoid chain *refoulement*.

#### **2.4.5 European interception measures and FRONTEX**

Interception is the most common exclusionary state practice, it consists in the denial of irregulars' arrival to the territory of state and, more importantly for this thesis, thereby enacting the prevention of the lodging of asylum claims. Interception measures at sea can consist of taking control of ships through boarding, seizure, turn backs, escort backs of vessels into high seas or third countries' territorial waters, thus it accounts for actual pre-border controls.

Needless to say, interception measures automatically involve the jurisdiction concept, triggering a state's international protection obligations. It is widely

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<sup>404</sup> Notwithstanding being into Albanian territorial waters, the victims of the shipwreck were considered to be under Italian jurisdiction and thus under Italian international protection obligation, See ECtHR *Xhavara & Ors v. Italy & Albania*, application 39473/98, decided in 2001.

<sup>405</sup> The International Convention for the Safety of Life at Sea of 1974, entered into force in 1980 (SOLAS)

<sup>406</sup> The International Convention on Maritime Search and Rescue of 1979, entered into force in 1985 (SAR)

<sup>407</sup> However, as Blay noticed, the term is not defined in any treaty or international instrument. Blay Sam, Burn Jennifer and Keyzer Patrick “Interception And Offshore Processing Of Asylum Seekers: The International Law Dimension” In 9 *Uts L. Rev.* 7, (2007), pp.7-25

recognised that knowledge or expectation that the subsequent disembarkation<sup>408</sup> of those in need of international protection in a country, from where direct or indirect *refoulement* might result establishes liability under the provision for complicit aid or assistance in causing an internationally wrongful act<sup>409</sup>.

It is important to stress until it is abundantly clear, indeed, that outsourcing international protection obligation to another state or to an international organisation will not result in a shift of international protection responsibility for the provider state. Notwithstanding the recognised acknowledgment of interception of those without proper documentation as legitimate sovereign prerogative, protection of borders shall take into account the state's obligation deriving from international treaties and rules of customary international law, as engaged once interception of asylum-seeker,s before trespassing the state's territorial borders took place<sup>410</sup>.

The EU Member states' interception operations are coordinated by the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)<sup>411</sup>, on suggestion of one or more Member states. Already during the Thessaloniki Council in 2003, the European Council put forward the proposal creating a Community tool for the management of external borders and the Commission proposed the establishment of an agency pursuing permanent border control activities. The Agency was created in a hurry, without a real involvement of the EP, hence taking advantage of the fact that the co-decision procedure on irregular migration was applied only after 2005.

As Lavenex observed<sup>412</sup>, the FRONTEX Agency is extremely entangled with the EU

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<sup>408</sup> Disembarkation constitutes a sort of grey area in law of sea, since on the one hand it is clear which State is responsible for Search And Rescue of vessels in distress, on the other hand it does not affirm which State is responsible for the disembarkation of those saved, enabling international stand-off such as Cap Anamur.

<sup>409</sup> See Legomsky, Stephen H., "Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677 See also Goodwin-Gill, Guy "The Extraterritorial Processing Of Claims To Asylum Or Protection: The Legal Responsibilities Of States And International Organisations" In *Uts Law Review*, Vol. 9 No. 26, 2007, pp. 25-40

<sup>410</sup> Indeed the non-refoulement principle is not breached until rejection carries risks of returning asylum-seekers to persecution, and not by the act of rejection per se.

<sup>411</sup> Council Regulation (EC) establishing FRONTEX- The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2007/2004/ , OJ L 349, November 2004, last amended by the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011. FRONTEX has budgetary and operational autonomy.

<sup>412</sup> See Lavenex, Sandra "Shifting Up And Out: The Foreign Policy Of European Immigration

Members as it is the response to Member states' perceived need for external borders control. Indeed, FRONTEX receives its funds<sup>413</sup> from the Union in general and from Member states, although those sources are not related to the way it implements the Union's conception of borders; most of the intergovernmental cooperative measures aimed at rendering more effective immigration controls display an operational feature which allows the bypassing of normal legislative procedures.

Among the others, its operations are undertaken using joint patrols in which interception is actually carried out by the third country. In these situation Member state and the EU bodies are nevertheless liable for actions resulting in a breach of international law, since they have knowledge of presumed danger of *refoulement* in the countries involved<sup>414</sup>. Another tool often displayed are the joint return operations, difficult in planning and organizing: Member states' authorities have to book (and pay) seats in advance for return flights and the result is either that they fill them all or find other persons who will put up no resistance.

Furthermore, the 2007 Amendments to the Founding Regulation will be analysed. These amendments established, in the first place, the Rapid Border Intervention Teams (RABIT)<sup>415</sup>: teams are made up with national border officers of Member states participating in the operations. Since guest border guards are present also temporarily, on request of a Member state in need<sup>416</sup>, the main differences with joint operations are displayed in RABIT's immediate operability and in FRONTEX's entire funding of those operations. In the first place, the 2007 Regulation expanded the FRONTEX's executive prerogatives and operational features, granting powers of

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Control.” West European Politics, Vol. 29, No. 2, 2006, pp. 329-50

<sup>413</sup> We shall underline that since its creation, FRONTEX budget increased steadily, from € 6,2 million in 2005 to € 118,187,000 in 2011 and operations are considered to be the core of FRONTEX activities: for the 2012 is expected that operational expenses will amount to 63% of the total budget. It is important to stress that operations at sea will use the biggest part of the Agency budget. See [Final Budget 2012 – Rev10, published on web.xlsx Frontex](#)

<sup>414</sup> This principle was restated in the ECtHR judgement *M.S.S. v. Belgium and Greece*, on the one hand recognising the sovereign right to prevent illegal migration, on the other affirming the non-derogability of international obligations. See *M.S.S. v. Belgium and Greece* Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011. Moreover, the FRONTEX regulation does not enact a total transfer of jurisdiction.

<sup>415</sup> The RABIT teams will be created when facing exceptional situations and will be into force for a limited period of time. See Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ No L 199/30, 2007

<sup>416</sup> Member states can lodge a request for RABIT missions, indeed, although the request is decided by the Executive Director in consultation with the Management Board

intervention and the use of force to all guards employed in the FRONTEX joint operations, helping local border officials. Hence, the Regulation established common rules for guest officers as equivalent to participating Member states' border guards, regulating their criminal and civil responsibility when participating to RABIT and joint operations. Secondly, amendments put forward the concept of compulsory solidarity, compelling Member states to support with personnel and funds RABIT operations.

The following theme is also controversial: while the FRONTEX Founding Regulation establishes the need to render information available to public and parties involved<sup>417</sup>, it has often been underlined how the Agency provides limited information on its operations and lacks of incisive democratic accountability. Annual reports and statistic within display the total number of those intercepted and diverted, but no information has been provided on the destination nor the percentages of those claiming asylum among the diverted ones. In 2009 the Immigration Law Practitioners' Association (ILPA), asked FRONTEX to clarify the legal basis of its operations and the answer was that the legal justification for operations rests within Member states agreements with third countries and, therefore, the Agency did not possess copies of them<sup>418</sup>. Most strikingly, working arrangements between FRONTEX and third countries are not accessible to the public.

This environment of secrecy is justified by the sensitive information provided by documents and the Management Board does not provide for deep scrutiny, being internal to the Agency.

In an attempt to show more compliance with human rights standards, FRONTEX and the UNHCR agreed to an Exchange of Letters<sup>419</sup> in June 2008: inside

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<sup>417</sup> See preamble (7), and (22), where FRONTEX Regulation recognised explicitly fundamental rights. Council Regulation (EC) establishing FRONTEX- The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2007/2004/ (26.10.2004, OJ L 349, November 2004, last amended by the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011

<sup>418</sup> FRONTEX stated not to be aware of any asylum claims lodged during operations. See Guild Elspeth and Bigo Didier, "The Transformation Of European Border Controls", In *Extraterritorial Immigration Control. Legal Challenges*, Edited By Bernard Ryan And Valsamis Mitsilegas, Brill 2010, pp.1-27

<sup>419</sup> We underline that the Exchange of Letters is a recognised instrument of international relations and attention was given to the legal form: the aim is to create a structure of cooperation between FRONTEX and UNHCR, in order to manage efficient border control and uphold Member states' protection obligations. Notwithstanding the expressed intent, simply commitment was expressed.

the Agency the human rights discourse was increasingly addressed, yet lack of information on missions and secrecy persist. Hence, scholars remain deeply sceptical on the possibility of a real endorsement of human rights in FRONTEX practices even following the Amendments of October 2011<sup>420</sup>, spurring from negotiations between the Council and the EP, which entered in force this January.

The EP, showing its co-legislator prerogatives, restlessly supported the introduction of Article 26 (a)<sup>421</sup> containing appointing of an Officer with the goal of monitoring human rights compliance, in order to address the lack of human rights' safeguards during FRONTEX operations. The Advisory Board was first intended as an independent and external body to FRONTEX, where representatives from the UNHCR would publish annual report evaluating the compliance of the Agency, allowing unconditional access to information upon request. Finally the Board would be invested of a suspension power regarding operations breaching fundamental human rights.

Needless to say, the Council did not approve the EP proposal and carried on negotiations without showing a real willingness to adopt any change. Indeed, the original proposal was dramatically modified and the suggestion of an independent Board was narrowed in a consultative Forum, which is made up of representative of the UNHCR, the EASO<sup>422</sup> and the Fundamental Rights Agency (FRA) and is nominated by the FRONTEX Management Board itself. The Parliament finally agreed on a “Fundamental Rights package” that was all show and no substance<sup>423</sup>, since even the central figure of the Fundamental Rights Officer is watered down to a consultative figure, not advisory anymore<sup>424</sup>, undermining the effectiveness of this

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<sup>420</sup> This last amendment strengthened the role of FRONTEX: the Agency can now buy and lease its equipments, or can start a co-ownership with Member states. Moreover its mandate was widened as regarding external relations: FRONTEX is now allowed to sign cooperation agreements with partner countries, aiming at rendering smoother Member states' external relations; it can dispose ILOs in partner countries; it is allowed to engage in technical cooperation with third countries.

<sup>421</sup> See Peers, Steve “The Frontex Regulation – Consolidated Text After 2011 Amendments” Statewatch Analysis, April 2012

<sup>422</sup> The FRONTEX Agency Signed A “Milestone” Working Arrangement With EASO In September 2012. See FRONTEX And European Asylum Support Office Sign Working Arrangement, 26 September 2012. available at <http://www.frontex.europa.eu/news/frontex-and-european-asylum-support-office-sign-working-arrangement-poljts>

<sup>423</sup> For a more detailed account on the questionable changes, see Intervista ad Anneliese Baldaccini (Amnesty International) su FRONTEX available at <http://asiloineuropa.blogspot.it/2011/10/intervista-ad-anneliese-baldaccini.html>

<sup>424</sup> Ms. Inmaculada Arnaez Fernandez became the FRONTEX's first Fundamental Rights Officer this



role. However, the Member states decisional power was maintained, whereas the role of the UNHCR and the EU Fundamental Rights Agency, the “partner organisation”, was kept on a consultative role at a final stage of the decision-making process.

Notwithstanding this blatantly failed attempt to prioritise human rights, since its inception, FRONTEX has been supported by the humanitarian arguments of saving lives of asylum-seekers. Indeed, it has often been assumed that the goal of prevention of irregular migration is at best pursued by efficient border control measures, such as interception<sup>425</sup>, forgetting that this reasoning proved to be a justification for implementing stricter surveillance methods, yet not a real solution to the death tolls in the Mediterranean.

In actual fact more severe border controls simply led to more dangerous and diversified routes of migrations, ultimately pushing more asylum-seekers into smugglers' arms in the attempt to reach the EU borders: surely this did not diminish loss of lives, as showed by the sad 2011 record boasted by the Mediterranean as the deadliest sea for refugees and migrants<sup>426</sup>.

In conclusion, FRONTEX has been instrumental for Member states in attempting to foster EU citizens' faith in border controls, and concomitantly it proved useful to transfer the blame to the Agency, misdirecting criticism from EU Member states. So far, FRONTEX is showing the same characteristic featured in governmental institutions, which closet human rights in second position, after implementing policies<sup>427</sup>.

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September 2012 and she has to report to the Management Board without referring to the EP as first envisaged. See Management Board Designates Fundamental Rights Officer, Warsaw, 27 September 2012.

<sup>425</sup> This might be due also to the UNHCR EXCOM Conclusion No.97, where it is expressly added an humanitarian connotation for interception measures, although admitting that results are not clear-cut. UN High Commissioner for Refugees, Conclusion on Protection Safeguards in Interception Measures, 10 October 2003, No. 97 (LIV) - 2003

<sup>426</sup> According to UHNCr, more than 1,500 people died during 2011. See Mediterranean takes record as most deadly stretch of water for refugees and migrants in 2011 UNHCR Briefing Notes, 31 January 2012

<sup>427</sup> See the Green spokesperson on migration and home affairs Ska Keller discourse after the FRONTEX 2011 amendments, The Greens in the European Parliament, Press release ,13 September 2011

## Chapter III - EU transfer of responsibility to third countries

### 1 Externalisation through safe country notions

As it was stated in the previous chapter, the European Union is relocating part of its responsibilities under the international protection regime to countries of origin and transit. In fact, the main goal of the safe country concept is to prevent submission of asylum in one or more countries simultaneously and decrease secondary movements of asylum-seekers to Europe from countries where they could have been granted refuge.

In stark contrast with the explicit prohibition of *refoulement* in Article 33 of the Refugee Convention, in international law we find no right to be granted asylum, nor a right to receive a decision by the country the asylum-seeker has chosen.

In other words, no regulation under international law establishes the clear-cut prohibition of transfer of asylum claims to third countries for the refugee status determination processing. This is in line with the authority to grant asylum, understood under international law as a sovereign prerogative.

However, some limits do exist: as the UNHCR Executive Committee Conclusion No. 15, adopted in 1979, stated<sup>428</sup>, asylum should not be declined on the basis it should be claimed somewhere else. Moreover, as many scholars have stressed<sup>429</sup>, the Refugee Convention does not require asylum-seekers to apply for

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<sup>428</sup> It was also underlined that irregular secondary movements are sometimes unavoidable. See the chapter "Refugees Without An Asylum Country", (IV) "Situations Involving Individual Asylum-Seekers" in "Conclusions Adopted By The Executive Committee On International Protection Of Refugees No. 15 (XXX)", Unhcr Ex. Com. Conc. 15, 1979

<sup>429</sup> For instance Hathaway and Goodwin-gill as cited in Legomsky, Stephen H., "Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

asylum in the first possible place<sup>430</sup>, nor it asks necessarily the direct<sup>431</sup> travel from the country where persecution was in place to the country where asylum claim is lodged.

In the attempt to lay down guiding rules on this issue, the UNHCR issued a paper in 1996<sup>432</sup> clarifying the factors to comply with before returning the asylum-seeker to a third country: the third country shall have ratified and observe in actual practice the Refugee Convention and international as well as regional human rights instruments<sup>433</sup>; it shall explicitly or implicitly show willingness to accept the returned one<sup>434</sup> and it shall provide a fair refugee status determination (RSD)<sup>435</sup> and adequate protection<sup>436</sup>; for their part, the western destination states shall examine the third country reception

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<sup>430</sup> Unless the asylum-seeker does not possess a national passport. See Convention relating to the Status of Refugees, 1951, and the Protocol relating to the Status of Refugees, 1967 (Introductory note by Guy S. Goodwin-Gill)

<sup>431</sup> The opposite argument stems from a literal understanding of Article 31 of the Refugee Convention, which prohibit states from imposing penalties on refugees for their illegal entry or presence, coming directly from where their lives were threatened. Moreover, UNHCR ExCOM Conclusion No.5 of 1977, during the Indo-Chinese crisis, appealed states to continue to grant permanent or temporary asylum to refugees coming directly to their territories. However, this view is contested, since the provision contained in Article 31 does not link persecution or threat to the asylum-seekers' country of origin, instead links it to a territory: this article clearly was envisaged by drafters as acknowledgement of adoption of irregular ways to escape from persecution.

<sup>432</sup> UN High Commissioner for Refugees, "Considerations on the 'Safe Third Country' Concept", July 1996

<sup>433</sup> UNHCR in truth does think ratification as a necessary but not sufficient prerequisite, as practice observed by the third country matters as well. However, strong objection are raised when relocation to a country non-party to the Refugee Convention takes place. Indeed, regarding ratification as a sufficient prerequisite for sending there unwanted asylum-seekers would be a motivation for non ratification: almost all Middle Eastern and South Asian countries are not parties to the Refugee Convention and although UNHCR might be able to have effect on their refugee policy, those countries usually do not display any domestic refugee legislation, nor provide a formal and fair RSD. In conclusion, since international law does not prohibit this, as long as the third country practice meets the other fundamental requirements of effective protection the transfer is seen as possible.

<sup>434</sup> While over unilateral returns UNHCR usually prefers readmission agreements, which include provision for asylum-seekers or at least provision to distribute responsibility on decision of asylum claims, the general term of these agreement do not provide the proper guarantees for the readmission, since the third country should at best provide a confirmation of readmission on that specific individual. Otherwise, orbit or chain refoulement to country of origin might happened.

<sup>435</sup> Notwithstanding the absence of the requirement of a fair RSD in the Refugee Convention, it goes without questions that this is a necessary condition to reach the proper judgement and not to violate individual's rights: it is of utmost importance to respect both privacy and confidentiality, plus to assure a free and frank testimony for the applicant.

<sup>436</sup> This provision entails non refoulement and respect of other convention rights in the third country, as well as respect for international and regional human rights provisions.

and integration facilities<sup>437</sup> and pay attention to the claimant's link<sup>438</sup> to the third country and the final processing country.

In brief, as explained by Legomsky<sup>439</sup>, no asylum-seeker should be relocated to a third country before completion of the RSD, unless he/she will be granted effective protection upon arrival there.

In the European Union context, the third country is understood as a “safe third country” and as a “first country of asylum”, as stated in the 2005 Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status<sup>440</sup>, a controversial attempt to harmonise procedures among Member states.

This Directive rules that the application for asylum by a claimants coming from each of the above-mentioned cases, i.e. safe third country and first country of asylum, is rejected on inadmissible grounds as unfounded. Hence, in other words, the asylum-seeker will not be granted access to RSD procedure on the rationale that he/she should have already asked for asylum in the third country. Furthermore, the term “country of first asylum” implies that the refugee has already been granted protection in that country, whereas “safe third country” implies that the asylum-seeker should have sought protection in that country<sup>441</sup>.

This chapter will describe in depth the different “safe country” concepts envisaged by the EU.

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<sup>437</sup> This refers to durable solutions, i.e. solutions provided as long as the individual remains refugee, unless another country admits him/her and provides effective protection for the rest of the time.

<sup>438</sup> Indeed, transit or simple presence in a third country is not a sufficient condition, since on humanitarian grounds the return will result in a real integration only when proper links to the new society and environment are provided. For these reasons as well, destination countries should take into account the preference shown by the applicant. However, there is no international prohibition for returning claimants to third countries with which they do not have links.

<sup>439</sup> See Legomsky, Stephen H., “Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection” In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

<sup>440</sup> See Council Directive 2005/85/EC of 1 December 2005, a.k.a. the “Asylum procedures Directive”

<sup>441</sup> This last concept of safe third country was boosted with the Pacific solution, where asylum-seekers were brought to countries where they have never transited.

## 1.1 Country of first asylum

The term “country of first asylum” usually refers to the first country where the asylum-seekers arrived after fleeing from persecution.

This concept, as inscribed in the Asylum Procedures Directive<sup>442</sup>, is directed at preventing asylum-seekers secondary movements toward EU. Article 27<sup>443</sup>, indeed, declares that a country is deemed first country of asylum if the applicant was already recognised refugee and, when readmitted there, he/she enjoys sufficient protection, including protection from *refoulement*.

Let us begin by underlining the difference in low standard provided by the concept of “sufficient protection”, which is lacking a clear definition when compared to the notion of “effective protection”, as previously outlined. In fact, Article 27 fails to notice that most of the first countries of asylum do not provide pragmatic protection, but only a formal one. As a consequence of this, even if, as in Africa, the refugee status is granted under the OAU Convention, most of the times countries in that area do not implement the necessary and complementary legislation<sup>444</sup>.

As denounced by NGOs<sup>445</sup>, in many first countries of asylum refugees are subjected to persecution by local population, since basic subsistence is hard to achieve and there is scarcity of employment opportunities. Furthermore, local governments struggle to help their own citizens, therefore, they often enact laws prohibiting refugees to work<sup>446</sup>: freedom of movement and access to educations are restricted, no provision for durable solutions, such as integration, voluntary repatriation or resettlement is contemplated, since many countries fear that asylum-seekers might be even more attracted by the implementation of these provisions.

Secondarily, the status of safe country is not appropriate even when the UNHCR is actually carrying on RSD there, since the country in question is not capable nor

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<sup>442</sup> See note 13.

<sup>443</sup> See Article 25 and Article 27 providing the definition of safe third country; Article 27 (2) (a) requests that the application of the safe third country concept is subordinated to rules asking for a link between the claimants and the third country. See the “Asylum procedures Directive”

<sup>444</sup> Human Rights watch “Stemming the Flow, abuses against migrants, asylum-seekers and refugees”, Vol 18, No.5 (e), September 2006

<sup>445</sup> See Human Rights Watch “By Invitation Only. Australia Asylum Policy” Vol. 14, No. 10 (C) – December 2002

<sup>446</sup> Illegal work has been permitted, however. See Human Rights Watch, *ibidem*.

willing of providing effective protection.

In conclusion, the country of first asylum concept makes access to protection difficult. The rationale behind this concept is that asylum-seekers had already enjoyed some sort of protection somewhere else: in our opinion, Hailbronner foresaw<sup>447</sup> Australian arguments, which will spread ten years later. Indeed he declared that secondary movers are not in such need of protection as the individual who flee directly to the country where he/she claimed asylum.

## 1.2 Safe third country

The concept of safe third country at the European level dates back to 1992<sup>448</sup>, when justice and interior Ministers of Member states met in London and adopted three resolutions<sup>449</sup> modifying greatly asylum and refugees' protection common agenda. These three measures detained unclear status, being neither international treaties nor EU law and therefore were not legally binding.

The historical background deeply influenced the reaction of Ministers of Member States when drafting the three Resolutions in 1992; indeed, the motivation to find a common starting point to reject asylum claims can be traced back to the break up of the URSS, and the subsequent fears of being invaded by a massive influx of asylum-seekers coming from countries of the former Communist block<sup>450</sup>. Hence,

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<sup>447</sup> Already in 1991, the eminent scholar Hailbronner presented a controversial report to the Council of Europe, asserting that the abuse of the asylum door could be stopped by introducing criteria to curtail spontaneous asylum-seekers' arrivals, such as safe third country notion; he moreover underlined that expedient asylum procedures were acceptable, provided a reasonable safety against refoulement. See Hailbronner, Kay "The Concept Of 'safe Country' And Expedient Asylum Procedures" Report Prepared By Prof. Dr. Kay Hailbronner, CAHAR (91) 2, Strasbourg, 4 September 1991

<sup>448</sup> As underlined by Thielemann, the safe third country provision was not an EU invention: see Thielemann, Eiko and El-Enany, Nadine, "The Myth of 'Fortress Europe': The (true) impact of European integration on refugee protection" Paper presented at Fourth ECPR Pan-European Conference on EU Politics, 25 to 27 September 2008, University of Latvia, Riga, Latvia

<sup>449</sup> Resolution on a Harmonized Approach to Questions Concerning Host Third Countries (30 November 1992); Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution"), 30 November 1992; Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution"), 30 November 1992

<sup>450</sup> Leimsidor, Bruce "The concept of "safe third country" in asylum legislation, regulation practice : political, humanitarian and practical considerations" a cura di Lauso Zagato, Verso una disciplina

the London declarations included the terms “safe third country” and “safe country of origin”, although the application of these principles was left to the willingness of each Member state. Let us begin by considering the issue of safe third country as considered in each of the these three Declarations.

The first declaration<sup>451</sup> outlines the rules to define a manifestly unfounded application, if the applicant had crossed a safe third country before reaching Member states: authorities could then avoid the substantive examination of claims of asylum-seekers and procedural rights were curtailed, even a successive recognition as refugee would not have been granted a right to enter the EU, since a safe country was already found in the third country.

The second resolution<sup>452</sup> outlines a common statement for safe third countries, a country inherent safe and different from the country of origin of the applicant, but through which he/she transited. Member states were required to take into account the known practice of the host state and to respect the *non refoulement* concept, as enshrined in the Refugee Convention.

The third declaration<sup>453</sup> details the safe country of origin concept and stressed that the concept is useful to avoid unnecessary long-waiting periods for genuine refugees and in order to prevent abuse of the asylum system.

Hence, these London Declarations were signed with the intent of providing a common starting point for Member states; in other words they were designed to transfer outside the then EC responsibility for asylum claims and asylum-seekers, without substantially considering the application for asylum. This provision of safety, as proposed in the 1992 Declarations, will afterwards provide the structure for the 2005 Asylum Procedures Directive, which instead provides for a compulsory application of the safe country principle.

As enshrined in article 27 (1) of the Asylum Procedures Directive<sup>454</sup>, the safe

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comune europea del diritto d'asilo. 2006, p. 39-54

<sup>451</sup> See before note 449 Council of the European Union, Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution"), 30 November 1992

<sup>452</sup> Resolution on a Harmonized Approach to Questions Concerning Host Third Countries (1 December 1992)

<sup>453</sup> The concept of safe country of origin will be explained in details later on. See “Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution)”, 30 November 1992

<sup>454</sup> See Council Directive 2005/85/EC of 1 December 2005, a.k.a. the “Asylum procedures Directive”

third country concept does not foresee requirements regarding prevention of violations of fundamental human rights, although it declares the respect of *non refoulement* and observance of the Geneva Convention. Article 27 (2) (c) asks, however, for a case-by-case assessment of safety, for the observance of rules in line with international law and for the applicant being able to challenge<sup>455</sup> the provision of the safety of the third country on the basis of cruel, inhuman or degrading treatment, torture or punishment<sup>456</sup>.

Furthermore, as noticed by ECRE<sup>457</sup>, this concept falls short of international standards as it might lead to chain *refoulement*, i.e. *refoulement* from the safe third country, since nowhere in international law is explicitly required to translate into practice the duty of *non refoulement*. Hence, as stated in Article 27 (1) (d) only the possibility of gaining refugee status and the possibility for refugees to obtain protection under the Geneva Convention shall be assured.

Moreover, since the link and its applicability between the asylum-seeker and the third country has to be assessed at a national level, it is clear that a fair and equal treatment throughout the Union cannot be guaranteed: no requirements related to suspensive effect of removal decision are prescribed in this Directive.

In conclusion, as stated by Morgades<sup>458</sup>, the safe third country concept produces externalisation of asylum in the most possible direct way. Therefore, a new functional external border is created outside the Union, where inadmissible<sup>459</sup> asylum claims are relegated, denying the right to enter the European territory.

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<sup>455</sup> As surveyed, many Member states, such as Bulgaria, Finland, Germany and Italy, recognised the necessity of providing individual interviews before recognising the safety of a particular country, in order to grant the claimants the chance to rebut that presumption, as envisaged by Article 31 (1) of the Asylum Procedures Directive; this notwithstanding, it is worrisome that the burden of proof is entirely shouldered by the Applicant. See “Improving Asylum Procedures: Comparative Analysis And Recommendations For Law And Practice”, Detailed Research on Key Asylum Procedures Directive Provisions, A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010

<sup>456</sup> Indeed, as it was stated before, the fear generating from a possible influx of asylum-seekers from ex-soviet countries pushed Member states to draft the Declarations, which were not intended to provide an in-depth solution to the asylum-seekers' claims.

<sup>457</sup> See ECRE “Comments From The European Council On Refugees And Exiles On The European Commission Proposal To Recast The Asylum Procedures Directive”, 2010

<sup>458</sup> Morgades, Sílvia “The Externalisation Of The Asylum Function In The European Union” In Shaping The Normative Contours Of The European Union: A Migration-Border Framework (CIDOB), September 2010

<sup>459</sup> Asylum claims rejected on inadmissibility grounds are, therefore, not substantively examined. See Article 25 of the Asylum Procedures Directive



### 1.2.1 Safe country of origin

According to the safe country of origin notion, an asylum-seeker coming from a country deemed safe would have his/her claim assessed with a short process, excluding appeal rights. Once again, it is envisaged the transferral of responsibilities and of asylum-seekers to territories outside the EU.

Fundamentally, as implied by the Dublin II Regulation<sup>460</sup>, all EU Member states are deemed safe countries of origins. Indeed, presumption of safety is taken on general conclusions only, on the fact that all Members comply with fundamental international standards. However, this reasoning fails to take into account the utmost importance of providing an individual evaluation of asylum claims and safety for each particular circumstances, prior to any refusal of status assessment<sup>461</sup>.

Not only is the safe country of origin notion contradictory under the guiding requirements of international refugee law, it is also not legally based on the Refugee convention<sup>462</sup>.

In conclusion, the safe country of origin functions as a bar, denying access to protection in avoiding the effective assessment of asylum claims, on the basis of the claim that the asylum-seeker fled from a country deemed safe. Indeed this concept aims at implementing accelerated procedures on the basis of an automatic exclusion of asylum applicants from assessment procedures, inevitably deeming asylum-seekers as not being bona fide refugees.

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<sup>460</sup> European Community, Council Regulation (EC) No. 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, February 2003 See paragraph 2.2 further

<sup>461</sup> This breaches Article 3 of the Refugee Convention, stating that contracting states shall not derogate from provisions on the basis of religion, country of origin or race. Moreover, according to UNHCR, in 2008 215 EU citizens were recognised refugees. See Annex, Table 11, UNHCR, 2008 Global Trends: Refugees, Asylum -seekers, Returnees, Internally Displaced and Stateless Persons, 2008

<sup>462</sup> The notions of safe third country is justified only following a literal reading of the Convention, without taking into account, as the Vienna Convention states, the purpose of the Refugee Convention. See chapter I and conclusion. See also Kneebone, Susan "The Legal And Ethical Implications Of Extraterritorial Processing Of Asylum Seekers: The 'Safe Third Country' Concept." In *Studies In International Law: Forced Migration, Human Rights And Security*, Edited By Jane Mcadam. Portland: Hart Publishing, 2008, Pp. 129-154

By the same token, it is important to underline the annulment ruled by the EU Court of Justice<sup>463</sup> of Article 29 (1) and (2), advancing the proposal of a minimum common EU list of safe countries of origin. However, the recent recast proposal<sup>464</sup> of the Asylum Directive still regrettably maintains the provision of Article 30, namely national designation of third countries list as safe countries of origin, and it allows to retain in the Member state domestic legislation the possibility to designate a country (or part of) it as safe for a specific group of people.

### **1.2.2 Article 36 of the Asylum Procedures Directive - Super safe countries**

Article 36 of the Asylum Procedures Directive allowed the European Council to list third European Member as safe third countries on the basis that: all Member states signed the Refugee Convention without geographic limitations; they signed the European Convention for Protection of Human Rights and Fundamental Freedoms without geographic limitations; they have asylum legislation and that they are enlisted by the Council as safe.

These low-standards criteria allowed not to substantially examine, or only partially examine, the submitted asylum claim: the risk here is that no effective application of the assessment criteria is required, but only formal adherence to the principles is requested.

In 2008 Article 36 (3) was deleted by the ECJ, ruling that it breached the Article 67 (5) EC on the co-decision prerogative of the European Parliament: instead, Article 36 of the Asylum procedure requested a consultation procedure with the EP.

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<sup>463</sup> The EP brought an action to annul articles in the Asylum Procedure Directive implying a decisional mechanism which provided the Council ruling on qualified majority voting after only consulting with the Parliament. The procedures breached article 67 (5) EC: see further, paragraph 1.2.2 super-safe countries. See European Court of Justice Case C-133/06, European Parliament and Commission v. the Council, Judgement of 6 May 2008

<sup>464</sup> See ECRE “Comments From The European Council On Refugees And Exiles On The European Commission Proposal To Recast The Asylum Procedures Directive”, 2010

### 1.3 Problems arising from the safe third country notion

As it was stated above, it seems acceptable under international refugee law to transfer asylum-seekers to third countries, provided that effective protection will be assured and that meaningful links between the applicant and the processing country are found.

Nevertheless, the first objection to the safe third country concept is that the notion of effective protection is still weak and likely to lead to circumvention of international protection mechanism. Indeed, the external dimension of asylum is increasingly seen as the tool intended to alleviate the “responsibility burden”<sup>465</sup> shouldered by each Member states<sup>466</sup>, while getting completely rid of human rights protection and delivering responsibilities to other countries. To obviate to this, Legomsky in 2003 suggested the international introduction of the complicity principle<sup>467</sup>: no state should help another state in knowingly breach international law and in accomplishing what would be forbidden for the first state. Furthermore, this complicity principle analyses the degree of knowledge, which shall be indirectly proportional to the importance of the right breached.

A further objection to the safe third country notion, as studied by Gil-Bazo<sup>468</sup>, is that there are no complete statistics available showing the reasons for refusal of asylum claims assessment: thus the impact of “passing of the buck” is difficult to assess; besides, it fails to take into account several factors.

For instance, the background rationale of safe country concept is the idea of sharing responsibilities for asylum-seekers within the international community and to provide

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<sup>465</sup> The UN High Commissioner for Refugees Ruud Lubbers in 2002 stated that refugees can be regarded as “agents for development” in hosting countries; he also acknowledged that in the short-term perspective, pressure on the host countries is high. On the same reasoning, it is now widely preferred to address the problem of burden as responsibility-sharing. See “Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, to the United Nations Economic and Social Council (ECOSOC) Substantive Session of 2002 (Humanitarian Affairs Segment)”, New York, 15 July 2002 available at <http://www.unhcr.org/3d353a7e4.html> last accessed 20 August 2012

<sup>466</sup> As declared in Article 35 (2) of the 2005 Asylum Procedures Directive, EU Members can apply lower standards of guarantees, compared to the fundamental ones, and procedures at their frontiers and borders.

<sup>467</sup> See Legomsky, Stephen H., “Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection” In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

<sup>468</sup> See Gil-Bazo, Marià-Teresa “Responses To Secondary Movements Of Refugees: A Comparative Preliminary Study Of State Practice In South Africa, Spain, And The Usa”, Expert Meeting On International Cooperation To Share Burden And Responsibilities, 27-28 June 2011, Amman, Jordan: Responses To Secondary Movements Of Refugees: A Comparative Preliminary Study Of State Practice In South Africa, Spain, And The Usa

regional protection. This notwithstanding, the resulting situation is an inequitable and disproportionate distribution of the burden, being shouldered by developing countries<sup>469</sup> surrounding the European Union. Above all, moreover, is difficult to find a real common and consistent application of the principle of safe country concept throughout the Union, as the basis on which the idea of safety shall be applied is outlined by each Member state.

## **2 Externalisation through Readmission Agreements**

Having examined the issue of externalisation through safe country notions, let us move on to externalisation pursued through readmission agreements.

Readmission agreements usually cover procedural requirements related to return: the aim is to guarantee the fast return of rejected asylum-seekers and irregular migrants to their countries of origin and transit, imposing on partner countries the obligation to readmit not only their own nationals<sup>470</sup>, but also third country nationals<sup>471</sup>, who crossed their borders before entering the EU unlawfully.

Under the Treaty of Amsterdam<sup>472</sup>, the competence to sign readmission agreement with third countries came within the Communitarian first Pillar: it was now the Commission gaining the competence to conclude readmission agreements, upon mandate of Member states. Since then, Member states complained about the slow

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<sup>469</sup> As reported in the most recent UNHCR's Global Trend Report, over four-fifths of global refugees escape to developing countries close to their own. See "Global Trends Report: 800,000 new refugees in 2011, highest this century", News Stories, 18 June 2012

<sup>470</sup> Under international customary law each state has the duty to readmit its own nationals: this obligation is deeply linked the right of each state to expel those unwanted. Nevertheless, many states are reluctant to comply with this readmission duty. Article 13 of the 1948 UN Universal Declaration of human rights declares the right to return to one's own country and condition sine qua non is the state acceptance of this readmission.

<sup>471</sup> See Cassarino, Jean-Pierre "Readmission Policy in the European Union", Study for the European Parliament, PE 425.632, 2010. Moreover, the first agreement on readmission of third country nationals of unknown nationality is the 2001 Swiss-Senegalese accord de transit, providing for the readmission of west african asylum-seekers.

<sup>472</sup> The first agreement of this kind was signed between Poland and Schengen countries in 1991. Thanks to the entry into force of the Amsterdam Treaty, the EC gained competence on migration and asylum issues: Article 63 (3) (b) EC, provided the legal basis, an "implied power", to the EC for the conclusion of readmission agreement and, to date, no question on the Community competence was raised. See Billet Carole, "EC Readmission Agreements: A Prime Instrument Of The External Dimension Of The Eu's Fight Against Irregular Immigration. An Assessment After Ten Years Of Practice" In European Journal Of Migration And Law 12 (2010), pp. 45-79

negotiation process vis-à-vis third countries<sup>473</sup>, while the Commission replied in asking the Council to propose incentives, in order to gain partners' consent on the conclusion of readmission agreements<sup>474</sup>.

Indeed, the hardest issue to accomplish proved to be readmission of stateless persons and third country nationals, since often the travel routes and/or the evidences supporting the actual transit of asylum-seekers through that specific country were controversial. Due to the lack of experience and of readmission agreements with countries of origin, therefore, transit country often are left alone in the challenge of managing foreigner and the resulting economical and social burden<sup>475</sup>.

In addition, when taking into account a country's readmission of its own

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<sup>473</sup> The following criteria were established during Conclusions of 25-26 April 2002: Nature and size of migratory flows toward the EU (migration pressure, number of persons awaiting return); Geographical position vis-à-vis the EU and regional balance; Attitude towards cooperation on migration issues; Need for capacity-building concerning migration management; Existing framework for cooperation. We would like to underline that the Council in this document stressed the essentiality of starting of a collaboration with Libya. See General Affairs And External Relations, “2463rd Council Meeting, General Affairs, Doc. 14183/02” (Presse 350), 18 November 2002

<sup>474</sup> See Paragraph 11- “Readmission Agreements” in “Communication from the Commission to the Council and the European Parliament. “Integrating Migration Issues in the European Union's Relations with Third Countries”, COM (2002) 703 final. In the Commission's Green Paper on a Community return policy on illegal residents of 2002 it was clearly stated that readmission agreements are intended to be in the Community interest, although their conclusion depends on the leverage proposed. See paragraph 4.1.1, Green Paper On A Community Return Policy On Illegal Residents, COM (2002), 175 final.

<sup>475</sup> More recently the Commission recognised this gap and provided for the budget line B7-667 to support cooperation with third countries. This measure was replaced by the so-called Thematic Programmes, designed to give technical help to better implement readmission agreements. The first Thematic Programme was AENEAS: this programme was intended to be operative between 2004-2008 with a budget of € 250 million and was envisaged particularly to help partner countries in implementing readmission agreements and. See Article 1 (e) of the Regulation (EC) n° 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), OJ L 80 of 18/03/2004. The Programme lasted only until 2006, when was replaced by the Thematic Programme for cooperation with third countries in the areas of migration and asylum, intended to last for seven years. The actual timeframe period started in 2007 and until 2013 will be provided with €384 million. Between 2011 and 2013 €179 million will be allocated as to grant €68 million to the area covering southern Mediterranean, Middle East and Sub-saharan Africa. This region will be the major funding-receiving one. See [http://ec.europa.eu/europeaid/how/finance/dci/migration\\_en.htm](http://ec.europa.eu/europeaid/how/finance/dci/migration_en.htm) last accessed 20 August 2012

In January 2008 the European Return Fund (ERF) came into effect with € 676 million budget for the period 2008-2013. See Decision n° 575/2007/EC of the European Parliament and of the Council establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme “Solidarity and Management of Migration Flows”, OJ L 144 of 06/06/2007. Moreover, as we studied in the previous chapter, FRONTEX was envisaged to facilitate operational cooperation with third states. See Article 14 Council Regulation (EC) establishing FRONTEX- The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2007/2004 , OJ L 349, November 2004

nationals, it is important not to forget that remittances play a great role<sup>476</sup> for the economy of the developing country, and that return usually coincides with social challenges and a destabilisation of balance in urbanisation. Most of the time, the destruction of a family's main economic income pushes those readmitted and their relatives to move together from the countryside, where they used to live, to the major cities in search for better opportunities, hence causing phenomena of internal migration. Another possible implication is re-emigration, especially after a forced return took place.

In order to gain the cooperation of partner states, therefore, “carrots” like visa facilitation<sup>477</sup> and financial aids were introduced: as incentives for readmission<sup>478</sup>, visa facilitation was envisaged especially for neighbouring countries<sup>479</sup>, whereas Mobility Partnerships<sup>480</sup> pilot projects have been signed with Cape Verde and Moldova, in order to create a better intergovernmental framework for cooperation on

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<sup>476</sup> In 2011 the Remittance flow reached the peak of \$372 billion to developing countries, signalling a 12.1 percent in comparison to 2010: since cash is hidden during travel, the total amount could be even higher. As noticed by the Economist article, this number is almost similar to the total FDI to poor countries, which by contrast decreased of a third since the economic crisis. <http://www.economist.com/node/21553458> last accessed 20 August 2012

<sup>477</sup> Agreements on visa facilitation are signed with the aim to ease issuance of 90 days visa (short-stay visas), whereas long-stay visa remain a Member state prerogative. For instance, at the start of 2012 the Italian Minister Cancellieri held that this year no further annual quota, after allowing entrance to 35,000 seasonal worker of selected nationality, will be issued to allow non-EU nationals to work in Italy: this system of quotas based on exclusive nationality was one of the key criteria introduced as incentive to negotiate readmission agreements. See Maccanico, Yasha “Extension of humanitarian residence permits to put an end to 'emergency' - problems including 'disappeared' Tunisians and rightless refugees from Libya persist”, Statewatch 2012

<sup>478</sup> As stated in the Parliament study, readmission agreements are understood as a way to consolidate bilateral cooperation on other strategic areas. See Cassarino, Jean-Pierre “Readmission Policy in the European Union”, Study for the European Parliament, PE 425.632, 2010

<sup>479</sup> Although even China in 2004 asked the EC to deal visa facilitation when negotiating the readmission agreement. The idea of fostering visa facilitation as incentive tool for signing readmission agreement seems nevertheless questionable. None of the Mediterranean state has so far signed a readmission agreement with EU, although it was envisaged as objective during the Barcelona Process; the latest such agreement (with Georgia) entered into force in 2011. See “Commission Staff Working Document Accompanying The Communication From The Commission To The European Parliament And The Council”, “Evaluation Of Eu Readmission Agreements Eu Readmission Agreements: Brief Overview Of State Of Play”, SEC (2011), 209, February 2011

<sup>480</sup> Mobility partnerships were proposed after October 2005 Hampton Court summit and aim at managing migration flows with third countries surrounding EU willing to cooperate on irregular migration, readmission and border control: they are soft-law tools which promote temporary or seasonal migration, i.e. circular migration and, therefore, proved to be a more comprehensive migration policy. Communication from the Commission on Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005), 621 final, November 2005. Another Mobility Partnership was signed with Georgia in 2009.

management of migratory flows<sup>481</sup> .

Another leverage to push third countries to cooperate was decided in the Seville European Council, as we saw previously<sup>482</sup> . The British-Spanish-proposed negative conditionality only apparently did not root and the Council decided in the end that each future cooperation or association agreement should include a mandatory clause on readmission<sup>483</sup> in case of illegal immigration, otherwise the EU would refuse to sign the agreement.

Nevertheless, as both Trauner and Billet stressed<sup>484</sup> , the EU does not really take into consideration what the partner state it is facing, when negotiating a readmission agreement. Indeed, these agreements follow a fixed scheme, with only few country-specific provision such as time limits for readmission or reference to the evidences the party has to provide to enact a readmission.

Even if references to human rights treaties<sup>485</sup> are contained in most of preambles of readmission agreements and while all of them provide a non-affectation clause<sup>486</sup> , international law does not openly prohibit to move asylum-seekers to other states where persecution is not likely, as it was already stated when analysing the safe third country provision. Again when signing readmission agreements with third countries, proper implementation of provision described in human rights international treaties is not taken into account.

Since the asylum system in third countries is usually young and not consolidated, procedural safeguards and access to refugee status determination are disregarded; local integration is lacking due to poor economical conditions in which third countries

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<sup>481</sup> EU funded a centre for information and management of migration in Mali, providing coordination between offers and demand of jobs in the two countries. See “Circular migration and mobility partnerships between the European Union and third countries”

<sup>482</sup> For an overview, see Chapter II, paragraph 1.2.3 “Laeken and Seville European Council”

<sup>483</sup> See further in this chapter, paragraph 2.1.

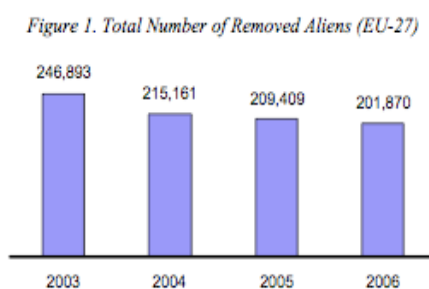
<sup>484</sup> Billet ,Carole, “EC Readmission Agreements: A Prime Instrument Of The External Dimension Of The Eu’s Fight Against Irregular Immigration. An Assessment After Ten Years Of Practice”In European Journal Of Migration And Law 12 (2010), pp. 45–79; see also Trauner, Florian and Kruse, Imke “EC Visa Facilitation And Readmission Agreements: Implementing A New Eu Security Approach In The Neighbourhood” CEPS Working Document No. 290, April 2008

<sup>485</sup> The Commission required explicitly, prior negotiation of readmission agreements, to keep in mind the human rights situation in the partner state. See paragraph 2.3 and 4.1.1 , “Green Paper On A Community Return Policy On Illegal Residents, COM (2002), 175 final

<sup>486</sup> Non-affectation clause establishes that the agreement shall be without prejudice to obligations and rights under international law.

are; transit countries have to deal with the further repatriation of third country nationals, creating more economical pressure and other negative effects. In brief, most third countries provide protection well below the standards of effective protection enshrined in the UHNCR<sup>487</sup> documents and, nevertheless, are regarded as safe third countries by the EU when signing readmission agreements.

In our opinion, it is important to underline that no distinction is made when concluding readmission agreements between readmission of irregular economic migrants and readmission of asylum-seekers, whose claims were rejected on safe third country provision: rejection of asylum applications on inadmissibility ground depicts asylum-seekers as sheer illegal immigrants, making readmission and therefore, externalisation of asylum, easier.



*Source: Trauner, Florian and Kruse, Imke "EC Visa Facilitation And Readmission Agreements: Implementing A New EU Security Approach In The Neighbourhood" CEPS Working Document No. 290, April 2008*

Indeed, a real evaluation of effectiveness of readmission agreements and their impact of asylum-seekers is almost impossible: data on removal is scarce and imprecise, as confessed in the Commission evaluation report of march 2009<sup>488</sup>; countries of origin do not possess information on actual numbers of those returned, also because the EU Member states did not give any future estimation; numbers provided were not divided, unsurprisingly, into rejected asylum-seekers and irregular migrants.

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<sup>487</sup> Instead of unilateral endorsement of safe third country concept, as Legomsky noted, UNHCR usually promotes the adoption of readmission agreements for making return easier and for providing a basic assurance of readmission.

<sup>488</sup> Data are acquired by CIREFI, collecting it among Members : data are defined as not perfect, and, therefore, caution is needed when referring to them. See Commission Staff Working Document, "Third Annual Report On The Development Of A Common Policy On Illegal Immigration, Smuggling And Trafficking Of Human Beings, External Borders, And The Return Of Illegal Residents" SEC (2009), 320 final



## 2.1 Readmission clauses

Well before the Treaty of Amsterdam, the EC incorporated readmission clauses into global agreements on cooperation, trade and association with other countries on request of Member states, even if at that time the Community did not have judicial competence on migration-related matters. After the entry into force of the Treaty it became compulsory to negotiate a new agreement with the Community as a whole, and standard readmission clauses became mandatory in every future EC cooperation agreements<sup>489</sup>.

This latter new provision concretised in the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries<sup>490</sup>, where a clause obliges ACP states to readmit not only their nationals illegally residing in an EU Member states, but also any other country nationals and stateless people, if deemed necessary (and vice versa).

Therefore, readmission clauses are intended as general tools to pave the way for a readmission agreement, which in turn will specify the procedural measures for return. Notwithstanding the strict enforcement of conditionality envisaged by the 2002 Seville European Conclusion<sup>491</sup>, the EU has so far failed firstly to monitor partner countries and secondly to keep its promises of economic sanction when non-compliance was found<sup>492</sup>; the Union moreover not only proved unable to offer positive chips to stimulate cooperation, ignoring third states' interest, but also sent contradictory messages to partner countries, because its readmission policy lacks of coherence<sup>493</sup>.

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<sup>489</sup> Council Of The European Union, “Decision on readmission clauses in Community agreements or mixed agreements”, 13461/99, 2 December 1999.

<sup>490</sup> See Article 13 “Migration”, paragraph 5 (c) “Partnership agreement between the members of the African, Caribbean and Pacific Group of States on one hand, and the European Community and its Member States, on the other hand, signed in Cotonou on 23 June 2000 (OJ 15 December 2000, No. L 317/3- 286, as revised by “Partnership Agreement ACP-EC” Revised in Luxembourg on 25 June 2005

<sup>491</sup> See Chapter II.

<sup>492</sup> Agence France Presse, “Austrian, Portuguese Leaders Differ on EU Immigration Proposal”, 20 June 2002

<sup>493</sup> Criteria such as geographical proximity or migratory pressure, to address third countries were

In conclusion, through readmission agreements the responsibility of an ill-management in border control and in the irregular entry of asylum-seekers is dumped from Member states to third states, with the result of an unconditional readmission of the migrants into the European buffer zone.

## 2.2 The multilateral Dublin Convention and its successor Dublin Regulation

The most famous multilateral readmission agreement is the Dublin Convention<sup>494</sup>: it entered into force in 1997, it took for granted the Europe-wide uniform treatment of asylum-seekers and it assigned responsibility for assessing asylum claim to the state whose territory the asylum-seeker entered first, once proved his/her staying in another Schengen state below six months, or absence of family members, visa or residence permit.

As a justification for the Dublin Convention, the integration of the Schengen acquis into the Amsterdam Treaty and the subsequent abolition of internal borders was asserted; also, the enlargement of the Union rose fears of sudden increases of secondary movers on a widened territory without inner controls<sup>495</sup>.

However, the UNHCR endorsed the adoption of fixed rules for state responsibility<sup>496</sup>, yet drawbacks were immanent, such as differences in national asylum systems and policies of Member states, difficulties and delays in establishing the responsible

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drafted, see “General Secretariat Of The Council, Criteria for the identification of third countries with which new readmission agreements need to be negotiated – Draft conclusions, 7990/02, COR 1, Limite MIGR 32”, 15 April 2002. Nevertheless each Member state continue its own bilateral readmission agreement negotiation, since the Commission has no exclusive competency in readmission matters. Furthermore, the Council stressed the necessity to create a a framework for cooperation on migration with Libya, although democratisation and human rights should be precondition for collaboration. See Sterkx, Steven, “The Comprehensive Approach Off Balance: Externalisation Of Eu Asylum And Migration Policy” Politike Wetenschappen, Psw Paper No.4, 2004

<sup>494</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ 1997 C254/1

<sup>495</sup> See paragraph 11 “Commission of the European Communities, Commission Staff Working Paper, Revisiting the Dublin Convention developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, SEC(2000) 522 (21 Mar. 2000). furthermore chapter II.

<sup>496</sup> See UNHCR, Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), 16 August 1991

country and the fact that only a small percentage<sup>497</sup> of asylum claims under the Dublin Convention actually was redirected.

In brief, through the Dublin Convention the European Community started to uphold its international responsibility in prioritising national sovereignty and in preventing access to protection through territorial exclusion, as analysed by Guild<sup>498</sup>.

Having examined the multilateral Dublin convention, let us move on to its successor. In 2003 the Council adopted the Dublin Regulation<sup>499</sup>, since the Treaty of Amsterdam required the adoption of a Community instrument replacing the Convention: the Dublin II, as it was dubbed, was in line with its predecessor as it claimed to reduce the phenomena of refugee in orbit, multiple submission of claims by the same asylum-seeker and asylum-shopping through placing the responsibility for asylum claims within the first Member state of entrance.

The Dublin II system surely provides, in the end, an increase in chances that a Member state will process asylum claims<sup>500</sup>; in addition, the Eurodac<sup>501</sup> database, listing fingerprints of irregular migrants and asylum-seekers, rendered the linkage with the responsible Member state easier.

Nevertheless, Member states disagree firstly on the interpretation of the Dublin II provisions, secondly on the entitlements of asylum-seekers during reception and during the process and, finally, no time limit is provided for requests regarding the taking back<sup>502</sup> of the claimants. As it was showed previously, each Member state is

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<sup>497</sup> Only 1,7 per cent of all asylum claims during the survey period 1998-1999. See for a more detailed report Legomsky, Stephen H., "Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

<sup>498</sup> Guild, Elspeth "The Europeanisation Of Europe's Asylum Policy." *Ijrl*, Vol. 18 No. 3, 2006, pp. 630-651

<sup>499</sup> European Community, Council Regulation (EC) No. 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, February 2003.

<sup>500</sup> Article 3 states that at least one Member state shall examine asylum applications, although, as we will see in a few lines, this commitment is suddenly forgot.

<sup>501</sup> See Council Regulation EC/2725/2000 of 11 Dec. 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprint for the effective application of the Dublin Convention [2000] OJ No L 316.

<sup>502</sup> Garlick denounced that Greece refused to process in substance the claims of those sent back under Dublin II, on the basis that, under the Asylum Procedures Directive, a claim can be considered implicitly withdrawn whenever the claimant left without authorisation or notice. This creates risk of refoulement, as asylum claims are not assessed into substance and refused on formal grounds, since many claimants are returned to responsible state after the fixed limit of three months. See Article 19

deemed safe country of origin and, even more worrying, the safe third country concept can be applied not only after, but also before the Regulation is taken into account<sup>503</sup>.

Thus the search for a safe non-EU country, where the applicant could be sent for assessment, can start even before a link with another Member state is provided<sup>504</sup>.

Needless to say, the Dublin System proved so far not to be an efficient responsibility-sharing mechanism, as it was claimed. Indeed, many claims of asylum-seekers are shifted to eastern countries of new accession<sup>505</sup> and to southern Member states<sup>506</sup>, thus renamed “asylum doors” due to their easier-to-reach geographical position compared to northern states. This shifting in asylum system actually deepens the divide already present on different EU levels<sup>507</sup>, surely not furthering the goal of creating the CEAS: this thesis contend that a real EU-wide compensatory mechanism is needed, in order to help southern and eastern states to cope with the pressure coming from dealing with numerous asylum claims.

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(1) (b) of the Asylum Procedures Directive. See Garlick, Madeline “The Eu Discussions On Extraterritorial Processing: Solution Or Conundrum?” *International journal refugee law* Vol. 18 No. 3, 2006, pp. 601- 629

In January 2011 the ECHR found both Greece and Belgium in violation of Article 3 ECHR, prohibition of enacting degrading and inhuman treatment or punishment, and Article 13 ECHR, right to an effective remedy; See ECtHR, Case Of M.S.S. V. Belgium And Greece (Application No. 30696/09) Judgement Strasbourg 21 January 2011

<sup>503</sup> See Article 3 (3) of the Dublin II Regulation

<sup>504</sup> This applies also when a Member state receives back the claimant: if a link with a safe third country exists, the claimants will be sent there. The utterly difficult requirements under Dublin II pushed Member states such as Austria and Slovakia to rely on bilateral readmission agreements among themselves more than on Dublin II. As the asylum systems in EU Member States should converge in the end within the CEAS, which in turn should provide the right of residency anywhere inside the EU, the Dublin system might result as a better protection compared to safe third country provision supported by bilateral readmission agreement with third countries.

<sup>505</sup> Which, in turn, are surrounded by refugee-producing countries, lack of proper reception facilities and usually display a weak asylum system.

<sup>506</sup> Among others, Malta is protesting vehemently and feels disadvantaged by Dublin II. See Klepp, Silja, “A Contested Asylum System: The European Union Between Refugee Protection And Border Control In The Mediterranean Sea” In *European Journal Of Migration And Law*, Vol. 12, 2010, pp. 1–21

<sup>507</sup> The famous Europe of two velocity, or two-tiered Europe. See for instance Pistelli, Lapo “Mappa della dis-unione europea” in *L'Europa è un bluff*, Limes 1 pp.233-240, 2006

### 3 Externalisation through resettlement

Resettlement is one of the two forgotten durable solutions<sup>508</sup> and historically it consisted in the voluntary<sup>509</sup> acceptance for (usually permanent) transfer of refugees present in a country where they first sought refuge: the whole scheme is carried out with the help of UNHCR.

As the Comprehensive Plan of Action (CPA)<sup>510</sup> implemented during the Indo-Chinese crisis showed, a functional asylum system should provide: access to the territory where assessment of asylum claims will be provided; a fair RSD to discern bona fide refugees from economic migrants and efficient procedures dealing with those not recognised as refugee. If today this latter aspect has been substituted by extraterritorial provision to prevent access to asylum system, the CPA instead provided for effective repatriation mechanism in agreement with countries of origin<sup>511</sup>.

In brief, although for decades in period of mass influx the processing of asylum-seekers outside the country where they would find protection was widely accepted and internationally endorsed, nowadays the extraterritorial processing shows a deeply

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<sup>508</sup> Apart from resettlement, there are other two durable solutions: return is now the most famous and preferred one, whereas it was discouraged during the Cold war as most refugees were fleeing from communist countries; integration was at first the favoured durable solution and it is mentioned in Article 34 of the Refugee Convention as assimilation and naturalisation. As Alice Edwards underlined, assimilation and naturalisation depend on the willingness of the state; citizenship is the higher form of local integration. See Edwards, Alice "Human Rights, Refugees, And The Right 'To Enjoy' Asylum" In International journal refugee law Vol.17 No.2 (2005), pp.293-329.

<sup>509</sup> Indeed we underline that no obligation under the Refugee Convention prescribes to state that they accept resettled refugees, nor the latter have a right to be resettled.

<sup>510</sup> The CPA was a programme adopted since June 1989 and was intended to manage third countries' resettlement opportunities and the influx of Indo-Chinese boat people, although it carried the same assumption that those fleeing conflicts were not genuinely in need of international protection; in that period, according to Towle, the difference between asylum-seekers and migrants started to disappear: this was reflected western states' attitudes which were involved in inner national challenges. See Towle, Richard, "Processes And Critiques Of The Indo-Chinese Comprehensive Plan Of Action: An Instrument Of International Burden-Sharing?" In *Ijrl* 2006 pp. 537-570

<sup>511</sup> For this reason mainly, the CPA was seen as the most successful burden-sharing programme: not only implemented all three measures, it also convinced different stakeholders in entrusting and reinforcing mutually the plan, even notwithstanding the thorny problem of involuntary, i.e. forced, returns : it was faced in the CPA under the euphemism of Orderly Return Programme (ORP), after the first repatriation of Vietnamese people made by Hong Kong in 1989. In Towle's view, the success of CPA lies in its ability not to lose the faith of stakeholders; the CPA left a clear legacy in regional fora for a such as the Bali process, or the Asia Pacific Consultation on refugees displaced persons and migrants. See Towle, Richard, "Processes And Critiques Of The Indo-Chinese Comprehensive Plan Of Action: An Instrument Of International Burden-Sharing?" In *Ijrl* 2006 pp. 537- 570

different feature. A permanent state of exception becomes the rule, as states relegate outside their own territory asylum claims of those intercepted while seeking to reach the state's shores or of those already present on their soil.

Even more worrisome, in our opinion, seems to be the exclusivity character of resettlement as promoted by more subversive states, in the attempt to substitute once for all the reception of spontaneous arrivals of asylum-seekers<sup>512</sup>. However, resettlement should not be considered a mean to manage migration.

This thesis already showed the lack of means to provide effective protection and shortcomings usually displayed in third countries, which already host the majority of the world's refugees<sup>513</sup> with all the environmental, economic and social issues deriving from the ill-management of this situation. All these problems should be clear in mind when analysing resettlement, and, moreover, it is important not to forget that procedural safeguards provided during offshore processing are typically weaker than those present in the domestic refugee status determination<sup>514</sup>. Furthermore, in particular when addressing resettlement from African states, Legomsky<sup>515</sup> stated that several northern countries usually decide to welcome resettled refugees, on the basis of which was their first asylum country: in turn, this facilitates the spread of forum-shopping phenomena, because asylum-seekers try to foresee the best resettlement country.

In our opinion, what Europe is seeking to implement with partner states<sup>516</sup>, is a

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<sup>512</sup> Although it is widely acknowledged that orderly resettlement might diminish the need for illegal secondary movements, as for instance declared in the Communication on Joint resettlement Programme, human rights lawyer stress that resettlement is not to be intended as a substitute for proper reception of non-orderly arrivals of asylum-seekers. See "Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme", 2 September 2009, COM(2009) 447 final

<sup>513</sup> According to UNHCR Global trends 2011, refugees were over 15.2 million and another 3.5 million were internally displaced in their countries of origin. Pakistan (it hosted over 1.7 million refugees), Syria and the Islamic Republic of Iran were the top three countries hosting refugees last year; the least developed countries hosted 2.3 million refugees: Asia and the Pacific Region hosted over 35% of all refugees. The durable presence of refugees in these regions causes regional and domestic instability and many first asylum countries, therefore, put into being restriction on asylum provisions. See UNHCR "Global Trends Report: 800,000 new refugees in 2011, highest this century", News Stories, 18 June 2012

<sup>514</sup> See Chapter I and the Australian case

<sup>515</sup> See Legomsky, Stephen H., "Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

<sup>516</sup> Although being one of the goals of the CEAS, a common EU resettlement Programme was at first proposed in the 2009 "Communication from the Commission to the European Parliament and the

second step for externalisation<sup>517</sup>: the first resettlement programme was launched in 2005 with the view of enhance both reception capacity and the asylum system of third countries. The ultimate goal was to share international responsibilities while providing access to asylum closer to countries of origin.

On February 2009 the European Asylum Support Office (EASO)<sup>518</sup> was created and will act as structural framework for implementing activities related to cooperation in the field of asylum, including resettlement. Moreover, since 2008 the European Refuge Fund III (ERF III) is supporting monetarily resettlement from third countries to Member states: indeed the amount of €4,000<sup>519</sup> is provided per resettled refugee and the annual allocation is drafted considering the quota resettled the previous year in each Member state.

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Council on the Establishment of a Joint EU Resettlement Programme”: at the moment only ten Member states (Czech Republic, Denmark, Finland, France, Ireland, Netherlands, Portugal, Romania, Sweden and UK) are taking part to the annual resettlement programme, while other participate on ad-hoc basis, usually in chase of emergency situation suggested by UNHCR: for instance Germany resettled Iraqi refugees from Syria and Jordan. Belgium, Italy, and Luxembourg also were involved. See “10 000 REFUGEES FROM IRAQ, A Report on Joint Resettlement in the European Union”, ICMC, May 2010

In 2011 the global resettlement places remained stable at quota 80,000, whereas the necessity is esteemed around 800,000 per year: for this reason, UNHCR welcomed the adoption, in March 2102, of the Joint EU resettlement programme, although it still works on voluntary basis: see “Decision No 281/2012/Eu Of The European Parliament And Of The Council of 29 March 2012”, amending “Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ ”, OJ L29, March 2012. Moreover in 2008 an agreement was concluded between UNHCR, IOM and Romania for establishing an Evacuation Transit Centre in Timisoara, as starting point for an emergency resettlement. See “Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme”, 2 September 2009, COM(2009) 447 final. We shall distinguish a common Eu resettlement programme to resettlement intra-Members, as a pilot scheme was started helping Malta to share those in need of international protection with other EU Member states. See

[http://ec.europa.eu/malta/news/over\\_300\\_refugees\\_resettled\\_en.htm](http://ec.europa.eu/malta/news/over_300_refugees_resettled_en.htm) last accessed 20 August 2012

<sup>517</sup> According to Bilgin, the externalisation process of asylum policies came into being with the concept of safe third country: as we saw before this provision allowed the refusal of processing asylum-seekers' claims submitted to EU Members and their transfer back to transit countries deemed safe. The next step was resettlement, and, more specifically, resettlement in the region of origin, which will be analysed in the following paragraph. See Bilgin, Pinar And Bilgiç, Ali, “Consequences Of European Security Practices In The Southern Mediterranean And Policy Implications For The Eu”, Inex Policy Brief No.12, 2011. As studied for the parliament analysis, resettlement as it is today helps Member states in picking refugees according to their needs. See “Analysis of the external dimension of the EU’s asylum and immigration policies” – summary and recommendations for the European Parliament, PE 374.366, 2006

<sup>518</sup> See the previous chapter. Regulation (EU) No 439/2010 Of The European Parliament And Of The Council Of 19 May 2010 Establishing A European Asylum Support Office (EASO)

<sup>519</sup> See Article 13 (3) (a) and (b) as amended by “Decision No 281/2012/Eu Of The European Parliament And Of The Council of 29 March 2012”, amending “Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ ”, OJ L29, March 2012

Unfortunately, resettlement under the ERF III requests rigid parameter as only four category of persons are interested, i.e. persons coming from a region or a state addressed for the implementation of Regional Protection Programmes<sup>520</sup>, children and women at risk, unaccompanied minors, those survived to torture or violence and persons with special physical or medical needs.

Other shortcomings immanent in this European resettlement attempt are the setting of priorities at each national level and the consequent almost complete lack of dialogue regarding not only structural cooperation in the field of resettlement<sup>521</sup>, but also in other external policy instrument<sup>522</sup>.

In conclusion, still little interest is shown by Member states toward resettlement<sup>523</sup>, the humanitarian approach to asylum, as defined by Van Selm<sup>524</sup>. In the attempt to reinforce EU participation and prominence in global resettlement activities, since resettlements needs greatly outnumber actual resettlement places, conferences of stakeholders were gathered during 2012<sup>525</sup> to discuss any step forward to the EU joint resettlement programme: the joint programme was envisaged to be evaluated in 2014<sup>526</sup>.

### 3.1 Resettlement and regionalisation

Let us begin by recalling the 2003 UK New Vision<sup>527</sup> plan and the failed proposal for

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<sup>520</sup> See paragraph 3.1

<sup>521</sup> Cooperation is enacted between UNHCR and through bilateral contacts with resettlement countries.

<sup>522</sup> See “Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme”, 2 September 2009, COM(2009) 447 final

<sup>523</sup> Although, as underlined by Professor Leisidor, the UNHCR as well is not implementing resettlement at best. The UNHCR is understaffed and underfunded and it hardly fills in the yearly available places for resettlement.

<sup>524</sup> See Van Selm, Joanne “Access To Durable Solutions”, Presentation Given In Amsterdam, 2 September 2004. On the idea of resettlement as solidaristic, see Haddad, Emma “The External Dimension Of Eu Refugee Policy: A New Approach To Asylum? ” In Government And Opposition, Vol. 43, No. 2, 2008, Pp. 190–205

<sup>525</sup> See <http://www.resettlement.eu/news/stakeholder-meeting-refugee-resettlement-sofia-19-june-2012> last accessed 20 August 2012 Another conference was held in Spain on 6 September 2012

<sup>526</sup> See “Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme”, 2 September 2009, COM(2009) 447 final

<sup>527</sup> If not, please see Chapter II, paragraph 2.1 “A vision for asylum-seekers”



the establishment of Regional Protection Zones (RPZs): we do not have to wait long after that idea to meet its concrete endorsement, the Regional Protection Programmes (RPP)<sup>528</sup>, namely another European instrument that fosters the “brand new” idea of protection closer to refugees-producing regions<sup>529</sup>.

This time, however, the external dimension of asylum is disguised as preventive approach, developing a better reception of asylum-seekers in their region of origin, in order to dissuade their resort to people smugglers to further journey in search for protection. Despite statements that offshore processing outside EU was abandoned, the idea of enhancing protection in the neighbouring area where RPP are started was clearly linked to enables processing of asylum claims outside the Union's territory<sup>530</sup>.

As it was already anticipated, RPPs are based on two elements: regionalisation, i.e. sharing the burden derived from hosting refugees with partner states through the improvement of their asylum system and reception capacities, and the following resettlement of those recognised refugees from targeted regions to EU Member states. Yet, because little incentives was actually offered to third states<sup>531</sup>, it was naive thinking of relying on a full collaboration of partner states<sup>532</sup>: already during the

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<sup>528</sup> RPP should be adaptable to each particular situation and should pave the way for one of the three durable solutions, local integration/repatriation/resettlement, to be implemented. See Communication From The Commission To The Council And The European Parliament On Regional Protection Programmes, COM(2005) 388 final.

We shall underline that after 2008 Communications, only few documents quoted the RPP pilot projects: no data no statistics regarding their actual implementation was found, although a Phase II was started in 2011. See Regional Protection Programme- Support to UNHCR activities in Eastern Europe (Belarus, Moldova and Ukraine) – Phase II (MIGR/2011/272 - 415) Terms Of Reference Of The Regional Steering Committee, 2011

<sup>529</sup> As stated by Justice and Home Affairs Commissioner Antonio Vitorino in 2005, the main aim for developing RPP is to create a chain of countries of first asylum where now we find countries of transit. See

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/435&format=HTML&aged=1&language=EN&guiLanguage=en> last accessed 20 August 2012

<sup>530</sup> The Ep revived suspects in the 2005 Resolution: see paragraphs 17, 27 and 36. See “Legal and illegal migration and the integration of migrants” P6\_TA(2005)0235, 9 June 2005

<sup>531</sup> As optimistically stated by the Commission, addressing resettlement priorities will be done taking into account each specific situation of the partner state and the whole European Union situations vis-à-vis third countries. Current situations brought to Member states' attention by UNHCR and other political and humanitarian considerations should be addressed. See “Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme”, 2 September 2009, COM(2009) 447 final

<sup>532</sup> The AENEAS budget was to support the RPP and at first no additional resources were directed to support the proposal: limited funds were available, therefore, for pilot projects.

UNHCR intergovernmental meeting of 2003<sup>533</sup>, states hosting most of refugees were outraged by the idea of processing in their region.

RPP pilot projects were started in 2007 in the Great Lake Regions, Tanzania (in the region of origin) and at Europe eastern border, in Ukraine, Moldova and Belarus (in the region of transit). The peculiar choice of those countries suggests immediately that, despite claims sustaining the primary consideration of a country's capacity to provide access to protection, targeted countries were instead selected mainly because of their ability to function as EU buffer zone and, therefore, on the basis of their geographic position. Indeed, as the Commission candidly admitted in 2009<sup>534</sup>, only a small number of refugees was finally resettled by reticent EU states and resettlement remained an element not fully developed, especially because commitments of Member states to resettlement was implemented on a voluntary and not compulsory basis.

In our opinion, regionalisation might prove to be a simple repackaging of resettlement, in a tool directed to management of migration flows only, thus forgetting to ensure access to protection.

Nevertheless, as stressed by the European Parliament<sup>535</sup>, a change in the style of extraterritorial centres must not coincide with a refrain of upholding protection responsibilities by Member states: no re-settlement of the international duty to ensure access to asylum shall take place, especially if we compare the 277,400 asylum claims filed in the EU to the number of refugees hosted in Dahab<sup>536</sup>.

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<sup>533</sup> UNHCR, *Convention Plus*, Form Briefing, 7 March 2003 as cited in Loescher, Gil And Milner, James "The Missing Link: The Need For Comprehensive Engagement In Regions Of Refugee Origin" *International Affairs* Vol. 79, Issue 3, May 2003, pp- 595-617

<sup>534</sup> See "Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme", 2 September 2009, COM(2009) 447 final

<sup>535</sup> See "The creation of transit centres outside the European Union", Motion for a resolution presented by Mr Wilkinson and others, Parliamentary Assembly, Doc. 10448, 27 January 2005

<sup>536</sup> To clarify, the EU received 327,000 asylum claims in 2011, less than the numbers of Somali refugees hosted in the largest refugee camp in Kenya, hosting 440,000 refugees. See Council Conclusions, 3124 Foreign Affairs Council meeting, 14 November 2011 See also UNHCR "Asylum trends in industrialized countries, Statistical overview of asylum applications lodged in Europe and selected non-European countries", 2011

#### 4 Libya, Morocco an the challenge of North African states

As it was said previously, the Mediterranean area, being one of the main transit route towards Europe, is of utmost importance for the Union. Firstly, this was recognised already in 1995, as the Barcelona Process<sup>537</sup> was initiated in order to create the proper framework through which enable a better coordination of Member state's external relations with countries in that region. Ultimately, the main long-term goal of the Euro-Mediterranean Partnership is to build a free-trade zone comprehensive of both the EU and the Mediterranean region.

Notwithstanding the lack of formal inclusion of migration issues in the Partnership talks, since in those years the topic was under the JHA pillar (in other words each Member state implemented its own bilateral agreement<sup>538</sup> with its most strategic third country), after the Amsterdam Treaty came into force in 1999 and the subsequent supranationalisation of this area, the Commission acquired authority on migration policies. As the Tampere Conclusion stressed<sup>539</sup>, the EC external relations vis-à-vis Mediterranean partners were to be shaped together with migration and asylum issues. A second time, with the launch in 2004 of the European Neighbourhood Policy (ENP)<sup>540</sup>, as reply to the enlargement of the European border, then including eight new Members, partner countries of the Eastern and of the Mediterranean region were addressed as vital to the EU interest: in the following years the Barcelona Process officially added to the Euro-Mediterranean Partnership the new dimension of migration<sup>541</sup>.

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<sup>537</sup> Also known as the Euro-Mediterranean Partnership, the whole process was re-launched in 2008 as Union For the Mediterranean. Together with the 27 Member states, 16 other countries are part of the Partnership.

<sup>538</sup> For instance Spain signed a readmission agreement for the other party's own nationals with Morocco in 1992. See Acuerdo de 13 de Febrero de 1992 entre el Reino de España y el Reino de Marruecos relativo a la circulación de personas, el tránsito y la readmisión de extranjeros entrados ilegalmente (B.O.E. nº 100 de 25/4/1992 y Corrección de Erratas, B.O.E. nº 130, de 30/5/1992

<sup>539</sup> See Chapter II.

<sup>540</sup> As envisaged by the Commission Communication "Wider Europe-Neighbourhood: A new Framework for relations with our Eastern and Southern Neighbours" COM(2003) 104 final, 2003. See also Communication From The Commission "European Neighbourhood Policy", Com(2004) 373 Final

<sup>541</sup> Migration is encompassed as one of the most strategic priorities. See Communication From The Commission To The Council And The European Parliament "On The Preparation Of The Tampere

The priority given to relations with North African states by the EU<sup>542</sup> underlines the fundamental dimension this region has acquired from a Member states' point of view: under the 2005 UK Presidency it was adopted the Global Approach to Migration<sup>543</sup>, prioritising partnership actions in the Mediterranean. The adoption of an Action Plan on Migration between the EU and Libya was suggested and, at the same time, the Global Approach contemplated a strategy which linked development, refugees protection and migration issues, thus trying to address root causes. Capacity-building, improvement of reception, readmission and integration of asylum-seekers, increased co-development projects were among the goals envisaged by the Council document. Notwithstanding the official endorsement of an EU-wide partnership actions over bilateral agreements, the inclusion of migration and asylum issues in a framework of bilateral relation between the EU and the Mediterranean region was so far sterile and it was lacking of a real preventive feature.

To date, progresses were made mainly at the bilateral level and on ad hoc policies; for instance between Morocco and Spain, Italy and Libya significant relations were built in the field of interception and return of asylum-seekers and migrants: indeed, southern EU Member states try to transfer to third safe partner much of the unbalanced responsibility concerning reception of asylum claims, forgetting that the blame for the creation of “asylum doors” in Fortress Europe, as many argue, should be primarily placed on little-effective harmonisation policies and on the absence of a real EU-wide resettlement project.

Let us now begin by analysing the European externalisation of asylum towards the key partners Morocco and Libya, underlying the main differences and similarities displayed in the implementation of these relations.

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Euro-Mediterranean Foreign Affairs Ministers Conference (27-28 November 2006) The Euro-Mediterranean Partnership: Time To Deliver”, Com (2006), 620 Final.

<sup>542</sup> Especially since the UK 2005 EU Presidency it was strengthened the view of supporting external relations within the Euro-Mediterranean framework, and also between Sub-Saharan African state and EU neighbouring transit countries such as Libya and Morocco.

<sup>543</sup> See Annex I and Paragraph IV, adopted by the Council “Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean”, 15914/1/05, REV 1, CONCL 3, December 2005,

## 4.1 Morocco - pursuing formal relations

In 1912 the Treaty of Fez made Morocco a French protectorate, whereas the Saharan part was under Spanish control: actual independence was gained in 1956 and a period of economic stagnation and social turmoil started.

Morocco is a state party to the Refugee Convention and its Protocol since 1971 and it also signed other relevant treaties: because of this formal adherence to international human rights standards, the country is attractive for its legitimacy to the EU Member states, especially as they are trying to pursue an expansion of control-oriented measures extraterritorialising asylum provisions.

The long-standing relationship with Europe starts with the 1976 Cooperation Agreement<sup>544</sup>, renewed with the Euro-Mediterranean Association Agreement between the EU and Morocco, which entered into force in 2000<sup>545</sup>. The Euro-Mediterranean Association Agreement provided an explicit reference to respect of democratic principles and of fundamental human rights<sup>546</sup>.

From an European point of view external relations with Morocco, being at the same time a country of origin and transit of migrants, are of utmost importance: this situation was, indeed, recognised with the 1999 HLWG Action Plan<sup>547</sup>, although that instrument glaringly showed European unilateral attitude towards third countries. In response, however, Morocco refused to agree to the Plan until it was amended, in 2005, to acquiesce to some of its interests<sup>548</sup>: the amended Action Plan declared among its goals the stipulation of a legislation coherent with international protection

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<sup>544</sup> EEC-Morocco Cooperation Agreement 1976, OJ L264/2, 1978

<sup>545</sup> Council And Commission Decision of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part OJ L70. The agreement entered into force in June 2000.

<sup>546</sup> See Article 2 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part

<sup>547</sup> We recall that Morocco was not even consulted for negotiations and a real political will was lacking. For an account on the political framework, see Chapter II. See [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/misc/13993.en0%20ann.doc.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/13993.en0%20ann.doc.htm) last accessed 20 August 2012

<sup>548</sup> For instance, a programme was designed specifically for Moroccan migrants, in helping them to start a business in Morocco. See Dietrich, Helmut, "The Desert Front - Eu Refugee Camps In North Africa?" Statewatch 2004

standards, practical implementation of the Refugee Convention and of the related *non-refoulement* duty; it made the EU experts available and fostered regional cooperation for combating illegal migration<sup>549</sup> from and through Morocco.

Despite no progresses concerning an EU readmission agreement, because of the disagreement on the thorny readmission of third country nationals, the Commission<sup>550</sup> recognised that the country is actively cooperating with Spain in implementing migration management measures and border checks: collaboration with Spain regards in particular the Spanish enclaves Ceuta and Melilla<sup>551</sup>, from where Moroccan and third country national are expelled, thanks to the 2004 joint naval patrols measures and the 1992 readmission agreement<sup>552</sup>. These enclaves became sadly famous in 2005, when the Spanish government sent the army to face the over 11,000 Sub-Saharan refugees climbing the barbed-wire fence to reach Europe, only kilometers away.

Furthermore Morocco accepts the return of those intercepted at sea, as well, because of the cooperation with the Spanish Integrated Service of Vigilance of the Straits (SIVE). However, lack of dialogue between Morocco and neighbouring countries and also with countries of origin in the Mediterranean region caused concern and it was asked to be addressed, in order to strengthen regional cooperation in the area of migration management.

After the Arab revolts of the Spring 2011, the King of Morocco introduced a Constitution containing a provision regarding refugees<sup>553</sup>: nevertheless, it is recognised by the 2012 Commission Working Paper that the country still is showing a noteworthy lacuna of domestic legislation in conformity to international standards, it lacks of an asylum system and it refuses to grant a full refugees status to those recognised by the UNHCR.

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<sup>549</sup> ENP Action Plan with Morocco, see in particular paragraph 48, combating illegal migration

<sup>550</sup> Commission Communication on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration. COM(2005) 352 final, July 2005

<sup>551</sup> Once the Spanish security increased in these enclaves, asylum-seekers changed their routes and headed through Canary Islands. After Frontex patrol started to sleave that area too, they finally headed toward Malta and Italy. See <http://www.spiegel.de/international/world/ceuta-and-melilla-europe-s-high-tech-african-fortress-a-779226.html>

<sup>552</sup> In January 2004 Spain agreed with Morocco on a readmission agreement for third country nationals

<sup>553</sup> See Chapter 5 in “Document De Travail Conjoint Des Services Mise En Oeuvre De La Politique Européenne De Voisinage Au Maroc Progrès Réalisés En 2011 Et Actions À Mettre En Oeuvre”, Swd(2012) 119 Final, May 2012

## 4.2 Libya- pursuing ad hoc instruments

The country achieved independence when the Libyan monarchy was restored in 1952. Notwithstanding the observer status acquired in the 1999 Barcelona Process<sup>554</sup>, Libya is not participating in the Process neither is one of the ENP countries, as being part of the Process is a precondition to access the latter<sup>555</sup>. On the official level, therefore, the EU has no formal contractual relation with the prior “rogue state”. Indeed, in October 2004 the EU lifted the arms embargo and economic sanctions imposed on Libya since 1992<sup>556</sup>, which allowed Member states to engage into an operational and ad hoc basis collaboration with Libya in several fields, such as ILOs and interception measures at airports and seaports<sup>557</sup>.

However, the case of Libya well depicts the European subtle operations in pursuing the external dimension of migration and asylum. Indeed, schizophrenic messages have been sent to other partners, since the 2004 Commission document on the mission to Libya<sup>558</sup> reported blatant violations of human rights, such as its stark and arbitrary detention system, and no data at all was acquired on the collective expulsion of third country nationals operated by the Libyan government toward countries of origin<sup>559</sup>. The report underlined, once again, that Libya is not a state party to the Refugee Convention and that the UNHCR office in Tripoli does not have official status: in other words, no protection guarantee can be ensured to refugees.

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<sup>554</sup> After the suspension, in the same year, of the UN sanctions.

<sup>555</sup> As stated in the ENP-Package for Libya, the country is not fully participating to the Partnership. See press release, ENP Package, MEMO/12/XXX Brussels, 15 May 2012

<sup>556</sup> The Un sanctions followed the Lockerbie case. See “Timeline, Libya Sanctions”

<sup>557</sup> See Human Rights watch “Stemming the Flow, abuses against migrants, asylum-seekers and refugees”, Vol 18, No.5 (e), September 2006

<sup>558</sup> European Commission, “Technical Mission to Libya on Illegal Migration 27 Nov–6 Dec 2004”, Report. The document report was published in 2005 (Council of the European Union 7753/05) 2005.

<sup>559</sup> See Human Rights watch “Stemming the Flow, abuses against migrants, asylum-seekers and refugees”, Vol 18, No.5 (e), September 2006. A noteworthy episode is the one regarding the plane which took off from Libya in August 2004, expelling all of the 75 Eritrean nationals onboard to Asmara. They managed to hijack the plane and forced it to land in Khartoum, where refugee status was recognised to 60 of them. See Pastore, Ferruccio “Libya's entry into the migration great game”, Recent Developments and Critical Issues, CESPI, October 2007

Clearly, in the face of those facts, is hard to regard Libya as a safe country<sup>560</sup> : yet, great contradictions exist between the EU law and practice, as ever since the EU in 2004 announced it would lift sanctions on the country, bilateral and informal dialogue bloomed<sup>561</sup> and the EU ad-hoc cooperation strategy with the Mediterranean state started, in order to fight illegal immigration coming to Europe through Libya<sup>562</sup> .

For historical reasons, Italy<sup>563</sup> is in the front row to pursue relations with Libya. Italian-Libyan bilateral relation has been carried out steadily in a highly secretive<sup>564</sup> and informal environment since early 1990s, supported by solid economic ties: once again the carrot-stick approach worked out well, as financial and technological support was traded for collaboration on irregular migration. Indeed, during the maximum period of cooperation, a first official agreement was concluded in 2000 on the issue on illegal immigration<sup>565</sup> , and a second was struck in 2004<sup>566</sup> right after the Cap Anamur incident<sup>567</sup> .

In 2007 the Prodi government signed with Libya a Protocol on irregular migration<sup>568</sup> in exchange for six more patrol ships: noteworthy, in our opinion, was the almost concurrent negotiation of energy agreement extending the Italian ENI gas and oil concession in Libya.

Furthermore, in August 2008 the third Berlusconi government signed the Treaty of

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<sup>560</sup> As recognised by the “Analysis of the external dimension of the EU’s asylum and immigration policies” – summary and recommendations for the European Parliament, PE 374.366, 2006

<sup>561</sup> In October 2004, Buttiglione, then EU commissioner candidate, announced he wanted to use the already existing camps in Libya, instead of building new centres outside EU. See <http://ins.onlinedemocracy.ca/?p=3661> In June 2005 Council started recognising Libya as a priority partner. We shall underline that no evidence has been found regarding Libyan refugees camps.

<sup>562</sup> Indeed, Libya is an immigration country, not an emigration one. See Cutitta, Paolo “Migrazioni, frontiere, diritti” in Edizioni Scientifiche Italiane, Vassallo Paleologo, Fulvio (a cura di), Napoli 2006, pp. 13-40.

<sup>563</sup> Italy ruled over Libya from 1911 to 1943 during the Fascism.

<sup>564</sup> For a detailed account see Miggiano, Luca “States Of Exception: Securitisation And Irregular Migration In The Mediterranean”, Research Paper No. 177, New Issues In Refugee Research, 2009

<sup>565</sup> Accordo Italia-Libia sulla Criminalità e immigrazione clandestina Roma, 13 dicembre 2000

<sup>566</sup> The agreement enacted a cooperative bilateral interception The 2004 Agreement is still surrounded by secrecy.

<sup>567</sup> See Chapter II.

<sup>568</sup> The Agreement was signed on December 29 , 2007 See Protocollo aggiuntivo all'accordo di cooperazione Italo-Libico. We would like to underline that ENI and Libya reached in the same period an historical agreement extending the 159 cooperation: gas and oil concessions were granted to the Italian firm until mid-2040, for an investment of over 28 billion dollars See [http://www.eni.com/it\\_IT/media/comunicati-stampa/2007/10/eni-libyan-national-oil-16-10-07.shtml](http://www.eni.com/it_IT/media/comunicati-stampa/2007/10/eni-libyan-national-oil-16-10-07.shtml)



Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya<sup>569</sup>. This bilateral agreement stipulated that Italy will be granting Libya 5 billion US\$ as compensation for Italian ruling during the fascism and it will be funding infrastructure and surveillance projects in Libya. The overall annual funding of US\$ 250 million will be granted for the next 20 years

Human rights and, specifically, refugee rights under the Treaty of Friendship is a contentious issue. Indeed, the Italian “push-back policy” started officially in March 2009<sup>570</sup> (the “Trattato di Amicizia” was ratified by the Italian Parliament in February 2009)<sup>571</sup>, although the first deportation operations date back to late 2004. However, already in 2005 the ECtHR condemned Italy<sup>572</sup> for having operated collective push-backs from Lampedusa through charter flights directed toward Tripoli and Misrata: these expulsions concerned migrants and asylum-seekers coming from Libya, without prior assessment of their status. More recently in February 2012, in the landmark case *Hirsi*<sup>573</sup>, the ECtHR found Italy in breach of its international *non refoulement* obligations and in violation of prohibition of collective expulsions.

This notwithstanding, both before the liberation of Libya from the Qaddafi regime

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<sup>569</sup> See Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, available at [https://it.wikisource.org/wiki/Trattato\\_di\\_amicizia\\_partenariato\\_e\\_cooperazione\\_tra\\_la\\_Repubblica\\_Italiana\\_e\\_la\\_Grande\\_Giamahiria\\_Araba\\_Libica\\_Popolare\\_Socialista](https://it.wikisource.org/wiki/Trattato_di_amicizia_partenariato_e_cooperazione_tra_la_Repubblica_Italiana_e_la_Grande_Giamahiria_Araba_Libica_Popolare_Socialista) last accessed 7 September 2012

<sup>570</sup> The “Politica dei respingimenti” started officially on 6<sup>th</sup> March 2009, following Minister of Interior Maroni's suggestion, in order to “*stop massive disembarkations and to restore Lampedusa to its former beauty as touristic island*” (translated by the author). See [http://www.youtube.com/watch?v=BNFep2xc\\_o](http://www.youtube.com/watch?v=BNFep2xc_o)

<sup>571</sup> We underline that Article 1 of the Friendship pact stresses the respect of customary international obligations deriving from International law treaties, although in truth customary norm is, by definition, not written. Article 6 of the Trattato di Amicizia rules the right of leaving countries, where persecution is enacted, and the obligations to respect human rights. See Natalino Ronzitti (a cura di) “Il trattato Italia-Libia di amicizia, partenariato e cooperazione” *Contributi di ricerca specializzati (IAI)*, dossier del senato della repubblica. 108, XVI legislatura, Gennaio 2009. The treaty was suspended after the revolt started. [http://it.wikisource.org/wiki/Trattato\\_Di\\_Amicizia\\_Parteneriato\\_E\\_Cooperazione\\_Tra\\_La\\_Repubblica\\_Italiana\\_E\\_La\\_Grande\\_Giamahiria\\_Araba\\_Libica\\_Popolare\\_Socialista](http://it.wikisource.org/wiki/Trattato_Di_Amicizia_Parteneriato_E_Cooperazione_Tra_La_Repubblica_Italiana_E_La_Grande_Giamahiria_Araba_Libica_Popolare_Socialista) last accessed 20 August 2012 The new treaty, signed 3 April 2012, does not mention refugees nor asylum-seekers, and it stresses to re-establish Libyan reception centres, see <http://www.cir-onlus.org/Comunicato%20stampa%2018%20giugno%202012.htm> last accessed 20 August 2012

<sup>572</sup> See ECtHR, *Hussun and others v. Italy*, Application no.10601/05,2010

<sup>573</sup> The case concerned Eritrean and Somali nationals travelling from Libya and intercepted in the high seas by the Guardia Costiera of Italy and pushed back there. The Court recognised the admissibility of the complaint thanks not to the sovereignty-territorial link, but taking into account the jurisdiction link. See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, decided 23 February 2012

and still today, it is not yet clear whether a formal readmission agreement for third country nationals was officially in force between Italy and Libya, nor whether a provision for refugee protection was included in the cooperation programme<sup>574</sup>, while it is acknowledged that a mere joint patrolling provision was stipulated to be operational along the Libyan coastline<sup>575</sup>.

Having analysed the relations between Italy and Libya, let us move on to the relation between the European Union and Libya. Following Italian steps<sup>576</sup>, in 2006 the Commission suggested<sup>577</sup> to grant € 2 million of AENEAS funds to IOM in Libya, in order to develop migration reception capacities<sup>578</sup> of the country. It was only in 2007 that negotiations between the EU and Libya to pursue and Agreement were established<sup>579</sup>.

The new Libyan government is at the moment focusing on short-term objectives and

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<sup>574</sup> According to many, Italy also funded detention camp in Libya. See Dietrich, Helmut, “The Desert Front - Eu Refugee Camps In North Africa?” *Statewatch*, article No. 26392, 2004. See Klepp, Silja, “A Contested Asylum System: The European Union Between Refugee Protection And Border Control In The Mediterranean Sea” In *European Journal Of Migration And Law*, Vol. 12, 2010, pp. 1–21. In 2010, about only 10,000 asylum claims were filed in Italy, the low level is due to the interception measures enacted at sea. In 2011 over 36.000 asylum claims were lodged in Italy. See [http://www.unhcr.it/cms/view.php?dir\\_pk=28&cms\\_pk=1171](http://www.unhcr.it/cms/view.php?dir_pk=28&cms_pk=1171) In the first 2012 quarter, Italy received 2.210 asylum claims, the number declined of 62 per cent compared to the same period in 2011, when claims reached 5.880 due to the Arab uprisings. See <http://www.cir-onlus.org/Eurostat%201%20trimestre%202012.htm>

<sup>575</sup> See Vassallo Paleologo, Fulvio “Migranti respinti in Libia - Italia e Malta si avvitano nelle pratiche di disumanità” 7 Maggio 2009

<sup>576</sup> According to Dietrich, new technologies for detection of refugees and irregular migrants were developed by the Italian government on the southern front, before the creation of FRONTEX and in coordination with the EU: the adoption of extraordinary measures, such as drones, was justified on the ground of facing a “state of emergency” in Lampedusa. We recall that other Members are interested in Libya cooperation: in addition to what we said in the previous chapter, already in 2002 Germany increased its exports, commerce and trades toward Southern Mediterranean and Middle East countries, investing in oil and gas especially in Libya; UK in 2005 signed with Libya an agreement worth €165 million for Shell, as basis for a long-term strategy to produce in Libya. See Dietrich, Helmut, “The Desert Front - Eu Refugee Camps In North Africa?” *Statewatch* 2004

<sup>577</sup> European Commission, “Thematic Programme For The Cooperation With Third Countries in Issues of Migration and Asylum”, 25/1/06. COM (2006) 26 final.

<sup>578</sup> Libyaonline, Libya, EU Start Talks on Co-operation Partnership, 2007. <http://www.libyaonline.com/news/details.php?id=943>

<sup>579</sup> Indeed, in October 2007 the Council decided to start the negotiations for a Framework Agreement with Libya, including a Free Trade Agreements over various goods and investments; in June 2010 a Memorandum Of Understanding was signed, which was structured to grant 60 million Euros in assistance programme over the years 2011-2013. After the 2011 uprising the Framework was frozen and negotiations will start only when the new Libyan government will be ready. See See press release, ENP Package, MEMO/12/XXX Brussels, 15 May 2012

in May 2012 the EU recognised its limited institutional capacity<sup>580</sup>. For this reason, the EU is planning to run a €30 million programme to enhance, among others, short-term goals in Libya, such as respect for human rights during the delicate transition process to democracy after the 2011 uprisings. Moreover, thanks to the same funding, in March 2012 an EU expert mission was implemented to assess the country's need on border management; the mission lasted 3 months<sup>581</sup>.

As noticed by many, cooperation on migration between Libya and the EU is still limited at the formal political level, whereas at the practical and operational level developments are rapidly implemented, thanks to the lack of formalities and democratic accountability: contrary to its founding principles, the EU is forgetting to ask for legal improvement in the situation of asylum-seekers and refugees before assuring its full collaboration to Libya<sup>582</sup>.

This lacuna, added to the always stronger push beyond external EU borders, will ultimately overlap with the impediment of access to refugee protection. As a consequence of this, as argued by Klepp<sup>583</sup> and Gammeltoft-Hansen<sup>584</sup>, it might cause a dangerous collapse of the European standards of protection and of the asylum system as a whole.

As it was already argued for the relations between Australia and its partner states, extraterritorial asylum policies in the Mediterranean are developed in a framework of unbalanced economic links between Europe, its Member states and the third host countries<sup>585</sup>. On the other hand, nevertheless, the dependency showed by partner states Libya and Morocco is far from being absolute.

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<sup>580</sup> See Country progress reports [http://ec.europa.eu/world/enp/documents\\_en.htm#3](http://ec.europa.eu/world/enp/documents_en.htm#3) last accessed 20 August 2012

<sup>581</sup> See [http://www.eeas.europa.eu/libya/index\\_en.htm](http://www.eeas.europa.eu/libya/index_en.htm) last accessed 20 August 2012

<sup>582</sup> More recently, for instance, the Commission wished upon a RPP between the area of Libya, Egypt and Tunisia. See “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”, Com(2011) 743 Final

<sup>583</sup> Klepp, Silja, “A Contested Asylum System: The European Union Between Refugee Protection And Border Control In The Mediterranean Sea” In *European Journal Of Migration And Law*, Vol. 12, 2010, pp. 1–21.

<sup>584</sup> See also Gammeltoft-Hansen, Thomas “The Extraterritorialisation Of Asylum And The Advent Of Protection Lite?” Diis Working Paper No. 2007/2

<sup>585</sup> To compare the situations between Australia and the Pacific countries see Chapter I.

Firstly, these two Mediterranean countries display a rather strong bargaining power when dealing with Europe, in first place because of their geographical position: above all, both countries are vital for the EU's plans of managing migration towards its Member states, because of their double function as origin and transit country.

On the contrary, Nauru and PNG are out of the normal routes used by migrants and asylum-seekers when trying to reach Australia.

Secondly, both Morocco and Libya have considerable oil reserves, which appeal the investments of the Member states: before the 2011 uprisings, the EU attracted 70% of Libyan total trade, especially France, Italy, Germany and the UK. As a result, oil was the major source of revenues for this country, reaching 95 per cent of the total export earnings, and trade in this field has recovered quickly since August 2011.

The relations between Morocco and the EU is “*more than association, less than accession*”<sup>586</sup> and the EU attracts over 60 per cent of the country's total trade and it stands as the first commercial partner for the southern Mediterranean state ( the peak of € 20.6 billion was reached in 2011)<sup>587</sup>. In particular research conducted showed how agricultural goods and textiles account for over 50 per cent of the Moroccan exports: between 1995 and 2007, the volumes of trade grew over 80 per cent<sup>588</sup>.

However, this was exactly the leverage used to assure Moroccan and Libyan compliance when managing migration: conditionality, namely the EU traded its partner states' dependency on the European FDI and on European aid for obtaining their respect for the agreements and migration policies. Whether this was negative or positive, conditionality<sup>589</sup> leaves both Mediterranean countries no other choice than rely on the EU for their economic developments.

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<sup>586</sup> <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/morocco/>

<sup>587</sup> “Document De Travail Conjoint Des Services Mise En Oeuvre De La Politique Européenne De Voisinage Au Maroc Progrès Réalisés En 2011 Et Actions À Mettre En Oeuvre”, Swd(2012) 119 Final, May 2012

<sup>588</sup> ENPI info centre, Country Press pack,

<sup>589</sup> As many noticed, the EU political conditionality was swapped for migratory conditionality during the 1990s in assuring partners' bilateral cooperation: reinforcing EU southern borders was then easier for Member states, pursuing a containment and management strategy when shifting controls to southern countries. See Perrin, Delphine, “Arab Revolts and the Crisis of the European Border Regime Perpetuating the failures of externalised migration control” in Discussion paper, Migration Working Group 25 May 2011

According to researches conducted by Afeef<sup>590</sup>, the peculiar bilateral relation between the EU and the two Mediterranean state is interdependent, and it shows the other face in which connections between host and contracting state can develop. When dealing with asylum issues, the EU external policies, whether through ad hoc measures<sup>591</sup> or through a formal structure<sup>592</sup>, are aimed at ensuring the full compliance with the shift to third states of responsibility for asylum claims, at stretching the external EU border beyond its southern edges and at containing refugees and asylum-seekers in their region of origin<sup>593</sup>.

In conclusion, as noticed by Schuster<sup>594</sup>, when dealing with partner states great predominance has been given to palliative measures, such as deterrence and surveillance tools to create airtight borders, whereas less attention was put on protection issues and root causes that push asylum-seekers to move.

First and foremost, what the EU is failing to take into account is a long-term perspective and a real comprehensive approach in the region of origin. Hence, a real “Mediterranean solution” should provide in the first place cooperation on all three circles of origin, transit and host countries, each developing its specific role in the solution<sup>595</sup> in a real responsibility-sharing environment. Secondly, underlying causes for irregular movement should be tackled, especially through institution building projects<sup>596</sup>, in order to provide enough stimulus to remain in countries of origin. The increasing recourse to exclusionary practices has instead endangered access to asylum and the result proved to be not a feasible solution, but a plain transfer of problems

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<sup>590</sup> See Afeef, Karin, Fathimath, “The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific” Rsc Working Paper No. 36, University Of Oxford 2006

<sup>591</sup> As we showed in the case of Libya.

<sup>592</sup> As it is the Moroccan experience.

<sup>593</sup> Again, we underline that the two premises on which this European pass-the-buck system is based are the lack of clear states' obligation to process asylum claims nor to grant asylum; no clear-cut obligation is found in international law against the removal of asylum-seekers to third countries, as long as non-refoulement provision is assured. See the beginning of this Chapter.

<sup>594</sup> See Schuster, Liza “The Realities Of A New Asylum Paradigm” Compas, Working Paper No. 20, University Of Oxford, 2005

<sup>595</sup> According to Betts, a real comprehensive “Mediterranean solution” should be similar, therefore, to the Indo-chinese CPA: yet in the Mediterranean is lacking inter-agency and inter-state cooperation. See Betts, Alexander “Towards A Mediterranean Solution? Implications For The Region Of Origin” *International journal refugee law* (2006), pp 652-676

<sup>596</sup> As stressed by Ruud Lubbers, see note 28, developments and humanitarian aids should be coordinated, according to UNHCR

back from where they started.

Having analysed the issue of transferral, let us move on to look at the last point of this dissertation, the lack of understanding of the partner's basic needs. Reading between the lines of the March 2011 Declaration, it is not hard to understand the surprise felt by Member states leaders when first apprehending the importance of the Arab Spring revolts<sup>597</sup> on the field of human rights and democracy. The so-hardly-achieved status quo in partnership with third countries' regimes was falling apart, and proportion of the springing migration movements was causing concern especially among Mediterranean Member states leaders, to such extent that only in a second moment was the development of democracies suggested in a revised Union for the Mediterranean<sup>598</sup>. Moreover, the choice of the Maghreb as the area where to externalise policies is controversial. For instance, according to Human Rights watch, between 2003 and 2005 Libya repatriated over 145,000 individuals to sub-Saharan countries<sup>599</sup>: since the Qaddafi Government maintained that Libya does not have political refugees, but only economic migrants, the non-recognition of UNHCR is not surprising. Despite stating that the same consideration is assured at the official level to foreigners and Libyan nationals, xenophobia is persistent. In our opinion, the Maghreb may prove not to be the most appropriate area where to implement extraterritorial asylum policies, given the extreme prejudice, systematic abuse and racial discrimination faced by sub-Saharan migrants and asylum-seekers in that region<sup>600</sup>.

The EU is aware of being increasingly seen as a role model<sup>601</sup> by third states and, on the contrary, the EU has not been setting the best example in asylum matters. The

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<sup>597</sup> See “Extraordinary European Council, 11 March 2011 Declaration” Euco 7/1/11, Rev 1, Co Eur 5, Concl 2, 20 April 2011

<sup>598</sup> “Deep democracy” and the principle of “more for more” were envisaged to substitute the old conditionality. See <http://www.reuters.com/article/2011/11/13/us-eu-forpol-libya-idUSTRE7AC0WX20111113> last accessed 20 August 2012

<sup>599</sup> The refoulement of individuals to country where they face serious risk of persecution is prohibited by the African Refugee Convention, of which Libya is a state party. See 1969 Organisation of African Unity Convention governing specific aspects of refugee problems, chapter I

<sup>600</sup> See Human Rights watch “Stemming the Flow, abuses against migrants, asylum-seekers and refugees”, Vol 18, No.5 (e), September 2006

<sup>601</sup> See press release, ENP Package, MEMO/12/XXX Brussels, 15 May 2012

Union has so far failed to fully consider the impact its asylum regime is likely to have on a global environment and on third states, from the social, political and economical point of view.

The transfer of asylum policies outside EU external borders might turn out as being counterproductive for the region where policies are exported, as it could ultimately undermine the building of strengthened protection capacities. In our opinion the risk of a never-ending passing the buck between and to third country is high, as showed by the Tanzanian example of emulation.

As Betts and Milner reported<sup>602</sup>, Tanzania learnt from the EU asylum policies and, from being known since the early 1970s as one of the most refugee-welcoming countries<sup>603</sup> in Africa, it changed its mind after the massive influx of Burundian and Rwandan refugees fleeing genocide and persecution since 1994 in the nearby Great Lake Regions.

The mounting pressure shouldered by some highly-populated refugees area pushed the government to close the doors to asylum-seekers and to expel Rwandan refugees in 1997, providing the best justification to implement restrictive and reactive policies towards refugees, such as forced repatriation or rounding up of refugees resettlements. In 2003 the National Refugee Policy suggested the implementation of safe zones in countries of origin<sup>604</sup>, implemented as practices aimed at blocking spontaneous arrivals of asylum-seekers.

The not-so-remote possibility that less developed countries might be interested in the emulation effect should then be taken into account when fostering the externalisation of refugee policies. Therefore, a deeper understanding of issues from the transit and host country should be assured.

Hopefully, this time the EU has learnt from its mistakes and, stressing human right and sustainable democracies promotion, it will not leave alone hosting states in facing asylum challenges.

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<sup>602</sup> Betts, Alexander And Milner. James “The Externalisation Of Eu Asylum Policy: The Position Of African States”,Compas Working Paper 36, Oxford, 2006

<sup>603</sup> Indeed the government granted lands for refugee resettlement and accepted to naturalise more than 36,000 Rwandan refugees. See Gasarasi, as cited in Betts and Milner, Supra.

<sup>604</sup> This policy was formulated with the supports of EU funds to enhancing Tanzania's domestic refugee policy.

## Conclusions

Up to this point, this paper has attempted an overview of the legal and humanitarian problems generated as a result of extraterritorial asylum policies. Both Australia and the European Union, indeed, are aiming at the same goal of restricting and impeding asylum-seekers' access to their territories through the implementation of extraterritorial refugee processing and readmission agreements, respectively, which have been shown to erode the international protection standards.

In the final part of this dissertation we will concentrate upon the two countries' main common features concerning extraterritorial actions on refugees, in order to define, in a broader and comprehensive manner, the current international situation concerning asylum policies.

Let us begin by considering the first common element, namely the transfer of protection obligations to other countries. On the one hand, Australia's Pacific Solution operated from 2001 to 2007 and consisted in a contracting out of Australian protection responsibilities for processing asylum-seekers to other countries, in order to prevent access to the Australian mainland, therefore denying potential asylum-seekers the protection of Australian refugee law<sup>605</sup>.

In a European context, RABIT operations and Joint operations under FRONTEX<sup>606</sup> are a complicated form of transfer of responsibilities from an international point of view, as Member states' national border guards are allowed to operate in the territory of partner countries and on international waters: pre-borders control enacted by the EU are aimed at intercepting individuals or at least deflecting them, rendering impossible potential refugees' seeking remedies and accessing to protection.

Indeed, this thesis has shown how both the EU and Australia deny that the implementation of extraterritorial instruments in protection shall be followed by an extraterritorial extension of the rule of law<sup>607</sup>: the principle these countries maintain is

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<sup>605</sup> Mcnevin, Anne "Border Policing And Sovereign Terrain: The Spatial Framing Of Unwanted Migration In Melbourne And Australia", In *Globalizations*, Vol. 7 No. 3, 2010, pp. 407-419

<sup>606</sup> But see also other practices described in chapter 3.

<sup>607</sup> Rijpma, Jorrit J. And Cremona, Marise "The Extra-Territorialisation Of Eu Migration Policies And



that of a “remote control” on asylum-seekers, allowing them to disregard intentionally the notion of jurisdiction, as outlined in international fora. These two countries maintain that protection obligations owed by each State to refugees are linked essentially to territory<sup>608</sup>. In truth, the attempt to circumvent asylum protection and human rights duties fails to acknowledge the notion of jurisdiction, which applies essentially when the territorial nexus is weak or non-existent at all, assuring the engagement with states' international responsibility also when acting extraterritorially.

Moreover, neither the Refugee Convention nor its Protocol prohibit or approve policies enacting protection elsewhere: as scholars have noted<sup>609</sup>, these policies engaging with protection extraterritorially do not collide with the scope of the Convention as long as all the benefits in the Articles there contained are ensured. For instance, as outlined in the Michigan Guidelines on Protection Elsewhere<sup>610</sup>, since the Convention does not envisage the delegation of responsibilities to non-state actors, the contracting out of refugee protection must consequently be assured between states; it is highly preferable that the receiving state be a party to the Refugee Convention. Nevertheless, international law is to be observed at least practically in the receiving state; formal agreements of readmission do not account as sufficient lawful basis for a transfer under extraterritorial measures, unless a specific commitment entailing the person in question and the receiving state is provided prior to the outsourcing of protection obligation is concluded.

Therefore, this thesis argued, Article 33 of the Refugee Convention entailing *non-refoulement* applies extraterritorially and implicitly imposes legally binding obligations to enact the refugee status determination also when operating extraterritorially<sup>611</sup>: for this reason, the UNHCR has not excluded the possibility of

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The Rule Of Law “ Eui Working Paper, Law 2007/01

<sup>608</sup> Gil-Bazo, Marià-Teresa “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” *Ijrl* 2006, pp. 571-600; see also Rijpma, Jorrit J. And Cremona, Marise “The Extra-Territorialisation Of Eu Migration Policies And The Rule Of Law “ Eui Working Paper, Law 2007/01

<sup>609</sup> Hathaway, James C. , Haines Rodger P.G., Foster Michelle “The Michigan Guidelines On Protection Elsewhere” Adopted 3 January 2007

<sup>610</sup> See *ibidem*.

<sup>611</sup> See Erika Feller, as cited in European Parliament Doc. 11304 “Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers”, 2007 . See also further, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, 179, July 2004

implementing extraterritorial processing, provided that certain fundamental requirements are met<sup>612</sup>. Indeed, a refugee is entitled to a wide set of benefits deriving from the recognition of his/her status, involving a specific quality of asylum<sup>613</sup>: when outsourcing protection responsibilities, the quality of protection provided by the receiving state shall not be inferior to that provided in the contracting out state, especially since most of the Convention rights are understood not in absolute term, but as balanced to the rights provided to the citizens of the state granting asylum<sup>614</sup>.

Another point to take into account when States are engaging in the transfer of protection obligations to third countries is the (usually unequal) balance of power between receiving and contracting out state: as it was observed in this thesis, the E.U. idea of conditionality based on a stick and carrot approach<sup>615</sup> proved to be workable when forcing the partner states to comply with the will of Member states. Nevertheless, prioritizing partnerships based on the geographical position of third countries<sup>616</sup>, ignoring partners' compliance with human rights and neglecting to take into account the partners' needs might prove to counteract the aims of cooperation, especially that of extraterritorial protection.

Both Australia and the European Union have so far failed to demonstrate a deeper recognition of the burdens and problems faced by the already-overloaded partners states when enacting or proposing measures of regionalisation of refugee processing; effective protection shall be always pursued and, more importantly, a real burden-sharing mechanism shall be implemented. Resettlement from third country, while recognised as being a tool strengthening international burden-sharing, thanks to regionalisation is increasingly becoming a replacement for provision of asylum to spontaneous arrivals<sup>617</sup>, an instrument through which managing migration and

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<sup>612</sup> See further, UNHCR Protection Policy Paper “Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing”, November 2010

<sup>613</sup> As we noted before, James Hathaway studied the incremental approach to benefits to which refugees are entitled, according to their attachment to the country providing protection. See also Hathaway, James C. , Haines ,Rodger P.G., Foster, Michelle “The Michigan Guidelines On Protection Elsewhere” Adopted 3 January 2007

<sup>614</sup> For instance, right to education and employment, freedom of movements... See Ibidem.

<sup>615</sup> Guild, Elspeth “The Europeanisation Of Europe’s Asylum Policy.” *Ijrl* ,Vol. 18 No. 3, 2006, pp. 630-651

<sup>616</sup> See “Analysis of the external dimension of the E.U.’s asylum and immigration policies”-summary and recommendations for the European Parliament, PE 374.366 , 2006

<sup>617</sup> See Levy, Carl “Refugees, Europe, Camps/State Of Exception: “Into The Zone”, *The European*

implementing burden-shifting policies are implemented.

Many partner states have already protested<sup>618</sup> and refused proposals enacting refugee processing in region of origin, since most of the world's refugees are already stuck in their region of origin; the paramount case of Tanzania showed well how the remote control game can be easily overturned when mimicking the attitude of European countries<sup>619</sup>.

However, differences in the attitude towards partner states do exist: on the one hand the E.U. enacted a broad range of instruments in transit countries as Morocco and Libya; on the other hand Australia pursued policies focussing on extraterritorial processing in third countries not associated with the asylum-seekers, where the asylum-seeker had never been.

Far from being equal, the balance of power between the contracting-out states and the receiving states was also different in the two cases so far analysed: as showed in the first chapter of this thesis, Nauru and Papua New Guinea were almost entirely dependent of Australian aid and, therefore, they were more inclined to accept any proposal resulting from the unilateral decision of the partner.

Morocco and Libya, instead, were able to show a higher degree of interdependence vis-à-vis Europe and its Member states, gaining a heavier weight and greater room for negotiations<sup>620</sup>: thanks to the dialogue on extraterritorial asylum policies, cooperation between the E.U. and partner states reached a deep level of involvement in the Mediterranean, whereas the same did not take place between states involved in the Pacific Solution<sup>621</sup>. Finally Australia pursued extraterritorial protection policies unilaterally, whereas several Member States proposed their measures in a supranational forum, the E.U. and FRONTEX, and failed. Moreover, according to

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Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)", *Refugee Survey Quarterly*, Vol. 29, No. 1, 2010, pp. 92-119.

<sup>618</sup> For instance, Loescher and Milner noted the negative reaction during the UNHCR intergovernmental meeting of March 2003, *Convention Plus*. See Loescher, Gil And Milner, James "The Missing Link: The Need For Comprehensive Engagement In Regions Of Refugee Origin" *International Affairs* Vol. 79, Issue 3, May 2003, pp- 595-617

<sup>619</sup> See Betts, Alexander And Milner. James "The Externalisation Of EU Asylum Policy: The Position Of African States", *Compas Working Paper* 36, Oxford, 2006

<sup>620</sup> Afeef, Karin, Fathimath, "The Politics Of Extraterritorial Processing: Offshore Asylum Policies In Europe And The Pacific" *Rsc Working Paper* No. 36, University Of Oxford 2006

<sup>621</sup> According to Afeef and Gibney, extraterritorial asylum policies may paradoxically start the spread of human rights. See *ibidem*. While taking into account the two Mediterranean countries, it is fundamental to underline the difference between Morocco and Libya, since Morocco did sign the Refugee Convention, whereas Libya always refused to do so.

Levy<sup>622</sup>, the proposal of extraterritorial asylum policies in Europe has been a failure from the beginning also because it was implicitly contradicting the European political basis: Europe, in comparison to Australia, has not recognised itself as an area of immigration and still does not display a Union-wide resettlement system to accept refugees offshore. In other words, the EU is searching for an immigrant labour force, but rejects the immigrants possible integration into its society.

Having examined the issue of transfer of protection responsibility, let us move on to the second common element in the way Australia and Europe have been enacting extraterritorial asylum policies, namely the provision of safe country and other similar legal loopholes.

The Australian excision of thousands of islands from the migration area has been implemented specifically to create a barrier to access to asylum. Indeed, this thesis has shown how landing on an excised site becomes instrumental for the creation of a new legal category, the offshore entry person (OEP). The OEP is denied the rights to claim protection and is deprived of judicial review without a proper assessment of his status.

A similar result is reached by the European Union, which instead is expanding its borders further on the Mediterranean: interdiction and pre-borders control are actively implemented in international waters and in embarkations points at airports<sup>623</sup>, impeding access to Member states' territories and, thus, to their protection. Furthermore, the Dublin II system is shifting protection responsibilities to Member states bordering the Union on the basis of the first country of entry, if the asylum-seeker cannot be returned to a partner country outside the EU, using the safe third country concept<sup>624</sup>.

While it is acknowledged that the Refugee Convention establishes the exclusion from asylum only to individuals who are already enjoying a higher level of protection in

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<sup>622</sup> See Levy, Carl "Refugees, Europe, Camps/State Of Exception: "Into The Zone", The European Union And Extraterritorial Processing Of Migrants, Refugees, And Asylum-Seekers (Theories And Practice)", *Refugee Survey Quarterly*, Vol. 29, No. 1, 2010, pp. 92-119.

<sup>623</sup> Mcnevin describes the new border as target-oriented and fluctuating. See Mcnevin, Anne "Border Policing And Sovereign Terrain: The Spatial Framing Of Unwanted Migration In Melbourne And Australia" In *Globalizations*, Vol. 7 No. 3, 2010, pp. 407-419 territory's edge.

<sup>624</sup> Garlick, Madeline "The Eu Discussions On Extraterritorial Processing: Solution Or Conundrum?" *International journal refugee law* Vol. 18 No. 3, 2006, pp. 601- 629

another state<sup>625</sup>, there is no legal basis for the safe third country notions<sup>626</sup> and the current use of extraterritorial asylum policies aims to a different outcome.

Hence, both Australia and the EU exemplify the current trend of industrialised countries<sup>627</sup> to resort to third country concepts, even if the level of protection provided by the partner state is far inferior to that outlined in the Refugee Convention.

Therefore, this thesis has argued, the recourse to the safe third country notion is essential to justify the idea of protection provided somewhere else, in impeding access to protection and in shifting international responsibilities away from industrialised countries<sup>628</sup>.

Both Australia and the EU Member states are straining to devise new tools to circumvent their protection obligations, limiting their understanding of the latter within the narrow territory-sovereignty link, notwithstanding the recognition under contemporary human rights law doctrine<sup>629</sup> that the jurisdiction concept extends extraterritorially.

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<sup>625</sup> Asylum is excluded where the level of protection provided in the other state is the same to that enjoyed by the same country's national. See Foster, Michelle "Protection Elsewhere: The Legal Implications Of Requiring Refugees To Seek Protection In Another State" In *Mich. J. Int'l L.* Vol.28 2006-2007, pp. 223-286

<sup>626</sup> We underline once again that, while being widespread, the notions of safe third country is based on the literal reading of the Convention. Indeed, this notion is supported by the idea that asylum is provided to those coming directly from a country where they feared persecution and to those claiming asylum in the first possible country. However, the safe third country provision could also be understood as breaching Article 31 of the Refugee Convention as it might amount to penalty on the way of entrance of asylum-seekers to the territory where asylum is claimed. See Kneebone, Susan "The Legal And Ethical Implications Of Extraterritorial Processing Of Asylum Seekers: The 'Safe Third Country' Concept." In *Studies In International Law: Forced Migration, Human Rights And Security*, Edited By Jane Mcadam. Portland: Hart Publishing, 2008, Pp. 129-154

<sup>627</sup> See, for instance, the controversially narrow meaning attributed to the word "refoulement" implying geographical restrictions. Limiting the territorial scope of the non-refoulement provision contradicts state practice and relevant international doctrine; the provision applies wherever a state exerts jurisdiction. See part B "Extraterritorial applicability of Article 33 (1) of the 1951 Convention" in UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007

<sup>628</sup> For instance, we recall the legal loophole provided in the case *Sale v. Haitian Centres Council*: the common meaning of the verb "refouler" was dropped and the majority of the court recurred to the extraordinary meaning and to the preparatory work of the Refugee Convention to find a legal basis for the U.S. push backs. See the dissenting opinion of Justice Blackmun stating that the duty expressed in the Convention is clear and unambiguous. See *Sale v. Haitian Centres Council, INC.*, 509 U.S. 155 (1993)

<sup>629</sup> *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, 1216, 2005; see also paragraph 109 of the *Legal consequences on the construction of a wall in the OPT*, where the Court recognised that the jurisdiction can be extraterritorial, especially when the scope of the Treaty is taken into account. See "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, 179, July 2004

Finally, the third common feature we will take into account is the widespread idea of efficiency and costs of asylum. Used as a justification to implement stricter access requirements and evaluations, efficiency has been incrementally present in rhetorical discourse when planning offshore processing and policies of protection in the region. This justification is merely political and finds no basis in human rights law.

The main assumption of the current efficiency discourse lies in the high expenses for reception of spontaneous arrivals, which instead could be better allocated, in the global north's view, in strengthening refugee and protection provisions in region of origin and in safe third countries<sup>630</sup>.

For instance, the main premise for the United Kingdom's document "New International approaches to Asylum Processing and Protection" was the failure of the current international protection system, which was related to the unfair distribution of economic support for refugees in the world. In that document, the legal cost born by states was estimated over \$10,000 per year and it was compared to the \$50 the UNHCR spends every year for each refugee in the world<sup>631</sup>.

However, this argument has proved faulty, as demonstrated both Australian offshore expenses<sup>632</sup> and the \$5 billion pledged to Qaddafi<sup>633</sup> to guarantee his help in preventing access to asylum in the Union.

Furthermore, since these high perceived costs in the asylum debate comprise social costs and political context, it is clear that the refugee burden shouldered by Australia and EU is not purely financial. Nevertheless, as it was showed in this thesis, developing countries are facing more severe problems in the short and in the long-run because they are hosting most of the world's refugees and, moreover, they are lacking the proper instrument to manage and contain the political and social costs deriving

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<sup>630</sup> For instance, this was the premise on which the UK proposal was built; however, evidences from the Australian experience with offshore processing contradict blatantly this assumption. When comparing onshore and offshore processing, an average expenditure of AU\$65 per day was estimated in Sidney, against AU\$ 236 on Cocos Island and AU\$293 on Christmas island. See Saunders, as cited in European Parliament "Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers", Parliamentary Report, Doc. 11304, 13 June 2007

<sup>631</sup> <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldselect/ldcom/74/7415.htm>

<sup>632</sup> The expenses for offshore processing are five times more costly. See note 26 and see <http://www.theaustralian.com.au/news/nation/offshore-option-five-times-dearer/story-e6frg6nf-1225983879727>

<sup>633</sup> See chapter III, before.

from this situation.

Regarding refugee law, what both Australia and EU should carefully reconsider is not only the quality of asylum<sup>634</sup> provided in the receiving state, as it was noted before, but also the supposed interchangeability of the protection in the region and resettlement system and reception of spontaneous arrivals of asylum-seekers<sup>635</sup>. The resort to partnership with low-level-of-asylum countries demonstrates the willingness of Australian and EU to erect these receiving states as a deterrence<sup>636</sup> for refugees and asylum-seekers who attempt to reach the Australian and European shores.

In conclusion, readmission agreements, safe third country provisions, excision and extraterritorial policies are changing the shape of the international asylum situation, creating new fictitious geographical barriers and restrictions against refugees.

The result is the so-called “neo-refoulement”<sup>637</sup>, a brand new way to deny refugees and asylum-seekers what should be granted them under the Refugee Convention, i.e. first of all access to protection.

Against this background, the UNHCR has the mandate to assure timely durable solutions to refugee situations all over the world. The task is not an easy one, as the UNHCR shares its supervisory role with party States, according to Article 35 of the Refugee Convention.

The problem lies in the lack of an international adjudicatory organ, giving the correct interpretation of the meaning of the Refugee Convention and formulating authoritative decisions<sup>638</sup>. This absence, while not diminishing the priority observance of international obligations, puts the UN agency in a difficult position of balancing reactivity and pro-activity when engaging into negotiations with different stakeholders.

For instance, when in 2003 the U.K. Government put forward its “New Vision”

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<sup>634</sup> See supra, note 9.

<sup>635</sup> Betts, Alexander “What Does ‘efficiency’ Mean In The Context Of The Global Refugee Regime?” *Compas Working Paper No. 9*, University Of Oxford, 2005

<sup>636</sup> On the illegality of the recourse to offshore deterrence, see James Hathaway, “The false panacea of offshore deterrence”, 2006

<sup>637</sup> Hyndman, Jennifer And Mountz, Alyson “Another Brick In The Wall? Neo-Refoulement And The Externalization Of Asylum By Australia And Europe” In *Government And Opposition*, Vol. 43, No. 2, 2008, Pp. 249–269

<sup>638</sup> Foster, Michelle “Protection Elsewhere: The Legal Implications Of Requiring Refugees To Seek Protection In Another State” In *Mich. J. Int’l L.* Vol.28 2006-2007, pp. 223-286

Proposals, the UNHCR answered detailing its own counterproposal: the discussion paper was called “Three-pronged proposal”<sup>639</sup> for an EU asylum policy, envisaging an EU-prong, a Member state-prong and a prong in regions of origin. The idea was to enhance protection mechanism in region of origin and domestically, while at the same time it proposed the establishment of a joint EU-wide refugee processing. However, it triggered an intense debate because of its similarities with the UK new vision, since it suggested to establish the regional processing centre: in comparison, although, the centre was to be established within the EU, to assure a better compliance with the Refugee Convention's principles of protection<sup>640</sup>.

Moreover, while acknowledging the sovereign rights of states to decide domestic policies, to take measures against irregular migrants and to decide who enters, the UNHCR always stresses the need to observe international obligations towards refugees, albeit in different ways over time. In 1991 the UNHCR underlined that protection shall not be refused on the ground of safe country provisions<sup>641</sup>, whereas in the Ex. Com. Number 71<sup>642</sup> the agency supported the conclusion of readmission agreements to provide common criteria and a better framework of refugee protection and, as a minimum, to avoid refugee in orbit. Indeed, the UNHCR does not object to the safe third country principle per se, but underlines the need to comply with international protection standards prior the transferral to a non-party state. This is in line with the absence of a clear guidance of the Refugee Convention, which neither expresses nor explicitly rejects the idea of providing protection somewhere else.

By the same token, the UNHCR does not expressly reject the idea of transferring

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<sup>639</sup> UN High Commissioner for Refugees, UNHCR Working Paper on "UNHCR's Three-Pronged Proposal", 26 June 2003, available at: <http://www.unhcr.org/refworld/docid/3efc4b834.html> last accessed 7 September 2012

<sup>640</sup> See Betts, Alexander “The Political Economy Of Extra-Territorial Processing: Separating 'purchaser' From 'provider' In Asylum Policy” Working Paper No. 91, New Issues In Refugee Research (2003). See also “The International Relations Of The “New” Extraterritorial Approaches To Refugee Protection: Explaining The Policy Initiatives Of The Uk Government And UNHCR” In Refuge Volume 22 No 1, 2004, pp 58-70

<sup>641</sup> UN High Commissioner for Refugees, Background Note on the Safe Country Concept and Refugee Status, 26 July 1991, EC/SCP/68, available at: <http://www.unhcr.org/refworld/docid/3ae68ccec.html> last accessed 7 September 2012

<sup>642</sup> Conclusions Adopted By The Executive Committee On International Protection Of Refugees, No. 71 (XLIV), General (1993)



refugees to non-party states of the Refugee Convention<sup>643</sup>, although this prerequisite gives a stronger leverage to the Agency when cooperating with the receiving state.

Notwithstanding the important role in refugee protection, the UNHCR in a few occasions showed a controversial attitude.

In 2003-2004 the UNHCR proposed the Convention Plus, an initiative to create a forum strengthening the north-south dialogue on refugees. During preparatory works to address the problem of Somali Refugees through Targeted Development Assistance (TDA), Development Assistance for Refugees (DAR) and provision Strengthening Protection Capacities (SPCP) the UNHCR clearly missed its mediatory role and leaned dangerously to the European part, fostering E.U. proposals to southern states.

The African group was completely left out from most of the discussions on TDA<sup>644</sup> and only in end-2005, a couple of months before the end of the Convention Plus, it was allowed to access the talk with donor states. Even then, the Convention Plus showed its real nature of monologue rather than dialogue, as African states were to agree on pre-written statements on SPCP and TDA, without having taken part to prior bilateral discussions on projects.

In that occasion the UNHCR neglected its role as a real mediator<sup>645</sup> of the Convention and the process which started deepened the already wide divide between north and south on asylum policies. Indeed, the African states selected to receive TDA were treated with suspect from those left out, as they were somehow absorbing resources directed toward Africa in general. Moreover, this “*divide et impera*” strategy caused other severe consequences as once struck bilateral agreements on refugees, such as the DAR from Denmark to Uganda, the overall UNHCR funding in the region was dramatically reduced<sup>646</sup>.

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<sup>643</sup> Legomsky, Stephen H., “Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection” In *Ijrl*, Vol. 15, No. 4, 2003, pp. 567-677

<sup>644</sup> See the African Group statement of October 2004, as cited in Betts, Alexander And Milner, James “The Externalisation Of Eu Asylum Policy: The Position Of African States”, *Compas Working Paper 36*, Oxford, 2006

<sup>645</sup> As it happened instead during Indochinese CPA: the agency evolved and showed in that period a proactive role and coordinated many burden-sharing arrangements. Its role consisted of keeping balanced the interest of states and asylum-seekers' rights. See Towle, Richard, “Processes And Critiques Of The Indo-Chinese Comprehensive Plan Of Action: An Instrument Of International Burden-Sharing?” In *Ijrl* 2006 pp. 537-570

<sup>646</sup> As Milner and Loescher stated, UNHCR is increasingly understaffed and overstretched. See Loescher, Gil And Milner, James “The Missing Link: The Need For Comprehensive Engagement In

Another episode seems to confirm this hypothesis. In 2005 UNHCR started its “Institution Building for Asylum in North Africa”<sup>647</sup> project, focussing on Algeria, Morocco, Libya, Tunisia and Mauritania. The project was funded by the B7-667 EU budget line and the report underlined the difficulties faced by the Agency in engaging into cooperation with countries surrounding the Mediterranean, most of which were reluctant to cooperate in the field of asylum<sup>648</sup>.

The latest evidence comes from Erika Feller's interview<sup>649</sup> on the Australia-Malaysia 2011 refugee swap agreement. The arrangement was defined “workable”<sup>650</sup> and it was clearly stated that the UNHCR never condemned offshore processing, provided that certain fundamental requirements are met. Whereas processing inside the intercepting country is surely preferred, extraterritorial processing is nevertheless acceptable when being part of a burden-sharing arrangement between the states involved<sup>651</sup>, when is embedded in a regional framework of collaboration and only if it provides durable solutions, effective protection and fair refugee status determination. In brief, the attitude showed by Australia and the European Union of exploiting the power imbalance between north and south states to reach more favourable outcomes in the field of refugees and to neglect the partners' needs seems to have somehow affected also the UNHCR.

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<sup>647</sup> See UNHCR, ‘Institution Building For Asylum in North Africa: Mid-Term Report’ (UNHCR: Geneva 2005) as cited by Betts, Alexander “Towards A Mediterranean Solution? Implications For The Region Of Origin” International journal refugee law (2006), pp 652-676

<sup>648</sup> See *ibidem*.

<sup>649</sup> Erika Feller is assistant High Commissioner for Refugees protection

<sup>650</sup> We underline that Malaysia is not a state party to the Refugee Convention. See UNHCR “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol”. For the transcription of the ABC radio interview see

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<sup>651</sup> UNHCR Protection Policy Paper “Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing”, November 2010

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