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Europe and extraterritorial asylum

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5 | Extraterritorial asylum under European Union law

5.1 OUTLINE OF THE CHAPTER

The European Union's *internal* admission policies can roughly be framed according to the threefold distinction between legal immigration, illegal immigration and asylum. Border controls and other measures of migration enforcement must necessarily reflect this distinction: they are not purely restrictive or aimed at putting migration to an end, but translate the needs and interests of Member States, international obligations and general humanitarian traditions into a system of selection and control. Essential guarantees for persons requesting asylum arriving at the EU external border are laid down in the Schengen Borders Code and the Common European Asylum System. Under these regimes of law, a highly rationalised model of entry conditions, admissibility criteria and enforcement measures has developed, which incorporates fundamental rights and subjects refusals of entry or residence to the rule of law.

In parallel to this internal dimension, under the paramount consideration that any effective migration policy must be embedded in the broader framework of external action and cooperation with third countries, the EU is shaping a distinct 'external dimension' to its asylum and migration policy. Under this external dimension, Member States are urged to proactively respond to the migration challenge, rather than to sit back and await the spontaneous arrival of migrants and asylum-seekers.

The key question addressed in the current chapter is how refugee concerns are incorporated into this external dimension: in what manner does EU law constrain the activity of individual Member States when they embark upon external policies of migration control? Is this external dimension also premised on a fundamental distinction between asylum-seekers and other migrants? Does it, in essence, merely export the existing 'internal' model of migration control, together with its essential safeguards, or is it premised on altogether different selection and admissibility criteria, potentially displacing the standards of the EU's internal admission policy?

Answering these questions requires an analysis on two levels. The first part of the chapter discusses in detail how refugee concerns are reflected in the strategic aims of the EU external migration and asylum policy and the concrete measures adopted under that policy. These measures include, apart from specific action programmes on the protection of refugees in countries of transit and regions of origin, a variety of instruments implementing the

idea of remote migration management, including rules on visa, carrier sanctions, immigration liaison officers and joint operations of border control. This part of the chapter focuses in particular on the tension which exists between the goals of preventing irregular migration and of guaranteeing asylum-seekers access to protection. This tension arises especially in the context of various pre-border control arrangements which are targeted at mixed flows of migrants and asylum-seekers and are criticized for not effectively distinguishing between the two.

The second part of the chapter addresses the legal relationship between the EU's internal rules on asylum and border control and the evolving external dimension. It makes some general observations on the territorial locus of European Union law and specifically explores the manner in which the Schengen border crossings regime and the Union's asylum *acquis* may govern extraterritorial activity of Member States.

The chapter argues that, despite a firm rhetoric on the part of EU institutions that external action on migration matters should not jeopardize access to protection by those entitled to it, the concrete measures implementing the policy of external migration management generally fail to regulate the legal status of persons requesting international protection. Because most EU instruments on external migration control leave considerable implementing discretion to Member States and often only in general terms refer to the duty to respect international standards, they do not give meaningful guidance on the crucial question of how refugee concerns should be confronted in practice. The conclusion is then that, in contrast with the EU's internal migration and asylum policy, the external dimension fails not only to formulate a system of selection and admission which pays account to the needs of refugees, but that it also tends to neglect the essential requirements of the rule of law: it does not specify the material and procedural conditions for the undertaking of external migration enforcement, it leaves the taking of coercive action to the virtual complete discretion of Member States, and it does not secure a system of judicial review for those migrants who are directly affected by external measures of migration control.

Although since the entry into force of the Lisbon Treaty the European Community has ceased to exist as a legal entity, the present and following chapters employ the term '(European) Community' when referring directly to judicial or other legal sources mentioning the term. Otherwise, the term EU or Union is used.

5.2 THE EU'S EXTERNAL DIMENSION OF ASYLUM AND MIGRATION

5.2.1 The external dimension as a policy strategy of the Union: from Tampere to Stockholm

What is now commonly referred to as the 'external dimension' of the European Union's immigration and asylum policy has from the outset formed an integral part of that policy. Already in 1994, in exploring the new possibilities of the Treaty on European Union, which had designated the subjects of immigration and asylum as matters of common interest of the Member States, the European Commission had proposed that a comprehensive and effective immigration policy should be built upon the three components of action on migration pressure, action on controlling migration, and action to strengthen policies for legal immigrants.¹ This included a strong focus on cooperation with the main countries of 'would-be' emigration to Europe.² The Tampere European Council of October 1999 confirmed this comprehensive approach. It outlined not only the future contents of the new first pillar instruments to be adopted on admission and residence of asylum-seekers and legal immigrants, but signaled that these instruments should be embedded in a broader framework of external action and cooperation on migration with third countries. The Tampere milestones contained separate paragraphs on 'Partnership with countries of origin' and 'Management of migration flows', in which the heads of state and government of the EU Member States stressed the importance of a 'comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit' along with the need 'for more efficient management of migration flows at all their stages.'³ Apart from interlinking the Union's migration policy with more general development issues, the Tampere conclusions called *inter alia* for the establishment of information campaigns on actual possibilities for legal migration in third countries, the further development of a common policy on visas, assistance to third countries in order to promote voluntary returns and to combat trafficking in human beings, and the conclusion by the Council of readmission agreements with third countries.⁴

The Conclusions of the Seville and Thessaloniki European Council meetings of June 2002 and June 2003 set further political guidelines for integrating immigration policy into the Union's relations with third countries.⁵ These were followed up in the 2004 Hague programme, which included an extensive

1 COM(1994) 23 final, 23 February 1994, foreword.

2 Ibid, esp. paras. 47-68.

3 Presidency Conclusions 15/16 October 2009, 'Towards a Union of Freedom, Security and justice: The Tampere Milestones' (hereafter 'Tampere programme'), paras. 11-12, 22-27.

4 Ibid.

5 Presidency Conclusions 21/22 June 2002, paras. 30-36; Council of the European Union, Presidency Conclusions 19/20 June 2003, esp. paras. 9, 15, 19.

paragraph on the 'external dimension of asylum and migration'.⁶ This dimension should, in general, aim at assisting third countries in managing migration and protecting refugees.⁷ More specifically, EU policy should help preventing illegal migration, inform on legal channels for migration, resolve protracted refugee situations, build border-control capacity and tackle the problem of return. In respect of regions of origin, the Hague Programme called for the development of EU Regional Protection Programmes, to be established in conjunction with third countries and UNHCR, which should primarily focus on building capacity for refugee protection and include a joint EU resettlement programme on the basis of voluntary participation of Member States.⁸ With regard to regions and countries of transit, the European Council called for capacity-building in national asylum systems, border control and wider migration issues 'to those countries that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees'.⁹ Issued one and a half year after the British New Vision for Refugees,¹⁰ the Hague Programme also called for a study, to be conducted in close consultation with UNHCR, into 'the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory'.¹¹ Such processing should however, not replace protection and processing within the Union, but rather complement the Common European Asylum System and should comply with international standards.¹² In the sphere of border checks and migration control, the Hague Programme further stressed the need for closer cooperation in external border control, both between Member States and with third countries.¹³ It welcomed the establishment of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) and initiatives taken in the context of controls and rescue operations at sea. It further called for the 'firm' establishment of immigration liaison networks in relevant third countries.¹⁴

One year later, at the Brussels summit of December 2005, the European Council adopted the EU Global Approach to Migration.¹⁵ This Approach

6 Presidency Conclusions 4/5 November 2004, Annex I, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (hereafter 'The Hague programme'), para. 1.6.

7 Ibid, para. 1.6.1.

8 Ibid, para. 1.6.2.

9 Ibid, para. 1.6.3.

10 United Kingdom Home Office, 'New International Approaches to Asylum Processing and Protection', reproduced in: House of Lords European Union Committee – Eleventh Report, 'Handling EU asylum claims: new approaches examined', 30 April 2004, Appendix 5.

11 The Hague programme, para. 1.3.

12 Ibid.

13 Ibid, paras. 1.6.3, 1.7.1.

14 Ibid, para. 1.7.1.

15 Presidency Conclusions 15/16 December 2005, Annex I, 'Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean' (hereafter 'Global Approach to Migration').

responded specifically to the events in the Mediterranean region, including the incident in September 2005 when hundreds of migrants had tried to climb over the fences erected around the Spanish enclaves of Ceuta and Melilla in Morocco.¹⁶ It called for action to reduce illegal migration flows and the loss of lives, to ensure safe returns, strengthen durable solutions for refugees and build capacity to better manage migration. It explicitly affirmed the 'individual's right to seek asylum', called on Frontex to organize joint operations in the Mediterranean region, for the establishment of regional networks of immigration Liaison Officers (ILOs), to establish a pilot Regional Protection Programme (RPP) and to carry out a study to 'improve understanding of the root causes of migration'.¹⁷ It mentioned Morocco, Algeria and Libya as countries with which dialogue and cooperation in migration management should be sought, but did not reiterate the condition formulated in the Hague Programme to do so only if these countries had showed a commitment to fulfil their obligations under the Refugee Convention.

The European Pact on Immigration and Asylum, formally adopted by the 27 Heads of State and Government on 16 October 2008, reaffirmed the goals outlined in the Global Approach to Migration and the need to engage in close partnership with countries of origin and countries of transit.¹⁸ It called, amongst others, for a greater allocation of resources to the Frontex agency to allow it to cope with crisis situations such as occurring in the Mediterranean and to increase EU aid for the training and equipping of border guards of third countries. It also called for closer operation with UNHCR to ensure better protection for refugees in third countries, possibly including schemes for resettlement in the European Union.

The most recently adopted long-term EU strategy in the field of Justice and Home Affairs, the Stockholm Programme, consolidates and further elaborates the wide variety of measures making up the external dimension of the EU's asylum and immigration policy. It takes stock of problems encountered in the past implementation of various policies and, as such, is much more outspoken in acknowledging that refugee interests and dangers of migrant smuggling require attention in shaping policies aimed at preventing irregular migration. It stipulates that the strengthening of border controls should not prevent access

16 This particular incident later gave rise to allegations that some of the arrested migrants – those with a nationality other than countries with which Morocco had a readmission agreement – were subsequently abandoned in the desert by the Moroccan authorities. For further details see: Human Rights Watch news release 12 October 2005, 'Spain: Deportations to Morocco Put Migrants at Risk – Violence against Migrants in Ceuta and Melilla Requires Independent Investigation'; European Commission, 'Visit to Ceuta and Melilla – Mission Report Technical mission to Morocco on illegal immigration, 7th October – 11th October 2005', 19 October 2006.

17 Global Approach to Migration, p. 5.

18 Council of the European Union, 'European Pact on Immigration and Asylum', 23 September 2008, doc. 13440/08.

to protection to those entitled to benefit from it and formulates 'the twin objective of facilitating access and improving security'.¹⁹ It specifically calls for proposals to clarify the mandate of Frontex and clear rules of engagement for joint operations at sea, 'with due regard to ensuring protection for those in need who travel in mixed flows' and to 'better record and identify migrants trying to reach the EU'.²⁰ The Stockholm programme remains firmly supportive nonetheless of furthering efforts to combat illegal migration. The notions of integrated border management and cooperation with countries of origin and transit are accorded key priority and more effective action is called for in respect of *inter alia* cooperation in conducting border controls, the conclusion of readmission agreements, capacity building in third countries and the posting of immigration liaison officers in both countries of origin and transit.²¹ In respect of 'the external dimension of asylum', the heads of State and government note that 'any development in this area needs to be pursued in close cooperation with UNHCR', that the newly founded European Asylum Support Office should be fully involved in this external dimension and that '[i]n its dealings with third countries, the EU has the responsibility to actively convey the importance of acceding to, and implementing of, the 1951 Geneva Convention on Refugees and its Protocol'.²² Concrete measures to be implemented should aim at capacity building for the protection of refugees, should expand the idea of Regional Protection Programmes and increase, on a voluntary basis, the number of refugees resettled in the European Union. The Stockholm Programme no longer explicitly requested a study into the feasibility of external processing of asylum-seekers, but in somewhat more ambiguous terms invited the Commission to explore 'new approaches' concerning access to protection in main transit countries, such as 'certain procedures for examination of applications for asylum, in which Member States could participate on a voluntarily basis'.²³

It transpires from the various policy conclusions and programmes for action that the European Union is unmistakably shaping a distinct external strategy to its immigration and asylum policy. It is not as such remarkable that the external dimension features so prominently in the Union's immigration and asylum agenda. Policies of return and readmission, which by their nature

19 The Stockholm Programme – An open and secure Europe serving and protecting citizens (hereafter 'Stockholm programme'), OJ 2010 C115/01, para. 5.1.

20 Ibid, paras. 5.1, 6.

21 Ibid, para. 6.1.6.

22 Ibid, para. 6.2.3.

23 Ibid. See also, para. 6.2.1, where the Commission is invited to 'finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications'. This probably refers to joint processing within the European Union. A Communication of the European Commission setting out the priorities for the future Stockholm Programme had referred to a continuation of the analysis of the legal and practical feasibility of joint processing of asylum applications outside the Union: COM (2009) 262 final, 10 June 2009, para. 5.2.2.

depend on cooperation with countries of origin and transit, are central to any effective immigration policy. The competence of the Union to adopt measures in the sphere of repatriation was explicitly conferred by Article 63(3)(b) of the EC Treaty. This has now been supplemented with a specific competence of the EU to conclude readmission agreements with third countries in Article 79(3) TFEU. The external dimension of the Union's immigration and asylum policy is however much wider in scope than issues of return and readmission. In neutral and widest terms, it propagates cooperation with third countries in the service of the two overarching aims of organising legal migration and controlling illegal immigration.²⁴ Apart from the facilitation of returns, this includes the goals of preventing illegal immigration, of facilitating legal migration and of contributing to refugee solutions in third countries. This rather inclusive scope of the external dimension has also found reflection in the TFEU, which provides a more express legal basis for future external action in the fields of migration and asylum than the former EC Treaty. Articles 77(1)(c), 77(2)(d), 78(2)(g) and 79(1) TFEU call respectively for the adoption of measures in the sphere of integrated border management; the creation of partnerships with third countries for managing inflows of asylum-seekers; and measures for the prevention of illegal immigration and trafficking in human beings.

The external dimension of the EU's immigration and asylum policy is multifaceted and not all the instruments adopted under it require this study's scrutiny. The two aspects of the external dimension which fall within the heart of this study's scope are the measures implementing what one may call the externalisation of external border management; and, secondly, the external dimension of the EU's asylum policy.

5.2.2 Integrated Border Management and pre-border controls

One of the most prominent and probably best developed facets of the EU's external dimension on migration and asylum is the creation of a multi-layered system of pre-entry control measures forming part of the strategy for the management of the Schengen external borders. This system gives voice to the concept of integrated border management, defined as involving measures taken at the consulates of Member States in third countries, measures in countries of transit, measures at the border itself and measures taken within the Schengen area.²⁵ The concept of integrated border management is premised on

²⁴ European Pact on Immigration and Asylum, p. 2.

²⁵ COM(2008) 69 final, para. 1.2. Building upon the Conclusions of the Laeken European Council and a Commission Communication on the management of the external borders, the concept of integrated management of the external borders was first adopted by the JHA Council in 2002 in its action plan for the management of external borders. Although focusing on the coordination of Member States activities, this action plan already envisaged border management cooperation with third countries, including the pooling of immigration

the idea that border controls are most effective when deployed in parallel with the various stages of the immigrants' travel towards (and inside) the Union. Partly adopted in the course of the intergovernmental Schengen *acquis*, and partly under Article 62 of the former EC Treaty, it is possible to categorize the relevant EU policy instruments implementing the idea of remote control under four headers: the EU visa requirement; carrier sanctions; the posting of immigration liaison officers in third countries; and the creation and operational activity of the Frontex external borders agency. Further, the EU has increasingly provided financial and technical assistance to third countries in order to strengthen border control capacity in third countries.²⁶

The key question arising with regard of these policies is to what extent they may impede asylum-seekers from gaining access to protection. As a matter of policy principle, the European Council, the European Commission and the European Parliament have all affirmed that the strengthening of border controls and other measures to combat illegal migration should not prevent persons entitled to protection access to protection and that therefore protection-sensitive border controls should be developed.²⁷ The question to be answered then, is to what extent this policy principle has effectively been implemented under EU law.

5.2.2.1 *The EU visa regime*

The EU visa policy does not accord special consideration to refugees. The Visa Requirement Regulation, listing the countries whose nationals are subject to a visa requirement, does not include refugee concerns in the consideration of whether a particular country should be included in the common list, nor does it list refugees as one of the categories of persons exempted from the visa requirement.²⁸ The Visa Requirement Regulation does make specific reference to stateless persons and *recognised* refugees, but only in stipulating that for purposes of the Regulation, they must be treated similarly as nationals of the third country where they reside and which issued their travel documents, implying that they are in principle to be subjected to the visa requirement on

liaison officers to be posted in third countries and the dispatching of EU special border advisors to third countries.

26 These measures are discussed hereunder in conjunction with the EU's thematic programme on asylum support in third countries, see *infra* section 5.2.3.

27 Eg European Pact on Immigration and Asylum, p. 11; Stockholm Programme, para. 5.1.; Green Paper on the future Common European Asylum System, 6 June 2007, COM(2007) 301 final, para. 5.3.; European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), recital (p) and pts. 13, 18, 28.

28 Council Regulation (EC) No. 539/2001, Article 4.

the same footing as the nationals of the country in which they reside.²⁹ The Visa Code, communitarising and streamlining the regime on the issuing of short stay visas as formerly set forth in the Schengen Implementation Agreement (SIA),³⁰ applies to all third-country nationals, including refugees, who must possess a visa pursuant to the Visa Requirement Regulation.³¹ The conditions for obtaining a visa include *inter alia* the entry conditions of the Schengen Borders Code,³² but without reiterating the specific derogations and safeguards the Borders Code provides in respect of persons requesting asylum.³³

It must, on the other hand, also be concluded that the EU visa policy does not prevent Member States from making favourable provisions to persons requesting asylum. Firstly, the Visa Code allows for the issue of visa with limited territorial validity (i.e. valid only in respect of the territory of the issuing Member State and possibly other Member States should they consent to it) on humanitarian grounds or because of international obligations.³⁴ Secondly, the issuing of long stay visa remains at the discretion of Member States,³⁵ implying that Member States may issue humanitarian- or other protection visa to persons in need of international protection, including for example special visa for refugees who are to be resettled, in accordance with their national laws. Lastly and most pertinently, it must be underlined that although the EU visa policy does not grant favourable treatment to refugees or other persons seeking protection, persons requesting asylum at the EU external border are exempted from the visa requirement pursuant to Articles 5(4)(c) and 13(1) of the Schengen Borders Code. This brings about the paradox that refugees are not generally exempted from the visa requirement, except at the very moment when that requirement is enforced, namely when it is verified whether the person complies with the entry conditions set forth in the Schengen Borders Code. This means, for practical purposes, that an EU visa requirement bestowed on a refugee wishing to enter the EU is problematic

29 See Article 3 and recital 7. This is however without prejudice to more favourable provisions of the European Agreement on the Abolition of Visas for Refugees (...). Further, Member States may decide that recognised refugees residing in a third country which is exempted from the visa requirement must nonetheless be in the possession of a visa.

30 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 239, p. 19–62.

31 See the express confirmation in the Explanatory Memorandum to the Visa Code, COM(2006) 403 final, p. 15: ‘The concept of “third-country national” is defined by default, by excluding citizens of the European Union within the meaning of Article 17(1) of the EC Treaty. It therefore also includes refugees and stateless persons.’

32 Article 21(1) Regulation (EC) No 562/2006.

33 See extensively section 5.3.2 *infra*.

34 Regulation (EC) No 810/2009, Art. 25(1).

35 Article 18 SIA.

only in those instances where the requirement is enforced by other means of border control than verification of compliance with the entry conditions in the meaning of the Schengen Borders Code. As is explained below other EU instruments do not expressly oblige Member States to verify compliance with the visa requirement in the various pre-border situations. But this may well be different in respect of Member State practices. Most notably, in making use of carrier sanctions and immigration officers entasked to check documents at foreign airports, verification of the visa requirement may be standard procedure.³⁶ This is especially problematic if these checks are not accompanied with alternative guarantees for refugees.

5.2.2.2 Carrier sanctions

Carrier sanctions have been incorporated in the Schengen *acquis* under Article 26 SIA, which was supplemented by the 2001 Carrier's Liability Directive.³⁷ Article 26 SIA requires Schengen countries to impose the threefold obligation on carriers to (i.) return aliens who are refused entry into the territory of a Contracting State to the appropriate third State, (ii.) ensure that aliens transported by the carrier are in possession of the travel documents required for entry, and (iii.) pay penalties for transporting aliens not having the requisite travel documents.³⁸ As a matter of law, the Schengen carriers regime does not jeopardize the position of refugees. Firstly, paragraphs 1 and 2 of Article 26 SIA make implementing measures subject to obligations resulting from the Refugee Convention, confirming that carriers sanctions must respect international refugee law obligations. Secondly, the obligation of return only applies to aliens who have been refused entry into the territory of a Contracting State, and refusals of entry may under the Schengen borders Code not be effectuated in disregard of both international and EU provisions on the right of asylum.³⁹ For a similar reason, the obligations of carriers to ensure that aliens have the required documents and to incur penalties otherwise, which refer respectively to 'travel documents *required for entry*' and '*necessary* travel documents',⁴⁰ could well be interpreted as not being applicable to persons entitled to international protection, because the Schengen Borders Code exempts these persons from the condition to possess valid travel documents. It would follow, hence, that the Schengen carriers regime does not oblige Member States to impose obligations on carriers in respect of persons who are entitled to protection or

³⁶ See notes 44, 45 and 53 *infra* and accompanying text.

³⁷ Directive 2001/51/EC.

³⁸ Article 26 (1)(a)(b) and (2) SIA. The obligation of returning the alien does not apply to land border crossings, see Article 26 (3) SIA.

³⁹ Current Article 13(1) Schengen Borders Code; former Article 5(2) SIA.

⁴⁰ Article 26 (1)(b) and (2) SIA.

who otherwise fall within the 'special provisions concerning the right of asylum' as specified under Article 13 (1) Schengen Borders Code.

However, with carrier sanctions, the proof of the pudding is in the eating. Exonerations of asylum-seekers under carrier sanction schemes are commonly seen as problematic in practice because they would depend on private carriers making their own assessment of whether a person is indeed exempted from the requirement of possessing valid travel documents – obliging them to entertain asylum applications themselves.⁴¹ Apart from the lack of expertise and training on the side of carriers, the limited processing time and expedient nature of boarding procedures at foreign ports or airports are manifestly ill-suited for conducting such assessments. By consequence, in order to rule out the imposition of fines and return obligations, carriers are prone to rely exclusively on establishing the validity of travel documents, also in respect of persons claiming to be a refugee.⁴²

Still, it is arguable that under the current system of EU law, by reading the carriers regime in conjunction with both the Schengen Borders Code and provisions of the Common European Asylum System, carriers need not necessarily be burdened with the hazardous task of verifying themselves whether passengers requesting asylum do indeed have a valid claim. Instead, the argument can be made that all persons requesting asylum, regardless of whether their claim is valid, fall outside the scope of the EU carrier sanctions regime. Because Article 7 of the Asylum Procedures Directive confers a 'right to remain' in the Member State upon any third country national applying for asylum at the border or in the territory of a Member State pending the examination of the application, it would seem that no third country national who lodges an asylum request may be refused entry in the meaning of the Schengen Borders Code, necessarily implying that they are also exempted from the requirement of possessing a valid travel document for being allowed entry. It would follow that the EU carrier sanctions regime does not oppose a system under which airlines and other carriers could simply accept all persons being improperly documented provided they present themselves as asylum-seekers when arriving at the EU external border.⁴³ Obviously, such a system could

41 S. Taylor, 'Offshore Barriers to Asylum-seeker Movement: The Exercise of Power without Responsibility?', in: J. McAdam (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008), p. 100-101; E. Feller, 'Carrier Sanctions and International Law', 1 *IJRL* (1989), p. 57; F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', 46 *ICLQ* (1997), p. 599-601.

42 Ibid.

43 It appears that this was also the manner in which the original French initiative for the Carrier's Liability Directive was drafted: 'It is essential that the existence of such provisions should not prejudice the exercise of the right to asylum. With this in mind, it is important that Member States should not apply the penalties which they are required to introduce under this Directive if the third-country national is admitted to the territory for asylum purposes', recital 2 of Initiative of the French Republic with a view to the adoption of a

easily undermine the very purpose of carrier sanctions – by prompting every undocumented migrant to claim asylum – which is probably why States rarely apply such a general waiver for asylum-seekers in their domestic regimes. It transpires from several studies that EU and other Western States incorporate refugee concerns in their carrier sanctions' arrangements in a widely divergent manner, with some countries fining carriers regardless of whether it concerns refugees, some countries waiving fines in case of persons admitted to the asylum procedure and other countries waiving sanctions only in case of improperly documented migrants who are granted refugee status.⁴⁴ Further, there are Member States operating arrangements in which carriers, when confronted with persons claiming asylum, are first required to contact the immigration authorities of the Member States.⁴⁵

A further issue left unaddressed by the EU carrier sanctions regime is whether sanctions should also be imposed for carrying persons without the required visa. Article 26 SIA only refers to 'travel documents', which is listed under the Schengen Borders Code as an entry condition separate from possess-

Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, OJ 2000C 269/06. But note that this formula does not distinguish all too clearly between persons admitted entry into the asylum procedure and persons admitted residence on asylum grounds. The adopted Directive 2001/51/EC merely restates that carrier sanctions should not prejudice obligations under the Refugee Convention, leaving the manner of implementation to the Member States, see recital 3.

- 44 According to a 2007 study of the European Council on Refugees and Exiles, France, Italy and the Netherlands waived the fines if a person was admitted to their asylum procedure (but see note below in respect of the Netherlands), while Denmark, Germany and the United Kingdom fined carriers regardless of protection concerns; European Council on Refugees and Exiles, *Defending Refugees' Access to Protection in Europe*, December 2007, p. 28. Another study indicates that the United Kingdom does waive fines in respect of recognised refugees: United Kingdom Refugee Council, 'Remote Controls: how UK border controls are endangering the lives of refugees' (Report), December 2008, p. 45. A study on Australia reveals that Australian law and policy makes no provision for non-imposition or refund of penalties in case of refugees: Taylor (2008), p. 100.
- 45 According to Dutch policy, carriers who 'consider' ('*overwegen*') to bring to the Netherlands improperly documented persons who have claimed asylum are required to first obtain permission of the Dutch immigration authority. When this permission is granted, no fines are subsequently imposed. Vreemdelingencirculaire 2000 [Aliens Circular 2000], para. A2/7.1.5. Air carriers are under this procedure required to call the general phone number of the Dutch Ministry of Justice, which forwards the call to the Border Guard Unit at airport Schiphol. No information is available on what grounds this Unit would grant permission, nor does it appear that this procedure is effectively in use. In the reporting period 2007, the immigration authority had received no requests of carriers to transport undocumented asylum-seekers; Immigratie- en Naturalisatiedienst [Immigration- and Naturalisation Department], Letter of 4 October 2007, no. INDUIT07-4752 [on file with the author]. On the Dutch carrier sanctions regime extensively: S. Scholten and P. Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', 10 *EJML* (2008), p. 123-147. The United Kingdom also recommends carriers to contact either representatives of UNHCR or the UK on how to proceed in case of persons claiming asylum, United Kingdom Refugee Council Report (2008), p. 45.

ing valid visa.⁴⁶ The original proposal for the Carriers Liability Directive had expressly included the lack of required visa as a ground for penalties, but this reference was not included in the adopted directive.⁴⁷ It transpires that Member States also impose sanctions for bringing into their territory persons without the required visa.⁴⁸

It must be said that it is notoriously difficult to envisage a carrier sanctions regime which can meaningfully reconcile control concerns with refugee concerns. From a refugee perspective, it would not seem that a system waiving penalties only for recognised refugees (or other protection beneficiaries) is sufficient in preventing refugees from not being allowed to board, because this would allocate the risk of 'getting it wrong' to the carrier. From a control perspective, a system exempting all persons requesting asylum from sanctions may be prone to abuse and therefore neither feasible. UNHCR has alternatively suggested that sanctions should be waived in respect of persons who have a 'plausible claim' for refugee or subsidiary protection status, to the effect that no sanctions are imposed when claims are not found to be manifestly unfounded.⁴⁹ This would however still require carriers to make their own assessment of asylum claims and encourage them to not take financial risks. A further solution would be for carriers to refer asylum-seekers to a third party which is able to provide effective protection or conduct a preliminary status determination, such as diplomatic missions which are competent to issue protection visa or the UNHCR. But such arrangements may be resource-intensive, would require the consent of the third country concerned and may be burdened with all kinds of procedural issues.

5.2.2.3 Immigration Liaison Officers

As a corollary to carrier sanctions regimes, and to assist carriers in complying with their obligations, Western States have increasingly deployed immigration control officers in foreign countries, most commonly at airports. These officers are termed differently under national law,⁵⁰ but referred to under EU law

46 Article 5 (1)(a) and (b) SBC.

47 Article 4 of the French Initiative, n. 43 *supra*.

48 This is the case for example in the Netherlands, see Vreemdelingen circulaire 2000 [Aliens Circular 2000], para. A2/7.1.2; and in the United Kingdom: United Kingdom Refugee Council Report (2008), p. 44.

49 UNHCR, 'UNHCR Position: Visa Requirements and Carrier Sanctions', September 1995.

50 It appears that the term 'Airline Liaison Officer' is most commonly used to depict officers supporting carriers in discharging their duties under carrier sanctions regimes, while 'Immigration Liaison Officers' are endowed with the broader tasks of collecting information and advising host state authorities. On the functioning of these officers in respectively the United Kingdom, Canada and Australia, see more extensively: United Kingdom Refugee Council Report (2008), p. 35-21; A. Brouwer and J. Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21 *Refuge: Canada's periodical on refugees* (2003); Taylor (2008).

as Immigration Liaison Officers (ILOs). Under the intergovernmental Prüm Treaty, binding seven of the 27 Member States, they are alternatively called 'document advisors'.⁵¹ The role of immigration officers in impeding asylum-seekers from boarding aircrafts bound to places of safety has been lamented by commentators and has also prompted questions asked by Members of European Parliament.⁵² The critique pertains in particular practices whereby immigration officers either directly prohibit persons from entering a plane or where they indirectly 'recommend' a carrier or a foreign border authority to not allow boarding or exiting the country. These practices are alleged not to distinguish between persons claiming to be refugees and other improperly documented travelers, or to provide asylum guarantees which are inherently ineffective.⁵³

EU law has done little to harmonise the tasks of immigration officers posted in third countries. Regulation EC 377/2004 created a network of immigration liaison officers, who are posted to the consular authorities of either another Member State or a non-Member State with a view to contributing to the prevention of illegal immigration, facilitating returns and the management of legal migration.⁵⁴ The Regulation foresees in the formation of local networks of ILOs from different Member States who are posted to the same country, in order to exchange information and adopt common approaches.⁵⁵ The Regulation does not oblige Member States to employ ILOs and does not

51 Article 20 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Hereafter 'Prüm Treaty'), 27 May 2005.

52 S. Taylor (2008); Brouwer and Kumin (2003); European Parliament, Written Question by Jeanine Hennis-Plasschaert (ALDE), Emine Bozkurt (PSE) and Thijs Berman (PSE) to the Commission, 'Immigration liaison officers (ILOs)', no. E-3228/08; European Parliament, Written Question by Jeanine Hennis-Plasschaert (ALDE) to the Commission, 'Immigration liaison officers (ILOs)', no. E-2276/09.

53 Several countries, including Australia, Canada, the Netherlands and the United Kingdom, deploy immigration liaison officers who do not issue refusals of entry but instead provide pre-boarding recommendations to air carriers. The United Kingdom has in the past also employed immigration officers conducting pre-clearance controls, extensively addressed in the *Roma Rights* case, discussed in chapter 4.3.1.1. It is reported that in Canada, Australia and the United Kingdom, instructions are in place for immigration officers to refer intercepted asylum-seekers to either the local UNHCR office, a diplomatic mission or the local authorities. It is also reported however, that such referrals scarcely occur, because intercepted persons seldom articulate a wish for asylum and because immigration officers are reluctant to put the relationship with the host country in jeopardy. In the Netherlands, ILOs confronted with asylum-seekers are instructed to contact the Dutch immigration authority on a similar footing as carriers, but there is no data supporting this practice. See the references in n. 44 and 45 *supra*.

54 Regulation (EC) No. 377/2004, Article 1.

55 Article 4.

exhaustively define the tasks and powers of the ILOs.⁵⁶ They must however, be competent to collect and exchange information on a variety of issues and must further be entitled to render assistance in establishing the identity of third country nationals and in facilitating returns.⁵⁷ The Prüm Treaty is somewhat more specific in referring to document advisers as having the competence to advice and train both private carriers and the host country border control authorities – although it does not specify whether this ‘advise’ is of general nature or should also pertain to checks conducted on individuals.⁵⁸

The ILO Regulation leaves the status and operational activity of immigration liaison officers rather obscure. The Regulation is adopted on the basis of Article 63(3)(b) of the EC Treaty, referring to measures on ‘illegal immigration and illegal residence, including repatriation of illegal residents’, which may explain why the regulation does not contain any reference to rights of refugees or other protection beneficiaries, and neither refers to the proper observation of other substantive EU instruments on border control, visa or legal migration.⁵⁹ Further, no public information is disseminated on the functioning of the EU ILO networks,⁶⁰ although a proposal is pending to forward the currently classified biannual reports on their functioning to the European Parliament.⁶¹ In view of its legal basis however, the Commission has considered it impossible to include in these biannual reports specific information on how asylum-seekers are affected by the network.⁶²

One question of particular relevance under EU law is whether immigration officers, should they carry out tasks which can be properly defined as amounting to ‘border control’ or ‘border checks’ in the meaning of the Schengen Borders Code,⁶³ should not also be regarded as ‘border guards’ under the Borders Code and/or be required to comply with all procedural and other standards laid down in the Code. This question touches not only upon the definitional terms of the Borders Code, but also upon its territorial scope, and is further addressed in section 5.3.2. of this chapter below.

56 Article 1(4)

57 Articles 2 and 4.

58 Prüm Treaty, Article 21 (2) and (3).

59 It must also be noted that the regulation was adopted before *inter alia* the Schengen Borders Code and the Visa Code.

60 According to Article 6 paragraph 1 of Council Regulation (EC) No 377/2004 a biannual report on the activities of immigration liaison officers networks should be forwarded to the Council and Commission, but this report is classified.

61 COM(2009) 322 final, Article 1 (3).

62 Commission Decision 2005/687/EC of 29 September 2005 sets forth that this report must *inter alia* include information on refusals of entry at the frontiers of the host country. Where relevant, information on asylum-seekers must also be included, but only in so far as asylum-seekers present a ‘risk and threat at the host country’s borders’, see Annex, paras. 6.2. and 6.4.

63 See Article 2 (9) and (10) Schengen Borders Code.

5.2.2.4 Frontex

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, has acquired remarkable notoriety in its relatively short life span. Founded in 2004, the agency was presented as a decisive step forward in ensuring effective Member State cooperation in external border controls, border surveillance and the removal of third country nationals.⁶⁴ Especially Member States faced with considerable migration pressure at the EU external borders have welcomed Frontex as a vehicle for the pooling of expertise, intelligence and material and personal assets. Others however, have denounced the agency as primarily functioning as a European security instrument, as an agency 'militarising' the EU external border, or even as the 'migrant hunting agency of the European Union'.⁶⁵ The agency itself, acutely aware of the contested environment in which it operates, has stressed its subsidiary role and underlined that it 'is not and never will be a panacea to problems of illegal migration'.⁶⁶

Frontex' executive powers are rather limited. After the idea of setting up a supranational European Corps of Border Guards was abandoned in June 2002, it was agreed that an agency should instead be created which would facilitate cooperation, coordination and consistency between the national border guards of the EU Member States – without replacing them.⁶⁷ The Frontex regulation lays down that 'responsibility for the control and surveillance of external border lies with the Member States', while the Agency shall 'facilitate and render more effective the application of existing and future Community measures relating to the management of external borders'.⁶⁸ Frontex is both a regulatory and coordinating agency, which assists national border guard services by providing technical assistance and training and facilitating the cooperation between national border guards.⁶⁹ It is also competent to co-

64 COM(2003) 687 final.

65 *Noborder network* 30 September 2009, 'Act against the migrant hunting agency of the European Union!'

66 The Executive Director of Frontex mr. I. Laitinen, 'Frontex – facts and myths', Frontex Press Release, 11 June 2007.

67 European Council 14 June 2002, 'Plan for the management of the external borders of the Member States of the European Union', doc. 9834/1/02 FRONT 55 COMIX 392 REV, para. IV. For a summary of discussions on the possible creation of a European Corps of Border Guards, see: House of Lords Select Committee on European Union – Twenty-Ninth Report ('Proposals for a European Border Guard'), 1 July 2003. Also see A.W. Neal, 'Securitization and Risk at the EU Border: The Origins of Frontex', 47 *Journal of Common Market Studies* (2009), p. 340-341.

68 Article 1(2) Regulation (EC) No. 2007/2004

69 Article 2. Extensively, J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009), p. 258-260.

operate with third countries in matters covered by the Regulation, by concluding working arrangements.⁷⁰

A prominent feature of Frontex' mandate concerns its power to initiate and approve proposals for joint operations of border control.⁷¹ Responding to the sense of urgency concerning irregular sea arrivals, Frontex has been particularly active in launching joint operations of maritime border control and it is precisely in the context of these operations that refugee concerns have been raised.⁷² As is extensively explored in the next chapter, some of these operations have allegedly been accompanied with immediate diversions of migrants to the third country of embarkation, without screening for refugees and without allowing persons access to a status determination procedure.⁷³

Although Frontex plays a leading role in the preliminary phase of deciding upon and outlining the *modus operandi* of joint operations, it is not directly involved in the actual operations themselves. The decision to implement a joint operation and the contents of the operational plan require the consent of both Frontex and the Member State hosting the operation.⁷⁴ The RABIT regulation has introduced a specific procedure for deciding upon the deployment of Rapid Border Intervention Teams in the case of emergency situations.⁷⁵ This procedure similarly foresees in the close collaboration and mutual consent of Frontex and the host Member State in deciding upon the launch of the operation and the drawing up of the operational plan.⁷⁶ Once a decision upon the undertaking of a joint operation has been taken however, the Member States remain in command and control over the activity undertaken by the border guards. Although the original Frontex Regulation left the competences and legal status of officers of Member States participating in a joint operation undefined, the RABIT Regulation, by amending the Frontex Regulation, has now exhaustively regulated the tasks, powers and liability of border guards of one Member State who are posted in another Member State (guest officers).⁷⁷ In essence, the adopted legal framework equates guest officers with the border guards of the Member State hosting the operation:

⁷⁰ Article 14.

⁷¹ Article 3.

⁷² For an overview of Frontex activities, see Report on the evaluation and future development of the Frontex Agency, COM(2008) 67 final; also see SEC(2008) 150/2.

⁷³ Chapter 6.2.

⁷⁴ Article 3 and 20 (3) Regulation (EC) No. 2007/2004. The current Frontex Regulation does not lay down a procedure for decisions to launch joint operations nor does it explicitly refer to the drawing up of an operational plan. These matters are currently regulated in Frontex' Internal Rules of Procedure, see extensively: Rijpma (2009), p. 270-273. The proposal for amending the Frontex Regulation contains a new provision on the drawing up of operational plans, which must be agreed upon by Frontex and the host state, COM(2010) 61 final, Article 3a. See also chapter 6.5.

⁷⁵ See the new Article 8d Regulation 2007/2004 as amended by Regulation (EC) No. 863/2007.

⁷⁶ Articles 8d (3)(5)(6) and 8(e).

⁷⁷ Article 10.

they are incorporated into the command structure of the host Member State, they must comply with the laws of the host Member State and they must be treated as officials of the host Member State for purposes of civil and criminal liability.⁷⁸ This rather far-reaching model of putting Member State officials at the disposal of another Member State means that the host Member State has decisive influence over the manner of operation of guest officers. The Frontex Regulation endows the host Member State with the power of instruction over guest officers and stipulates that decisions to refuse entry shall be taken only by the host Member State.⁷⁹ What this means in terms of attributing conduct to one or the other Member State is addressed in the next chapter.⁸⁰

The core of the Frontex mandate is rather broadly described as rendering 'more effective the application of existing and future Community measures relating to the management of external borders'.⁸¹ The original Regulation did not refer to specific EU instruments on migration and border control and only in general terms affirmed that the Regulation respects fundamental rights.⁸² The lack of a specific reference to international refugee obligations in the mandate of Frontex contributed to a perception that Frontex is pre-occupied with security concerns and the prevention of illegal migration, without meaningfully addressing the needs and rights of persons seeking international protection.⁸³ A variety of stakeholders, including the EU institutions themselves, have called for a clarification of the Frontex mandate in this respect, with a view to ensuring that joint border operations are 'protection-sensitive'.⁸⁴ In the Stockholm Programme, the European Council specifically requested the Commission to make further amendments to the Frontex legis-

78 Articles 10(2)(3), 10b and 10c. Also see Rijpma (2009), p. 283.

79 Article 10(3)(10).

80 See chapter 6.5.

81 Article 1(2).

82 Recital 22. The RABIT Regulation, adopted after the entry into force of the Schengen Borders Code, incorporated a reference to the Schengen Borders Code in Article 10 of the Frontex regulation. Article 2 of the RABIT Regulation also refers to rights of refugees, in particular the prohibition of refoulement. Also see recital 17 Regulation 863/2007.

83 S. Carrera, 'The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document No. 261, March 2007; Rijpma (2009), p. 348.

84 Green Paper on the future Common European Asylum System, COM(2007) 301 final, para. 5.3; UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, p. 48; European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR), P6_TA(2008)0633, para. 18; COM(2008) 67 final, para. 15; Also see COWI, 'Frontex, External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (Final Report), January 2009, p. 19; House of Lords European Union Select Committee, Ninth Report, 'FRONTEX: the EU external borders agency', 5 March 2008, paras. 140-145.

lative framework, including 'common operational procedures containing clear rules of engagement for joint operations at sea with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law' and a mechanism for reporting and following up on incidents occurring in these operations.⁸⁵

Early 2010, the European Commission tabled a general recast for the Frontex Regulation which establishes a permanent pool of available border guards for joint operations ('Frontex Joint Support Teams') and includes several provisions specifically addressing joint operations at sea and the plight of persons seeking asylum.⁸⁶ The proposal includes an explicit reference to obligations related to access to international protection, an express legal basis for initiating joint operations outside the territory of the Member States, a requirement that all border guards participating in operational activities coordinated by the Agency have received training in refugee law and an obligation of reporting incidents of alleged breaches of relevant EU law and fundamental rights.⁸⁷ Further, the proposal foresees in non-binding supervision of Frontex on the manner in which host Member States are carrying out operations, by obliging the host Member State to take the views of the Frontex coordinating officer 'into consideration'.⁸⁸

Specifically responding to the call in the Stockholm programme to establish common procedures for joint operations at sea, the Council further adopted a Council Decision (2010/252/EU) in April 2010 which embeds sea border operations coordinated by Frontex in the framework of the Schengen Borders Code.⁸⁹ A remarkable novelty of the Decision, which establishes binding rules for interception at sea and non-binding rules for rescue operations in the course of Frontex missions, is that it introduces, as a general principle, that '[n]o person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle'.⁹⁰ Arguably, this can be taken as a codification, for the first

⁸⁵ Stockholm programme, para 5.1.

⁸⁶ COM(2010) 61 final.

⁸⁷ Articles 1(2), 1a(2), 2(1a), 3a(h)(i), 3b(4), 8e(h)(i) and recitals 10, 17 and 23.

⁸⁸ Article 3c(2).

⁸⁹ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The decision was based on a Commission proposal issued on 27 November 2009, COM(2009)658 final.

⁹⁰ Council Decision 2010/252/EU, Annex, Part I, para. 1.2.

time in EU law, that the prohibition of *refoulement* also applies to extraterritorial conduct of Member States.⁹¹

Although firmly embedding international refugee obligations within the Frontex mandate, the proposal for recasting the Frontex Regulation and Council Decision 2010/252/EU do not as such resolve the fundamental issue of how, precisely, the material and procedural requirements stemming from the prohibition of *refoulement* should be made operational in conducting maritime interdictions. The instruments do not set forth in what manner screening for refugees should occur, whether intercepted persons have the right to lodge an asylum application when intercepted, whether third country compliance with refugee and human rights should be a precondition for engaging in cooperation with these countries, and where, ultimately, persons claiming international protection should be disembarked.⁹² These are all modalities which must presumably be spelled out in the individual operational plan of each joint operation.⁹³ Given the importance accorded to refugee concerns in the proposed amendments to the Frontex mandate however, it would seem that Frontex would at the least become bound to take such issues into meaningful account when drafting and deciding upon the operational plan.

The European Parliament has decided to bring an action for annulment of Council Decision 2010/252/EU to the ECJ on account of the Council having exceeded its implementing powers as prescribed under the Schengen Borders Code.⁹⁴ The relation of Council Decision 2010/252/EU with the Schengen Borders Code is more extensively discussed in section 5.3.2.1 below. In chapter 6, the relationship between Council Decision 2010/252/EU and obligations deriving from international maritime law and the pertinent rights of persons seeking asylum is more extensively addressed.

91 The original Commission proposal had expressly considered that the prohibition on *refoulement* 'would apply regardless of the status of the waters the people were in', COM(2009)658 final, para. 2. Also see Annex, para. 4.2. of the original proposal, referring to the material obligation not to expose persons to a risk of harm, rather than adherence to the 'principle of *non-refoulement*'.

92 The only elaboration of the prohibition of *refoulement* is rather ambiguously formulated obligation to inform intercepted or rescued persons 'in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement', Annex, Part I, para. 1.2.

93 Also see Annex, Part II, para. 1.2.

94 Case C-355/10, *European Parliament v Council of the European Union*, action brought on 14 July 2010.

5.2.3 The EU's external asylum policy

The evolving EU's external asylum policy⁹⁵ is of an altogether different legal nature than the instruments making up the EU system of integrated border management. The policies which have in recent years been developed, primarily in the context of the Hague Programme, and which specifically address the plight of refugees in third countries, have almost exclusively taken the form of programmes of financial and technical aid and do not directly touch upon the legal status of individuals. Despite intense discussions both in- and outside EU institutions on the merits and feasibility of establishing a EU programme for the processing of asylum claims in third countries,⁹⁶ the most recent EU policy documents refrain from proposing such a far-reaching scheme and focus instead on the implementation of a strategy – much in line with UNHCR's Convention Plus initiative⁹⁷ – which should build capacity in third countries to provide effective protection and contribute to solving protracted refugee situations.⁹⁸

Formally, the external asylum dimension is built on two pillars: the managed entry of refugees into the European Union and protection of refugees in the regions of origin.⁹⁹ These two pillars support the general strategy of 'consolidating protection capacities in the region of origin and the treatment of protection requests as close as possible to needs and the regulation of safe

95 The Stockholm Programme refers to this policy as 'The external dimension of asylum', para. 6.2.3.

96 See, extensively eg M. Garlick, 'The EU Discussions on Extraterritorial processing: Solution or Conundrum?', 18 *IJRL* (2006), p. 601-629. G. Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 *EJML* (2003), p. 303-341.

97 The Convention Plus initiative, officially launched by UNHCR in June 2003, sought to develop a normative framework supplementing the Refugee Convention for global burden-sharing that would increase the involvement of Western states in guaranteeing adequate protection for refugees in their regions of origin. The Convention Plus initiative was incorporated in UNHCR's Agenda for Protection, first endorsed in 2002. Statement by Ruud Lubbers, United Nations High Commissioner for Refugees, First Meeting of the High Commissioner's Forum, 27 June 2003; UN High Commissioner for Refugees, *Agenda for Protection*, October 2003, Third edition, available at: <http://www.unhcr.org/refworld/docid/4714a1bf2.html> [accessed 19 March 2010]. For a comprehensive appraisal of the Convention Plus Initiative see: M. Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 21 *IJRL* (2009), p. 387-420.

98 The Stockholm Programme still foresees in the conducting of a 'study on the feasibility and legal and practical implications to establish joint processing of asylum applications', but without referring to processing outside the territory of the Member States; Stockholm Programme, para. 6.2.1. Also see COM (2009) 262 final, para. 5.2.2.

99 The European Commission mentions Regional Protection Programmes as a distinct third part of the external asylum dimension, but these programmes may well be perceived as a more targeted manner of enhancing protection and managing entry: COM(2004)410 final, paras. 4-5; 36-54. Also see Presidency Conclusions 19/20 June 2003 (Thessaloniki), para. 26.

access to the European Union for some of those in need of international protection'.¹⁰⁰

Financing is the principal means through which the EU implements the notion of enhanced protection in regions of origin. Under the AENEAS budget line and the successor 'Thematic programme for the cooperation with third countries in the areas of migration and asylum', funds are allocated to projects in third countries contributing to *inter alia* the strengthening of institutional capacities to provide protection, the promotion of norm-setting on asylum, the support of registration of asylum applicants and refugees and the support for improving reception conditions and prospects for local integration.¹⁰¹ These funds form part of the broader financing scheme embracing all 'essential facets of the migratory phenomenon', which also covers projects aimed at discouraging illegal immigration and improving border management capacities in third countries.¹⁰² Given the wide material and geographical scope of the financial programme on asylum and migration, the resources available may be perceived as rather modest: the EU budget for actions in third countries in these fields has risen from an annual amount of € 10 million in 2001 to just over € 50 million in 2010.¹⁰³

The funding made available under this thematic budget line must also provide the means for developing EU Regional Protection Programmes. These programmes are presented as a vehicle for intensified commitment of the EU to specific regions hosting many refugees, in order to contribute to the three 'Durable Solutions' of repatriation, local integration or resettlement and are to be developed in close cooperation with UNHCR.¹⁰⁴ A first pilot project, funded by the EU and implemented by UNHCR, for the three countries of Belarus, Moldova and Ukraine, was officially launched in April 2009.¹⁰⁵

The second limb of the EU's external asylum policy, that of facilitating organized arrivals of refugees in the EU, is considerably less developed, or, indeed, not developed at all. The main instrument having a reasonable chance of adoption in this area is a Joint EU Resettlement Programme, proposed by

100 COM(2004)410 final, para. 2.

101 European Commission, 'AENEAS Programme. Financial and technical assistance to third countries in the field of migration and asylum, 19 February 2003'; COM(2006) 26 final, para.3.2; Article 16(2)(e) Regulation (EC) No. 1905/2006; European Commission, 'Strategy Paper for the Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum 2007-2010' (undated).

102 Article 16(2)(c) Regulation (EC) No. 1905/2006.

103 Strategy Paper, note above, p. 5, 12. Note that other EU budget lines may also cover financial aid in migration matters, notably in the context of pre-accession countries and the European Neighbourhood Policy.

104 Ibid, p. 29; and in general see European Commission Communication, 'On Regional Protection Programmes', COM(2005) 388 final.

105 Press Release UNHCR 23 April 2009, 'Regional project to support integration of refugees in Belarus, Moldova and Ukraine launched in Kyiv'; Press release Söderköping Process Secretariat, 14 April 2009, 'UNHCR Regional Protection Support Project launched in Kiev'.

the Commission in September 2009.¹⁰⁶ The proposal foresees in the setting by the Commission of common annual priorities on resettlement, in which Member States would participate on a voluntary basis. To this end, it is proposed to include in the Decision establishing the European Refugee Fund a provision stipulating that Member States will receive a fixed amount of 4.000 Euros for each resettled refugee.¹⁰⁷ The decision was not adopted as of August 2010.¹⁰⁸

Despite the modesty of the proposals, the establishment of an EU resettlement scheme would in itself signify an important departure from the traditional reluctance of European countries to contribute to worldwide resettlement efforts.¹⁰⁹ Nonetheless, it is difficult to see how a EU resettlement scheme, even if it receives widespread Member State participation, could meaningfully address the ambition formulated by both the European Council and European Commission to create effective mechanisms of orderly entry into the EU for refugees, mitigating the need to resort to illegal migration channels and the services of migrant smugglers.¹¹⁰ By their nature, resettlement policies are subject to numeral ceilings, regional allocations and the selection of specific categories of refugees – and do not grant individual entitlements of entry.¹¹¹ Hence, they cannot reasonably be expected to alleviate the phenomenon of refugees arriving spontaneously and by disorderly means. Although the European Union has discussed the establishment of alternative pre-entry procedures allowing refugees to lodge formal applications in third countries for entry into EU territory as employed in various forms by individual Member

106 European Commission Communication, 'On the Establishment of a Joint EU Resettlement Programme', COM(2009) 447 final. Also see Stockholm Programme, para. 6.2.3.

107 Proposal for a Decision amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, COM(2009) 447 final. The decision was not adopted as of August 2010.

108 In a resolution on the joint EU resettlement programme, the European Parliament considered that a budget line and financial support are not sufficient to establish a real EU-wide resettlement programme and recommended the setting up of a permanent Resettlement Unit as part of the European Asylum Support Office: European Parliament Resolution T7-0163/2010 of 18 May 2010. The EP also proposed to amend the Refugee Fund so as to increase the funding received per resettled person for Member States participating for the first and second years to 6.000 and 5.000 Euros respectively. European Parliament Resolution P7_TA(2010)0160 of 18 May 2010.

109 Currently, nine states host the bulk of the refugees who are annually resettled, of which four are EU Member States: United States, Canada, Australia, Sweden, Norway, Finland, New Zealand, Denmark, The Netherlands. For figures, see UNHCR, Resettlement Handbook (country chapters updated September 2009), 1 November 2004. Also see S. Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum-seekers: The 'Safe Third Country' Concept', in: J. McAdam (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008), p. 136.

110 COM(2004) 410 final, paras. 12-21.

111 These selection criteria are also foreseen in the Commission's proposal, COM(2009) 447 final, para. 3.2.1.

States (Protected Entry Procedures or PEPs) – under which refugees can apply, for example, for special protection visa at diplomatic missions – the European Commission ultimately decided to refrain from pursuing further the setting up a EU Protected Entry Procedure mechanism, because of a lack of Member State commitment.¹¹²

In summary, the EU's external asylum policy is as of yet scarcely developed and of ambivalent character. On the one hand, it is beyond question that the aid and assistance provided by the EU to building capacity for receiving and protecting refugees in third countries may come to the benefit of many persons who are genuinely in need of protection.¹¹³ On the other hand, the evolving EU's external asylum policy embodies more than a mere gesture of international solidarity, but is also premised on a theory of 'containment', i.e. the idea that enhanced protection in regions of transit and origin reduces incentives for people to try to receive protection elsewhere.¹¹⁴ This containment idea is in fact accorded key priority in the financial programme on asylum and migration support in third countries. Out of a total of € 205 million made available for the years 2007-2010, € 120 million is apportioned to projects along the 'Southern' and 'Eastern Migratory Routes', while only € 4 million is earmarked for asylum and refugee protection globally.¹¹⁵ It is also noteworthy that the first pilot Regional Protection Programme – originally presented as aimed at providing durable solutions for refugees close to regions of origin – is implemented in the EU's Eastern neighboring (transit) region, and that this programme, apart from contributing to the protection of refugees, includes a strong focus on border management.¹¹⁶

5.3 THE TERRITORIAL SCOPE OF EU LAW ON BORDER CONTROL AND ASYLUM

In the previous section I have noted that the specific instruments on external migration management do not succeed in satisfactorily regulating the legal status of refugees subjected to coercive action of Member States, and that they neither make, in the alternative, any meaningful linkage with the pertinent

112 COM(2004) 410 final, paras. 20, 35. An extensive study on Member State practices and the feasibility of establishing EU protected entry procedures was conducted on behalf of the European Commission in 2002: G. Noll, J. Fagerlund and F. Liebaut, Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure (final report), European Commission/The Danish Centre for Human Rights, 2002.

113 Garlick (2006), p. 629.

114 Ibid, p. 612. Also see K. de Vries, 'An Assessment of 'Protection in Regions of Origin' in relation to European Asylum Law', 9 *EJML* (2007), p. 84.

115 Strategy Paper, n. 101 *supra*, p. 33.

116 *Supra* n. 105.

internal rules of the European Union on border control and asylum. The present section explores the latter relationship from the perspective of the internal rules. Is it possible that when, for example, a Member State makes use of immigration officers in controlling the borders of a foreign country or when it patrols the territorial sea of a third country, the migrants subjected to such activities can invoke the Union's ordinary regime on border controls and asylum?

It has been suggested that the internal rules on border control and asylum are not designed to address extraterritorial activity of Member States and that therefore, EU law does not comprehensively regulate the manner in which Member States may subject asylum-seekers to coercive measures outside their territories.¹¹⁷ The current section challenges this assumption – in part. It first shows that EU law may, in general, well regulate relationships or activities which can be situated outside the territory of the European Union. The section then specifically explores the territorial scope of the Schengen border crossings regime and the Common European Asylum System. Although the instruments making up the Common European Asylum System are equipped with specific terminology limiting their territorial scope, the Schengen Borders Code is remarkably responsive to different types of pre-border control measures and may as such constrain the freedom of European Member States in subjecting migrants to controls away from their borders. However, in attempts to embed Frontex sea operations within the Schengen border crossings regime, the Council and the European Commission have tried to do so in questionable disregard of the specific procedural guarantees ordained under that regime.

5.3.1 Some observations on the territorial scope of European Union law

The European Union's legal relationship with the wider world can be approached from a multitude of angles. Most typically legal discourse focuses on defining the EU's external competences with reference to the Union's treaty making powers and its competence to participate in international organisations, touching upon the dual questions of the sources of these competences and the division of power between the Union and the Member States. Although

¹¹⁷ See, with respect to the Schengen Border Crossings regime House of Lords Report (2008), para. 143; and Rijpma (2009), p. 337. With respect to the Common European Asylum System, H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 209-211. Also see R. Weinzierl, 'Human Rights at the EU's common external maritime border, Recommendations to the EU legislature', German Institute for Human Rights: Policy Paper No. 11, September 2008, p. 4.

indirectly of relevance to this study, this topic has received ample attention in literature and case law of the ECJ and is not further dealt with here.¹¹⁸

A question of a different nature concerns the EU's external prescriptive, or legislative, competence. This issue is also commonly commented upon, but mainly in the context of prescriptive jurisdiction in the field of EU competition law. Here, the most paramount question has been to what extent the EU's competition rules apply to undertakings which have no physical presence in the Union but whose conduct negatively affects the functioning of the internal market. In *Wood Pulp*, the ECJ took position in a theoretical debate which had been ongoing for some years on the question whether the European Community is entitled, along the model previously endorsed by the United States Supreme Court, to assert jurisdiction over companies established outside the Community on the basis that those companies, by engaging in conduct producing substantial effects within the internal market, act contrary to EU antitrust law.¹¹⁹ The ECJ, avoiding the effects doctrine as an explicit basis for the establishment of jurisdiction, concentrated instead on the factor that it suffices that an agreement is 'implemented' within the Community's internal market and found this basis for asserting jurisdiction over third country companies to accord with 'the territoriality principle as universally recognized in public international law'.¹²⁰ The judgment was received by some authors as a clear rejection of the effects doctrine as adhered to by the United States,¹²¹ while others observed that the ECJ had upheld an effects doctrine in disguise.¹²² What is, in the context of the present study, most noteworthy about the *Wood Pulp* case, is that in defining the territorial scope of Community law, an assessment was made, firstly, of the wording of a particular Treaty provision and whether particular conduct can be brought within the ambit of that provision. And secondly, if such assessment may have extraterritorial

118 See the contributions in two fairly recently published textbooks, A. Dashwood and M. Maresceau (eds), *Law And Practice Of EU External Relations; Salient Features Of A Changing Landscape*, Cambridge: Cambridge University Press (2008); M. Cremona (ed), *Developments in EU External Relations Law*, Oxford: Oxford University Press (2008). And specifically in the context of competences for the management of the EU's external borders: Rijpma (2009), p. 313-318.

119 For an overview of the US 'effects doctrine', eg A. Robertson and M. Demetriou, "'But that was in Another Country ...': The Extraterritorial Application of US Antitrust Laws in the US Supreme Court", 43 *ICLQ* (1994), p. 417-425.

120 ECJ 27 September 1988, *A. Ahlström Osakeyhtiö a.o. v Commission (Wood Pulp I)*, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, paras. 16-18.

121 V. Lowe, 'International Law and the Effects Doctrine in the European Court of Justice', 48 *The Cambridge Law Journal* (1989), p. 9-11.

122 J.J. Friedberg, 'Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine', 52 *University of Pittsburgh law review* (1990), p. 291. See also the discussions following the more recent judgment in *Gencor* rendered by the Court of First Instance: Court of First Instance 25 March 1999, *Gencor v Commission*, Case T-102/96, M.P. Broberg, 'The European Commission's Extraterritorial Powers in Merger Control, The Court of First Instance's Judgment in *Gencor v. Commission*', 49 *ICLQ* (2000), p. 172-182.

implications, decisive weight in defining the territorial scope of the Treaty is accorded to the limits set by public international law and in particular the principle of non-intervention.¹²³

Wood Pulp evolved around the question to what extent international law permits the European Community to establish jurisdiction over foreign undertakings. The issue of accommodating the Union's competences with the sovereign interests of third countries is not normally apparent in situations where it are the Member States themselves who engage in extraterritorial activities. It is precisely this relationship – to what extent does EU Law regulate the extraterritorial conduct of Member States – in which this study is particularly interested. Unfortunately, this question has received surprisingly little scholarly attention and it is perhaps for this reason that in recent discussions on the extraterritorial applicability of EU legislation on border control and immigration, the knee-jerk proposition has been advanced that EU law cannot govern the extraterritorial activity of the Member States. But this proposition is, as may also be implicitly inferred from *Wood Pulp* and as is more explicitly explained below, misfounded, at least in so far as it intends to suggest that EU rules can only have effect within the common territories of the Member States. Hereunder, a review is made of several cases dealing with the specific issue of the application of EU law to Member State activity outside the common territories of the EU.

In the *Sea fisheries*-case, the question was to what maritime zones the Regulation laying down a common structural policy for the fishing industry applied.¹²⁴ The ECJ held that secondary legislation adopted on the basis of the Treaty in principle applies to the same geographical area as the treaty itself and that the delimitation of this geographical area depends on the legal context, the subject matter and the purpose for which the regulation was adopted.¹²⁵ Because the Regulation specified that its scope was confined to the 'maritime waters coming under [the Member State's] sovereignty or within its jurisdiction' as 'described by the laws in force in each Member State',¹²⁶ the ECJ found the geographical scope of the Regulation to necessarily correspond with the extent to which a Member State exercised its sovereignty in maritime waters and that any extension of national competences in this respect automatically means 'precisely the same extension of the area to which the Regulation applies.' It observed that this interpretation was the only one which accorded with the subject matter and the purpose of the Regulation, which

123 This dual assessment implicitly follows from the Court's judgment in paras. 11-13 and 15-18 and was explicitly followed in the Conclusion of the Advocate-General: Opinion of AG Darmon 25 May 1988, *A. Ahlström Osakeyhtiö a.o. v Commission (Wood Pulp I)*, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, paras. 8-10; 19 et seq.

124 ECJ 16 February 1978, *Commission v Ireland (Sea fisheries)*, Case 71/77.

125 Ibid, paras. 45-46.

126 Council Regulation (EEC) No. 101/76, Article 2 (1)(3).

was to establish a 'common system for fishing' throughout the whole of the maritime waters belonging to the Member States.¹²⁷ This meant that the Regulation and the prohibition of discrimination on grounds of nationality laid down in the EEC Treaty applied to the newly adopted Irish fishery policies within the Irish Exclusive Economic Zone (EEZ).

A similar approach had been followed in *Case 167/73*, on the question of applicability of the EEC Treaty to sea and air transport, including transport outside the territories of the Member States.¹²⁸ The case concerned the conformity of restrictions set by French legislation on the number of foreign workers on French commercial and fishing vessels with the primordial treaty provisions on the free movement of workers. Even though the Community had not (yet) made use of its explicit power conferred by former Article 84 (2) EEC Treaty to regulate the air and sea transport, the Court found the ordinary treaty regime on free movement to apply to the French *Code du Travail Maritime*, precluding the French legislator to give preferential treatment to French nationals vis-à-vis nationals of other Member States in respect of work on French vessels.

The Court has not departed from this line of reasoning in various later cases concerning employment relations carried out outside the territory of the EU between a national of one Member State and an undertaking of another Member State. In respect of such employment, the ECJ has consistently held that EU law on free movement of workers applies to 'all legal relationships in so far as those relationships, by reason of either the place where they were entered into or the place where they took effect, could be located within the territory of the Community.'¹²⁹ This implies, according to the ECJ, that 'activities temporarily carried on outside the territory of the Community are not sufficient to exclude the application of [Community law], as long as the employment relationship retains a sufficiently close link with that territory'.¹³⁰ In the case of *SARL Prodest*, the Court considered that a link of that kind can be found in the fact that the Community worker was engaged by an undertaking established in another Member State and, for that reason, was insured under the social security scheme of that State and in the fact that he continued to work on behalf of the Community undertaking even during his posting to a non-Member Country.¹³¹ In *Mário Lopes da Veiga*, concerning the question

127 *Sea fisheries*, paras. 48-50.

128 ECJ 4 April 1974, *Commission v French Republic*, Case 167-73.

129 ECJ 12 July 1987, *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, Case 237/83, para. 6 ; ECJ 27 September 1989, *Mário Lopes da Veiga v Staatssecretaris van Justitie*, Case 9/88, paras. 15-16; ECJ 29 June 1994, *R.L. Aldewereld v Staatssecretaris van Financiën*, Case C-60/93, para. 14.

130 *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, para. 6 ; *Mário Lopes da Veiga v Staatssecretaris van Justitie*, paras. 15-16; *R.L. Aldewereld v Staatssecretaris van Financiën*, para. 14.

131 *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, para. 7.

of applicability of free movement law to a Portuguese national working as a seaman for a Dutch shipping company, the Court found the relevant criteria for the establishment of a 'sufficiently close connection' to be that the person in question worked on board a vessel registered in the Netherlands, that he was employed by a Dutch undertaking, that the employment relationship was subject to Dutch law and that he paid his taxes in the Netherlands.¹³² This case is particularly noteworthy in the context of the present study, because it signified that whereas the Dutch Aliens Act did not impose requirements in respect of the holding of a residence permit on board a Dutch vessel sailing on the high seas, this did not preclude Community law from governing the matter of the person's residence rights in the Netherlands.

In *Boukhalfa*,¹³³ the ECJ confirmed the case law above and explicitly considered that the general rule that the EC Treaty applies to the territories of the Member States as currently laid down in Article 52 TEU¹³⁴ 'does not preclude Community rules from having effects outside the territory of the Community'.¹³⁵ It reiterated the 'sufficiently close link'-criterion in establishing whether employment relations are covered by Community law and specified that this link sees primarily to the connection between the employment relationship, on the one hand, and the law of a Member State *and thus the relevant rules of Community law*, on the other.¹³⁶ Decisive in the specific case was that the employment contract of a Belgian national who worked for the German embassy in Algiers was entered into in accordance with German law – even though this law stipulated that conditions of employment were to be determined in accordance with Algerian law – that employment disputes had to be brought to courts in Bonn and that the employee was at least partially covered by the German State social security system.¹³⁷

It is difficult to infer from this rather small collection of cases, mostly dealing with free movement of EU citizens, a general set of legal criteria for deciding upon the extraterritorial applicability of European Union law. But it is possible to conclude, firstly, that EU law may well have implications for activities engaged in outside the common territories of the Member States. Secondly, it seems that the question of extraterritorial scope of EU law is inspired by two issues in particular. The first is the object and purpose of EU law, which ordains that the goal of establishing a harmonized system of EU rules may be jeopardized if extraterritorial Member State activity is automatically excluded from the ambit of EU law. Secondly, it transpires that the territorial scope of EU law derives primarily from the territorial scope of the

132 *Mário Lopes da Veiga v Staatssecretaris van Justitie*, para. 17.

133 ECJ 30 April 1996, *Ingrid Boukhalfa v Bundesrepublik Deutschland*, Case C-214/94.

134 Former Article 299 TEC.

135 *Ingrid Boukhalfa v Bundesrepublik Deutschland*, para. 14.

136 *Ibid*, para. 15.

137 *Ibid*, para. 16.

domestic laws of the Member States. If persons or activities outside the territory of the Union are nonetheless covered by the domestic laws of a Member State (and can hence 'be located within the territory of the Community (or the EU)'), *and* if the domestic law with regard to that person or activity normally falls within the ambit of EU law, the ECJ has been willing to accept that EU law also extends to that person or activity.

5.3.2 The territorial scope of the Schengen border control regime¹³⁸

If one looks at the EU's border control regime through a territorial lens, problems of legal conceptualisation become readily apparent. On the one hand, EU law on the crossing of external borders signifies the geographical threshold where persons become obliged to comply with the Union's rules on entry conditions and, in general, rights of residence and free movement. On the other hand, it is precisely with a view to maximizing the effective implementation of those rules that the EU has shaped its external migration and asylum policy, which is premised on the very idea that one should control the border well before persons have arrived at it. This conceptual tension may lead to all sorts of legal problems, relating both to the definition of the powers of the European Union and the Member States to subject persons not yet having arrived at the border to coercive measures and, on the other hand, to the identification of rights of persons under EU law who are subjected to such measures. It has been questioned for example, whether EU law provides a basis for engaging in pre-border controls at all.¹³⁹ It has also been suggested that persons who are subjected to such measures cannot rely on safeguards deriving from EU law, because those safeguards are triggered only upon the moment one makes contact with Europe's external borders as understood in its geographical meaning.¹⁴⁰

The Schengen Borders Code is highly relevant for asylum-seekers seeking entry into the European Union for two reasons. Firstly, it lays down generally applicable norms on procedures and good administration to be respected in conducting border controls. These include the procedure to be followed in conducting entry checks, the material entry conditions, the obligation that entry may only be refused by means of a substantiated decision and the right of

138 In addressing the EU legal regime regulating external border controls, a distinction must be made between the Schengen external borders, where border procedures are governed by the Schengen Borders Code, and the external borders of non-Schengen Member States, where national laws determine the procedures to be followed, although within the limits set by EU rules on free movement of persons. On this difference and legal implications extensively, Rijpma (2009), chapters IV, V and VI. The present section exclusively focuses on the Community border regime applicable to the external Schengen border.

139 House of Lords (2008), para. 142-145.

140 Ibid. Also see Rijpma (2009), p. 337.

persons to appeal against refusals of entry.¹⁴¹ Secondly, the Code accounts for the special position of asylum-seekers who are subjected to border controls. Article 3(b) affirms that the Code does not prejudice the rights of refugees and persons requesting international protection, in particular as regards *refoulement*. This general norm also finds expression in Article 5 (4)(c), allowing Member States to derogate from the entry conditions on humanitarian grounds or because of international obligations. And in Article 13(1), it is provided that entry may not be refused if this comes in conflict with special provisions concerning the right of asylum and to international protection. The practical implication of these provisions must be that in case of asylum-seekers who do not meet the cumulative list of conditions for entry as provided by the Borders Code, border guards may nevertheless not refuse entry and that, at least if an asylum application can be considered to have been made 'at the border or in the transit zones of the Member States', the special procedural safeguards laid down in the Asylum procedures Directive become applicable.¹⁴²

The definition of the external border is set forth in Article 2(2) Schengen Borders Code: "the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders". This definition does not precisely map where the external borders lie, but implicates that the EU external border is congruent with that of the Member States. Amongst other things, this implies that EU law does not interfere with various territorial disputes, such as over Gibraltar or the boundary disputes which have arisen as a consequence of the dissolution of Yugoslavia and the Soviet Union.¹⁴³

Even though EU law does not precisely map the location of the external borders, it transpires from the various definitions laid down in the Borders Code that the border control regime is closely intertwined with the physical location of the external border. Border checks are defined as "checks carried out at border crossing points" and border guards are defined as public officials who are assigned "to a border crossing point or along the border, or in the immediate vicinity of that border".¹⁴⁴ Article 3 of the Code, further, limits its scope to persons 'crossing the internal or external borders of Member States'. Even though these provisions are equipped with some geographical flexibility ('along', 'at', 'immediate vicinity') the most immediate impression of these provisions surely is that the Schengen Borders Code focuses on the physical external border as the very object of its scope.

141 Articles 6-13 Schengen Borders Code.

142 Asylum Procedures Directive, Art. 3 (1). But see S. Peers, 'Revising EU Border Control Rules: A Missed Opportunity?', *Statewatch analysis*, 6 June 2005, who expresses reservations as to whether the Borders Code must be interpreted as meaning that asylum-seekers may not be refused entry and considers it preferable to set out this obligation more clearly.

143 See, extensively, Rijpma (2009), p. 76-84.

144 Articles 2 (10) and 2 (13) Schengen Borders Code.

The precise geographical delimitation of the external borders (e.g. does it also include the contiguous maritime zone or the disputed maritime border between Slovakia and Croatia?) may be considered as not terribly important, as the control regime in respect of the external border is operationalised through the obligation incumbent on any person crossing the external borders to do so only at notified border crossing points and during the fixed opening hours.¹⁴⁵ These border crossing points are designated by the Member States, notified to the European Commission and generally labelled merely by the name of the town located at an external land border, the name of the international airport or the name of the port-city. These border crossing points, as is also apparent from the compiled list of border crossing points published by the European Commission, need not necessarily be located 'at' the physical border but may, on the one hand, be located well within the territory of the Schengen area – as is the case with international airports – or on the other hand, well outside the territory of the Schengen area, as is the case with Ashford International railway station in Kent, England and the London Waterloo station, both listed as authorised French border crossing points in the meaning of Article 2(8) of the Schengen Borders Code.¹⁴⁶ Hence, persons may for legal purposes be considered to have crossed the external Schengen border even though they remain physically outside the Schengen area and vice versa. This fiction of law is often used in national immigration legislation.¹⁴⁷

For enforcement purposes, the Schengen Borders Code foresees in two sorts of policing instruments, both designated as 'border controls'. Border controls, in the meaning of the Code, can consist either of border checks or border surveillance.¹⁴⁸ 'Border checks' are the checks carried out at border crossing points, which, with respect to third-country nationals, comprise verification of whether the person complies with the entry conditions as laid down in the Code.¹⁴⁹ Persons who do not fulfill the entry conditions and do not belong to one of the exempted categories (including persons applying for asylum), must then be refused entry.¹⁵⁰ 'Border surveillance' means the surveillance of borders between border crossing points of which the main purpose is to prevent unauthorized border crossings, to counter criminal activity and to

145 Article 4(1). Exceptions are provided in Article 4(2).

146 Update of the list of border crossing points referred to in Article 2(8) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2007 C 316/01, 28 December 2007.

147 P. Boeles et. al., *European Migration Law*, Antwerp/Oxford/Portland: Intersentia (2009), p. 16-17. That this legal fiction does not preclude persons from being within the jurisdiction of a state for human rights purposes was confirmed in ECtHR 25 June 1996, *Amuur v France*, no. 19776/92, para. 52.

148 Article 2(9) Schengen Borders Code.

149 Articles 2(10), 5, 7(3).

150 Article 13 (1).

take measures against those who have gained illegal entry.¹⁵¹ Although the Borders Code does not define precisely what measures border guards surveilling the external border may take in respect of persons who have crossed or try to cross the border at a place other than the border crossing point, the non-binding Schengen Handbook mentions the checking of documents of such persons and to stop and to bring them to the nearest border guard's station.¹⁵² This procedure would then allow for refusing such persons entry in accordance with the provisions of the Code and the possible imposition of auxiliary penalties for having gained illegal entry in accordance with the domestic laws of the Member States.¹⁵³

The model described so far is fairly simple: the Schengen rules on the entry of persons wishing to cross the border are effectuated by means of border checks at one of the authorized border crossing points; and to prevent persons from crossing the border elsewhere, the areas in between those crossing points should be held under surveillance.¹⁵⁴ It is probably with a view to this simplified model that it has been questioned whether Frontex has a mandate to operate beyond the external borders of the EU, i.e. to coordinate operations where surveillance and checks are carried out far away from any designated border crossing point and which are accompanied with measures which in the terms of the Schengen Borders Code would amount to a 'refusal of entry'.¹⁵⁵ But if this mandate is indeed not provided by the Code, it must also be questioned – in view of the legal character of the Borders Code *and* because the Code expressly aims at the establishment of a 'common corpus' of legislation as regards border controls – on what basis the Member States themselves may take measures which would normally fall within the ambit of the Code but have the effect of modifying its scope.¹⁵⁶

151 Articles 2(11), 12.

152 Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final, 9 November 2006, Part 3, para. 2.3 (e).

153 In this vein also COM(2002) 233 final, para. 8: 'Surveillance is exercised in the spaces located between the permitted passage points in order to dissuade persons from crossing the external border illegally.'

154 One explicit exception to this model is that authorities may also conduct a 'second line check', which means a further check carried out in a special location away from the border crossing point, in case there is a need for making additional verifications, see Articles 2(12) and 7(5) SBC.

155 *Supra* n. 139-140.

156 According to recital 4, the Schengen Borders Code aims at 'the establishment of a 'common corpus' of legislation (...) on the management of the external borders'. As a general rule, the legal character of a Community regulation opposes its transformation into domestic law provisions and Member States may not adopt measures which have the effect of altering its scope or adding provisions to it, unless provided for in the regulation itself. See, in general, P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans and

The proposition that the Schengen Borders Code only regulates the regime on border crossings in the immediate vicinity of the external border (or only 'at' authorized border crossing points) is difficult to sustain however. It would not only create an anomaly as regards practices of border control carried out at other places, but, more pertinently, is difficult to reconcile with the terms of the Borders Code itself. Crucially, Article 18 of the Code allows for the adoption of specific rules on different types of border controls, in order to tailor checking procedures to the various types of traffic and modes of transport. These specific regimes are set forth in Annex VI of the Code and may derogate from the provisions on entry conditions, border checks and refusal of entry laid down in Articles 5 and 7 to 13.¹⁵⁷ What is most noteworthy about the specific regimes as currently laid down in this Annex is that some of them expressly allow for border checks in third countries, thus incorporating the Union's strategy of integrated border management.

With regard to train traffic this Annex spells out that, pursuant to agreements with third countries, border checks on persons may be carried out in the stations in a third country where persons board the train, during transit or in the station where the persons disembark.¹⁵⁸ And in respect of maritime traffic, the Annex expressly refers to checks carried out in a third country or during sea crossings:

'Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country.'¹⁵⁹

This paragraph constituted an overhaul of the existing provisions of maritime checking of the Schengen Common Manual on checks at the external borders,¹⁶⁰ and was drafted in the light of the previous recommendations of the Civipol Conseil study and the Programme of measures to combat illegal immigration across the maritime borders of the European Union,¹⁶¹ which

L.A. Geelhoed, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International (2008), p. 280-282.

157 Article 18.

158 Schengen Borders Code, Annex VI, paras. 1.2.1.-1.2.2.

159 Ibid, para. 3.1.1.

160 Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), OJ L 239, p. 317.

161 Civipol Conseil, 'Feasibility study on the control of the European Union's maritime borders' (final report), 4 July 2003, reproduced in Council doc. 11490/1/03 REV 1 LIMITE FRONT 102 COMIX 458; 'Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union', Council Doc. 15445/03.

called for the stepping up of border cooperation with third countries and the conducting of port-to-port checking of persons.¹⁶²

The paragraph on maritime checking adds that '[t]he purpose of [these] checks is to ensure that both crew and passengers fulfil the conditions laid down in Article 5'. This explicit reference to the entry conditions enumerated in Article 5 of the SBC would seem to imply that in respect of such checks, the ordinary entry conditions and therewith the substantive requirements concerning *inter alia* travel documents, visa, purposes of stay, means of subsistence and public order concerns apply. This may certainly be described as a prominent example of where EU law establishes prescriptive extraterritorial jurisdiction as regards substantive EU requirements on immigration and border control, but it does so only in so far as 'agreements reached on the matter' allow for this type of border checks.

Contrary to various other specific border procedures mentioned in Annex VI of the Code, the paragraph on checking procedures on maritime traffic does not mention any derogation to Articles 5 and 7 to 13 as allowed for under Article 18 of the Code being applicable. It logically follows that the procedural rules on the conducting of border checks, including safeguards on refusal of entry and the right of appeal, apply equally to the maritime border checks provided for by Annex VI of the Code, including those carried out during sea crossings or in the territory of a third country. Because the specific checking procedure on maritime traffic may not derogate from Article 4 which provides that external borders may only be crossed at border crossing points, this special regime thus allows for the physical relocation of border checks, but does not relieve persons subjected to such checks from the obligation to cross the external border at one of the authorized border crossing points. It is not specified whether this means that the person must again be checked upon arrival at the border crossing point.

Since one of the primary aims of the Borders Code is to provide a 'common corpus' of legislation applicable to external border controls and to ensure 'uniform application by border guards of the provisions of Community law on the crossing of external borders', it makes sense that the Code recognises and arranges for the undertaking of extraterritorial controls by virtue of the specific rules set out in Annex VI.¹⁶³ The extension of the Borders Code to areas away from the Union neither appears to be particularly problematic from the perspective of the sovereign rights of third countries. In those instances where instruments of the Union refer to border activity affecting the rights

162 COM(2004) 391 final, p. 25-26.

163 See in particular recital 4 Schengen Borders Code. Also see Article 3(1)(c) Council Decision No. 574/2007/EC.

of third countries, this activity is made conditional upon the prior approval of the third country concerned.¹⁶⁴

The logic which thus emerges is that, even though some definitional provisions of the Borders Code appear to locate the legal regime on Schengen border crossings 'at' the external border, the Code and related EU instruments are also equipped with flexibility in terms of the geographical areas where border controls may be conducted and that the Code does provide a legal basis for border checks away from the physical external border. As regards train and sea traffic, the Code already allows for subjecting persons to border checks at foreign ports or stations or during transit – but without derogating from the ordinary procedures under the Borders Code. Although Annex VI of the Code also contains an extensive paragraph on air traffic checking procedures, this paragraph does not refer to the checking of persons at airports in a third country.¹⁶⁵

This logic would also ordain that, if Member States would deem it necessary to establish further extraordinary procedures on the checking of persons in foreign territories which would derogate from the standards contained in Articles 5 and 7 to 13 Schengen Borders Code, appropriate rules must be incorporated in Annex VI Borders Code, requiring amendments in accordance with the co-decision procedure.¹⁶⁶ This would not only imply that border controls at sea involving the checking of identities and travel documents and possibly the issuing of refusals of entry, but also checking procedures at foreign airports, such as pre-clearances, require – in so far as they do not confirm with the ordinary procedures – prior incorporation in the Borders Code.

This is a conclusion with rather far-reaching implications, as it may render current practices of sea and air border control in foreign territories, which involve the taking of measures which can properly be defined as 'border checks' or 'refusals of entry' in the meaning of the Code but which derogate from the Code's procedural standards, void of legal basis – and therefore illegal.

5.3.2.1 Council Decision 2010/252/EU

But an altogether different outlook on the undertaking of extraterritorial controls under the Schengen Borders Code is followed in the Council Decision for maritime Frontex operations, referred to in section 5.2.2.4 above. The Decision constitutes an attempt not only at harmonizing interception practices

¹⁶⁴ See the references in Schengen Borders Code, Annex VI, para. 3.1.1.. Also see Article 14 Regulation (EC) No. 2007/2004

¹⁶⁵ Annex VI, para. 2.1.2.

¹⁶⁶ This also appears to be the view of European Parliament, see n. 176-177 *infra* and accompanying text.

in operations initiated by Frontex, but also at legally embedding those operations in the Schengen Borders Code. The Decision creates a legally binding set of norms for conducting border controls at sea and non-binding guidelines for search and rescue situations.¹⁶⁷

The (binding) 'Rules for sea border operations coordinated by the Agency' set out in Part I of the Annex introduce a truly extraordinary range of migration enforcement measures to be employed at sea. Rather than setting the modalities for carrying out border checks or issuing refusals of entry in maritime areas, the rules allow for no less than seven types of interception measures taken in respect of migrant vessels, including the requesting of information and documentation on the identity, nationality and other relevant data on persons on board; the stopping, boarding and searching of the ship and persons on board; the seizure of the ship and apprehension of persons on board; ordering the ship to modify its course or escorting the vessel until it is heading on such course; and the conducting and handing over of the ship and persons on board to a third country or another Member State.¹⁶⁸ Although the rules do set out that such measures may only be taken in accordance with the prohibition of *refoulement* and with the competences of states under the law of the sea, extensively discussed in chapter 6 below, the rules do not refer to any of the individual safeguards mentioned under the relevant provisions on border checks and refusals of entry in the Schengen Borders Code.¹⁶⁹

That the rules do not require compliance with the Schengen Borders Code's procedural standards on border checks and refusals of entry is the consequence of the choice of the Council – seconding that of the Commission's earlier proposal¹⁷⁰ – to hook up the draft on Article 12 (5) of the Borders Code, which allows for the adoption of implementing measures governing 'surveillance' in accordance with the comitology procedure. In legal terms, this choice can only be understood as following a presumption that the Schengen Borders Code would allow for two kinds of procedures for undertaking coercive measures in respect of persons wishing to enter the European Union. One is the procedure on border checks and refusals of entry, which may only be conducted in accordance with the strict procedural guarantees laid down in Borders Code, unless specific derogations are provided under Annex VI. And the second one is border surveillance, which is less precisely defined in the Code but apparently perceived by the Commission and the Council – as long as it is conducted in compliance with international law – as covering the complete spectrum of migration enforcement measures, encompassing not only the checking of identities and documents, but also the issuing of refusals of

167 These are set out in Parts I and II of the Annex, respectively.

168 Annex Part I, para. 2.4.

169 Annex Part I, para. 1.2.

170 COM(2009)658 final.

entry, the apprehension of persons and the return of persons to a third country – and where none of these measures need to be accompanied with individual safeguards or norms of good administration. As the proposal currently stands, one may even wonder how it would be possible for a EU citizen who is intercepted and refused further passage somewhere at sea in accordance with these draft rules, to vindicate his right to enter the European Union.

A further peculiarity of questionable legal nature concerns the legal basis for undertaking these coercive measures. The Decision lays down that the various ‘surveillance’ measures may be taken against ships ‘with regard to which *there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points*’.¹⁷¹ Thus, rather than creating a legal basis for taking coercive measures in respect of migrants at sea by means of relocating the material entry conditions, the Decision foresees in the taking of sanctions on account of a *prospect of gaining illegal entry*. This is problematic for two reasons. Firstly, the rules are silent on the kind of activity which gives rise to such suspicion. This may give rise to evidentiary problems as it may be difficult to determine whether persons do indeed have the intention to queue up at an authorized border crossing point or not. In particular, persons seeking asylum may simply wish to step on shore and immediately report to the appropriate authorities in order to request asylum. But secondly and more fundamentally, the sanction of interception and return is imposed not on the basis of a failure to comply with entry conditions, but on an attempt to gain illegal entry. In ordinary migration law discourse, gaining illegal entry is certainly regarded as an offence, but not one which without more constitutes a ground for refusing entry or denying a right to stay. The proposal thus represents a fundamental shift away from the substantive norms on entry and residence under EU law, creating an almost unfettered basis for not allowing persons entry into the European Union.

Possibly, the absence of references to procedural guarantees in the Decision could be remedied by including such guarantees in the operational plans drawn up for each operation coordinated by Frontex.¹⁷² In respect of questions of disembarkation of rescued or intercepted persons, the Decision already stipulates that the operational plan should spell out the ‘modalities’ of such disembarkation.¹⁷³ As is more extensively discussed in the following chapter, procedural norms protecting against possible human rights violations must however find a basis in a law which is accessible and foreseeable and which must afford sufficient protection against arbitrary interferences.¹⁷⁴ In view of their confidential character, Frontex operational plans cannot be deemed as complying with these requirements. It can also be noted that,

171 Annex Part I, para. 2.4.

172 Article 1 Council Decision 2010/252/EU.

173 Annex Part II, para. 2.1.

174 Chapters 6.4.2-6.4.3.

because the Decision has brought Frontex maritime operations within the framework of the Schengen Borders Code and therewith the ambit of EU law, the Member States participating in the operations, in giving effect to the rules on interdiction as laid down in the Decision, are bound by the EU fundamental rights regime, as embodied in general principles of EU law and the EU Charter on Fundamental Rights.¹⁷⁵ The substance of the relevant human rights in the context of maritime controls is discussed in the next chapter.

The European Parliament has opposed the adoption of the Decision, on account of the decision exceeding the implementing powers of the Schengen Borders Code and has brought an action for annulment of the Decision before the ECJ under Article 263 TFEU.¹⁷⁶ The key objection formulated by the Parliament is that the proposed measures exceed the scope of Article 12(5) SBC since they do not constitute additional measures governing 'surveillance', but modify the essential elements of the Borders Code which are reserved to the legislator.¹⁷⁷ One may take this argument further by noting that the proposed measures not only exceed a reasonable interpretation of the term 'surveillance', but that they also exceed the scope of the Borders Code as a whole. In particular, rules on the apprehension of migrants and their return to a third country are not laid down in the Borders Code but in the Returns Directive.¹⁷⁸ The Parliament nonetheless requests the Court to exercise its discretion to maintain the effects of the contested Decision until such time as it is replaced (Article 264(2) TFEU). But because the rules not merely supplement the rules on border checks and border surveillance, but appear to *derogate* from several provisions of the Borders Code it is questionable whether the Court would comply with that request.

The most pertinent conclusion which can be drawn from the above is that the Council Decision for maritime Frontex operations is premised on an inherently contradictory view on the possible extraterritorial application of the Schengen border crossings regime. On the one hand, it is accepted that the common rules on external border control do provide a legal basis for Member States to engage in all sorts of coercive conduct in respect of migrants outside the common EU territories. But they ignore the very same extraterritorial application of the individual safeguards laid down in the Code. This is an illustration of the essential tension between the EU's internal and external

¹⁷⁵ Also see section 5.3.3 below.

¹⁷⁶ Case C-355/10, *European Parliament v Council of the European Union*, action brought on 14 July 2010.

¹⁷⁷ Also see European Parliament, Motion for a Resolution, 11 March 2010, B7-0227/2010, which refers to an opinion of the EP's Legal Service, in which it was considered that the proposed measures 'did not constitute 'additional measures governing surveillance' in general, but specific rules on reinforcing border checks and/or on refusal of entry at the external sea borders, the adoption of which was restricted to the legislature under Article 18 of the Schengen Borders Code'.

¹⁷⁸ Directive 2008/115/EC.

migration agenda. It shows how the instrument of border control functions internally as a neutral policy enforcing the Union's rules on admission and residence, while it is employed externally as a tool allowing for the exertion of virtual complete and unchecked state power, which has the potential to displace the Union's substantive rules on legal migration and asylum.

5.3.3 The territorial scope of the asylum *acquis*

The Common European Asylum System was expressly conceived as a body of law applying only to asylum applications made within the territory of the EU Member States or at their border and not to claims lodged outside a Member State's territory. The former EC Treaty contained specific territorial restrictions to this effect.¹⁷⁹ These restrictions have been reiterated and further specified in the various EU asylum instruments adopted under the EC Treaty. The Dublin mechanism for establishing the Member State responsible for examining the application applies only to applications which have been lodged *in* one of the Member States, which includes claims lodged at the border.¹⁸⁰ The Reception Conditions Directive only applies to reception standards provided *within* a Member State and only to asylum-seekers who have lodged their request *at the border* or *in* the territory of a Member State.¹⁸¹ The Asylum Procedures Directive has a similar restriction: it applies only to standards on procedures *in* Member States and only to those applications "made in the territory, including at the border or in the transit zones of the Member States".¹⁸² The Asylum Procedures Directive further expressly excludes asylum applications from its scope which are submitted in diplomatic or consular representations of Member States.¹⁸³

The one existing (first phase) asylum instrument not containing an explicit territorial restriction is the Qualification Directive, laying down the eligibility criteria and standard of protection to be granted to holders of a protection status. Neither do the corresponding provisions on qualification for international protection of the former EC Treaty embody a restriction of territorial character.¹⁸⁴ It is not entirely clear what should be inferred from this absence.

179 Article 63 (1)(a)(b) and (d) TEC.

180 Articles 1 and 3(1) Regulation EC 343/2003.

181 Articles 1 and 3 Directive 2003/9/EC.

182 Articles 1 and 3(1) Directive 2005/85/EC. The addition of 'transit zones' is in conformity with *Amuur* judgment, where the ECtHR stated that the European Convention on Human Rights and Fundamental Freedoms (ECHR) fully applies in transit zones and that the latter should be considered as an integral part of a state's territory: ECtHR 10 June 1996, *Amuur v. France*, Application No. 19776/92.

183 *Ibid.*, Article 3(2).

184 Article 63(1)(b) and (2)(a) EC Treaty and Article 1 (on 'subject matter and scope') of Directive 2004/83/EC.

The original Commission proposal for the Qualification Directive did contain a provision on territorial scope similar to the one inserted in the Dublin regulation and the Reception Conditions directive, but this provision was deleted because a number of Member States wanted the scope of the directive to be consistent with that of the Procedures directive and considered the issue of territorial scope a matter to be decided by the latter directive.¹⁸⁵ This would imply that we should not assume that the Qualification Directive has a territorial scope different from the other directives. It has further been argued that it is (i) hardly likely that the EU legislator intended to oblige Member States to grant refugee status to persons who apply for asylum outside their territorial boundaries and that (ii) the absence of a territorial restriction on the scope of the Qualification Directive would be at odds with the consistency advanced by the Common European Asylum System.¹⁸⁶ A further contextual argument against extraterritorial application of the Qualification Directive is that several provisions of the Directive describing the content of international protection presume that protection is enjoyed inside the territories of the Member States.¹⁸⁷

And even though these arguments not necessarily oppose a strict literal reading – in line with the observation that EU law in general may well govern extraterritorial member State activity¹⁸⁸ – under which the Qualification Directive would oblige EU Member States deciding to examine a claim for protection in an extraterritorial setting to respect the eligibility standards laid down in the Qualification Directive, the Directive does not on its own solve the question of how to proceed with asylum claims made in foreign territories. It contains no free-standing right to make an asylum application, does not generate an obligation to examine a claim, nor does it lay down the procedural safeguards to be respected in the examination. Thus, even a broad interpretation as to its territorial scope would leave the Directive of only modest practical value for the various ways in which European States attempt to regulate the movement of asylum-seekers outside their borders.¹⁸⁹

In the absence of specific EU asylum instruments regulating the legal status of refugees in the broader phenomenon of external migration control, the question of rights to be accorded to refugees who come within the ambit of the EU's external dimension will primarily depend on the scope and meaning of the primordial right to asylum as a principle of EU law and as enshrined

185 COM(2001) 510 final, Article 3; for the Council discussions, see Council doc. 7882/02, 24 April 2002, p. 5. Also see Battjes (2006), p. 217 at n. 71.

186 H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 209-210.

187 See Articles 28 (social welfare), 31 (accommodation) and 32 (freedom of movement).

188 See section 5.3.1.

189 Also see K. Wouters and M. den Heijer, 'The Marine I Case: a Comment', 22 *IJRL* (2010), p. 17-18.

in Articles 18 and 19 of the EU Charter on Fundamental Rights.¹⁹⁰ Because the content and scope of this right to asylum must correspond to the Refugee Convention and the rights guaranteed by amongst others the European Convention on Human Rights,¹⁹¹ this right may well have a territorial scope broader than that contained in the secondary instruments EU instruments.¹⁹² Further, the explicit reference in Article 18 of the EU Charter to the 'right to asylum' allows for an interpretation focusing not only on the prohibition of *refoulement* (which is separately codified in Article 19 of the Charter), but also on the rights associated with gaining access to protection mechanisms and the content of protection.

It follows from the right to asylum as a principle of EU law that both in the interpretation and the implementation of EU law this must be respected, also in situations where EU law expressly permits or obliges States to take action in respect of migrants and asylum-seekers away from the Schengen external border.¹⁹³ As indicated above, general references to fundamental rights, the Refugee Convention or the prohibition of *refoulement* have also been incorporated in the EU's carrier sanctions regime, the Frontex' mandate and the Schengen Borders Code. These references, together with the general doctrine of implementing EU law in accordance with fundamental rights,¹⁹⁴ may thus set potent limits to Member State activity falling within the scope of the relevant EU instruments. But the key challenge which EU law has yet to take up, is to translate these general principles into a useful framework of rights, procedures and practical guidelines.

In the proposals for the second phase asylum instruments, no change of the territorial scope of the various instruments is foreseen, although the proposal for recasting the procedures directive does specify that the directive must also apply to asylum applications made in the territorial waters of the Member States.¹⁹⁵ A complication for urging the European Union to specify in more detail the procedural standards and rights of asylum-seekers to be respected when Member States engage in forms of pre-border control is that the pertinent provisions on asylum in Article 63 EC Treaty contained a strict territorial outlook as noted above. In the new Article 78 of the Treaty on the Functioning of the European Union, laying down the Union's competence to develop a common policy on asylum, the previous references in Article 63 EC Treaty to asylum applications, procedures and reception conditions 'in Member States' have been omitted. It has also added a new paragraph which calls for engaging in 'partnership and cooperation with third countries for the purpose of

190 OJ 2007 C303/01..

191 Articles 52 (3) and 53 Charter.

192 As discussed in chapters 2 and 4.

193 Article 51(1) Charter.

194 ECJ 27 June 2006, *Parliament v Council*, C-540/03, paras. 104-105; ECJ 13 July 1989, *Wachauf*, 5/88, para. 19.

195 COM(2009) 554 final, Article 3(1).

managing inflows of people applying for asylum or subsidiary or temporary protection'.¹⁹⁶ Read together, these provisions do not oppose the adoption of a more comprehensive Union framework where instruments on border control and other facets of the external migration and asylum agenda are supplemented with safeguards on the protection of refugees and persons seeking asylum. Article 78 TFEU would thus provide a suitable legal basis for the conclusion of future legislative instruments or agreements with third countries on *inter alia* safeguards of asylum-seekers subjected to pre-border controls, the installment of alternative protection mechanisms for refugees in third countries or the development of mechanisms for the managed entry of persons in need of international protection. The European Asylum Support Office, created on the basis of Articles 74 and 78 TFEU, has expressly been endowed the competence to be involved in the external dimension of the EU asylum policy, amongst others by coordinating issues arising from the implementation of relevant instruments and facilitating operational cooperation between Member States and third countries.¹⁹⁷

5.4 FINAL REMARKS

As they stand, the EU instruments adopted under the external migration and asylum policy do not directly require Member States to interfere with refugee rights. But neither do they take the special position of refugees and other protection seekers meaningfully into account. Pre-border migration enforcement measures in the form of carrier sanctions and a variety of pre-clearances have become an object of EU law, but their reconciliation with refugee concerns is primarily a matter of Member State implementation. It is no surprise therefore, that in making use of carrier sanctions schemes, immigration officers or controls at the high seas, Member States employ highly divergent mechanisms for dealing with persons claiming asylum.

A key challenge for the future external migration policy of the Union, and in particular its strategy of 'integrated border management', is how it will seek to distinguish refugees from other irregular travelers. At the extreme ends, the Union faces the choice of either simply equating the two categories of migrants, in line with the approaches of several Member States, or to export the 'internal' safeguards in respect of asylum claimants also to those who are intercepted far away from Union territory.

It is suggested however that the policy freedom of the European Union in devising external forms of border control is limited. Firstly, several issues will presumably be a matter of the crystallization of law rather than of unrestrained policy-making. The proposition cannot ultimately be maintained

¹⁹⁶ Article 78(2)(g) TFEU.

¹⁹⁷ Articles 2(1), 7 and 49(2) Regulation (EU) No. 439/2010.

that EU law would allow for the creation of two altogether different regimes on border controls, where one would have the potential of defeating the core guarantees, and therewith the object and purpose, of the other. This means that, in the context of extraterritorial control measures which in fact amount to border checks or refusals of entry as defined in the Schengen Borders Code, including interceptions at sea but possibly also activity undertaken by ILOs in third countries, such measures will, sooner rather than later, have to appropriately correspond with or be embedded in the prevailing framework of EU law and in particular the Borders Code. In view of the special protection accorded to persons requesting asylum under the Borders Code, this would also present a possible solution to the problem that refugees without a valid visa may currently be refused further passage in the context of controls other than those carried out at the external Schengen Border. Because i) the Schengen Borders Code aims to set forth a common corpus for the controls of persons who wish to enter the Schengen states, because ii) there is no rule of general character stipulating that EU law cannot govern extraterritorial activity of Member States, and because iii) the Code already recognises the possibility of conducting controls at sea and in third states, there is a strong argument for employing the Code as a standard for all controls on persons wishing to cross the external border, also if conducted away from that border. It follows that, should Member States wish to maintain or establish special procedures for conducting border checks or refusals of entry which derogate from the ordinary procedures, specific rules must be incorporated into the Borders Code in accordance with Article 18 of the Code, instead of through adopting additional rules with regard to 'surveillance' as has been done with Council Decision 2010/252/EU.

Secondly, implementing measures taken under EU law must comply with fundamental rights. This not only follows from the Member States' international obligations, but also from the duty incumbent under EU law to implement EU rules in a manner consistent with requirements flowing from fundamental rights.¹⁹⁸ The obligations set by international law on the protection of refugees in extraterritorial settings as explored in the first part of this book thus set limits to the discretion of states in their dealings with refugees. Hence, the key question is not whether refugee interests are of concern, but rather *how* they must be responded to. The discussions on the drafting of Council Decision 2010/252/EU evidence the difficulties Member States encounter in agreeing upon common standards and practical arrangements for guaranteeing human rights in the course of pre-border controls. This is due not only to the reluctance to accept that human rights law does set limits to the state's discretion to conduct controls, but also due to the absence in international law of a clear duty to allow persons claiming international protection access to

198 C-540/03, para. 105.

the territory and/or asylum procedure of the state. Because neither international law nor European Union law oblige Member States to allow persons requesting asylum with their agents in foreign territories entry into their territory, there is, at least in theory, room for devising alternative arrangements. The challenge for EU law, should it wish to bring more coherence in the Member States' approaches, is not only to identify and reiterate the relevant human rights which set limits to external border controls, but also to translate these norms into practical guidelines and rules addressing the questions how refugee screening should occur, whether asylum claimants should be allowed access to an asylum procedure and which authority should be responsible for the reception and the processing of claims. The search for solutions in this respect will touch upon the fundamental dilemma of how to reconcile refugee concerns with control concerns. In the following two chapters, the merits and feasibility of several 'protection-sensitive' arrangements for conducting external border controls are further explored.

