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Enhancing the Common European Asylum System and Alternatives to Dublin

Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax

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Abstract

Upon request by the LIBE committee, this study examines the reasons why the Dublin system of allocation of responsibility for asylum seekers does not work effectively from the viewpoint of Member States or asylum-seekers. It argues that as long as it is based on the use of coercion against asylum seekers, it cannot serve as an effective tool to address existing imbalances in the allocation of responsibilities among Member States. The EU is faced with two substantial challenges: first, how to prevent unsafe journeys and risks to the lives of people seeking international protection in the EU; and secondly, how to organise the distribution of related responsibilities and costs among the Member States. This study addresses these issues with recommendations aimed at resolving current practical, legal and policy problems.

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Executive Summary

Introduction: Key question

Throughout the evolution of the Common European Asylum System (CEAS), the **Dublin system** of responsibility allocation for the examination of asylum claims has been, it is claimed, its 'cornerstone'. This is despite it being neither fit for its intended purpose nor designed as a solidarity measure, as multiple reports have demonstrated, including the 2014 study on *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection* (the '2014 Study'). Judicial decisions have, in turn, highlighted that the Dublin system violates fundamental rights in several respects. Yet, the tendency is towards its ever more coercive application, regardless of the administrative, financial, and human costs.

Against this background, this study urges a fundamental rethink. The study is premised on the **ethical and practical importance of avoiding excessive coercion of asylum seekers and refugees**. Any reforms should bear in mind the significance of avoiding coercion, in order to foster trust between asylum seekers and refugees and the authorities, and to ensure that **fundamental rights are respected, protected and promoted.** Avoiding coercion is also important to deliver the **workability** of asylum systems and any responsibility allocation mechanisms that are developed to replace or complement the Dublin system.

The text proceeds in three sections. Section 1 demonstrates that refugees' dangerous journeys to the EU are necessitated by EU visa policies and carriers' sanctions. Alternatives means of **ensuring safe and lawful access to the EU** are set out. These are urgently required if we wish to avoid those seeking refuge dying on their way to Europe, whether in transit by sea or by land. Safe and lawful access would greatly reduce the demand for the services of smugglers, and thereby enhance trust between asylum-seekers, refugees and the authorities in EU Member States. It would also contribute to more planned and orderly arrivals in the territory of the Member States. Section 2 explores **mutual recognition of positive asylum decisions**, which would alleviate some of Dublin's shortcomings and help realise the 'common status valid throughout the Union' the EU is obliged to adopt as part of the CEAS under the EU Treaties. Section 3 discusses **alternatives to the Dublin system**, thereby contributing to the wider debate on its replacement.

Existing and alternative ways of ensuring safe and lawful access to EU territory

Death in the Mediterranean in desperate attempts to reach safety in Europe has become a recurrent horror of our times. In parallel, several studies reveal that, until the 1990s, there were relatively few drownings of migrants at sea, suggesting that the introduction of mandatory visas, carrier sanctions, and other border control measures, establish the conditions under which people engage in irregular, unsafe journeys, often using the services of smugglers.

This is the context in which the *EU Agenda on Migration* has been launched, proposing different initiatives, including **military intervention** to locate, seize and destroy the vessels employed for smuggling by sea. Such action raises serious legal, moral and practical concerns. A more viable and ethical way of fighting smuggling and reducing dangerous, deadly journeys would be to consider lifting or suspending **visa requirements** and/or **carrier sanctions**, at least for those nationalities in greatest need of refuge. A range of options to ensure safe access should be adopted, including **humanitarian evacuation** programmes; **humanitarian visas** (as distinct

from extraterritorial processing, as discussed in some past proposals); increased **resettlement** and **humanitarian admission**; and more extensive use of **existing migration visas** for family reunification, work, study or research. The **Temporary Protection Directive** – which has never been applied to date - should be amended, following the outcome of its ongoing evaluation by the Commission. Such amendments should facilitate its use in situations of pressure due to large-scale arrivals and limited capacity, potentially through adjustments to the definition of 'mass influx' triggering its use, the procedure for deciding on its application, and solidarity provisions which would apply. These measures should be treated as additional to existing obligations regarding spontaneous arrivals.

It is unclear whether **EU reception centres within Member States' territory** would enhance access to protection. Centralised, top-down approaches to asylum-seeker reception seem unlikely to enhance protection, particularly if linked to forced transfers, and risk increasing coercion. However, under certain conditions, such centres could be useful, if designed and implemented in full accordance with EU and international standards. Reception and processing of asylum-seekers **outside EU territory**, by contrast, raises a wide range of legal, practical and political questions that are yet to be addressed. If a model were to be developed that would comply with EU legal and fundamental rights obligations, it would need to be demonstrated that this would provide a viable alternative to dangerous maritime journeys for people in need of protection, in order to save lives and alleviate the pressure of arrivals at EU frontiers.

The **role played by the private sector** should be acknowledged and encouraged, both regarding **search and rescue at sea**, as undertaken by commercial shipping vessels and NGO rescue boats, pursuant to their obligations under the Law of the Sea, and concerning **post-arrival arrangements** of referral, reception and social insertion of persons in need of international protection. Their involvement in resettlement programmes through **private sponsorship schemes** would be particularly beneficial.

Support from other Member States and the EU to **reception and first reception facilities in frontline Member States** could potentially improve conditions at arrival at some external borders, including in Italy and Greece. The recent proposal of the European Council in June 2015, building on the Commission's *Agenda on Migration*, foresees identification, registration and fingerprinting at **'hotspots'**, including for the purpose of determining who is in need of international protection. Such facilities could only be effective, appropriate and lawful if they **ensure that the *acquis* standards are met**, and practical arrangements put in place **to guarantee effective access to procedures and adequate treatment for asylum-seekers and protection for those entitled to it**. This would require ensuring that the facilities and processes carried out there are **focussed on identifying those seeking protection**, including those with special reception or procedural needs, and referring them to asylum procedures and conditions which fulfil the *acquis* requirements. **Fingerprinting** could take place, **by non-coercive means**; and **referral** should occur **to facilities and personnel appropriate** for dealing with medical needs, trauma, victims of trafficking and separated families, as well as people not claiming asylum, with the support of non-governmental experts where useful. **Such first reception facilities and processes could not substitute for the full asylum procedure**, which must be carried out in line with the Recast Asylum Procedures Directive's standards, in order to identify those needing protection. Finally, such initiatives must take the opportunity to **build capacity in the host Member States in the longer term**, to enable it to meet its obligations more effectively in the future.

Mutual recognition of positive asylum decisions

Mutual recognition is a key principle of EU law. However, in the field of asylum, only negative asylum decisions are subject to mutual recognition at present. Yet, the **need for mutual recognition of positive asylum decisions within the CEAS** flows directly from the Treaties, and is required to fulfil the **obligation under Article 78 TFEU** for the EU **to develop a common policy on international protection, comprising a 'uniform status … valid throughout the Union'**, as recalled in the *EU Agenda on Migration*. Unless that EU-wide status is granted by an EU agency, mutual recognition of national decisions is the means to achieve it.

The rationales for mutual recognition are **manifold**. On the one hand, it would reinforce the effective operation of the CEAS, in line with key EU principles of free movement of persons, fundamental rights,

solidarity and fair sharing of responsibility for international protection. On the other hand, mutual recognition, coupled with mobility rights granted to beneficiaries of international protection at an earlier stage than is currently the case under the Long-Term Residence (LTR) Directive, would also address some of the many incongruities plaguing the Dublin system.

Two options are put forward to provide a clear basis for **mutual recognition of positive asylum decisions**. The **first** would entail an obligation on Member States to recognise the grant of international protection by another Member State from date of grant, thereby ensuring that status had EU-wide effects and validity as envisaged in the EU Treaty. The **alternative**, less ambitious model would **involve the right to move after two years** of legal and continuous residence in the granting Member State and would largely follow the LTR Directive criteria. Both systems would require legal reform and entail a number of advantages and limitations to be considered. Legislation to provide for transfer of protection is needed to address a gap in the current EU legal framework, and ensure legal certainty for States and for refugees exercising their rights under existing law, including the LTR Directive. This is required in distinctly from mutual recognition measures; although the introduction of legislative changes associated with mutual recognition would provide an opportunity to address the issue.

Alternatives to the Dublin System and systems of financial imbalance

As set out in the 2014 Study, root and branch reform of the Dublin system is long overdue. But any reform must be guided by the importance of avoiding unnecessary coercion.

Several options are explored, including the possibility of instituting an EU Migration, Asylum and Protection Agency (EMAPA) with powers to make centralised, EU-wide decisions on asylum applications; a 'free choice' approach, as supported by the UN Special Rapporteur on the Human Rights of Migrants, with the advantage of reducing complexity and maximizing asylum seekers' agency and trust; the possibility of decoupling disembarkation and allocation of responsibility, suspending Dublin rules vis-à-vis coastal Member States, eliminating incentives to non-rescue; post-recognition relocation, following the EUREMA model, as an option to mitigate ex post some of Dublin's shortcomings; or a system of distribution keys, for the distribution of persons, resources or both, aimed at enhancing the overall protection capacity of the EU through a more efficient and transparent system of allocation of responsibilities.

Financial Support, available under the AMIF, could be used to support initiatives to replace (or mitigate) Dublin. In addition, to address imbalances which are caused or exacerbated by significant arrival numbers and limited capacity, AMIF resources for emergency measures could be increased in future budgets to ensure that sufficient resources can be made available swiftly to address situations of 'heavy migratory pressure' as foreseen under the AMIF Regulation's provisions. A further possibility would be the creation of a dedicated fund within the Union's budget to support Member States in covering costs which cannot be met from national or existing EU funds for implementation of asylum *acquis* obligations. An appropriate system for the allocation of such funds, along with rigorous programming, transparency and monitoring systems, would need to attend such a new fund.

In all cases, the dignity and agency of all migrants, asylum-seekers and refugees should be respected. In practice, this requires that any transfers avoid coercion, ensuring that a reasonable range of options is offered, and that reliable and trusted information is made available to inform decision-making. To ensure that they make well-informed decisions, mechanisms to ensure their participation in relocation decisions are essential.

The Commission's Relocation Proposal of May 2015 should be analysed in light of this ethical and practical commitment. Some notable shortcomings should thus be noted and avoided in any subsequent measure, such as the Commission's planned legislative proposal in 2015 for a mandatory and automatically-triggered distribution system, foreshadowed in the *Agenda on Migration.* These include the limited territorial and temporary remit of the proposal; its reduced personal scope of application; the use of numerical indicators to select the beneficiaries of the scheme, which could obscure protection needs of specific groups and fail to reflect changing circumstances in countries of origin; and limited appeal rights, which risk incompatibility with effective remedy standards. The most striking factor is the lack of any input from asylum seekers in transfer decisions. Coercive transfers have contributed to the failure of Dublin.

Conclusions and Policy Recommendations

This study concludes that **creating legal and safe avenues to access protection in the EU is essential**, to avoid life-threatening journeys and deaths in transit, whether at sea or by land. Safe access would also diminish the burden on coastal Member States for search and rescue, reception, and processing of claims.

Dublin should be replaced with a non-coercive, solidarity-based, fundamental rights-compliant system of responsibility allocation for asylum claims.

In addition, irrespective of whether Dublin is maintained or replaced, **a system of mutual recognition of positive asylum decisions should be adopted**. This would open up free movement rights, allowing beneficiaries of international protection to join family and support networks or accept job offers that maximise opportunities for integration. At the same time, **if maintained, Dublin should be applied** in line with already existing obligations, **guaranteeing fundamental rights and minimising coercion**.

Key recommendations among those set out in full in Section 4 (Conclusions and recommendations) include the following:

Summary of recommendations:

Existing and alternative ways of ensuring safe and lawful access to EU territory

- The European Parliament should encourage the Commission to put forward a proposal for legislative changes to achieve the lifting of visa requirements and carrier sanctions on transport companies so that persons seeking asylum in the EU can arrive safely;
- The European Parliament should encourage the Commission and the Council to consider alternative tools for safe access to the EU, including the adoption of measures on humanitarian visas. The opportunity should be utilised during negotiations on the Visa Code reform to clarify obligations to issue Limited Territorial Validity (LTV) visas for that purpose, in line with non-refoulement and the right to asylum;
- The Temporary Protection Directive, currently under evaluation by the Commission, should be amended to facilitate its application to address significant arrivals of people needing protection, including potentially through adjustments to the definition of 'mass influx' triggering its application; the procedure for applying Temporary Protection; and to strengthen its solidarity provisions.
- The European Parliament should closely monitor the implementation of the resettlement programme approved in June for compliance with fundamental rights. It should also encourage the Commission and the Council to expand resettlement in the short to medium term, supplemented by a scheme for private sponsorship by NGOs, families and other civil society actors and organisations, in line with FRA recommendations. These elements could be put forward in discussions around the proposal foreshadowed by the Commission in the Agenda on Migration for a binding and mandatory legislative approach to resettlement after 2016;
- The European Parliament should also encourage the Council and the Member States to facilitate wider use of family reunification by international protection beneficiaries already in the EU, including with extended family members, and the waiver of support, accommodation and health insurance requirements to assist their safe entry;
- The European Parliament should promote a generous approach to the application of visa rules in other existing categories, including students, researchers, and workers. In particular, the opportunity should be seized following the public consultation on the future of the Blue Card Directive and in the course of its review, as announced in the European Agenda on Migration, for the adaptation of Blue Card rules to facilitate its wider application to people in need of protection;
- Plans for humanitarian evacuation of specific populations in dire need of international protection should be explored at EU level. The European Parliament should encourage the Commission to submit

such a plan, especially for Syrians, Eritreans, Somalis and Afghans, to reduce the need for dangerous and irregular movement across the Mediterranean and to the external land borders of the EU;

- Proposals for support to first reception in 'frontline' Member States and registration, identification and fingerprinting at 'hotspots', with the assistance of personnel from other Member States and EU agencies, could, if appropriately designed and implemented, ensure more effective access to procedures. However, to achieve a positive impact, these must operate in full compliance with the safeguards and requirements of the asylum acquis and international law and standards.
- Past proposals for establishing reception centres and processing asylum claims outside EU territory raise significant questions of legal, practical and political feasibility which remain unaddressed. Such ideas, if formally put forward in the current context, would require careful reflection, in light of previous critical analysis, to ensure full compliance with the EU's legal and other obligations, and present a genuinely safe and viable alternative to dangerous maritime journeys for significant numbers of people in need of protection, which could impact on arrivals at EU frontiers.

Mutual recognition of positive asylum decisions

- The European Parliament should encourage the Commission to put forward a proposal for legislative changes to achieve mutual recognition of positive asylum decisions in the near future. Such a proposal could foresee immediate mutual recognition, enhanced movement rights within the Union, and transfer of protection rights immediately after recognition. An alternative approach would involve mutual recognition and adjustment of the existing LTR framework to provide for LTR and rights to take up residence in another Member State after two years, providing for mobility in a more gradual way;
- An EU instrument is needed on transfer of protection status, to address existing gaps in the legal framework, and ensure legal certainty for people with international protection seeking to exercise their rights to free movement within the Union.

Alternatives to the Dublin system and systems of financial imbalance

- The European Parliament should acknowledge the failure of the organising principles of the Dublin system of allocation of responsibility for asylum seekers. The Parliament is encouraged to invite the Commission to put forward a proposal for legislative changes for root and branch reform of the Dublin System;
- The European Parliament should ensure future legislation on responsibility allocation for asylum claims and/or distribution of asylum seekers avoids coercion. If 'free choice' is not employed, then preference matching or other mechanisms to offer asylum-seekers a reasonable range of options should be explored;
- The European Parliament is not a co-legislator on the current Commission proposal to relocate 40,000 Syrian and Eritrean asylum-seekers from Italy. However, it should work to ensure that political support for the proposal is reinforced, and that it is implemented without coercion;
- Some features of the Commission's proposal of 27 May 2015 should be significantly adjusted in any general measure, such as the Commission's planned legislative proposal in 2015 for a mandatory and automatically-triggered distribution system. The European Parliament should ensure that future general legislation does not make use of past recognition rates to determine groups for relocation or leave unclear the necessity for transfers to be voluntary, based on proper information and presentation of a reasonable range of options.
- The European Parliament should scrutinize national action plans under the AMIF, and ensure that the indicators for the measurement of the specific objectives in Annex IV of the AMIF Regulation are used to ensure transparency;
- To address imbalances which are caused or exacerbated by significant arrival numbers and limited capacity, AMIF resources for emergency measures should be increased in future budgets to ensure

that sufficient resources can be made available swiftly to address situations of 'heavy migratory pressure' as foreseen under the AMIF Regulation's provisions;

- The European Parliament should examine whether legislative reform is needed to extend AMIF funding to support voluntary Dublin transfers (where the asylum-seeker wishes to join family in another Member State in particular) or other voluntary transfers;
- The European Parliament should advocate for creation of an EU Migration, Asylum and Protection Agency, with powers to grant EU-wide protection status, and develop further methods of external monitoring of compliance with EU and international standards.

Enhancing the Common European Asylum System and Alternatives to Dublin

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Introduction

The Common European Asylum System (CEAS) is a fundamental part of the EU's Area of Freedom Security and Justice (AFSJ) established from 1999. It has gone through two phases of legislation. The first culminated in 2005, the second concluded in 2013. The CEAS from its creation and incorporation into the AFSJ, has promoted as its cornerstone the Dublin system of responsibility for the determination of asylum applications throughout the EU. While the Dublin Convention (1990), Dublin II Regulation (2003) and now Dublin III Regulation (2013) were not designed as solidarity measures regarding the distribution of responsibility for asylum seekers among the Member States they have become something of a barrier to the realisation of solidarity.

The European Commission is committed to an evaluation of the Dublin system in 2016. In particular, it will "determine whether a revision of the legal parameters of Dublin will be needed to achieve a fairer distribution of asylum seekers in Europe". This study supports the need for urgent revision of Dublin. Further, in the Commission's evaluation it will be considering a single asylum decision making process – to this end, the study supports the development of such a system to ensure better protection of refugees across the EU.

This study examines enhancing the CEAS and alternatives to the Dublin system in three substantive sections:

- Section 1 considers how the EU can promote safe access to the territory and asylum procedures for those in need of international protection;
- Section 2 examines how mutual recognition of status can assist in a better distribution of refugees across the EU;
- Section 3 looks at alternatives to the Dublin system, and the use of financial support

The study finishes with conclusions and recommendations, key elements of which are also set out in the executive summary (above).

This study focuses on refugees and their protection in the EU. This is not to ignore or avoid the wider issue of safe arrival of persons who are not refugees and the various international obligations regarding their treatment but this is beyond the scope of this study.

The principles of the Dublin system are three fold: (1) an asylum seeker has only one opportunity to make an asylum application in the territory of the EU and, if the decision is negative, that rejection is recognised by all Member States; (2) the rules set out in the Dublin system determine which Member State is responsible for assessing the asylum application and receiving the asylum seeker during the procedure; the preferences of the asylum seeker is not a relevant criterion; (3) the asylum seeker may be deported to the Member State to which

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he or she is allocated – coercion is built into the system. The challenge for the EU as a whole is that the Dublin system works only very poorly, as documented by direct observers, including the European Commission itself.[1] It has been calculated that only 3% of asylum seekers are actually required to move from one Member State where they want to have their applications considered to another. Yet, very substantial resources are invested by the Member States in the system, administratively, financially and politically. Dublin precludes the emergence of effective solidarity measures, which actually embody solidarity among the Member States and with asylum seekers and refugees. Instead, the tendency is towards more coercive application of a set of rules that have proven ineffective over more than 20 years.

Further, the current insistence on continuing to try to make the Dublin system work, in the absence of the conditions and standards across the EU that would make this possible, is resulting in increasing judicial attention at the levels of the national courts, the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR), focused on the adequacy of the asylum systems in each of the Member States. Instead of fostering trust and confidence, the Dublin system seems to be engendering increasing levels of mistrust and suspicion among Member State authorities, their appeal bodies and superior courts, as well as asylum seekers themselves. This is a strong indication that perhaps there is a pressing need to think about new ways of achieving solidarity among Member States inter se and with refugees in the EU.

Since the European Parliament requested this note on ***Enhancing the Common European Asylum System and Alternatives to Dublin*** in March 2015, there has been much activity among the EU's institutional actors on the subject of relocation, resettlement and responsibility sharing regarding asylum seekers and refugees. This heightened concern has been fuelled by the crisis in the Mediterranean with increasing numbers of persons making dangerous sea journeys to reach the EU, with many losing their lives trying to cross the Mediterranean. The Commission issued far-reaching proposals in May 2015.[2] Best efforts have been made to include information and recommendations which are relevant to the current situation.

The methodology followed in this study consists of desk-based research of a range of scholarly works, official reports of UNHCR and other international organizations, the EU institutions, Member States as well as non-governmental organizations and think tanks. It includes recent documents up to and including 20 June 2015. Information obtained in informal interviews and conferences attended by the researchers has also been included where relevant and duly anonymised.

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[1] Evaluation of the Dublin System, COM (2007) 299, 6 June 2007. See also, JRS, *Protection Interrupted: The Dublin Regulations Impact on Asylum Seekers' Protection* (June 2013), available at: www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf (accessed 15 June 2015); and ECRE, *Dublin II Regulation: Lives on Hold* (18 Feb. 2013), available at: http://ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html (visited 15 June 2015).

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A European Agenda on Migration*, COM (2015)240, 13 May 2015; European Commission, *Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, 27.05.2015, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf ;

European Commission, *Recommendation on a European Resettlement Scheme*, C(2015) 3560, 8.06.15, available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf.

1. Existing and Alternative Ways of Ensuring Safe and Lawful Access to EU Territory

Key Findings

EU mandatory visa requirements coupled with carriers sanctions expose people to risks associated with unsafe arrival in the EU;

Suspending carriers sanctions, even without changes to the visa rules, would permit safe arrival, if not regular entry to the EU;

Those who make dangerous journeys are overwhelmingly those who are subject to a mandatory visa requirement and are least likely to receive Schengen visas for regular entry to the EU;

EU border control procedures at 'green' borders may contribute to death in the Mediterranean when they are applied in a way that prevents people from entering the EU safely by land;

Humanitarian visas, resettlement and protected-entry mechanisms could be deployed to provide safe and regular access to the EU for people in need of international protection;

Family reunification for people with protection needs in the EU, including with extended family members, should be facilitated, including through the waiver of support, accommodation and health insurance requirements, to assist safe entry;

Encouraging Member States to widen the opportunities for legal migration under domestic and EU law, using existing legislative instruments, would increase opportunities for regular arrival (Directive 2003/86 on family reunification, Directive 2009/50 on highly skilled migration, Directive 2005/71 on researchers and students);

Engaging with the private sector for the expansion of opportunities of safe and legal access to the EU would improve chances of social insertion and public acceptance. This should include a specific role for private sector sponsorship of persons for resettlement;

Protected-entry channels are additional to (and do not replace) obligations owed to migrants and refugees who arrive spontaneously.

Support from other Member States and the EU to reception/first reception facilities in frontline Member States could potentially improve conditions at arrival at some external borders, including Italy and Greece. Recent proposals, foreseeing identification, registration and fingerprinting at 'hotspots', would need to ensure that all EU and international standards are met, and practical arrangements put in place to guarantee effective access to procedures and adequate treatment for asylum-seekers and protection for those entitled to it.

Death in the Mediterranean and elsewhere in desperate attempts to reach safety in Europe has become a recurrent horror of our times. In April 2015, 800 people perished in a single event.[3] From the dramatic deaths in 2013,[4] which sparked the current concerns, to those of April 2015, the EU has been criticized for its lack of a serious response. After each mass drowning, there has been attention to the measures the EU has taken or should take to avoid future tragedies.[5] The pressure to find ways to diminish and avoid death in the Mediterranean has engaged many actors including, but not limited to, the Pope, heads of state and government, and all of the main EU institutions.

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[3] Crilly, R., Akkoc, R., Marszal, A. and Squires, N., (2015), 'UN confirms 800 dead in shipwreck disaster: as it happened on April 20', The Telegraph, available at: http://www.telegraph.co.uk/news/worldnews/europe/italy/11551278/Mediterranean-migrant-crisis-hits-Italy-as-EU-ministers-meet-live.html visited 15 June 2015.

[4] http://publications.iom.int/bookstore/free/FatalJourneys_CountingtheUncounted.pdf visited 15 June 2015.

[5] Guild, E. and Moreno-Lax, V., (2013), 'Current Challenges regarding International Refugee Law, with a focus on EU policies and EU co-operation with UNHCR', Study for the European Parliament, Directorate-General External Policies, Policy Department for External Policies, PE 433.711 (Brussels) available at: http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf visited 10 June 2015.

However, the tragedies do not stop. Many non-governmental organizations (NGOs), prominent among them Amnesty International,[6] have investigated the rising death toll and deplored the situation. The International Organization for Migration (IOM) has published a study of death in the course of migration, including a chapter by Spijkerboer and Last on the Mediterranean, which provides an excellent overview of the situation.[7] They note, like de Haas of Oxford University, that until the 1990s there were rarely drownings of migrants in the Mediterranean, suggesting that the introduction of mandatory visas for nationals of almost all North African and Middle Eastern countries (except Israel) has made it much more difficult for people to cross from the South to the North by safe, regular means such as scheduled flights and ferries, thus giving rise to the new smuggling 'travel' industry in the region.[8] Basaran has also noted that these border control measures have the effect of dissuading people from humanitarian action on account of the risk of finding themselves subject to criminal investigation on smuggling charges.[9]

The Strik Report *Lives Lost in the Mediterranean: who is responsible?*, adopted by the Parliamentary Assembly of the Council of Europe on 29 March 2012, documents the failure of many European agencies and other international actors, including NATO, to rescue 72 people in desperate need of assistance on a small boat across the Mediterranean on 26 March 2011. Only nine persons survived the trip. The Report notes that in 2011 alone over 1,500 people drowned in the Mediterranean.[10]

Deaths in North Africa have been a substantial driver of European policy in the field of migration (though less so regarding asylum). As ECRE has noted, the EU's Global Approach to Migration and Mobility (GAMM), particularly after 2009, was triggered by the killing of migrants outside the Spanish enclaves of Ceuta and Melilla.[11] The development of the GAMM as a general policy is one of the key responses included as an important element of the Stockholm Programme of that year.

However, both the dangerous journeys and deaths continue. In this report the European Parliament's LIBE Committee has requested an examination of existing and alternative ways to ensuring safe and lawful access to the EU territory to put an end to this phenomenon.

1.1 Who can arrive regularly in the EU? The Role of Visas

According to FRONTEX there are over 700 million entries and exits into and out of the EU every year.[12] This figure includes EU citizens entering and leaving the EU territory. FRONTEX refined this figure for 2014, according to voluntarily reported information from border guards, as 194,716,566 entries into the EU.[13] FRONTEX confirms that each immigration officer takes approximately 15 seconds to decide on the admission of each person. All these people, whether they are admitted or refused admission to the EU, arrive at Europe's

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[6] Amnesty International UK/Issues on 'The world's deadliest sea crossing', available at: http://www.amnesty.org.uk/rising-death-toll-mediterranean-sea#.VVo2V1p9mlI visited 18 May 2015.

[7] International Organization for Migration publication on 'Fatal journeys', available at: http://publications.iom.int/bookstore/free/FatalJourneys_CountingtheUncounted.pdf visited 15 June 2015.

[8] Blog entry on 'How much do we learn from history', available at http://heindehaas.blogspot.com.br comment visited 27 April 2015.

[9] Basaran, Tugba, (2014), 'Saving lives at sea: security, law and adverse effects', European Journal of Migration and Law 16.3, p. 365-387.

[10] Parliamentary Assembly of the Council of Europe, Report of the Committee on Migrants, Refugees and Displaced Persons, Lives Lost in the Mediterranean: Who is Responsible? ('Strik Report') 29 March 2012. The anticipated 2015 death toll could top 30,000, according to IOM: http://www.bbc.co.uk/news/world-europe-32399433

[11] ECRE Comments to the Commission Communication on the Global Approach to Migration and Mobility COM (2011) 743 final available at: http://www.ecre.org/component/downloads/downloads/482.html visited 18 May 2015.

[12] FRONTEX report, (2014), 'Twelve seconds to decide', available at: http://frontex.europa.eu/assets/Publications/General/12_seconds_to_decide.pdf visited 18 May 2015.

[13] FRONTEX report, (2015), 'Annual Risk Analysis 2015', available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf Annex Table 13 visited 18 May 2015.

frontiers in safety. They appear before immigration officials in an orderly fashion and a decision is made (overwhelmingly positive – immigration officials refused only 114,887 persons admission in 2014).[14]

So, it is clear that anyone who can arrive at an EU external border in a regular manner is unlikely to die on the way. Further, he or she is unlikely to be refused admission. Thus, the first answer to this difficult set of questions – how to provide safe and lawful access to the EU territory – seems to be to ensure that people seeking to come to the EU can arrive regularly at the EU external border. Who are these people who can arrive safely and what makes them different from those who die in the Mediterranean trying to get to the EU? The first group (who fall outside the scope of this report) are EU citizens. They have a right to enter the EU under Article 21 TFEU and the EU Citizenship Directive. Secondly, there are nationals of those countries that are not subject to mandatory visas for entry to the EU. These are the nationals of about one-third of all countries in the world.[15] These countries are, by and large, fairly wealthy based on GDP and perceived as not posing an irregular immigration and/or security risk. Lastly, there are those coming from 'black listed' countries subject to visa requirements, comprising much of the global South, including all refugee-producing countries. The EU institutions are currently negotiating to remove a handful of these countries from the visa black list.[16]

Exceptionally, some countries on the EU's visa white list are important countries of origin of asylum seekers in the EU. The fifth most important country of origin of asylum seekers in the EU, Serbia,[17] is such a country whose nationals do not require visas to enter the EU for short stays. Of a total of 626,100 asylum applications made in the EU in 2014, Serb nationals accounted for 30,840, according to EUROSTAT.[18] The recently announced Hungarian government plan to build a barbed wire fence across the length of the border between Serbia and Hungary[19] indicates that safe, if irregular arrival of Serbs in the EU is the norm at the moment, not the exception. The justification of the Hungarian government for the need for the fence is to prevent irregular arrivals in their country from Serbia. This raises the question whether safe arrival of Serb nationals into the EU through the EU's green borders will be diminished.

Lifting of mandatory visa requirements for nationals of other countries which produce substantial numbers of asylum-seekers and people found to need protection could reduce the compulsion for them to undertake dangerous journeys in search of safety. This would have to be accompanied by the lifting of carrier sanctions on transport companies so that those in need of international protection who have not been able to acquire travel documents are able also to flee. According to the European Commission, people arriving irregularly across the Mediterranean pay between US$5,000 and US$7,000,[20] while a flight directly from Cairo or Amman to Rome costs approximately €350 and a ferry from Tunisia to Italy €50. Thus, if asylum seekers could arrive at the EU external border regularly, on normal flights or passenger ferries, and apply for asylum, not only would there be little risk of death, but travel costs would be exponentially lower, permitting such persons to have money to support themselves, initially at least, during their stay in the EU.

Regarding the lifting of visa requirements, a number of options are possible short of abolishing them for refugee-producing countries. The first is the possibility of establishing a mechanism to suspend them for a period of time, until the root causes/push factors have been addressed, particularly for those states from which there are substantial flows of refugees seeking to come to the EU. One could use the EUROSTAT list of the

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[14] Idem 12.

[15] See the European Commission's map of mandatory visa countries: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm visited 30 May 2015.

[16] See for instance the positive Commission reports on Colombia and Peru http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2014/20141029_01_en.htm visited 30 May 2015.

[17] The first four are: Syria, Afghanistan, Kosovo and Eritrea, according to EUROSTAT.

[18] EUROSTAT data on Countries of origin of (non EU) asylum seekers in EU 28 Member states, in 2013 and in 2014, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Countries_of_origin_of_(non-EU)_asylum_seekers_in_the_EU-28_Member_States,_2013_and_2014_YB15_III.png visited 18 May 2015.

[19] Euractiv article, (2015), 'Hungary to build fence at Serbian boarder', available at: http://www.euractiv.com/sections/justice-home-affairs/hungary-erect-fence-its-border-serbia-315487 visited 3 July 2015.

[20] European Commission Press Release on 'Facts and Figures on the arrivals of migrants in Europe ' available at: http://europa.eu/rapid/press-release_MEMO-15-3261_en.htm visited 18 May 2015.

top ten countries of origin of persons seeking asylum in the EU in the previous year as a yardstick of need. However, this should not lead to rigid approaches or to reverse assumptions that asylum seekers from *other* countries are not genuinely in need of international protection. While nationality and assessments of country of origin conditions may be used as a basis for such – in principle favourable – policy decisions, this must be done very carefully, and not undermine the individual right of 'everyone' to seek asylum and to have claims properly assessed. This is, in effect, the line taken by the CJEU in *HID*.[21]

The evidence set out here, and the conclusions that follow from it, may be inconsistent with the current policy and perspectives of some EU Member States. However, the question of ensuring safe entry, if it is seriously to be addressed, requires an examination of how EU and national laws and practice create the conditions for unsafe journeys, by denying safe access to refugees. The denial of safe access is rooted in visa policies and also border control practices. The UNHCR and Human Rights Watch reports on the deaths of Iraqi and Syrians at the land border between Bulgaria and Turkey evidence this (see below).[22]

1.2 Arriving Safely but Irregularly? The Role of Carriers Sanctions

Many refugees fleeing conflict zones are unable even to obtain passports, let alone visas, not least because no Member State embassies remain open in certain war-torn (though 'black listed') countries.[23] In such circumstances, in order to arrive safely by normal commercial means, even if visa requirements were lifted, carrier sanctions would also have to be lifted. The Schengen Borders Code requires that anyone seeking to enter the EU must have a valid travel document (and visa if required).[24] However, the Regulation is specifically without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement* (Article 3).

However, the effectiveness of the Article 3 saving provision for persons seeking international protection is undermined by EU carrier sanctions legislation.[25] The problem is one of structural design. Through the threat of sanctions, carriers have been de facto delegated to check documentation, without however being given the authority (let alone the means and necessary training) to undertake refugee status determination (which, in an extraterritorial context, would anyway run counter to the most basic fundamental rights protections enshrined in the EU asylum *acquis*).[26] As a result, carriers, concerned to avoid fines and other expensive sanctions, simply refuse to carry anyone who does not have a passport (or if necessary a visa).

The justifications for carrier sanctions have been seriously challenged by numerous authorities, including most recently Bloom and Risse.[27] The issue has been most succinctly described by Kritzman-Amir as follows:

> While carriers are threatened with sanctions if they err and allow entry to undocumented migrants, they are not subject to any sanctions if they effectively deny entry and admission of asylum seekers.

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[21] Case C-175/11 *HID*, 13 January 2013.

[22] Human Rights Watch article on 'Bulgaria: New Evidence Syrians Forced Back to Turkey', available at: http://www.hrw.org/news/2014/09/18/bulgaria-new-evidence-syrians-forced-back-turkey visited 17 June 2015; and more generally UNHCR, (2015), 'UNHCR calls for an investigation into the death of two Iraqis at the Bulgaria-Turkey border, raises concerns over border practices', available at http://www.unhcr.org/551a70379.html visited in June 2015.

[23] E.g. Somalia and Sierra Leone. See List of Member States' consular presence of 04/12/2014, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/en_annex_28_ms_consular_representation_20.pdf visited 10 June 2015.

[24] Article 5 Regulation 562/2006.

[25] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 and Art 26 of the Convention implementing the Schengen Agreement (CISA).

[26] Peers S. et al, (2012), 'EU Immigration and Asylum Law', 2nd Ed, Vol. 2, Brill, Chapter 12; and Moreno-Lax, V., (2008), 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carrier Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10 EJML, 315.

[27] Bloom, T., Risse, V., (2014), 'Examining hidden coercion at state borders: why carrier sanctions cannot be justified', Ethics & Global Politics, 65.

> There are thus incentives to err on the side of caution which in this case means to refuse to transport asylum seekers who wish to enter clandestinely.[28]

Carrier sanctions render safe arrival in the EU extremely difficult for anyone seeking international protection. The simple act of lifting or suspending carrier sanctions would transform the possibility of safe arrival of asylum seekers and at a stroke end the business of smugglers. Those who profit the most from carrier sanctions are the smugglers themselves, whose whole business depends on desperate people having no alternative to their services. Instead of discussing military action against smugglers in the Mediterranean,[29] the EU would better simply destroy their business model by removing demand for the services of smugglers. As long as people can obtain safe (and much cheaper) means of travel, they are unlikely to pay smugglers for a dangerous and uncertain service. This would put smugglers out of business immediately.

1.3 Who can arrive in the EU safely? The Role of Border Controls

Border controls may also contribute to death in the Mediterranean as the transition from the Italian Mare Nostrum operation to the FRONTEX Triton operation has revealed[30]. The response of the EU policy maker has been to provide more money to FRONTEX for its border control operations, but it did not include a proposal to provide the Triton operation with a clearly defined search and rescue objective – which would go beyond the current mandate of the Agency and require legislative amendment.[31] The way in which border controls are carried out can have route displacement effects and make border crossing more or less dangerous. The previous section has examined the role of visa requirements in creating risk for people seeking international protection before they reach the EU. Hereafter the analysis considers the role of border controls at the external borders of the Union.

Both Syrian and Ukrainian nationals require visas to enter the EU. According to EUROSTAT, in 2013, 49,980 Syrians sought asylum in the EU and 1,055 Ukrainians did so, following armed conflict in both countries. In 2014, the number of Syrians seeking protection in the EU rose to 122,115 and of Ukrainians 14,050. In percentage terms, Ukrainian applications have increased by 1,331.7% and their Syrian counterparts by 244.32%. While Ukrainians do not die at the EU border trying to enter the EU to seek asylum, Syrians do. What is the difference? One difference is of course the blue (sea) border versus the green (land) border. But many Syrians have sought to enter the EU via the green borders between Turkey and Bulgaria. This triggered one of the most appalling of reception conditions failures in the EU.[32] According to UNHCR, the response of the Bulgarian authorities to these efforts to cross the green border between Turkey and Bulgaria has been to push these asylum seekers back without any consideration of their cases, notwithstanding refugee law and human rights obligations of all Member States and the EU.[33]

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[28] Kritzman-Amir, T., (2011), 'Privatization and Delegation of State Authority in Asylum Systems', Law and Ethics of Human Rights 5: 203.

[29] See Council press release on the launch of military action against smugglers: http://www.consilium.europa.eu/en/press/press-releases/2015/05/18-council-establishes-naval-operations-disrupt-human-smugglers-mediterannean/ visited 24 June 2015.

[30] Amnesty International highlighted in its report of 22 April 2015 the problem that the TRITON operation as it is a border control operation not a search and rescue operation as MARE NOSTRUM is inadequate to prevent death by drowning in the Mediterranean. https://www.amnesty.org/en/latest/news/2015/04/amnesty-international-s-blueprint-for-action-to-end-refugee-and-migrant-deaths-in-the-med/

[31] Current FRONTEX rules require engagement in SAR when a distress incident occurs in the course of a border control operation, but do not provide for pro-active SAR operations as such. See Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea 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.

[32] See the Human Rights Watch report 4 April 2014 http://www.hrw.org/sites/default/files/reports/bulgaria0414_ForUpload_0.pdf visited 18 May 2015.

[33] Human Rights Watch article on 'Bulgaria: New Evidence Syrians Forced Back to Turkey', available at: http://www.hrw.org/news/2014/09/18/bulgaria-new-evidence-syrians-forced-back-turkey visited 17 June 2015; and more

Syrians are the top nationality of asylum seekers in 2014 for Belgium, Bulgaria, Denmark, Germany, Cyprus, Spain, Netherlands, Austria, Romania, Slovenia and Sweden. Ukrainians were the top nationality for the Czech Republic, Estonia and Portugal. They came second in Spain, Cyprus, Latvia and Poland, according to EUROSTAT. Looking at these destination countries, it is not obvious why Syrians die trying to get to the EU and Ukrainians do not. Instead, it is necessary to examine the approaches of border guards in countries of transit of Syrians and Ukrainians into the EU. As noted above, reputed organisations have documented very serious allegations of human rights abuses at the Bulgarian/Turkish border regarding the duty of *non-refoulement*. This is contrary not only to the Refugee Convention and the European Convention on Human Rights, but also the EU's Common European Asylum System.[34]

According to FRONTEX, 22,069 Syrians were treated as trying to 'illegally' cross a land border into the EU in 2014.[35] Ukrainian nationals do not figure in FRONTEX's top ten nationalities of those seeking to cross into the EU irregularly. FRONTEX also reports that, in 2014, 1,091 Syrians were treated as trying to enter the EU clandestinely (placing them near the top of the ten main nationalities of persons entering the EU clandestinely), while Ukrainian nationals are not among the top ten nationalities here either.[36] It would seem that the attitude of EU Member State border guards towards Ukrainian nationals seeking to enter the EU without visas may be different from that towards Syrians seeking the same, raising doubts of compatibility with non-discrimination duties under EU and international law, on top of potential breaches of the principle of *non-refoulement*.[37]

On the other hand, according to the European Commission, of the over 1.3 million short stay visa applications made in Ukraine in 2014, only 2% were rejected. By contrast, of the 360 visa applications made in Syria, 49.4% were rejected. As the FRA has examined, since the beginning of the civil war in Syria, visa refusal rates for Syrians have skyrocketed.[38]

Two conclusions can be reached so far. First, the way in which EU border controls are carried out in the Mediterranean (both green and blue borders) may play a role in why people die at sea as it seems that many people cannot get access to the safer green border crossing points. Secondly, the operation of land border controls means that some asylum seekers, such as Ukrainians, can enter the EU safely, while others, despite strong protection needs, are forced into much more dangerous sea border routes, such as the Iraqis and Syrians who may be unable to cross green borders into the EU to seek protection via the Bulgaria-Turkey border as evidenced by UNHCR and HRW (see above).

1.4 What Role for the Private Sector?

There are two principal ways in which the private sector is engaged in the crisis in the Mediterranean. The first and most immediate is the private shipping sector, which is deeply involved in rescuing people at sea. The shipping industry has played a significant role in search and rescue operations in the Mediterranean, leading private companies to incur heavy financial losses in the process. As a result, they have started to re-route their voyages to avoid areas frequented by migrant boats, and private vessels are becoming more reluctant to reveal

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generally 'UNHCR calls for an investigation into the death of two Iraqis at the Bulgaria-Turkey border, raises concerns over border practices' May 2015.

[34] Arts 3(b) SBC, 33 Geneva Convention, 3 ECHR, 4 and 19 EUCFR. For analysis, see Moreno-Lax, V., (2011), '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law', in Maes, M. Foblets, M.-C. and De Bruycker, P. (eds), The External Dimensions of EU Asylum and Immigration Policy, Bruylant, 385.

[35] FRONTEX report, (2015), 'Annual Risk Analysis 2015', available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf visited 18 May 2015.

[36] Idem 31.

[37] Arts 6(2) of the Schengen Borders Code, 3 Geneva Convention, 14 ECHR, 21 EUCFR. For analysis, refer to Cholewinski, R., (2002), 'Borders and Discrimination in the European Union', available at: www.ilpa.org.uk/data/resources/13281/ilpa_mpg_borders.pdf visited 10 June 2015.

[38] FRA report, (2015), 'Legal entry channels to the EU for persons in need of international protection: a toolbox', available at: http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf visited 8 June 2015.

their positions at sea.[39] In order to reverse this unfortunate trend, States should invest the necessary resources into their SAR services to comply with their SAR obligations and consider measures to alleviate private rescue costs, such as exemptions from docking fees, when disembarking persons rescued at sea, and predictable disembarkation modalities for such rescue operations. A mechanism established by the International Maritime Organization during the massive departures from Indochina by boat in the 1980s still exists and could be reactivated.[40]

Secondly the NGO and voluntary sector have been involved in the issue of unsafe journeys and drownings in the Mediterranean, first, expressing the concerns and demands of civil society that more be done to save people and make the crossing of the Mediterranean safe for everyone, including by actually sending out rescue boats or establishing offshore aid stations for migrants.[41] Secondly, they have a vital role to play in referral, reception and social insertion of persons in need of international protection.[42] Thirdly, the FRA has recommended an official role for the private sector in resettlement including the possibility to introduce and/or support resettlement applications for individuals in need in regions of conflict through private sponsorship schemes. The private sector could also be involved in sponsorship in other areas such as students, workers etc. as the FRA suggests, taking account of increased accountability and transparency advantages of multi-actor arrangements.[43]

1.5 Is there a role for existing EU immigration and asylum tools?

So far this analysis has considered the impact of mandatory visa requirements, carrier sanctions and border controls on the safety or otherwise of the arrival of people at EU external borders. In the search for safe ways for people in need of international protection to access EU territory, what immigration and asylum tools are available and how could they be used to provide safe access to those in need of international protection? This is the main question addressed in this section. Four main tools will be assessed in turn: (1) Humanitarian evacuation and transport; (2) humanitarian visas, (3) resettlement; (4) immigration visas.

Before commencing, however, it must be underlined that immigration and protection tools can never be an alternative to the receipt and processing of spontaneous asylum applications. Pursuant to the duties of non-discrimination and non-penalisation of irregular entry,[44] people who need international protection, irrespective of their mode of arrival, must always have the opportunity to make their applications and to have them considered in a fair and efficient procedure. Other tools may be useful to provide protected-entry routes to those known to the EU authorities as being in need of a way out of their current state (of origin or transit) to somewhere safer for at least the interim.

1. **Humanitarian evacuation and transport**: The EU has used humanitarian evacuation and transport on a number of occasions to rescue EU and non-EU citizens caught in conflict zones. In July 2006, the EU

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[39] Moloney, L. and Paris, C., (2015), 'Europe's Cargo Ships Diverted to Sea Rescues', the Wall Street Journal, available at: http://www.wsj.com/articles/boat-people-trying-to-reach-europe-disrupt-mediterranean-mercantile-shipping-1427399702 visited 10 June 2015.

[40] Goodwin-Gill, G., 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', available at http://www.jmcemigrants.eu/category/working-papers/ visited in June 2015.

[41] On the Cap Anamur case, see Klepp, Silja, (2014), 'Europa zwischen Grenzkontrolle und Flüchtlingsschutz: eine Ethnographie der Seegrenze auf dem Mittelmeer', transcript Verlag. On the Migrants Offshore Aid Station (MOAS), see: http://www.moas.eu/ visited 10 June 2015.

[42] See, for instance, DRIVE project, MayDay! Report, available at: www.refworld.org/pdfid/4f02ebd92.pdf; and PRAESIDIUM project, Evaluation Report, available at: http://www.unhcr.org/4ac35c600.pdf visited 10 June 2015.

43FRA report, (2015), 'Legal entry channels to the EU for persons in need of international protection: a toolbox', available at: http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf visited 8 June 2015 Fra Press Release, (2014), 'Fundamental rights at the EU's borders: FRA reports reveal challenges ahead', available at: http://fra.europa.eu/en/press-release/2014/fundamental-rights-eus-borders-fra-reports-reveal-challenges-ahead visited in June 2015.

[44] Arts 3 and 31 of the Geneva Convention.

coordinated a substantial evacuation plan in response to the crisis in Lebanon.[45] According to the EU delegation to the UN, 'between 17 and 21 July, 27 ships operating under various flags brought some 18,000 evacuees from Lebanon to Cyprus. A further 13 ships were expected to arrive over the weekend. By air, some 23,491 evacuees have landed in Cyprus, of which 12,491 are EU citizens. On 22 July, 5,197 EU citizens and 2,630 non-EU citizens remained in Cyprus'. The EU also coordinated humanitarian evacuation from Libya in 2011, mainly limited to its own nationals and their family members.[46] Other promising practices have been documented by FRA, including examples of humanitarian admission to several Member States of Syrian and Iraqi nationals, which could be replicated and formalised in an EU instrument.[47]

Perhaps the most well-known example is that of Germany where on 14 June 2014 the German Interior Ministers' Conference extended their **humanitarian admission** programme for Syrian refugees by an additional 10,000 places. Germany has previously committed to providing 10,000 places for Syrian refugees under this programme in 2013 and 2014. Refugees with family already living in Germany are given priority as well as families with several children and minors living alone in the camps.[48] The residence status is defined in national law as temporary protection but includes full access to the labour market.

In this line, the **Temporary Protection** Directive for provision of relief and protection to those 'who have had to leave their country or region of origin, or *have been evacuated* … and are unable to return in safe and durable conditions because of the situation prevailing in that country' should be considered as well.[49] Accordingly, the activation of the Directive and, in particular, the system of determination of what constitutes a 'mass influx' should be construed in line with its purpose, in order for the mechanism to be applied more effectively.[50] The temporary protection scheme foreseen in this Directive, however, is only triggered by a Council Decision recognising a mass influx of displaced persons in the EU, based on a proposal from the Commission. Even though the criteria for initiating a temporary protection scheme are rather vague it may be a useful tool. The European Parliament, as well as UNHCR and civil society, has called for its application on several occasions, without success.[51] The Commission is currently undertaking an evaluation of the Temporary Protection Directive with a view to proposing amendments to facilitate its application in future. Such amendments could foresee amendment of the definition of a 'mass influx' in Article 2(d) of the current Directive, in order to provide for clearer grounds, in numerical and/or qualitative terms, requiring its invocation. Amendments could potentially also include adjustments to the procedure under Articles 4-5 for applying a temporary protection scheme through by QMV in the Council on a proposal by the Commission in accordance with the ordinary legislative procedure post Lisbon. Furthermore, adjustments to the current provisions on solidarity measures (Articles 24-26) could also be made, in order to limit the current wide discretion available to Member States in defining their capacity to receive temporary protection holders, and provide a clearer obligation to offer places to receive such people arriving in the most affected Member States.

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[45] European Union Joint Press Release, (2006), 'Summary: EU action in response to crisis in Lebanon' available at: http://eu-un.europa.eu/articles/en/article_6140_en.htm visited 1 June 2015.

[46] European Commission Press Release on 'The European Commission's humanitarian response to the crisis in Libya' available at http://europa.eu/rapid/press-release_MEMO-11-143_en.htm?locale=en visited 1 June 2015.

[47] FRA report, (Idem no. 42).

[48] European Resettlement Observatory article, 'Germany offers to take in 5.000 Syrian refugees', available at: http://www.resettlement-observatory.eu/archivio-news/155-germany-offers-to-take-in-5000-syrian-refugees.html visited 3 July 2015; also see UNHCR, (2015), Global Appeal Update, 'UNHCR subregional operations profile – Northern, Western, Central and Southern Europe', available at: http://www.unhcr.org/pages/49e48e5f6.html visited July 2015.

[49] Art. 2(c), Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) [2001] OJ L212/12.

[50] Further on Temporary Protection and how it should work, see Durieux, J.-F., (2014), 'Temporary Protection: Hovering at the Edges of Refugee Law', 45 Netherlands Yearbook of International Law 221.

[51] European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)); European Parliament resolution of 9 October 2013 on EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria (2013/2837(RSP)); European Parliament resolution of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)).

2. **Humanitarian visas**: In 2014 the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) commissioned a study on humanitarian visas and their possible deployment for people in need of safe entry into the EU.[52] In that study the author examined in great detail the possibility of including in the current EU legal structure a humanitarian visa and how it might work. The study indicates that there is too little follow up on the current use of humanitarian visas by Member States, which actually have a system, to conclude one way or the other about their effectiveness. The study recommends that Member States can and should be issuing humanitarian visas. A prior study commissioned by the LIBE Committee in 2010 recommended the use of the Limited Territorial Validity (LTV) provisions contained in the Visa Code for the purpose.[53] In the current context, the opportunity should be seized during negotiations of the Visa Code reform to clarify LTV obligations, in accordance with *non-refoulement* and right to asylum standards, so a uniform and coherent practice emerges in line with the Charter of Fundamental Rights.[54] The dangers of humanitarian visas becoming a system of **extraterritorial processing** have been evaluated by many scholars and should be avoided to ensure compliance with fundamental rights.[55] It is necessary to monitor the current use of humanitarian visas, and to use compliance and enforcement mechanisms to ensure they are issued. Otherwise this mechanism will remain a chimera rather than a reality.

3. **Resettlement**: Resettlement is a different procedure from humanitarian visas, as it normally entails a consideration of the asylum application of the individual which takes place while that person is in another country outside the EU (usually a transit country). Normally, the services of UNHCR are called upon to make the refugee protection needs assessment and to refer to states persons eligible, according to the criteria provided to UNHCR by the resettlement state.[56] Because resettlement decisions take place outside the territory of the potential recipient state, the length of procedures is particularly noticeable. It is not infrequent that UNHCR carries it out in refugee camps, such as in Kenya, Turkey or Jordan, where access itself may take time. A number of EU states have been countries in which resettlement procedures were carried out (for instance Austria and Malta[57]) before their accession to the EU (and Malta even today). These countries have extensive experience of being host countries for resettlement procedures. There are many issues attendant on resettlement programmes. First, they are usually capped, such as the Commission's recent proposal of 20,000 places.[58] The Commission's proposal is for a Recommendation,[59] which would be a non-binding measure and thus would not need approval from the other institutions. It also means that it would be difficult to enforce. However, the

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[52] Jensen, Iben U., (2014), 'Humanitarian Visas: option or obligation?', Study for the European Parliament, Directorate-General Internal Policies, Policy Department for Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 509.986 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf visited 18 May 2015.

[53] De Bruycker, P. at al., (2010), 'Setting Up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system, Study for the European Parliament, Directorate-General Internal Policies, Policy Department for Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 425.622 (Brussels), available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf visited 10 June 2015.

[54] Arts 4, 18 and 19 of the European Union Charter of Fundamental Rights. Note reference to compliance of EU visa policy with fundamental rights in Preamble to Visa Code Regulation 810/2009, Recital 29. On the extraterritorial applicability of the Charter, see Moreno-Lax, V, Costello, C. (2014), 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model', in S. Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights*, Hart, 1657.

[55] Peers S. et al, (2012), 'EU Immigration and Asylum Law', 2nd Ed, Vol. 2, Brill. Chap 10. See also, De Bruycker, P. at al., (2010), 'Setting Up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system, Study for the European Parliament, Directorate-General Internal Policies, Policy Department for Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 425.622 (Brussels), Part 3, Section 6.

[56] UNHCR, Resettlement Handbook, (2014), available at: http://www.unhcr.org/4a2ccf4c6.html visited 10 June 2015.

[57] From this later state there is still some resettlement taking place to the USA.

[58] European Commission Press Release on 'Managing migration better in all aspects: A European Agenda on Migration' available at http://europa.eu/rapid/press-release_IP-15-4956_en.htm http://europa.eu/rapid/press-release_IP-15-4956_en.htm visited 18 May 2015.

[59] Commission Recommendation COM(2015) 3560 of 8.6.2015 on a European resettlement scheme.

European Agenda on Migration states that if necessary the proposal may be followed up **with a legislative proposal** of a binding and mandatory nature. This is most welcome as it would give a proper statutory basis of resettlement and include, as co-legislator, the European Parliament. It would also provide an opportunity to set out common principles to govern resettlement practices and help streamline processes. However, any specific figures for the number of resettled refugees to be distributed to individual Member States should be defined as minimum ones, and States should retain discretion to admit further resettled refugees beyond those numbers. It is imperative that any legal measure not inadvertently constrain resettlement, one of the advantages of which is its additional and discretionary character. The importance of this flexibility and readiness to increase resettlement beyond collective EU targets is also acknowledged in the *Agenda on Migration*, which encourages the Member States to make use of possibilities under the Asylum, Migration and Integration Fund and pledge further places under national programming, with funding that can be adjusted swiftly to support such actions.[60]

The Commission's proposal[61] plans to attach EU funding to each resettled person to increase the take up rate from the Member States. In terms of the numbers of persons to be resettled, the proposal of 20,000 is derisory compared to the number of refugees even from Syrian alone arriving and seeking protection in the EU. The UN Special Rapporteur on the Human Rights of Migrants, Francois Crépeau has criticised the EU proposal as inadequate. "The number of resettlement places initially envisaged seems utterly insufficient", Crépeau stressed. "20.000 places in the EU regional block is not an adequate response to the current crisis which in 2014 saw over 200,000 irregular migrants – a majority of whom were asylum seekers – arrived in Europe by boat".[62] The distribution key for **resettled refugees** is mainly the same as that recommended for relocation, which is further discussed in section 3. Secondly, the criteria provided to UNHCR need to be clear and non-discriminatory, as there is always concern that states may want to 'cherry pick' refugees they consider to have significant potential, rather than take the most vulnerable. Thirdly, the procedures need to be sufficiently quick that people have a real possibility of being resettled and the offer is not a chimera, if resettlement is to be credible. Fourthly, the most **successful resettlement procedures have involved NGO and non-state actors**. This can take place in the offer of spaces for resettlement and in the reception of resettled persons (see below on after-entry issues). One might have regard to the original resettlement programme offered by Canada for Vietnamese boat people in the late 1970s, where the government offered to match one-for-one every resettlement offer made by NGO and private actors, such as families or religious institutions.[63] The FRA has recommended the inclusion of private resettlement options whereby individuals, groups, NGOs etc. can sponsor people for resettlement. This is a useful proposal that deserves further consideration.[64] As pointed out, the engagement of the private sector is critical to successful social insertion and public acceptance; it serves to inform public opinion, diminish anti-immigrant sentiment, and foster social inclusion.

4. **Immigration visas**: the EU has moved far down the road towards an EU immigration code, which includes, in every measure, provision of the issue of visas. A number of these measures could be used in a widened form to provide a protected-entry system for people who need international protection. The first category to consider is **family reunification**. Directive 2003/86 permits Member States both to have more generous family reunification rules (Article 3(5)) and to include in the terms of the Directive extended family members (Article 4(2) and (3)). Facilitating visas for family members of beneficiaries of international protection already resident in the EU is one very straightforward way to use immigration tools to assist safe access to the EU. 'Family

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[60] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM (2015)240, 13 May 2015, page 5.

[61] Commission Recommendation COM(2015) 3560 of 8.6.2015 on a European resettlement scheme.

[62] United Nations Human Rights Office of the High Commissioner for Human Rights opinion on 'Migrants: "EU's resettlement proposal is a good start but remains woefully inadequate" - UN expert', available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15961&LangID=E visited 1 June 2015.

[63] Canadian Council for Refugees, statistics available at: http://ccrweb.ca/sites/ccrweb.ca/files/static-files/20thann.html visited 18 May 2015.

[64] FRA report, (2015), 'Legal entry channels to the EU for persons in need of international protection: a toolbox', available at: http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf visited 8 June 2015.

members', as a term, can be more widely interpreted than merely spouses and minor children, beyond the minimum standard provided for by the directive.[65] For EU citizens, in Directive 2004/38, admissible family members include all family members in the ascending and descending lines of the EU citizen and his or her spouse as well as possibilities for other family members who are dependent on the principal. Such a wider scope to the concept of family entitled to visas to come to the EU would assist many people in need of international protection who already have some extended family member in the EU – following the example of Germany, France and others, regarding humanitarian admission.[66] To be properly effective as a safe entry scheme, those seeking entry must not be made subject to the onerous support, accommodation, integration and health insurance requirements of the directive. In a similar vein, Member States may issue **student and researcher visas** to those who are unable to complete their studies or research in their country of origin on account of civil war or other situation. Such visas may need to be accompanied by scholarships or bursaries – following existing practice[67]– to assist such students financially, if they have insufficient means themselves. The **Blue Card Directive** could be used more expansively as well, being a minimum standards directive, which also allows Member States to maintain more generous employment migration systems. Many of the people fleeing civil wars are highly skilled, though the recognition of their skills and diplomas may not be automatic. Allowing them easier access to the EU labour market as a mechanism to allow them to escape civil war is also an option to explore. The European *Agenda on Migration* announced a public consultation on the future of the Blue Card Directive and a review. The Commission is encouraged to take into account these proposals in that consultation.

1.6 Reception Conditions in EU Law and Practice

EU law has detailed rules on so-called 'reception conditions' for asylum-seekers. The Recast Reception Conditions Directive[68] aims to ensure 'adequate and comparable reception conditions throughout the EU'. Moreover, AMIF funding is available to support reception of asylum-seekers, including by focusing on social inclusion from the outset. In the sense that EU law establishes minimum standards for reception, and funds reception activities, all reception centres are EU centres.

Could 'developing EU Asylum Reception Centres at the EU's periphery could help secure greater access to protection and better functioning of the CEAS'?

The idea of having centres 'at the EU's periphery' needs close examination. If there were safe and legal access to asylum in Europe as outlined above, the need for dangerous sea and land journeys would diminish, and asylum-seekers would not arrive at the 'periphery.' Establishing physical centres might also undermine the flexibility and adaptability needed. This observation is made in light of the current diversity of reception across the EU.

A 2014 European Migration Network Study (the 'EMN Study')[69] showed the diversity of forms of reception, including within Member States, as reception is often a matter of sub-state competence. The EMN study highlighted that **organisation** of **reception facilities differs greatly** between surveyed States. Such differences are not only apparent between Member States, but also occur within Member States including for

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[65] See generous interpretation of 'relative' by CJEU in Case *C-245/11 K*, 6 Nov. 2012, for the purposes of the Dublin Regulation humanitarian clause.

[66] FRA report, (2015), 'Legal entry channels to the EU for persons in need of international protection: a toolbox', available at: http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf visited 8 June 2015.

[67] Orchard, C. and Miller, A., (2014), 'Protection in Europe for Refugees from Syria', RSC Forced Migration Policy Brief 10, September, available at: http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf visited 10 June 2015.

[68] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive) [2013] OJ L180/96.

[69] This Synthesis Report was prepared on the basis of National Contributions from 24 EMN NCPs (Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom, Norway), The European Migration Network Study, (2014), 'The Organization of Reception Facilities for Asylum Seekers in different Member States', available at: http://emn.ie/cat_publication_detail.jsp?clog=1&itemID=2653&t=6 visited in June 2015.

some at sub-state level. Most Member States report to have experienced **pressure** on their **asylum system** between 2008 and 2012/2013. The **allocation process** of applicants for international protection among different centers in different geographical locations is used as a means to reduce pressure in reception facilities. Furthermore, Member States further apply a range of different flexibility mechanisms to prevent and reduce pressure.

Good practices for the application of flexibility mechanisms were identified and placed in a broader theoretical framework. Based on the findings of the National Contributions, the following two good practice approaches are advocated. These were, firstly, preparation of strategies to prepare, mitigate and respond to pressure; and secondly, the management of reception as a chain (i.e. from inflow, reception, procedure, outflow, to return/integration).

The EMN Study concludes that diversity in approaches between different national contexts is welcome, provided that **coordination, implementation and external control mechanisms** ensure that EU and international standards are met. The Study also highlights the importance of keeping **flexibility** in reception systems. The EMN Study highlighted the lack of data to assess the efficiency of reception, which would be attentive to the issue of how long people stay in formal reception centres in light of the duration of the asylum process. The report emphasized **'chain management'** of reception, noting the importance of looking at both reception and processing claims as an integrated process, and 'external control mechanisms.' The need for **fair and efficient asylum procedures** in particular where refugees are staying in reception centres is very important. The fact that refugees may be out of sight must never be a reason for their asylum claims to be subject to procedures which are less advantageous than those available to refugees who are not housed in reception centres.

Moving to establish EU Asylum Reception Centres raises significant political, logistical and organisational challenges. Firstly, there are important subsidiarity concerns, as it could be argued that running centres is better left to the national, sub-state or local level. Secondly, given the importance of the 'chain management' approach, ensuring that first reception links in with later reception phases is crucial. Thirdly, as the 2014 Report[70] emphasised, multi-actor involvement in first reception is important. There are some striking examples of communities coming together to support reception of asylum-seekers and refugees.[71] A top-down approach could imperil local support, which is crucial for social cohesion.

The main challenge at present is to ensure that Reception Centres are places of welcome. We suggest that institutional living can easily become coercive. There are rigorous past studies indicating unacceptably high risks of sex and gender based violence in reception centres.[72] In this context, it is underlined that there is a human rights obligation to permit external monitoring of reception centres,[73] and provide support for the

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[70] European Parliament Study commissioned by the LIBE Committee, (2014), Guild, E., Costello, C., Garlick, M. , Moreno-Lax, V., Mouzourakis, M., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015.

[71] UNHCR has praised the Farsta Centre in Stockholm, which was established at the initiative of the former hotel's staff, and involves refugees in the welcome provided:

http://www.unhcr-northerneurope.org/news-detail/hotel-turned-asylum-seeker-reception-centre-sets-a-good-example-in-sweden/ visited June 2015.

[72] Keygnaert, I. et al, (2014), 'Sexual and gender-based violence in the European asylum and reception sector: a perpetuum mobile?' European Journal of Public Health.

[73] For example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for monitoring of detention by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in States parties, including closed reception centres. Given that many reception centres are semi-carceral (in that asylum-seekers may be subject to curfews and restrictions on free movement), and court decisions have established that conditions may risk being inhuman and degrading, there is a strong argument for the development of external monitoring of reception centres.

enforcement of the reception rights of asylum-seekers and refugees. Accountability through audit is also an important aspect of ensuring that standards for reception are met. We will develop on this in the next section.

In situations where a Member State is unable to meet its obligations to provide reception conditions, and otherwise to respond in accordance with European and international law to people arriving at its frontiers or in its territory, support from the EU, competent agencies and other Member States will potentially be critical to ensure the rights of asylum-seekers will be respected, and their arrival more effectively and appropriately managed, in their own interests and that of Member States.

In this connection, it is noted that the European Council, in its conclusions of 25-26 June 2015,[74] proposed the 'setting up of reception and first reception facilities in the frontline Member States with the active support of Member States' experts and of EASO, Frontex and Europol, to ensure the swift identification, registration and fingerprinting of migrants (**"hotspots"**).'[75] This proposal takes up that of the European Commission in the Agenda for Migration[76] of 13 May 2015, foreseeing such support at 'hotspots' as an immediate action in response to current needs, including in the Mediterranean.

Correctly designed, resourced and implemented, this proposal could potentially improve conditions at arrival at some external borders, including in Italy and Greece, provided that the *acquis* standards are met, and other practical arrangements are in place to guarantee effective access to procedures and adequate treatment for asylum-seekers and protection for those entitled to it.

This includes ensuring that such identification processes are focussed on ascertaining whether a person seeks international protection. Where this is the case, the process must also ensure that he or she is afforded immediate access to the asylum procedure, in accordance with the Asylum Procedures Directive,[77] including the right to formal registration or lodging of his or her claim, to legal and procedural information, to legal assistance and all other facilities as required to pursue the application. An asylum-seeker is also at that point entitled to the full range of reception entitlements under the Reception Conditions Directive,[78] including accommodation and material conditions which can ensure an adequate standard of living.[79]

Non-governmental experts and organisations can potentially play a valuable role in initial reception, information provision and offering other services, which should be considered in the context of the first reception proposals.

The identification process, as referred to in the Council Conclusions of June 2015, must also provide for the identification of applicants with special reception needs[80] and for those in need of special procedural guarantees.[81] 'Registration' of asylum-seekers must also ensure an opportunity to lodge the asylum application in accordance with the deadlines set in the Asylum Procedures Directive with the competent authorities at

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[74] European Council conclusions, 25-26 June 2015, Conclusion 3.

[75] Ibid, para. 4(c).

[76] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM (2015)240, 13 May 2015, page 6.

[77] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Art. 2(d), Article 6.

[78] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive) [2013] OJ L180/96, Art 6.

[79] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive) [2013] OJ L180/96, Art. 17.

[80] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Recast Reception Conditions Directive) [2013] OJ L180/96, Art. 2(k),

[81] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) [2013] OJ L180/60, Art. 2(d).

national level,[82] to enable the claim determination process to begin as swiftly as possible. It is important that those officials dealing with asylum-seekers, whether representatives of the host Member State, other Member States' experts or personnel of EU agencies such as EASO, possess the legal competence and the relevant qualifications and training to deal with people who are seeking and may be in need of international protection, as required by the Asylum Procedures Directive.[83] This is particularly important in any context in which personnel of other agencies that do not have legal competence or training in relation to asylum and protection needs might be involved, as foreseen in the 'hotspots' proposal.

Where fingerprinting is undertaken for the purpose of identification and registration processes, including registering an asylum claim, it is crucial that this takes place in a non-coercive manner, in line with fundamental rights and the dignity of the applicant.

Initial reception facilities and identification and registration processes, carried out in accordance with the Directives, can afford an opportunity to refer people arriving in Member States to the most appropriate facilities, resources and procedures for their particular situation and needs. In other words, there must be effective 'chain management' if EU Centres are not to become detached from the rest of the legal process. This includes the referral of asylum-seekers to the asylum procedure, as discussed above. It may also involve the referral of people with medical needs to immediate care, as required, before they will be in a position to express their intention or provide other information; identification and referral of traumatised people to appropriate support facilities; referring of victims of trafficking to care and to legal and physical protection from their traffickers, if needed; and separated family members to facilities for tracing their relatives. It can also provide for referral of people who make clear that they do not wish to claim asylum to counselling processes in order to explain their situation and options.

However, such initial reception facilities, as well as registration, identification and referral processes cannot of themselves 'determine those who need international protection and those who do not',[84] as the Council Conclusions could be interpreted to suggest. A full determination of protection needs must be conducted rigorously, comprehensively and professionally in accordance with the range of safeguards, processes and timeframes provided for in the Asylum Procedures Directive, which cannot be observed in an initial reception facility of the kind envisaged in the 'hotspots' proposal. Thus while such an initial reception facility and process may permit Member States to identify persons who are *seeking* protection, only a complete asylum procedure can be used to determine who is *in need of international protection* under EU law.

Finally, any proposal to provide additional support and resources to reception and first reception facilities in 'frontline' Member States must also aim to develop the capacity in the longer term for such Member States to respond effectively and flexibly to arrivals and to meet their reception and related asylum *acquis* obligations. They should accordingly not be seen solely as a short-term measure in a transitory 'hotspot', but an opportunity to work with and strengthen the host Member State, in terms of its expertise, processes and facilities. Consequently, rather than 'setting up' of such facilities anew, as the Council Conclusions appear to foresee, it is likely to be preferable to utilise, expand and improve as appropriate and necessary existing national facilities and procedures.

Supporting experts from other Member States and agencies should ensure that their knowledge is passed on and their support provided in a way that can assist the host Member State to be benefit from it in the longer term, through increased capacity to receive and respond appropriate to arrivals, and ideally reduce or obviate the risk of being overwhelmed in future and to call on further support to fulfil its basic obligations.

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[82] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) [2013] OJ L180/60, Art. 6.

[83] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) [2013] OJ L180/60, Art. 4.

[84] European Council conclusions, 25-26 June 2015, CONCL 3, para. 4(c).

1.7 EU Reception Centres: available options

EU law has detailed rules on so-called 'reception conditions' for asylum-seekers. The Recast Reception Conditions Directive aims to ensure 'adequate and comparable reception conditions throughout the EU'. Moreover, AMIF funding is available to support reception of asylum-seekers, including by focusing on integration from the outset. In the sense that EU law establishes minimum standards for reception, and funds reception activities, all reception centres are EU centres. Yet, diversity is the hallmark of the European reception system, as the EMN Study conveys. In this context, some additional comments on the role of EU Reception Centres have been included.

Avoiding 'camps'

EU Asylum Reception Centres could come to share many features with refugee camps. At a time when UNHCR is moving against camps and developing policies on urban refugees, it would be inappropriate for the European Parliament to develop an encampment policy.[85] UNHCR states

> From the perspective of refugees, alternatives to camps means being able to exercise rights and freedoms, make meaningful choices regarding their lives and have the possibility to live with greater dignity, independence and normality as members of communities.

In addition, when delivery of aid to refugees from Syria in the form of cash assistance in countries in the Middle East is being lauded as an important aspect to ensure self-sufficiency and autonomy,[86] many EU Member States under the Reception Conditions Directive use benefits in kind. Naturally, there is a difference between treatment of asylum-seekers and recognised refugees, but as asylum proceedings are often prolonged, the treatment of asylum-seekers often has an enduring impact on their integration prospects.

Under these conditions, we urge that against any policy that could lead to the creation of large camps, or prolonged institutional living.

Avoiding Coercion: Understanding the experiences of asylum-seekers and refugees

Rigorous participatory studies are needed to understand the lived experience in reception centres. As the EMN Study notes, data is at present limited. The empirical studies which have been reviewed suggest that at present, reception centres create coercive environments, which undermine trust and potential for later integration. Even when well run, conditions in large first reception centres may degenerate and become carceral or semi-carceral spaces. Institutional living, poor food, remote locations, strict reporting obligations, and limited recreational facilities make large centres unsuitable for long stays.[87]

A study of conditions in Austria concludes that 'The concept of 'minimum standards' translates into minimum welfare and restricted enjoyment of personal freedom but not into measures supportive of a dignified life for asylum seekers.'[88] A study of reception centres in the Czech Republic argued that centres 'served as tools of migration control. The prolonged confinement of a highly diverse group of people produced by the interconnectedness between asylum and immigration policies leads to asylum seekers' disillusionment about the asylum procedure and nourishes various illicit activities. In everyday practices in the centres, control and assistance are closely intertwined and produce an oppressive environment that engenders asylum seekers'

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[85] UN High Commissioner for Refugees, (2014), 'UNHCR Policy on Alternatives to Camps', UNHCR/HCP/2014/9, available at: http://www.refworld.org/docid/5423ded84.html visited 1 June 2015.

[86] Byce, S., 'ATM Cash Assistance: does it work', Forced Migration Review, available at: http://www.fmreview.org/en/urban-displacement/42-43.pdf visited in June 2015; Campbell, L., 'Cross-Sector Cash Assistance for Syrian Refugees and Host Communities in Lebanon: An IRC programme' available at: http://policy-practice.oxfam.org.uk/publications/cross-sector-cash-assistance-for-syrian-refugees-and-host-communities-in-lebano-322214 visited in May 2015.

[87] A large study of reception centres in Germany notes such concerns. See Die Landesflüchtlingsräte und Pro Asyl (eds.) AusgeLagert, Zur Unterbringung von Flüchtlingen in Deutschland, (2011), 'DeCamped, on accommodation of refugees in Germany', Sonderheft der Flüchtlingsräte, (Special Issue of refugee councils' newsletter).

[88] Rosenberger, S. and König, A., (2012), 'Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria', 25(4) Journal of Refugee Studies 537.

dependency.'[89] From qualitative research, one gets a strong impression that the lack of integration opportunities (work, study, living a normal life) creates strong incentives for onward movement.[90]

Particularly disturbing are the findings of a notable 2014 study in 8 countries based on 600 individual interviews. It showed a high risk of sexual and gender-based violence in reception centres.[91]

This evidence is patchy, but it creates a strong duty to develop better external control mechanisms for reception centres, one of the main EMN Study conclusions.

External Monitoring of Reception Centres – a Human Rights Obligation

At present, the monitoring of places of detention takes place under the auspices of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) has the power to visit places wherever people (including young people) can be deprived of liberty, including surprise visits. Given that many reception centres are semi-carceral (in that asylum-seekers may be subject to curfews and restrictions on free movement), and we know that conditions may risk being inhuman and degrading, the European Parliament should support the development of external monitoring of reception centres.

The proposed EU Migration and Protection Agency would have such external monitoring capacity. In the absence of a new agency, a legal requirement for external monitoring should be imposed, either via an amendment to the AMIF Regulation or EU Reception Conditions Directive.

Institutional Enforcement

Reception Conditions are already regulated by EU law. The problems are ones of implementation and capacity. EU law's effectiveness is imagined to rest on the 'dual vigilance of individuals and the Commission' to bring proceedings to invoke EU law before the Courts. If the individuals concerned are unlikely to bring their own claims, then we need to enhance institutional forms of law enforcement. Some notable cases vindicating EU law have been brought by NGOs – by the French NGO *GISTI* on reception conditions for those subject to Dublin proceedings for instance.[92]

The EP should support institutional monitoring and enforcement actions. The proposed EU Migration and Protection Agency should be empowered to bring cases on behalf of migrants and refugees.

Accountability through Audit

The European Parliament and the European Commission, using the regulation of allocation of EU funding under AMIF, have developed important criteria for reception capacity in Annex IV of the AMIF Regulation. At present, there is no systematic monitoring of the reception conditions and the efficiency of the process whereby refugees are recognized, and then proceed to work and live normal lives in their host communities. This needs to change.

Reception Centres in Third Countries

The possibility of establishing reception centres in third countries in regions of origin or transit has been raised once again. According to press reports, the EU Commissioner for Migration, Home Affairs and Citizenship has proposed the possible use of EU representations in third countries for the processing of asylum applications

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[89] Szczepanikova, A., (2013), 'Between Control and Assistance: The Problem of European Accommodation Centres for Asylum Seekers', (2013) International Migration, 51: 130–143.

[90] Brekke, J. and Brochmann, G., (2014), 'Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation', Journal of Refugee Studies.

[91] Keygnaert, I. et al, (2014), 'Sexual and gender-based violence in the European asylum and reception sector: a perpetuum mobile?' European Journal of Public Health.

[92] Case *C 179/11, Cimade et GISTI (*Groupe d'information et de soutien des immigrés) *v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 2012, [2012] ECR I-XXX.

outside the EU.[93] The press has reported that Italy has gone further and recommended the setting up of reception centres in North African countries such as Niger, Tunisia or Sudan where people seeking to come to the EU as refugees could be processed.[94]

The *Agenda on Migration* has proposed a 'pilot multi-purpose centre' to be set up in Niger by the end of 2015.[95] The *Agenda* refers to these as venues for the 'provision of information, local protection and resettlement opportunities' which could 'help provide a realistic picture of the likely success of migrants' journeys, and offer assistance voluntary return options for irregular migrants'. There is no explicit suggestion that these could be used for processing of asylum claims under any more far-reaching arrangement, for which a detailed proposal outlining legal, practical and political parameters would be needed.

Proposals have been made, however, on numerous occasions in the past for processing of claims in non-EU countries by or on behalf of EU Member States. The best known example was that of the call by the (then) British Prime Minister, Tony Blair, in 2003 for such reception and processing centres to be established.[96] This was followed by a call in 2005 by the (then) German Interior Minister, Otto Schily, for asylum centres in North Africa.[97]

The appeal of such ideas lies in the possibility of providing a venue for processing of asylum claims in a region of origin or transit of asylum-seekers, enabling them to apply for protection in Europe without having to undertake a dangerous journey and seek to enter the EU by irregular means, potentially resorting to the costly and unreliable services of smugglers. For EU Member States, there could be the additional advantages of processing at lower cost in third countries, with fewer challenges around removal of those rejected. However, academic authorities have been highly critical of such proposals, arguing that the legal and practical problems which such centres would create may be insurmountable.[98]

The question of legal responsibility for such reception centres and the treatment of people who would undoubtedly go to those places in search of protection underlines the complexity of the issue. What state would be responsible for the reception of such people and for how long? What kind of due process would there be including appeal rights? What would happen to someone who might be rejected at one of the centres but who then manages to get to the EU and makes an asylum application? The European Court of Human Rights has clarified that European countries remain responsible to ensure that the principle of *non-refoulement* is respected, including where they act outside their territory.[99] The Charter of Fundamental Rights also governs Member States' actions, including beyond the Union's borders. Clear proposals would be needed to meet the

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[93] Traynor, I., (2015), 'Migrant crisis: EU plan to strike Libya networks could include ground forces', The Guardian, available at: http://www.theguardian.com/world/2015/may/13/migrant-crisis-eu-plan-to-strike-libya-networks-could-include-ground-forces visited July 2015.

[94] The Telegraph, article, 'Italy calls for migration centres outside EU', available at: http://www.telegraph.co.uk/news/worldnews/europe/italy/11463400/Italy-calls-for-migration-centres-outside-EU.html visited 4 July 2015.

[95] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM (2015)240, 13 May 2015, page 5.

[96] UK Home Office, *A New Vision for Refugees*, February 2003, referred to in 'Safe havens plan to slash asylum numbers, *The Guardian*, 5 February 2003. A later version was presented to the European Council in March 2003: UK Home Office, *New international approaches to asylum processing and protection*, March 2003. For a discussion of the proposal and its implications, see Garlick, M. (2006) 'The EU discussions on extraterritorial processing: solution or conundrum?' International Journal of Refugee Law 18.3-4, 601-629.

[97] German Interior Ministry, *Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Einrichtung einer EU-Aufnahmeeinrichtung in Nordafrika* 9 September 2005. See also Garlick, M. (2006) ibid.

[98] Noll, G., (2003), 'Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones', European Journal of Migration and Law 5.3, 303-341; Peers S. et al, (2015), 'EU Immigration and Asylum Law', 2nd Ed, Vol. 3, Brill, Chapter 10, section 2.3, 'Offshore processing'.

[99] European Court of Human Rights (Grand Chamber) *Hirsi Jamaa and others v Italy* (Application No. 27765/09), Judgment of 23 February 2012.

challenge of ensuring that the appropriate standards could be met, for a potentially very large number of applicants, in the sovereign territory of another country. Securing the full cooperation of a potential host State would be a fundamental prerequisite for the establishment of such an arrangement, for which the EU would need to demonstrate a clear interest and benefit in the proposal. This would also be likely to necessitate assurances that the arrangement would not constitute a 'pull factor' to a host country, and that the latter would not be left with full responsibility for irregular migrants rejected under such a system. Moreover, for EU Member States, the idea would bring added value only if it could have a marked impact on the numbers of spontaneous arrivals. To do so, it would require readiness to provide large-scale resettlement or other arrangements for admission of those identified as refugees in third countries that is not clearly evident at this point.[100]

Thus while ideas on extraterritorial processing, which are not currently proposed formally at EU level in the Agenda on Migration or otherwise, may merit further examination, they would need to be developed in a way that would ensure full compliance with legal standards, and provide a genuine and viable alternative to irregular movement for a significant proportion of people in need of protection. The European Parliament would be wise to require any formal proposal to be held up to careful scrutiny, taking into account the critical analysis of academic authorities on the subject.

This section has considered the core problem of how to ensure safe and lawful access to the EU territory for persons in need of international protection. It commenced with an analysis of the source of the problem of unsafe access to the territory and placed it squarely on mandatory visa requirements coupled with carrier sanctions. Without these two EU measures, unsafe access to the EU would disappear. Secondly, border control procedures and practices have been examined, which raise a number of questions about the treatment of some persons in need of international protection in comparison with others, depending on their country of origin. The limited nature of EU search and rescue efforts in comparison with those carried out by the Italian government until November 2014 has also been appraised. It was noted that more balanced efforts to ensure safe access to the EU are needed and strongly recommended. Thirdly, the analysis considered other immigration and protection tools for safe access to the territory, including humanitarian evacuation, humanitarian visas, resettlement, and the use of wide family reunification possibilities, student visas and work visas, as also available to Member States through existing EU legislation. The role of the private sector, both the shipping sector through rescue and NGOs through sponsorship and support to sea arrivals is vital to the success of safe access to the EU. Grave concerns are raised about reception centres particularly when they involve institutional living arrangements for substantial numbers of persons. The need for independent external monitoring of reception centres is key. The idea of establishing EU asylum reception centres outside the EU is unrealistic, unworkable and highly questionable from a human rights perspective.

The next section will move to what happens after an asylum-seeker arrives in the EU, including the mechanisms for providing international protection after a safe arrival.

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[100] Given hesitation around resettlement of 20,000 people pursuant to the Commission's resettlement proposal of 8 June 2015, significantly larger numbers may not be realistic in the short term. For a full discussion of the potential benefits and disadvantages of extraterritorial processing arrangements for Europe in the current context, see McAdam, J., (2015), 'Extraterritorial processing in Europe: is regional protection the answer? If not, what is? May 2015, UNSW, http://www.kaldorcentre.unsw.edu.au/publication/policy-brief-1-extraterritorial-processing-europe-%E2%80%98regional-protection%E2%80%99-answer-and-if visited in July 2015 ; Garlick, M., (2015), 'The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims', Migration Policy Institute, available at : http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims visited in July 2015

2. Mutual Recognition of Positive Asylum Decisions

Key Findings

- Mutual recognition of positive asylum decisions will be an important further step in the CEAS's development, promoting further investment in achieving consistent, high-quality standards in decision-making EU-wide.
- The negative impact of Dublin on individuals would be mitigated by mutual recognition and increased mobility rights, by permitting recognised refugees to reside outside the state responsible for their asylum claim - which may not be the state where they have closest ties or the greatest potential to integrate.
- Mutual recognition of positive, in addition to negative, decisions would also ensure greater balance and coherence. Its wide acceptance in other JHA areas, with less extensive legislative harmonisation, enhances the prospects of its feasibility for positive asylum decisions.
- Rules on transfer of protection rights and status between Member States at EU level are needed to ensure legal clarity and certainty, including in the context of mutual recognition and movement. A dedicated EU instrument could address outstanding gaps and ensure coherence with other parts of the asylum acquis.
- Mutual recognition could be achieved in different ways, including a model involving immediate mutual recognition, optimal flexibility and swift access to mobility rights for protection beneficiaries; or through mutual recognition and adjustment of the existing LTR framework, ensuring mobility in a more gradual way.
- Under each model, adjustments would be required to the Qualification Directive; Asylum Procedures Directive; LTR Directive, and a new instrument on transfer of protection.

Introduction

Mutual recognition is a principle which lies at the foundation of EU Citizenship, internal market and the Area of Freedom, Security and Justice (AFSJ).[101] In the asylum field, although mutual recognition of negative asylum decisions applies under existing legislation and practice, there is no obligation at present under EU law for Member States to recognise positive decisions to grant refugee status or subsidiary protection made by other Member States. Nevertheless, mutual recognition by Member States of grants of protection made by other Member States, based on harmonised legal standards and practice, has been described as an important step in the further development of the CEAS.[102]

The Refugee Convention, in its Article 28 and the related Schedule, contains an obligation for States Parties to issue travel documents to refugees and to recognise the validity of those issued by other States, which implicitly entails a form of mutual recognition of positive RSD decisions made by those states.[103] However,

[101] Mutual recognition was referred to in the Tampere Conclusions of 1999 as the 'cornerstone' of judicial cooperation in civil and criminal matters. See Council of the European Union, Presidency Conclusions, Tampere 15-16 October 1999, available at:

http://www.europarl.europa.eu/summits/tam_en.htm. The Tampere Conclusions also foresee that Community rules should 'lead to a common procedure and a uniform status for those granted asylum, valid throughout the Union'. See paragraphs 13-15.

[102] Tampere Conclusions, para. 15.

[103] Art. 28 and Schedule, para. 7 of the Refugee Convention. See also para. 11 of the Schedule, on the transfer of responsibility for the renewal of travel documents in the event of a change of country of residence by a recognised refugee. For analysis, see J Vested-Hansen, 'Article 28 and Schedule', in Zimmermann, A. (ed), (2011), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary', Chapter 56.

neither these provisions, nor related rules under a Council of Europe instrument,[104] are currently interpreted by states as entailing a full transfer of international protection responsibilities of recognised refugees.

This chapter aims to examine the potential need for, and consequences of, mutual recognition of positive asylum decisions in the context of the EU's common policy, legal standards and practice. It considers the rationale for mutual recognition, against the background of existing rules and practice on mutual recognition in asylum and the AFSJ more broadly. The need for rules on transfer of protection – and specifically, transfer of responsibility for the purpose of ensuring respect for the rights attached to protected status – will be assessed, as an accompanying measure to mutual recognition. The chapter analyses the relationship between existing LTR rules and the possibility of mutual recognition, and identifies specific adjustments to the former that would be necessary in order to accommodate mutual recognition and encourage mobility in line with the aims of the LTR Directive, with regard to the particular situation and vulnerability of protection beneficiaries. Finally, it considers how to achieve mutual recognition of positive asylum decisions in law, setting out two possible models for consideration; and makes specific recommendations for the amending and other instruments that would be needed to enshrine mutual recognition of positive asylum decisions in EU law.

2.1 A step towards a 'uniform status': mutual recognition under the Treaties and other EU documents

The Treaty on the Functioning of the EU (TFEU) obliges the EU to develop a 'common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection'.[105] Article 78 provides that the EU's common policy must be 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967' and ensure respect for *non-refoulement*. In order to achieve this, the Treaty provides that the 'European Parliament and the Council … shall adopt measures for a Common European Asylum System comprising: (1) a 'uniform status of asylum for nationals of third countries, valid throughout the Union'; and (2) a 'uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.

The European Council provided political guidance for the further development of the CEAS in 2009 in the Stockholm Programme, which among other things, called upon the Commission to evaluate 'the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law'.[106] The Action Plan implementing the Stockholm Programme foresaw that the Commission would issue a Communication on a framework for transfer of protection and for the 'mutual recognition of asylum decisions'.[107] In 2014, the Italian Presidency called for reflection and debate on adoption of rules on mutual recognition of positive decisions;[108] a call supported by

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[104] European Agreement on the Abolition of Visas for Refugees of 20 April 1959, CETS, available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/031.htm (vistied 10 June 2015). See also, European Agreement on Transfer of Responsibility for Refugees of 16 October 1980, available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/107.htm. For commentary on its interaction with relevant acquis instruments, see Peers, S., (2012), 'Transfer of International Protection and European Union Law', 24 IJRL, 527.

[105] Art. 78(1) of the Treaty on the Functioning of the European Union.

[106] European Union: Council of the European Union, The Stockholm Programme - An Open And Secure Europe Serving And Protecting Citizens, December 2009, OJ 2010/C 115/01.

[107] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, p 55. See also Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen, COM (2009) 0262 final, pp. 27-28.

[108] Italian Presidency of the Council of the European Union, Europe, A Fresh Start: Programme of the Italian Presidency of the European Union, July 1-December 31, 2014 (Rome: Italian Presidency of the Council of the European Union, 2014), available at: http://italia2014.eu/media/1227/programma-en1-def.pdf visited May 2015.

the Commission[109] in 2014, in its Communication recommending policy priorities for the coming years in the field of Justice and Home Affairs. The Agenda for Migration of May 2015, under the heading of 'completion of the Common European Asylum System', recalled the Treaty obligation to create a uniform status, valid throughout the Union, and committed the Commission to launch a debate on next steps, including mutual recognition of asylum decisions.[110]

2.2 Rationale for mutual recognition of positive asylum decisions

As an important further part of the development of the EU's common policy on asylum, mutual recognition would reinforce the operation of the CEAS in line with key EU principles of free movement of persons and solidarity.[111] It would represent a transitionary step towards the introduction of a uniform status of asylum, valid throughout the Union, and the establishment of an EU Migration and Protection Agency, the decisions of which would be recognised EU-wide.

It is strongly arguable that mutual recognition of decisions to grant asylum, accompanied by mobility rights at an earlier stage than currently available to refugees and others in need of protection, would also address many of the incongruities, hardships and problems that are associated with the current Dublin system.[112] There is increasing acknowledgement that the shortcomings of Dublin also undermine its ability to fulfil the expectations and needs of States,[113] and raise the question of whether it still truly represents a 'cornerstone' of the CEAS.[114] At present, asylum-seekers and even recognized refugees are legally stranded in one Member State. Mutual recognition with enhanced free movement for protection beneficiaries would reduce the importance of the particular Member State in which an asylum claim is determined: regardless of where a person might be recognised as a refugee or subsidiary protection holder, she or he could in principle seek to take up residence in another Member State, where she or he might have close ties or language or professional skills that could be in demand in the local labour market, at an earlier stage than currently possible under the LTR rules.[115]

The problems caused by the current requirement under the LTR Directive of five years of legal and continuous residence before movement is possible are exemplified by the significant numbers of refugees and subsidiary protection holders who move without authorisation within the EU from the State which has granted them protection, in some cases living irregularly or even claiming asylum again, in the hope of securing a right to

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[109] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An Open and Secure Europe: making it happen, 11 March 2014, COM (2014) 154 final.

[110] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM (2015)240, 13 May 2015, p. 17.

[111] ECRE has referred to mutual recognition as 'the next logical step' in development of the CEAS, to ensure it functions on the basis of common systems and transfers: European Council of Refugees and Exiles, November Discussion paper: Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU, November 2014, p 3, http://ecre.org/component/downloads/downloads/953.html, visited 4 July 2015.

[112] For a full critique, refer to Section 3 and to Guild, E. et all, (2014), 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection, Study for the European Parliament, Directorate-General Internal Policies, Policy Department for Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015.

[113] Fratzke, S., (2015), 'Not Adding Up – the fading promise of Europe's Dublin system', Migration Policy Institute, section III, B (on low transfer rates), C (exchanges of similar numbers of take back/charge requests), D (ongoing secondary movement) and E (costs), p. 9-15.

[114] Stockholm Programme 2009; Preamble, Dublin Regulation (EU) 604/2013; European Commission, *A European Agenda for Migration*, COM (2015)240.

[115] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (see further below).

stay. Under current law and practice, the Member State that decides a person's asylum claim is solely responsible for his or her protection and rights under the Qualification Directive (QD). Even if that state is in breach of its obligation to provide entitlements associated with a protected status under the QD, the refugee is not free to move, unless and until she or he qualifies for long-term residence.

A key feature of mutual recognition – and one of the reasons for the sensitivity of the subject among Member States – is that it confers extraterritorial effect on rights arising from national decisions taken in a foreign jurisdiction. In that sense, mutual recognition is a crucial principle that underpins both EU Citizenship and the internal market. Member States recognize the rights of one another's nationals as EU citizens, in the absence of any harmonization of the conditions of naturalization. Workers move freely across the EU if their employers are providing services, once they have a migration status in any one Member State. In that context, the position of recognized refugees is incongruous. In spite of the legislative harmonization of the CEAS, their status does not have EU-wide effect.

Mutual recognition will work most effectively if a high level of trust can be established between the Member States that the common asylum criteria and procedures are applied correctly. This underlines the importance of continued efforts on the part of Member States and the EU to develop and expand their capacity at national level to fulfil their fundamental rights, as well as other, EU legal obligations; and of monitoring and appropriate action to enforce those standards. Member States are also likely to wish to see correct application of standards in order to be assured that positive decisions are not being taken in cases that do not qualify for protection in a way that could place unjustified demands on other states. Continued national and EU efforts to ensure high standards in practice, as well as measures to ensure correct application of EU asylum instruments, are necessary to build up the mutual trust among states that is key for the acceptance and effective operation of mutual recognition in the future. Compliance with the rights of individuals is also essential to secure the trust of those most directly affected by the CEAS' operation, namely people seeking and in need of protection, in order to encourage them to cooperate and ensure the sustainability of the system.

2.3 Mutual recognition in justice and home affairs

In the EU asylum *acquis*, at present, mutual recognition of *negative* asylum decisions is reflected in the Dublin system for allocating responsibility for asylum applications among the Member States. If a person's claim for international protection has been rejected in one Member State, and she or he subsequently claims asylum in another Member State, the second Member State is entitled to decline to examine the application. In doing so, the second state is effectively recognising the legal validity of the negative asylum decision in the first state. The first Member State then is obliged to 'take back' the applicant.[116]

It is noteworthy, however, that the Dublin Regulation has no provision for people who have been granted protection in a responsible Member State, but who subsequently move on to other Member States without authorisation. In such cases, if a refugee who was granted status in one Member State applies (again) for asylum in the second Member State, that state is entitled to treat the claim as inadmissible, under Article 33(2)(a) of the Asylum Procedures Directive,[117] and reject it without a substantive examination. Thus a *positive* decision on an asylum claim taken in one Member State is accorded some form of recognition – but only as a basis for denying the holder further rights in a second Member State, and not for the purpose of respecting or extending the geographical application of those rights.

In turn, the Visa Regulation 539/2001 establishes a special regime for recognised refugees. Following the pattern of the European Agreement on the Abolition of Visas for Refugees,[118] 'refugees … who reside in a Member State and are holders of a travel document issued by that Member State … shall … be exempt from the visa requirement' and be granted visa-free travel for periods up to three months.[119] This requires an implicit

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[116] This is an outcome that is likely to lead to removal, unless the person has another right to remain in the Member State.

[117] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) [2013] OJ L180/60.

[118] European Agreement on the Abolition of Visas for Refugees.

[119] Art. 1(1) and (2) Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that

recognition of positive asylum decisions, attaching short-term travel rights to refugees upon RSD, but does not go as far as to entail a full transfer of secondary rights – and apparently does not concern beneficiaries of other forms of international protection.

The fact that a significant number of protection beneficiaries are reported to move in practice to another Member State[120] – in a number of cases claiming asylum in the hope of being able lawfully to establish themselves there – testifies to the need for rules to regulate more clearly the movement of those holding protection, and clarify their rights and legal implications of grants of status made in another Member State.

At present, mutual recognition of negative asylum decisions is also effectively enshrined in other parts of EU law, where those decisions result in removal orders under the Returns Directive,[121] as well as expulsion orders under the 2001 Directive on Mutual Recognition of Decisions on the Expulsion of Third Country Nationals.[122]

Beyond the asylum and migration fields, mutual recognition is also provided for in law, and applied in practice, in the criminal justice area, notably in the context of the European Arrest Warrant (EAW). Under the EAW Framework Decision, Member States are required to enforce an arrest warrant issued by the competent bodies of another Member State, subject to strict timeframes, and are not permitted to question the basis of the first state's decision to issue a warrant.[123] There are limited grounds for refusal of a request to execute the warrant, even in the event of trials *in absentia*.[124]

In the field of protection of victims of crime, the Directive on the European Protection Order also ensures that a person is entitled to claim the benefit of that protection in other Member States.[125] A state receiving a request must, without undue delay, recognise a Protection Order and adopt any measure that would be available to a person in a similar situation under domestic law, and ensure that the person is protected.[126] The free movement rationale of this Directive is underlined in the Preamble, which states that 'in a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved'. The Preamble also indicates that the legitimate exercise by citizens of the Union of their rights to move and reside freely within the territory of Member States[127] should be ensured and will not result in a loss of their

requirement as amended by Regulation (EC) No 1932/2006 of 21 December 2006 of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

[120] Refugees and subsidiary protection beneficiaries granted status in Italy, for example, have been identified in substantial numbers in France, Germany, Finland and other countries, in addition to asylum-seekers who have not had a substantive determination of their protection claims.

[121] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008. This Directive applies in the Member States of the EU, except for Denmark, the United Kingdom and Ireland. The Directive also applies in Norway, Iceland, Switzerland and Lichtenstein.

[122] Directive 2001/40/EC on Mutual Recognition of Decisions on the Expulsion of Third Country Nationals, OJ L 149/34.

[123] Council of the European Union, Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ 2002 L 190/1, Arts 3, 4.

[124] Case C-399/11 *Melloni*, 26 February 2013.

[125] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

[126] Article 10.

[127] See Art. 21 on the right to move and reside freely. Art. 21, European Union, "Treaty on the Functioning of the European Union;" and Article 3(2), European Union, "Consolidated Version of the Treaty on European Union," October 26, 2012, EUR-Lex, C 326/01, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012M/TXT.

protection.[128] It is noteworthy also that the application of the Directive is not limited to EU citizens, but extends to any 'natural person'.[129]

There are thus clearly-established legal principles in the EU justice and home affairs area which provide for mutual recognition of decisions, including those which confer rights upon individuals. It is noteworthy that this is particularly the case in the criminal justice sphere, in which the degree of harmonisation of law is substantially less than in the asylum field. This would appear to support the argument for the feasibility of mutual recognition in relation to asylum decisions, as an area where significant harmonisation of legislation has already occurred.

2.4 Transfer of protection under international and European law

International law provides for the recognition and enforcement of refugee rights across borders, in states other than those which have initially granted them status. It is also foreseen that refugees may move and take up lawful residence in another state. As noted above, under the 1951 Convention– by which all Member States are bound, and to which the EU's common asylum policy must conform[130] – states are obliged to issue Convention Travel Documents, which must be recognised by other Contracting Parties for the purpose of admitting refugees.[131] This highlights the extraterritorial nature of refugee status.[132] Where a refugee takes up residence in another state, paragraph 11 of the Schedule to the Convention provides that responsibility for the issuance of a new travel document to the refugee lies with the competent authorities of the new state of residence and authorises the refugee to apply to those authorities. UNHCR has emphasised that this does not require a new determination by the second state of the person's protection needs, effectively implying a degree of recognition of the first decision.[133]

The Convention and the Schedule are not explicit, however, about whether and which other rights, beyond that to a Convention travel document, transfer upon change of residence; nor on the conditions under which transfer may take place. The issue is addressed in somewhat more specific terms in the Council of Europe Agreement on Transfer of Responsibility for Refugees.[134] This agreement, concluded in response to the UNHCR Executive Committee's call for States to clarify the legal position of refugees moving between countries, is in force in 11 EU Member States, although a further four have signed it.[135] While it does not provide a right for refugees to move, it regulates some aspects of their legal position if they are granted a right to reside by a State other than that which granted them protection. Under Article 2(1) of the European Agreement, responsibility is considered to be transferred after two years of actual and continuous stay in a signatory state, starting from the date of admission to its territory. At that point, responsibility for issuing a new Convention Travel Document to the refugee falls upon the second state. This period of two years of actual and continuous regular stay was

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[128] See preamble, recital 6, European Union, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. For further analysis see Mitsilegas, V., (2015), 'The Place of the Victim in Europe's Area of Criminal Justice' in Fippolito and Iglesias Sanchez, s. (eds) Conceptualising Vulnerability in Europe, Oxford Hart.

[129] Recital 6.

[130] Art. 78 Treaty on the Functioning of the European Union and 18 E Union Charter of Fundamental Rights.

[131] See above and accompanying text.

[132] UN High Commissioner for Refugees, Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 24 August 1978 (EC/SCP/9, para 17. Point (f) of the ExCom Conclusions state: The Executive Committee considered that the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognised also by the other Contracting States".

[133] UN High Commissioner for Refugees, Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. 32.

[134] Council of Europe, European Agreement on Transfer of Responsibility for Refugees (Strasbourg, France: Council of Europe: 1980), ETS no. 107.

[135] 15 signatures, 11 ratifications and 11 entries into force in EU Member States as of November 21, 2014. The states in which it has entered into force are Denmark, Finland, Germany, Italy, Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.

considered to indicate the refugee's intention and commitment to establish him or herself in the second state, as well as that of the state to permit the person to do so.[136] The Explanatory Report to the Agreement indicates that the second state is subsequently required to grant to the refugee the 'rights and advantages flowing from the Geneva Convention';[137] it also obliges it to facilitate a refugee's family reunification with spouse and minor or dependent children.[138] The Agreement is without prejudice to the rights and benefits which refugees can derive from other instruments.[139] It also permits states to extend its application to people who do not fulfil its conditions;[140] a significant rule, given the Agreement – like the Refugee Convention and its provisions on Convention Travel Documents – cover only refugees as defined in Article 1A of the Convention, and thus not explicitly holders of complementary forms of protection, such as subsidiary protection.

Hence, there are some important provisions in international law on transfer of protection that bind at least some Member States. However, given the limited number of Member States that have signed the European Agreement, and the issues which are left unregulated by the Agreement – including the possible transfer of other rights conferred by the Qualification Directive[141], extending beyond those in the Refugee Convention – there is a strong argument for adoption of EU legal measures on transfer of protection to clarify the issue. The Commission has noted that a uniform status of asylum, as unequivocally required by the Treaties, should entail rights for refugees to move and settle in another Member State,[142] and that consequently issues of transfer of protection, among others, should be examined. To this end, it produced a study in 2004 that assessed the legal implications and ways to regulate transfer of protection in the context of progressive steps towards establishing a uniform status.[143] To date, however, comprehensive rules have not been adopted that would regulate the rights of refugees and subsidiary protection holders who could move between Member States and, in particular, their entitlements under the Qualification Directive. In case of mutual recognition of positive asylum decisions, and the possibility of increased movement that it might occasion, the transfer of protection issue will thus require yet further clarification in EU law.

2.5 Long-term residence, free movement, transfer of protection and mutual recognition

The right of international protection holders to move and take up residence in another EU Member State have been addressed to a limited degree by their inclusion in the scope of the LTR Directive, as amended in 2011.[144] According to the Preamble to the 2011 amending Directive, 'beneficiaries of international protection who are long-term residents should, under certain conditions, enjoy equality of treatment with citizens of the Member

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[136] See also Parliamentary Assembly of the Council of Europe (PACE), Explanatory Report to the European Agreement on Transfer of Responsibility for Refugees, Assembly Document 3703, para 21.

[137] Parliamentary Assembly of the Council of Europe, Explanatory Report, paragraph 31.

[138] Ibid, See Article 6, Council of Europe, "European Agreement on Transfer of Responsibility for Refugees," (n 4).

[139] Art. 8(2).

[140] Art. 8(3).

[141] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).

[142] European Commission, Communication From the Commission to the Council and the

European Parliament: Towards A Common Asylum Procedure and A Uniform Status, COM (2000)755, 22 Nov. 2000.

[143] Lassen, N.M., Egesberg, N., van Selm, J., Tsolakis, E., and Doomernik, J., 'The Transfer of Protection Status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum'. Final Report, Tender No. D.JAI/A2/2003/001 (European Community, 2004)

[144] Council of the European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004, L 016, 44. For an analysis, see Boelaert-Suominen, S., (2005), 'Non-EU nationals and Council Directive 2003/109/EC on the status of third country nationals who are long-term residents', 42(4) Common Market Law Review, 1011-1052.

State of residence in a wide range of economic and social matters, so that long-term resident status constitutes a genuine instrument for integration of long-term residents into the society in which they live'.[145]

As the Preamble acknowledges, however, transfer of legal responsibility for protection was left outside the scope of the Directive.[146] Refugees and holders of subsidiary protection who have resided 'legally and continuously for five years' in the territory of a Member State may qualify for long-term residence (a period which includes half of the time spent as an asylum-seeker).[147] They are required to meet requirements for sufficient resources and health insurance, as well as fulfil integration conditions. No exemptions from these criteria apply to refugees, although some of their entitlements under the QD – to work and self-employment rights as well as integration facilities – may assist them to some degree to meet these requirements.[148]

Holders of LTR status are entitled, in principle, to move to, and reside in, another Member State, for the purposes of employment or self-employment, or studies or vocational training.[149] However, these rights may be limited by numerical quotas, or labour market preference rules.[150] In the absence of provisions in the LTR Directive or otherwise on transfer of protection rights, the entitlements attached to the protected person's status in the first state under the Qualification Directive – including rights to work, to social assistance, to basic medical care and others – do not apply in the second state. In theory, protection holders who take up residence in a second Member State should ultimately be able to obtain LTR in that second State.[151] However, the requirements for sufficient resources and health insurance,[152] among others, may prove harder for individuals to satisfy, as they will not have the benefit of the QD entitlements in the second state.

LTR rights are considerably less extensive, and offer lesser protection, than those attached to refugee or subsidiary protection status, in a number of respects. LTR can be withdrawn if the holder is seen as a threat to 'public policy'[153] - a considerably wider concept than the exclusion criteria that could entitle a state to revoke a refugee or subsidiary protection holder's protected status. Expulsion of an LTR holder is only possible, however, where s/he constitutes an 'actual and sufficient threat to public policy or public security'.[154] While the Member States remain bound by their international obligation to respect *non-refoulement*, there is no reference in the LTR provisions to the specific substantive and procedural safeguards against expulsion that apply to refugees under Article 32 of the 1951 Convention.

As a consequence of the LTR Directive's strict conditions, in order to move and take up residence in another Member State, even after five years of lawful residence in a first state, the refugee in practice will need to have attained a certain level of economic success to be in a position to exercise LTR movement rights. The Commission's evaluation of the LTR Directive has indicated that a number of obstacles have limited the mobility of LTR holders within the Union,[155] with the result that a relatively small proportion of third country

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[145] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L132/1, see preamble, recital 6.

[146] Ibid. See preamble recital 9.

[147] Ibid, Article 3(2)(a), Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L132/1. Exceptionally, the whole period may be counted if the person spent more than 18 months in the asylum process.

[148] For a further detailed analysis of the application of LTR rules to refugees and subsidiary protection holders, see Peers above (no. 49) and Peers S. et al, (2012), 'EU Immigration and Asylum Law', 2nd Ed, Vol. 2, Brill, Chapter 10.

[149] Art. 14

[150] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Art. 14(3), (4).

[151] Idem, Art. 23(1).

[152] Idem, Art. 23(1) read with art. 5.

[153] Idem, Art. 12(1).

[154] Art. 12(1).

[155] European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM (2011)585, 28 September 2011.

nationals generally have been able to benefit from LTR status and move to another Member State under its provisions. Refugees, who could face additional hurdles in seeking to find work and integrate in the Member State which has granted them protection, may thus be even less well-placed to exercise their conditional movement rights under the LTR. This may be the case even if the state to which they seek to move could be one where they have skills, cultural connections, or extended family or community ties, which could make it easier for them to integrate and succeed.

In this context, there are strong arguments to be made for additional, comprehensive rules on transfer of protection. These are necessary to complement current LTR rules, in the context of regular free movement of international protection holders, as well as in light of the possibility of potential mutual recognition of positive asylum decisions.

Among those arguments, firstly, EU rules going beyond those currently in the LTR, the European Agreement, and the 1951 Convention are required to extend the limited scope of the existing instruments. The 1951 Convention and the European Agreement apply only to refugees, yet the Treaties foresee a uniform status also for subsidiary protection beneficiaries, as defined in the Qualification Directive. There is thus an obligation also to provide for transfer of their protection entitlements in clear EU legislation. Moreover, the European Agreement is binding on only 11 Member States, highlighting the importance of complementary EU rules that would ensure that all Member States bound by other key instruments of the asylum *acquis* are required also to apply the same rules to transfer the relevant entitlements.

Secondly, the need to address lack of clarity about transfer of protection upon movement is pressing, notably for those who would be entitled to such rights. It was reported in the EC's study on transfer of protection that refugees were very uncertain about the consequences for their status of moving to another state, which could explain the limited numbers of refugees who have exercised their right to do so under the European Agreement in the past.[156] Specific EU rules on transfer of protection could clarify questions that remain about the rights of protection beneficiaries who could move under the LTR directive, including in relation to the extent of the rights transferred, limits and safeguards around expulsion, and the consequences of loss of LTR status upon protection and vice versa.

2.6 Possible models for achieving mutual recognition, transfer of protection and mobility

There are a number of possible approaches to the application of mutual recognition, involving different timeframes and legal adjustments, which could be considered. In each of the models below, mutual recognition and associated rights are proposed both for refugees and subsidiary protection beneficiaries. These two categories of protected people were previously in very different legal situations, but now, following the recast instruments, are defined collectively as beneficiaries of 'international protection' in the asylum Directives. Equal treatment is also justified in light of the fact that the risks of serious harm, giving rise to the need for subsidiary protection, are often as serious in nature and as long in duration as the threat of persecution which faces refugees. Moreover, the difference in rights attached to the two forms of status have been considerably narrowed under the 2011 recast of the Qualification Directive, and administrative practice highlights a similar or identical approach to the two categories in many Member States. These developments suggest that the need to accord the two categories equal treatment is increasingly accepted by Member States in the EU, reflecting the similar situations and needs of the individuals concerned.

Model 1: Mutual recognition, increased free movement rights, and transfer of protection available from date of grant of status

One possible ambitious approach to mutual recognition would entail the right to request mutual recognition of a positive asylum decision from the date on which protected status is granted. Under this model, a refugee or subsidiary protection holder would be entitled to ask for recognition of his or her protected status by another state, which would be obliged to accept the request and acknowledge the applicant's status, subject only to

[156] Lassen, N.M., Egesberg, N., van Selm, J., Tsolakis, E., and Doomernik, J., 'The Transfer of Protection Status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum', p. 127-39.

very narrowly-defined exceptions, essentially providing for a presumption in favour of mutual recognition. These exceptions could include cases where there might be strong evidence of changes in circumstances following the grant of protection to the applicant, which could give rise to exclusion or cancellation of refugee or subsidiary protection status.[157]

Amendments could be foreseen to the LTR Directive under which people whose status would be recognised in a second state would be able to move to that state and enjoy the full range of rights associated with his or her protected status in the second state. New EU transfer of protection rules would be needed to regulate the legal position of those taking up residence in another state, requiring the second state to accord all Qualification Directive rights associated with the concerned person's status.

This model would provide maximum legal certainty and significantly enhance the free movement rights of refugees and subsidiary protection holders. It would effectively entail significantly more favourable treatment than that accorded to other third country nationals, which would remain subject to the current LTR rules – in that protection holders would acquire rights to move within the Union at a much earlier stage than the five years applying to others who must first secure LTR rights. Such preferential treatment under EU law could be justified on the basis that protection holders who entered the EU as asylum-seekers, unlike other third country nationals who take up lawful residence in a particular Member State, are not (under the current Dublin system) entitled to choose the state in which their claims will be determined. Mutual recognition would thus confer a degree of flexibility and recognise the agency of a refugee, whose right to stay in the EU is based on common EU standards and criteria that should be applied in a consistent manner. It would also provide a means to acknowledge and provide for transfer of residence for a person who may have strong ties to a Member State other than that which considered his or her protection claim. It would also correspond to an expansive reading of the free movement provision in Article 26 of the Refugee Convention, conferring rights to 'refugees lawfully in [the] territory … to choose their place of residence [and] to move freely [therein]'.[158] Mutual recognition and rights to move upon the grant of status would extend these entitlements to all beneficiaries of international protection within the territory of the EU, and assure them 'the widest possible exercise of these fundamental rights and freedoms',[159] in line with its humanitarian spirit.

However, this option would also fuel concerns on the part of states which might fear that they would attract a significant number of people who would seek access to their labour markets and social welfare systems at the earliest opportunity. Such a model would thus potentially need to be preceded by other measures aimed at ensuring all Member States are strongly encouraged, and assisted as required, to establish and maintain well-functioning asylum systems that ensure fulfilment of the rights of refugees immediately upon recognition. This would seem essential to avoid creating a 'push factor' away from states with lower levels of rights at present for those granted protection, and a 'pull factor' towards other Member States with higher standards of protection. Given the possibility of significantly increased movement by protection holders under this model, the EU and Member States would potentially see a strong incentive in investing in raising standards across the Union in this way.

Model 2: Mutual recognition upon grant of status with long-term residents' rights and transfer of protection, available after two years

Under this alternative model, mutual recognition could be requested by a refugee upon grant of status. However, long-term residence rights, and the entitlement to take up residence in another Member State, would accrue only after two years of legal and continuous residence in the granting Member State. The requirement for LTR would remain as a precondition for taking up residence in another Member State under this model. However, the Directive would be amended to introduce exceptions to enable the acquisition of LTR in individual cases, even where the resource requirements, sickness insurance, and integration conditions criteria are not fulfilled, where this might be necessary on humanitarian grounds or due to special needs on the part of

[157] In such a case, the state which originally granted protection would have the right to reassess the person's status under the Qualification Directive, and the requested state would not be obliged to recognise the person's status meanwhile, although s/he would continue to enjoy that status in the originally granting state.

[158] Art. 26, Convention Relating to the Status of Refugees.

[159] Preamble, Convention Relating to the Status of Refugees.

the protection holder, which limit his or her ability to qualify for LTR under the general rules. Transfer of protection, pursuant to a new EU instrument (as discussed in model 1 above) would then be possible upon moving to the second Member State, with all rights associated with the holder's status under the QD being transferred to the second Member State. The new Member State would be obliged to honour those QD rights fully under national law.

Under this model, refugees would be able to seek long-term resident status after a significantly shorter period than the present five years. This shortened two-year period would reduce the time during which refugees and protection beneficiaries may be required to wait before moving to join extended family, or to take up work or other opportunities in a Member State with which they have close connections. At the same time, it would provide a period during which protection holders would be encouraged to settle in the granting Member State, and potentially explore whether it might be a suitable place for them to remain, contrary to any initial expectations or misinformation.[160]

As a condition for taking up residence in another Member State, most protection holders – except for whom humanitarian or other compelling considerations might apply – would still be required to demonstrate that they had scope to undertake economic activity or study, and to have sufficient resources and medical insurance. This could make it considerably more politically acceptable among Member States, including those concerned about creating excessive demand on their welfare systems, and exacerbating imbalances in refugee protection responsibilities across the Union.

The advantages of this model are that it provides for a principled, workable system, founded in existing international instruments (including the 1951 Convention and the European Agreement) as well as EU law (in the form of the LTR framework, albeit with an adjusted timeframe). The more favourable position of refugees compared to other third country nationals can be explained in light of their vulnerable situation and the lack of strong ties or freedom of choice in relation to the state which was responsible for their claim determination (under the current the Dublin system – see model 1 above). It should not result in excessive demands upon states to which protection holders may seek to move, and should provide legal certainty about their protection and other rights.

2.7 Specific instruments required

In order to effect changes to mutual recognition, transfer of protection and residence rules under each of the two possible models outlined above, the following legal instruments or amendments would be required:

- Amendments to the Asylum Procedures Directive to define a procedure for requesting, examining a request for, and confirming mutual recognition of an asylum decision.
- Amendments to the Qualification Directive to provide for recognition under national law upon of the status of protection beneficiaries from other states, and conferral of relevant rights under Chapter VII of the Qualification Directive upon applicants whose status, granted in another state, is recognised.
- Changes to the Long Term Residents' Directive to confirm the right of protection beneficiaries to be admitted and take up residence in another Member State:
    - Under model 1: upon mutual recognition of protected status.
    - Under model 2: after two years following mutual recognition of protected status.
        - Changes to the LTR directive to provide for exceptions to the requirements for sufficient resources and self-funded medical insurance as a precondition for LTR, in case of people with humanitarian

[160] The two year interval is also comparable to the required time period of 18 months before which highly-skilled third country national workers under the Blue Card scheme are entitled to move to another Member State, and the two years before they can take up new employment: see Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17 available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0050 visited in June 2015.

considerations; specific needs which render them unable to fulfil the requirements; or demonstrated strong connections to another Member State which is willing to accept them as resident.

- A new Directive, or other appropriate instrument, on Transfer of Protection among EU Member States – defining in specific terms the process for requesting transfer of protection upon taking up residence in another Member State.[161]

2.8 Conclusion

There is a strong basis in the Treaties and in the current policy framework for mutual recognition of positive asylum decisions, based also on the principle of mutual trust.[162] This would also represent an important further step towards establishment of the uniform status, valid throughout the union, which is foreseen as the logical completion of the CEAS in Article 78 TFEU. However, it will be necessary to complement such a change with clear rules on transfer of protection rights for refugees and subsidiary protection holders who might wish to seek mutual recognition and take up residence in another Member State. Amendments to the LTR Directive, along with new rules on mutual recognition and transfer of protection, would be required, in a manner that ensures legal certainty and clarity for protection holders, as well as for Member States. Text.

[161] For an analysis of the scope and form of such Transfer of Protection rules, see Lassen, N.M., Egesberg, N., van Selm, J., Tsolakis, E., and Doomernik, J., 'The Transfer of Protection Status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum' and Peers S. et al, (2012), 'EU Immigration and Asylum Law', 2nd Ed, Vol. 2, Brill.

[162] See CJEU opinion 2/13

3. Alternatives to the Dublin System and Systems of Financial Imbalance

Key Findings

- The failings of the Dublin System are now well known. Root and branch reform of Dublin is long overdue.
- Any reform must be informed by the importance of avoiding unnecessary coercion. Responsibility must be allocated with respect for existing fundamental rights obligations, taking account of asylum-seekers' well-informed choices, based on a range of reasonable options.
- Coercive methods for securing fingerprinting raise serious legal, practical, and ethical concerns.
- A European Migration, Asylum and Protection Agency (EMAPA) could provide a means to ensure fulfilment of EU and Member States' collective goals.
- Distribution keys are useful to determine fair allocation across the EU. They can bring transparency to the extent to which Member States are meeting their responsibilities, and provide benchmarks for developing institutional capacity.
- Distribution keys should not lead to coercive transfers or allow Member States to buy their way out of their protection responsibilities. However, additional financial support for those who provide protection over and above their allocation should be made available.
- The Commission's proposal of 27 May 2015 for an emergency Council Decision on relocation is an important first move to an allocation key across the EU. However, there are concerns about the use of past recognition rates to determine groups for relocation and the absence of asylum-seeker's consent to transfer.
- Financial support, properly focused and monitored, can encourage and support Member States to meet their obligations. It could be more effectively used to achieve strategic goals and to further incentivize assumption of responsibility.

Introduction

The workings of reception and allocation systems are closely related to the means of access to asylum set out in Section 1 and the status granted to those recognized as refugees, and rights associated with status, in Section 2.

As Section 1 has demonstrated, if there were safe and legal access for those in need of international protection, asylum-seekers and resettled refugees would arrive in different EU Member States very differently to the present. If greater means of safe access were available, arrivals would in likelihood be dispersed across ports, airports, and land-borders of the EU. Of course, it cannot be assumed that with greater safe and legal access different states would not find themselves with larger number of asylum-seekers than others. But at least some of the current responsibilities, particularly of coastal states for rescue at sea, would be reduced, reducing reception pressure on external border states.

It should also be recalled that the current uneven dispersal of asylum-seekers across the EU is due to poor reception conditions and asylum systems in many states. Often all movement is characterised as 'irregular secondary movement', when in fact asylum seekers and refugees are seeking a place of refuge, often fleeing poor reception conditions.

To recap, if there were greater safe and legal access, and if the consequences of allocation were less severe, many of the current problems would be mitigated. Currently, the absence of safe access routes makes the mal-distribution of asylum seekers acute. Moreover, adequate reception conditions and access to fair and effective assessment of asylum claims is lacking, so asylum seekers move on. While these states may, in some instances,

have additional maritime search and rescue obligations, they appear to be falling short in providing effective protection.[163]

3.1 The Failings of Dublin

The failings of the Dublin System are now well known, and widely accepted, as set out in the 2014 Study[164]. Root and branch reform of Dublin is thus long overdue. Any reform must be informed by the importance of avoiding unnecessary coercion, in accordance with current legally binding obligations.[165]

The Dublin System allocates responsibility for asylum claims according to a set of priorities, commencing with family connections. However, in practice, transfers to facilitate family reunion are rare and most asylum-seekers engage instead in evasive strategies to join relatives or other support networks, with good reason.[166] If they sought asylum in the Member States of first arrival, including Italy, Greece, and other external border states, these would deal with the majority of applications. Instead, many asylum-seekers move on, irrespective of the Dublin provisions, often applying for asylum elsewhere, as the pattern of seeking asylum across the EU demonstrates.[167] This suggests Dublin does not 'work' as an allocation mechanism, as it is so widely ignored and flouted by both Member States. Dublin thus does not 'work' for Member States.

To illustrate, the Italian Refugee Council reported that only 36,000 of the 106,000 people who had arrived by boat in the first half of 2014 had filed asylum claims in Italy.[168] By the end of 2014, the total number of irregular arrivals in Italy was 170,000 (a 277% increase by comparison with the previous year), 40% of whom were Syrian and Eritreans (a nationality with a 75% positive recognition rate across the EU). Asylum applications in Italy over the same period totalled 64,625. This would appear to suggest that, at least, some of those arriving in Italy who are likely to be refugees are not claiming asylum in that country, but may be moving on to other Member States where they may seek protection.[169] This is not the 'asylum shopping' which Dublin ostensibly

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[163] Case *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: http://www.refworld.org/docid/4d39bc7f2.html visited 16 June 2015 and

Case *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/docid/5458abfd4.html visited 16 June 2015.

[164] European Parliament Study commissioned by the LIBE Committee, (2014), Guild, E., Costello, C., Garlick, M. , Moreno-Lax, V., Mouzourakis, M., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015.

[165] European Parliament Study commissioned by the LIBE Committee, (2014), Guild, E., Costello, C., Garlick, M. , Moreno-Lax, V., Mouzourakis, M., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015 and CJEU K and MA Case C-648/11 *MA v Secretary of State for the Home Department* [2013] ECR I-0000, 6 June 2013. Case C-245/11 K v. Bundesasylamt (Austria) [2012] ECR I-0000.

[166] ECRE, Dublin II Regulation: Lives on Hold (18 Feb. 2013), available at: http://ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html visited 15 June 2015; Mouzarakis, M., (2014), 'We Need to Talk About Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union' RSC Working Paper.

[167] Jesuit Refugee Service (2013) Protection Interrupted: The Dublin Regulation's Impact on Asylum Seekers' Protection, June 2013, Brussels, available at www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf visited in June 2015; Fratzke, S., (2015), 'Not Adding Up – the fading promise of Europe's Dublin system', Migration Policy Institute.

[168] Asylum Information database available at: http://www.asylumineurope.org/sites/default/files/resources/one-pager_it_0.pdf visited in June 2015.

[169] European Commission, Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 27.05.2015, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf visited in June 2015; it is quoting Eurostat and Frontex statistics.

aims to avoid,[170] but rather asylum seekers seeking out the reception conditions and procedures to which they are entitled in EU and international law.

This is not to suggest that Dublin is benign – quite the contrary. At present, Dublin is weakly enforced, so many asylum seekers do exercise some degree of choice as to their country of asylum. However, in so doing, they risk being deported and detained, and may even use smugglers for onward movement within the EU. The Dublin system exacerbates their vulnerability, rather than enhancing protection. Also, many do not evade Dublin, so may find themselves effectively stranded by its workings. Dublin does not 'work' for asylum seekers and refugees. [171]

One of the deepest injustices of the Dublin System is that it is built on an illusion of common standards. It is widely acknowledged that, in practice, both reception conditions[172] and recognition rates vary considerably,[173] and in some cases fall below international and European standards.[174] That unfairness is exacerbated by the enduring consequences of allocation. Even if the asylum seeker's claim is resolved quickly in his or her favour and he or she is recognized as a refugee, that recognition confers a status which is, in principle, available in only that single state. As Section 2 illustrates, various mechanisms exist that could mitigate this unfairness.

3.2 Ethical and Practical Commitments to Respect Dignity and Agency

In this part, various reform options are canvassed, but first the commitment to respect dignity and agency is reiterated.

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[170] In the words of the European Commission, the system's main purposes include 'to prevent abuse in the form of multiple applications for asylum submitted by the same person in several Member States with the sole aim of extending his or her stay in the Member States.' European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person, COM(2008)820, 3 December 2008, p. 3.

[171] The many empirical reports and studies on this topic include:

Jesuit Refugee Service (2013) Protection Interrupted: The Dublin Regulation's Impact on Asylum Seekers' Protection, June 2013, Brussels. Available from http://www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf visited 29 September 2014; European Council on Refugees and Exiles, (2013), 'Dublin II Regulation: Lives on Hold', available at http://www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-%20regulation-lives-on-hold.html visited 29 September 2014.

[172]See European Migration Network, (2014), 'The Organisation of Reception Facilities for Asylum Seekers in different Member States', available at http://emn.ie/cat_publication_detail.jsp?clog=1&itemID=2653&t=6(visited 29 September 2014).

[173] There is a longstanding scholarly and official evidence of divergent recognition rates in the EU. For example, Neumayer, E., (2005), 'Asylum recognition rates in Western Europe: their determinants, variation, and lack of convergence' (2005) Journal of conflict resolution' 49 (1), 43-66. The 'lottery' has continued in spite of the adopted of EU legislative standards. Note, for instance, that Syrian nationals had an 89% recognition rate in Germany in 2012, while that in Cyprus was 0%. EASO (2013) *Annual Report on the Situation of Asylum in the European Union 2012* (EASO 2013). See further ECRE *Asylum Lottery in the EU in 2011* (ECRE 2012). See also the AIDA (Asylum Information Database), (2014 annual report), 'Mind the Gap, An NGO perspective on Challenges to Accessing Protection in the Common European Asylum System', available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf visited in June 2015. On this phenomenon, note also that new EU standards have produced a new set of divergent national practices. See the literature on the divergent interpretation and application of the Article 15(c) of the Qualification Directive: UNHCR, (2011), 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence', available at: http://www.refworld.org/docid/4e2ee0022.html visited June 2015.

[174] See, for example, *MSS v Belgium and Greece* (2011) 53 EHRR 2, wherein the European Court of Human Rights found both the living and detention conditions in Greece to risk being inhuman and degrading in violation of Article 3 ECHR.

The 2014 Study conducted for the European Parliament[175] was premised on an ethical and practical commitment to treat asylum seekers and refugees with dignity. That commitment demands that systems treat asylum seekers and refugees as people, as fundamental rights holders, and avoid unnecessary coercion that is disproportionate or can otherwise not be adequately justified. The 2014 Study demonstrated that coercion is not only ethically problematic, but also a source of costs, delay and avoidance. Any replacement or substitution to Dublin needs to avoid coercion and create mechanisms so that decisions on transfers or onward movement take place under conditions where asylum seekers or refugees are well-informed and presented with a reasonable range of options, in line with their needs and entitlements.

The only way to avoid coercion is to provide a reasonable range of options.[176] Trust and reliable information are necessary for decisions between those options to be meaningful. The context of forced migration is such that many asylum seekers make their migratory decisions under great pressure and with incomplete information.[177] Moreover, smugglers increasingly advertise (distorted) versions of reception conditions.[178] In this context, having time to make an informed selection, based on reliable information will be crucial. As newly arrived asylum seekers have little reason to trust government officials, particularly those threatening to detain them for non-cooperation with fingerprinting, trusted interlocutors are key to dispel misinformation. The 2014 Study also emphasised the importance of multi-actor involved in the asylum process, particularly in first reception. In particular, involving civil society actors brings expertise, accountability and transparency to processes, and may enhance public support for asylum seekers and refugees.

If we are to increase the EU's overall protection capacity, Member States which currently host few asylum seekers and refugees must do more. Complete free choice, particularly under conditions of misinformation, may not of itself lead to fair allocation across states. However, the aim of fair allocation is to increase the EU's protection capacity, and so must not lead to rights violations in breach of EU and international legal standards. To be clear, if Member States properly met their EU and international legal obligations, and developed appropriate levels of reception capacity, asylum seekers could be offered a reasonable range of options regarding their country of asylum. Investment in each Member States' asylum system is essential, from both a legal and practical perspective.

For practical reasons too, asylum seekers' and refugees' participation into decisions about where they will live is important, if secondary movements are to be reduced. If any allocation system is to work, a new approach which recognizes not only the 'vulnerability', but also the dignity, agency, and rationality of the asylum seeker is warranted. Those who have made long and dangerous journeys to safety are entitled to more than physical force to ensure fingerprinting, threats of detention, and deportation guised as welcome.

3.3 Coercion, fingerprinting and the threat of detention

The Commission on 27 May 2015 issued proposals in a Working Document which places particularly strong emphasis on the importance of fingerprinting all those who arrive,[179] as required under the Eurodac regulation.

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[175] European Parliament Study commissioned by the LIBE Committee, (2014), Guild, E., Costello, C., Garlick, M. , Moreno-Lax, V., Mouzourakis, M., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015.

[176] For a discussion in a different context, see Kälin, W., (2013), 'Changing Climates, Moving People: Distinguishing Voluntary and Forced Movements of People' in Warner, K. et al (eds), 'Changing Climates, Moving People: Framing Migration, Displacement and Planned Relocation', (UN University Policy Brief No 8), 40.

[177] See, for instance, Neumayer, E., (2005), 'Bogus Refugees? The Determinants of Asylum Migration to Western Europe', International Studies Quarterly 49, pp. 389-409; 'Asylum Destination Choice: What Makes some European Countries more Attractive than Others?' (2004) European Union Politics, 5 (2), p. 155-180.

[178] See, for example, Adamson, D., and Akbiek, M., (2015), 'The Facebook smugglers selling the dream of Europe' BBC World Service, 13 May 2015, available at http://www.bbc.co.uk/news/magazine-32707346 visited in June 2015.

[179] Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints Brussels, 27.5.2015 SWD(2015) 150 final.

As this Report is premised on avoiding unnecessary coercion, a brief assessment of this Working Document is included below.

A rigorous human rights analysis is needed of fingerprinting and other biodata practices, to ensure that human rights, in particular the right to privacy, are respected.[180] At present, evading fingerprinting is part of the avoidance strategy induced by Dublin's coercion. Asylum-seekers know that fingerprinting may deter their onward movement, and often resist fingerprinting for good reasons. Indeed, refusal to be fingerprinted in order to avoid human rights violations could be construed as form of civil disobedience. Experiences in first reception must foster trust, and support asylum-seekers' cooperative predisposition.

Instead, as the UN Special Rapporteur on Human Rights of Migrants, François Crépeau has noted, the 'system also creates the potential for tension at borders, as many migrants do not want their fingerprints to be taken. Troubling reports have emerged recently about border management officials using force to collect fingerprints.'[181] He has also referred to 'troubling anecdotal evidence by migrants and front-line workers suggests that force has been used in countries of first entry to the European Union.'[182]

The Commission's proposed guidance falls short on this front from a human rights perspective, and from the perspective of fostering trust between migrants and the authorities. Although the guidance invokes human rights and proportionality, it countenances physical force and detention threats in order to take fingerprints.

The Commission Working Document was informed by the responses received from governments in response to an *ad hoc* query to national authorities.[183] There are serious concerns about the nature of the guidance provided, in particular that it does not limit the use of force against individuals in a legally acceptable way, or set up appropriate legal safeguards. [184] The practice of states on this matter varies considerably: In response to the question, 'Do you permit or require the use of force or coercion in your law or practice in order to take the fingerprints of applicants for international protection?' 8 states answered in the affirmative,[185] but 18 negatively.[186] Presumably, the variations in practice are rooted in ethical, legal or practical concerns, or as would seem likely, a combination of these.

This matter needs careful study in light of the serious ethical, legal and practical concerns surrounding the use of force against vulnerable asylum-seekers and refugees. A Commission Working Document based on a rudimentary survey with little empirical evidence is not the appropriate method to inform policy choices. Nor is it the legally appropriate mechanism to set standards which purport to guide the conduct of law enforcement officials.

3.4 Alternatives to Dublin

3.4.1 An EU Migration, Asylum and Protection Agency (EMAPA)

Serious reflection should be given to the creation of a centralised EU agency charged with decision-making powers to assess asylum claims. The TFEU envisages a uniform status for refugees, valid across the EU. An EU agency could be charged with assessing claims for international protection. As Goodwin-Gill has urged,

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[180] The operation of Eurodac raises serious privacy concerns.

[181] F Crépeau, Report of the Special Rapporteur on the human rights of migrants, François Crépeau Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants* A/HRC/29/36 8 May 2015, para. 51.

[182] Ibid, para. 52.

[183] Summary of EMN Ad-Hoc Query No. 588 Eurodac Fingerprinting - Ad hoc query on EURODAC Fingerprinting, requested by the Commission on 10 July 2014, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/588_emn_ahq_eurodac_fingerprinting_en.pdf visited June 2015.

[184] For further analysis and critique, see Suffee, Z., (2015), Statewatch Briefing on 'Coercive measures or expulsion: Fingerprinting migrants', available at http://statewatch.org/analyses/no-270-fingerprinting-migrants-coercive-measures.pdf visited in June 2015.

[185] AT, CZ, DE, ES, FI, SK, UK, NO.

[186] BE, BG, CY, FR, HR, HU, EE, IE, LV, LT, LU, MT, NL, PL, PT, RO, SE, SI.

such an agency should be established to fulfil collectively and to implement the individual obligations of Member States and the policy and protection goals of the EU.[187] As he urges 'There is no legal reason why an EU institution should not be set up, competent to determine refugee status and enabled to fulfil, collectively as it were, the individual obligations of the Member States.[188] Similarly, Williams has pointed out, 'establishing a "European Asylum Service" along these lines operating in all Member States could, potentially, leapfrog the slow process of harmonisation'.[189]

In a 2015 publication, CEPS urged that a Common European Asylum Service be established, and suggested as follows:

> This agency should become a proper Common European Asylum Service, responsible for processing asylum applications and determining responsibilities across the EU, and with competence for overseeing a uniform application of EU asylum law. The Service could be modelled along the lines of the European Central Bank or, to be more precise, the European System of Central Banks (the Eurosystem). The Service would be financed either directly by the EU budget or via contributions from member states, which would be proportional to their GDP.[190]

If an EU wide status were granted by an EU centralized process, the matter of allocating responsibility for asylum claims would be of less significance. Although accommodating asylum seekers while their claims are being processed would of course involve some direct and indirect costs, these would be decoupled from processing costs.

Other functions that the Agency could take on include external monitoring of reception facilities. As the EMN Study identified, there is a lack of external monitoring at present, and a lack of reliable information about the conditions in reception centres.[191]

In terms of its *aim*, the creation of EMAPA is coherent with the European Parliament's Resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies, where it called on the Commission to enlarge the mandate of EASO to increase its operational role in the processing of asylum applications.[192]

Increasing the role of EASO in supporting *national* determinations could improve quality, but it is not the same as developing an EU-wide status granted by an EU-agency. In terms of creating EMAPA, careful consideration to questions of mandate and operational independence are required. If it were proposed to expanding and reform the work of the EASO in order to enable it to play this role, significant changes to its mandate, structure, staffing and funding would be required, as well as extensive amendments to the current asylum *acquis*, which is premised on the exercise of power and fulfilment of obligations to identify people in need of international protection by Member States, through their national asylum systems. Important questions around reconciling such a role for EASO with Member States' constitutions (some of which create independent obligations at national level towards refugees, and provide for appeal rights to national courts from legally-binding decisions) would have to be addressed. It would need to be clarified whether a reformed EASO could continue to carry out its current functions – which are evidently needed, as Member States call on it for support and other services

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[187] Goodwin-Gill, G., 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', available at http://www.jmcemigrants.eu/category/working-papers/ visited in June 2015.

[188] Goodwin-Gill, G. (2015), 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' Keynote Address at An International Workshop National and Kapodistrian University of Athens Faculty of Law Friday.

[189] Williams, R., (2015), 'Beyond Dublin - A Discussion Paper for the Greens/EFA in the European Parliament', 13.

[190] Carrera, S., Gros, D., and Guild, E., (April 2015), 'What Priorities for the New European Agenda on Migration', CEPS.

[191] European Migration Network Study, (2014), 'The Organization of Reception Facilities for Asylum Seekers in different Member States', available at: http://emn.ie/cat_publication_detail.jsp?clog=1&itemID=2653&t=6 visited in June 2015.

[192] European Parliament Resolution of 29 April 2015 on 'The latest tragedies in the Mediterranean and EU migration and asylum policies' 2015/2660(RSP) available at:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2015-0176%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN visited June 2015, para 6.

in a wide range of areas – or whether another body would be required to discharge those support tasks. Moreover, Member States and institutions would need to be politically ready to confer such power upon the EASO. In its governing Regulation in 2010, the legislature expressed clearly its intention to limit EASO's powers and exclude any scope for it to take decisions in individual cases. [193] A shift in that view would thus be needed, to entrust the EASO with this major area of responsibility.

3.4.2 The 'Free Choice' Approach

Allowing asylum-seekers to choose their countries of asylum is not a significant departure from current practice. However, it contradicts the official mythology of Dublin. The UN Special Rapporteur on the Human Rights of Migrants, François Crépeau has urged that '[A]sylum seekers should be able to register their asylum claim in the country of their choice and the European Union should build upon current initiatives and support the countries receiving asylum claims with proportionate and adequate financial and technical support. Standardizing reception conditions and refugee status determination procedures throughout the European Union should be a top priority, in order to avoid "asylum dumping" and stress on the countries that offer better conditions.[194]

A viable 'Free Choice' model was proposed in March 2013.[195] The model entails removing the 'irregular entry' criterion from the Dublin Regulation, and its replacement with allowing asylum seekers to choose their country of asylum. If asylum seekers arrived elsewhere, they would be registered and then allowed to move on. Travel assistance could be provided from a central fund and permission to travel granted, thereby removing smugglers and clandestine journeys at once. That proposal also includes a financial compensation fund to support Member States. This model would maximize asylum seekers' trust in and agency within the CEAS.

3.4.3 Distribution Keys – Distributing Persons and Financial Support

As highlighted in the 2014 Study, there are many potential variations on the distribution key idea that have been put forward in academic and theoretical discussions. A 2014 ICMPD Study demonstrates that while different keys have somewhat different outcomes in terms of the number of asylum seekers allocated to each State, their differences are relatively minor.[196] Much more important is the purpose of the key - namely to whether it will be used to distribute money or persons or both, and if persons, whether it will be used to distribute asylum-seekers or recognised refugees, or even linked to resettlement of recognised refugees. The 2014 Study set out various proposals in detail. The present study notes the limits to any system for distributing persons and the importance of financial support to enhance overall protection capacity.

If a key is used to distribute persons, it is crucial that allocation of persons must be consensual, allowing asylum-seekers a reasonable range of options. Accordingly, perfect allocation of persons through a key is not likely. However, a matching mechanism, as proposed by Rapoport and Moraga,[197] could help ensure that allocation is non-coercive. In practice, though, a matching mechanism might be poorly understood. To be effective, decision-making must be based on reliable and trusted information. The design of the process is crucial in this respect.

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[193] Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office 2010 OJ L 132/12, Preamble, Recital 14.

[194] Report of the Special Rapporteur on the human rights of migrants, François Crépeau Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants* A/HRC/29/36 8 May 2015, para 66.

[195] German Bar Association, AWO Workers' Welfare Association, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS (2013) (2013) Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility, March 2013. Available at: www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Memorandum_Dublin_engl.pdf visited in June 2015.

[196] Kraler, A. and Wagner, M., (2014), 'An Effective Asylum Responsibility Sharing Mechanism' (2014 International Centre for Migration Policy Development).

[197] Rapoport, H. and Moraga, J. Tradable, (2014), 'Refugee-admission Quotas: a Policy Proposal to Reform the EU Asylum Policy. EUI Working Paper RSCAS 2014/101.

Distribution or allocation keys can be useful to determine how many asylum seekers should be accommodated in each Member State. Yet, some of the proposed models (for instance the SWP Proposal of 2013[198] and Rapoport and Moranga's concept) allow states to pay others, instead of physically accommodating asylum seekers or refugees within their territories. These ideas may be traced back to an earlier proposal by Schuck.[199]

As the philosopher Michael Sandel has pointed out, there is something objectionable in treated refugees as a burden to be off-loaded or a revenue stream, rather than human beings in peril.[200] While he does not develop his argument further with regard to refugee burden sharing, his hypothesis is that market-based mechanisms can change values, norms and behaviour for the worse. More specifically, as Gibney has argued, it 'demeans refugees by treating refugees as if they possess negative value'.[201] In the EU context, allowing states to buy their way out of refugee protection would be at odds with the common legal commitments, the principle of loyalty to the common project of the CEAS, enshrined in Article 4(2) TEU, and the rationale underpinning the solidarity provision, in Article 80 TFEU.

The aim of distribution keys should be to bring transparency to individual States' responsibilities, in order to enhance the overall protection capacity of the EU and putting an end to the 'refugees in orbit' phenomenon. As all Member States have commitments to protect refugees, none of them should be permitted to buy their way out of refugee protection. However, additional financial support for those who provide protection over and above their allocation should be made available in compensation.

3.4.4 Assessment of the Commission's Relocation Proposal of 27 May 2015

The Commission's proposal of 27 May 2015 for an emergency Council Decision on relocation,[202] and its announcement of a forthcoming legislative proposal before the end of 2015 for a mandatory and automatically-triggered scheme,[203] is an important first step towards moving away from Dublin and towards better allocation mechanisms. While the Commission's proposal was for a legally binding measure, the political agreement reached at the European Council meeting on 25 and 26 June 2015 is only for a voluntary relocation.[204] The Commission suggests the proposal could provide a 'blueprint for the EU's reaction to future crises'. On that basis, the strengths and weaknesses are identified below.

3.4.5 Distribution Key in the Commission's Relocation Proposal

The relocation would be based on the redistribution key, already published as an Annex to the Agenda. Although it is currently unclear whether the key will be subject to political approval, it remains pertinent. Even if the relocation agreed is voluntary, a distribution key is the only way to ensure a benchmark to assess how

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[198] Angenendt, S., Engler, M., and Schneider, J., (2013), 'European Refugee Policy: Pathways to Fairer Burden-Sharing. SWP Comments, German Institute for International and Security Affairs.

[199] Schuck, P.H., (1997), 'Refugee burden-sharing: a modest proposal', 22 Yale Journal of International Law 243. See also Hathaway, J. and Neve, A., (1997), 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', Harvard Human Rights Law Journal, 10, 115.

[200] Sandel, M., (2013), 'What Money Can't Buy: The Moral Limits of Markets', Penguin, 63.

[201] Gibney, M., 'Forced migration, engineered regionalism, and justice states' in Kneebone S. and Rawlings, F., (2008), 'Sanei Regionalism and asylum seekers: Challenges ahead', Berghahn Press. p 70. See further Gibney, M., (2015), 'Refugees and Justice between States', European Journal of Political Theory 1. For a rejection of this concern, see further Kuosmanen, J, (2013), 'What if anything is wrong with trading refugee quotas', Res Publica 103.

[202] European Commission Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 27.05.2015, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf visited in June 2015.

[203] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A European Agenda on Migration*, COM (2015)240, 13 May 2015, p 5.

[204] The legal basis for this exceptional measure, Article 78(3) TFEU, allows it to be passed by QMV in the Council, with Parliament only consulted. It is unclear at present whether a qualified majority of Member States will support the measure. See also the report of the European Parliament (Rapporteur: Ska Keller), Procedural file 2015/0125(NLE): http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/0125(NLE)&l=en

many people should under ideal conditions go to each Member State. In any event, given that the relocation proposed is a temporary measure, and full reform of Dublin is on the table, relocation keys have relevance beyond the short term.

The criteria in the published table aim to reflect both the absorption capacity and the integration capacity of the Member States. The two major factors are: 1) the size of the population (40%): the larger the population, the easier it is for the Member States to absorb and integrate refugees; 2) the total GDP (40%): large economies are generally considered more able to shoulder greater migration pressures. In addition, there are two corrective factors which reduce the allocation, namely, 1) the number of the asylum applications received and resettlement places already offered in the past 5 years (10%); and 2) the unemployment rate (10%). The key has much to be commended, provided it does not lead to further complexity and coercion in its implementation.

3.4.6 Scope of the Commission's Relocation Proposal

The proposal only applies to arrivals in Italy and Greece. It notes that if other states are subject to 'an exceptional migratory pressure', they could be considered for such a programme. It will only apply on a temporary basis, for 24 months. Of those who arrive in Italy and Greece, the aim is only to relocate 24 000 and 16 000 respectively. It is claimed this corresponds 'to approximately 40% of the total number of persons in clear need of international protection who have entered irregularly in these two countries in 2014'. It would only apply to those 'in clear need of international protection' or 'prima facie' in need of international protection. This proposal defines this category of applicants as those belonging to nationalities for which the EU average recognition rate, as established by Eurostat data, was above 75% the preceding year. Thus, the proposal appears to indicate only Syrians and Eritreans will qualify.[205]

Treating this as a pilot measure and beginning with those most likely to be recognized as refugees seems to have merit, but here we outline four concerns about the use of numerical criteria of past recognition.

Firstly, the shortcomings of using past recognition rates must be recognised, in order to ensure that this does not become an established feature in any future, more general relocation mechanism. It should be noted that nationality discrimination may violate international and EU non-discrimination and right to equality norms, unless they can be shown to be objectively justified.[206] It will be recalled that the Belgian Constitutional Court struck down a provision which designated SCOs on the basis of past rejection rates as a violation of constitutional equality, admittedly where past rejection rates were used to designate countries as safe, with negative procedural implications for the newly arrived asylum seeker.[207] Secondly, past *average* recognition rate could be quite a crude indicator. Thirdly, the use of recognition rate by nationality could also obscure particular protection needs of specific groups, such as people at risk based on their gender or perceived ethnic, religious or political affiliation. Fourthly, past recognition rates will also fail to reflect current protection needs, given that situations in the country of origin may change quickly, so may be a poor proxy for those with the strongest protection needs.

The authorities in Italy and Greece must carry out a selection process, and fingerprint all asylum seekers *before* relocation is carried out. In the selection criteria, 'priority' is to be granted to those who are deemed 'vulnerable', as defined by the EU Reception Conditions Directive. This definition is broad and amorphous

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[205] The Commission's explanation to the proposal states: 'A significant proportion of the total number of irregular migrants detected in these two regions included migrants of nationalities which, based on the Eurostat data, meet a high EU level recognition rate (in 2014, the Syrians and the Eritreans, for which the EU level recognition rate is more than 75%, represented more than 40% in Italy and more than 50% in Greece).' Recital 18 of the proposal states: 'Based on Eurostat data for 2014 first instance decisions, a threshold of 75%, which corresponds in that year to decisions on applications for Syrians and Eritreans, should be used in this Decision.'

The UK and Ireland have an option to participate in measures in this field. The UK has indicated that it will not participate, but Ireland may. Denmark does not participate in EU measures on asylum and migration. The proposal will not apply to the non-Member States bound by the Dublin rules (Norway, Switzerland, Iceland and Liechtenstein).

[206] Art 3 RC as among refugees, ICCPR, CERD, EU Law – Art. 21 EUCFR, HID case – quote Case C-175/11 *HID* [2013] ECR I-0000, 31 January 2013, para 73.

[207] Case 20/93 of 4 March 1993. See further, Leboeuf, L., (2014), 'Le Juge Garant Ultime l'équité de la procédure d'asile', Administration Publique 221.

and does not easily lend itself to establishing clear priorities between the 'vulnerable'.[208] The strategy also sits uncomfortably with CJEU case law on unaccompanied minors and dependent relatives, if transfer is not in their best interest.[209] Moreover, often these grounds of vulnerability require time and appropriate procedures to assess, for instance whether someone has been a victim of trafficking or sexual violence. Finally, the proposal provides for limited remedies against decisions to transfer (or not to transfer), for those who may want to contest them.

The proposal is also limited in its territorial scope, applying only to those for whom Italy and Greece would be responsible. In other words, if there are asylum seekers with family ties which mean that they qualify for transfer under the Dublin family reunification provisions, that obligation remains – as according to the EU hierarchy of sources, a Regulation is subject to compliance with primary law, including the Charter of Fundamental Rights.

The premise is that Member States must accept the asylum seekers nominated by Italy and Greece. They may refuse relocation only if it is 'likely that there are national security or public order concerns'. Once relocated, the Member State of relocation will be responsible for processing the claims, in accordance with the normal EU procedural rules.

Stepping in to relocate from Greece has a further problematic legal dimension. How does establishing this mechanism fit in with Court rulings finding the treatment and conditions for asylum seekers in Greece 'inhuman and degrading'? If EU Member States will take some applicants, why not all? If the conditions in Greece remain inhuman and degrading, there may well be a positive obligation to take more extensive action in this context. The Commission acknowledges that deporting asylum-seekers back to Greece is not the current practice, but it does not mention the inhuman and degrading conditions, citing in more abstract terms the 'systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in Greece', which have been identified by the Court of Justice of the EU.[210]

Relocation without Coercion?

The most striking feature of the proposal is that it does not explicitly require the asylum seekers' consent to transfer. It is therefore premised on a degree of control that may be legally prohibited and impossible to implement.

By contrast, the previous EU pilot of relocating from Malta (EUREMA) was based on the principle of double voluntariness,[211] as provided under the EU Temporary Protection Directive.

As the EASO Study on EUREMA II noted: 'In general, respondents asserted that relocation should always be a voluntary decision both on the side of the beneficiary and that of the receiving country. If the voluntary aspect is removed, integration difficulties might arise, which could lead to secondary movements or return to the country where protection was initially granted, in this case Malta.'[212]

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[208] It refers to those 'such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.'

[209] Case C-175/11 *HID* [2013] ECR I-0000, 31 January 2013, para 73.

Case C-648/11 *MA v Secretary of State for the Home Department* [2013] ECRI-0000, 6 June 2013.

[210] Case *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: http://www.refworld.org/docid/4ef1ed702.html visited 16 June 2015 and Costello, C., (2012), 'The Ruling of the Court of Justice in NS/ME on the fundamental rights of asylum seekers under the Dublin Regulation: Finally, an end to blind trust across the EU?', Asiel - en Migrantenrecht, 83-92.

[211] European Asylum Support Office (EASO), EASO fact finding report on intra-EU relocation activities from Malta, July 2012, available at: http://www.refworld.org/docid/52aef8094.html, page 13.

[212] EASO report, (2012), 'EASO fact finding report on intra-EU relocation activities from Malta', available from http://www.refworld.org/pdfid/52aef8094.pdf visited June 2015.

To be workable, transfers should indeed take place only once asylum seekers have had time to recuperate from their traumatic journeys and trusted interlocutors have provided them with adequate information. The strict allocation quotas may not be workable without proper advice and information to facilitate informed decisions and a right to decide between a reasonable range of options, and crucially to refuse transfer. As it is envisaged that not all asylum-seekers will be transferred under this system, it is imperative that non-coercive mechanisms be designed to facilitate agency.

There are procedural protections for asylum seekers, but they fall short. The Italian and Greek authorities must inform and notify the asylum-seekers of the relocation 'in a language which the applicant understands or is reasonably supposed to understand on the relocation procedure as set out in this Decision'. However, an obligation to 'inform and notify' does not provide for consideration of the asylum seeker's wishes. The proposal seems to imply choice for Member States among the asylum seekers to be relocated. Yet, in turn, choice is not foreseen for the asylum seekers addressed by the proposal. The imbalance may exacerbate, rather than resolve, the main problem of the current system for those unwilling to relocate to a state they have no ties to.

The Commission's Proposal for a relocation decision acknowledges that the 'best interests of the child shall be a primary consideration for Member States when implementing this Decision'. If children, even those accompanied by their parents, must be heard, and their 'best interests' assessed, extreme care must be taken to ensure that transfers do not violate this principle. The proposed decision provides that 'Member States shall ensure that family members who fall within the scope of this Decision are relocated to the territory of the same Member State' (Article 6(2)), but, again, there is no explicit mechanism for a family decision.

3.5 Dublin without Coercion

Even if Dublin remains as is, it should be implemented without coercion. The Regulation will soon be amended to reflect the CJEU's ruling in *MA*, that 'as a rule, unaccompanied minors should not be transferred to another Member State'.[213] The Dublin III Regulation sets out improved procedural safeguards such as the right to information, personal interview, and access to remedies. Under Article 5, the Member State in which the asylum seeker arrives must conduct a personal interview with the asylum seeker, in order to facilitate the process of determining the Member State responsible. That interview should be used to assess the presence of the links referred to by the Dublin Regulation and any other strong reasons the applicant may have for or against transfer.[214]

Practice under the Dublin II Regulation suggests that Member States underused the humanitarian grounds provision.[215] Given the lack of information about the internal workings of Dublin, it is unclear why this is so, but an institutional shift is required to operationalize Dublin without coercion, in line with the more expansive, sympathetic use propounded by the CJEU itself in the case of *K*.[216]

Decouple disembarkation and allocation of responsibility

A narrow proposal, focusing on disembarkation at sea, would decouple the obligations of disembarkation and those to process asylum claims, in particular in order to ensure that there are no disincentives to disembarkation – this would require the replacement or suspension of Dublin rules vis-à-vis coastal Member States currently receiving the bulk of sea arrivals. As stated at the outset, if safe access was available, the need for rescue at sea would diminish.[217]

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[213] Case *C-648/11 MA v Secretary of State for the Home Department* [2013] ECRI-0000, 6 June 2013

[214] M Di Filippo 'After Mare Nostrum: delinking the acceptation of disembarkation and the assumption of responsibility for asylum seekers rescued at sea' Submission of the International Institute of Humanitarian Law to the UNHCR High Commissioner's Dialogue on Protection Challenges, 2014 - Protection at Sea.

[215] ECRE *Dublin II Regulation: Lives on Hold* (ECRE 2013).

[216] Case C-245/11 *K v Bundesasylamt*, 6 November 2012.

[217] M Di Filippo 'After Mare Nostrum: delinking the acceptation of disembarkation and the assumption of responsibility for asylum seekers rescued at sea' Submission of the International Institute of Humanitarian Law to the UNHCR High Commissioner's Dialogue on Protection Challenges, 2014 - Protection at Sea. See further, Klug, A., (2014),

Relocation of Recognised Refugees

The study of the EUREMA programmes of relocation from Malta in 2009-2013 provides some lessons for the proposed relocation.[218] They involved relocating recognised refugees, based on the principle of 'double voluntariness', as the Temporary Protection Directive, meaning that both the refugee and the receiving state authorities had to agree to any transfer before it took place. Approximately 500 people were transferred to other Member States, but at the same time, Dublin returns to Malta were still being carried out, with some 560 Dublin returns to Malta in 2010. The EASO evaluation notes that relocations failed in some instances due to the poor reception conditions in the countries of relocation and lack of adequate information about the conditions awaiting.[219] This experience is instructive as regards the importance of information and support for relocation.

Financial Support

Our comprehensive review of the financial burden-sharing literature in the 2014 Report suggests that most of the discussion about financial burden-sharing only takes into account direct costs of hosting asylum-seekers, like accommodation or administrative efforts. An exception is the 2010 report of Thielemann et al, which also looked at some indirect costs and opportunity costs.[220] Above all, the underlying benefits are rarely considered, such as the potential economic gains from allowing asylum-seekers and refugees to work and contribute economically and socially. As the 2014 Study demonstrated, asylum in Europe is costly, as it is excessively complex and coercive. EU funds should be carefully targeted to ensure reception conditions and processes are suitable, and allow asylum-seekers to live in dignity.

Financial support, if properly focused and audited, can both encourage and support Member States to meet their legal obligations under the CEAS, and run efficient asylum systems. The importance of first reception and efficient decision-making, where decisions are taken promptly, and time spent in reception centres minimized, cannot be overestimated. The Asylum, Migration and Integration Fund (AMIF)[221] funds are available to support integration of both asylum-seekers and refugees, so measures to assist livelihoods and self-sufficiency can be developed, including from the time of the asylum application is made. Pooling financial resources is one way to sharing responsibility for asylum claims, and has much to recommend it over 'sharing people', particularly if transfers are coercive.

The AMIF has agreed priorities for the six years (2014-2020), and requires Member States to establish multiannual plans for that duration. Its aims include:

- To strengthen and develop all aspects of the Common European Asylum System (CEAS), including its external dimension.
- To support legal migration to the Member States in line with their economic and social needs, such as labour market needs, and to promote the effective integration of third-country nationals.
- To enhance fair and effective return strategies in the Member States with an emphasis on the sustainability of return as well as effective readmission to countries of origin and transit.

'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing', 26/ 14 International Journal of Refugee Law, 48, in part. 60-61.

[218] European Asylum Support Office (EASO), EASO fact finding report on intra-EU relocation activities from Malta, July 2012, available at: http://www.refworld.org/docid/52aef8094.html

[219] Ibid.

[220] See Thielemann, E. et all, (2010), 'What System of Burden-sharing between Member States for the Reception of Asylum Seekers?', Brussels: European Parliament Directorate for Internal Affairs.

[221] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC. See also Commission Implementing Decision of 12 February 2015, concerning the adoption of the work programme for 2015 and the financing for emergency assistance within the framework of the Asylum, Migration and Integration Fund C(2015) 653 final.

- To enhance solidarity and responsibility-sharing between the Member States.

Importantly, at the behest of the Parliament, the AMIF Regulation includes Annex III, which provides a more extensive list of common indicators to gauge whether the objectives are being met. As ECRE notes, these indicators are necessary to ensure effective and qualitative evaluation of the objectives of the fund.[222] The AMIF Regulation also contains important principles for partnership, which could help foster the multi-actor involvement advocated in the 2014 Study.[223]

An important new feature of the AMIF is that Member States have to adopt multiannual national programmes, instead of annual national programmes, for the entire period 2014-2020. The national programmes need to lay out an appropriate strategy identifying the objectives to be pursued with the support of the AMIF and include targets for their achievement. The AMIF has set three mandatory objectives to be included by Member States in their programmes: (1) strengthening the CEAS, (2) setting up and developing integration strategies and (3) developing a return programme, which includes a component on assisted voluntary return (Article 20).

In order to address imbalances which are caused or exacerbated by significant arrival numbers and limited capacity, AMIF resources for emergency measures could be increased in future budgets to ensure that sufficient resources can be made available swiftly to address situations of 'heavy migratory pressure' as foreseen under the AMIF Regulation's provisions. A further possibility would be the creation of a dedicated fund within the Union's budget to support Member States in covering costs which cannot be met from national or existing EU funds for implementation of asylum *acquis* obligations. An appropriate system for the allocation of such funds, along with rigorous programming, transparency and monitoring systems, would need to attend such a new fund.

By contrast, the possibility of bilateral payments between EU Member States, or a fund containing individual contributions by Member States to support others, could create problems of accountability, targeting to address real needs, monitoring and effective coordination with EU funding. It is thus recommended that efforts be invested in reinforcing the existing EU funding mechanisms and tools, to minimise the above risks and ensure maximum impact in addressing situations of arrival pressure and gaps in facilities and entitlements for asylum-seekers and people in need of protection.

Supporting Voluntary Relocation

Even under the Dublin System, transfers to facilitate family reunion that are requested by the asylum-seeker rarely occur.[224] It is unclear why not. Financial support could be used to further incentivize assumption of responsibility in such cases, for transport costs and for taking charge of any claims, particularly if they are beyond the strict legal requirements of Dublin. Consideration could be given to arranging for additional payments under *AMIF* to any state that takes responsibility for asylum claims beyond its strict obligations under Dublin III, which may require legislative changes. For instance, if an asylum seeker wishes to be transferred to another state, and responds positively to a 'take charge' request under Article 21, both transport costs and an additional payment from EU funds should be made. Currently under AMIF, lump sums of €6000 are only available for relocation of beneficiaries of international protection. This is a step back from the Commission Proposal and the European Refugee Fund, where funding was available for relocation of applicants for international protection. [225]

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[222] ECRE Information Note on the Asylum, Migration and Integration Fund (ECRE, 29 May 2015), available at http://ecre.org/component/downloads/downloads/1022.html visited 4 July 2015.

[223] European Parliament Study commissioned by the LIBE Committee, (2014), Guild, E., Costello, C., Garlick, M. , Moreno-Lax, V., Mouzourakis, M., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', PE509.989 (Brussels), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf visited 10 June 2015. See further ECRE, UNHCR and 10 organisations, Statement on the Partnership Principle in the EU Asylum and Migration Fund, May 2013. ECRE, UNHCR and 7 organisations, The AMIF Partnership Principle: Recommendations on implementation, July 2014.

[224] Fratzke, S., (2015), 'Not Adding Up – the fading promise of Europe's Dublin system', Migration Policy Institute.

[225] ECRE Information Note on the Asylum, Migration and Integration Fund (ECRE, 29 May 2015), available at http://ecre.org/component/downloads/downloads/1022.html visited 4 July 2015. European Commission, Proposal for a

Annex IV of the AMIF Regulation contains a 'List of common indicators for the measurement of the specific objectives' which aims to clarify how the attainment of the objectives of the AMIF is to be measured. These indicators could enhance oversight and accountability through proper external scrutiny and audit. The EU Court of Auditors has examined how previous funds were spent, and noted a lack of data.[226] The European Parliament should scrutinize national action plans, and ensure that the indicators in Annex IV to the AMIF Regulation are used to ensure transparency. The EMAPA should be tasked with develop further methods of external monitoring.

Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 27.05.2015, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf visited in June 2015.

[226] European Court of Auditors Special Report 22, (2012), available at http://www.eca.europa.eu/Lists/News/NEWS1212_11/NEWS1212_11_EN.PDF visited in June 2015.

4. Conclusions and Recommendations

Conclusions: 1. Existing and alternative ways of ensuring safe and lawful access to EU territory:

The Dublin system of allocation of responsibility for asylum seekers is based on the principle of coercion and does not achieve its objectives. It works neither for States nor asylum-seekers. It is estimated that only about 3% of asylum seekers are ever actually subject to a successful Dublin transfer[227] while it seems apparent that the majority of asylum seekers who enter the EU have their asylum claims actually determined in another Member State than that through which they entered. Why is this the case?

Most refugees remain outside the EU, and the EU needs to step up as an international actor to assist those countries hosting large refugee populations. Resettlement is an important tool in this respect. As regards those seeking to come to the EU, at present they must undertake life-threatening journeys due to the lack of safe and regular means of access to the EU. The EU could adjust its legal regime to avoid these journeys and diminish demand for the services of smugglers. Secondly, developing mechanisms to assist Member States to share their international protection responsibilities is necessary to make the CEAS work effectively.

The first issue is how to ensure safe access to the EU territory for persons in need of international protection. Those seeking refuge undertake dangerous journeys as they have few other options - mandatory visa requirements coupled with carrier sanctions on transport companies preclude regular means of travel. Without these two EU measures, unsafe access and the demand for the services of smugglers would greatly diminish. Secondly, border control practices raise concerns about the potentially discriminatory treatment of some persons in need of international protection. There is a stark comparison between the relative safety of arrival of Ukrainians seeking international protection in the EU with the dangerous routes which Syrians similarly seeking protection are obliged to take. These differences are based on access to safe means of travel which, at the moment, depends on access to visas, travel documents, safe modes of transport and equal treatment by border guards.

In addition to assuring safe access to the EU for spontaneous arrivals of asylum seekers, the EU has available a number of tools for safe and regular entry. Four main tools are (1) humanitarian evacuation and transport; (2) humanitarian visas, (3) resettlement; (4) immigration visas. All of these tools should be deployed where appropriate to provide safe access for persons in need of international protection.

The role of the private sector, both the shipping sector through rescue and NGOs through sponsorship and support to sea arrivals is vital to the success of safe access to the EU. The possible role of the deployment of EU military to attack smugglers' boats is ethically, legally and logistically indefensible. The likely resulting deaths of refugees may engage the international responsibility of the EU for crimes against humanity.

Once they arrive in the EU, many asylum-seekers are accommodated in national reception centres, the nature and quality of which vary greatly across the EU. Participatory research and external monitoring are required to better understand the lived experience in such centres, and to ensure they meet EU and international standards. There is a duty to monitor living conditions in such environments, as well as to ensure compliance with legally binding EU standards in the Directives.

Recommendations

- The European Parliament should encourage the Commission to put forward a proposal for legislative changes to achieve the lifting of visa requirements and carrier sanctions on transport companies so that persons seeking asylum in the EU can arrive safely.
- The European Parliament should seek information regarding the application of EU border controls to all asylum seekers seeking entry to the EU and ensure that there is no discrimination in access to the territory to seek asylum on the basis of nationality;
- The European Parliament should encourage the Commission and the Council to consider alternative tools for safe access to the EU including the adoption of measures on humanitarian visas. The

[227] European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2013, July 2014, section 2.6, p 30, https://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf , accessed 4 July 2015.

opportunity should be used during current negotiations on the reform of the Visa Code to clarify obligations to issue Limited Territorial Validity (LTV) visas for that purpose, in line with non-refoulement and right to asylum standards;

- The Temporary Protection Directive, currently under evaluation by the Commission, should be amended to facilitate its application to address significant arrivals of people needing protection, including potentially through adjustments to the definition of 'mass influx' triggering its application; the procedure for applying Temporary Protection, and to strengthen its solidarity provisions.
- The European Parliament should closely monitor the implementation of the resettlement programme approved in June for compliance with fundamental rights. It should also encourage the Commission and the Council to expand resettlement in the short to medium term, supplemented by a scheme for private sponsorship by NGOs, families and other civil society actors and organisations, in line with FRA recommendations. These elements could be put forward in discussions around the proposal foreshadowed by the Commission in the Agenda for Migration for a binding and mandatory legislative approach to resettlement after 2016;
- The European Parliament should also encourage the Council and the Member States to facilitate wider use of family reunification by international protection beneficiaries already in the EU, including with extended family members, and the waiver of support, accommodation and health insurance requirements to assist their safe entry;
- The European Parliament should promote a generous approach to the application of visa rules in other existing categories, including students, researchers, and workers. In particular, the opportunity should be utilised following the public consultation on the future of the Blue Card Directive and in the course of its review, as announced in the European Agenda on Migration, to adapt Blue Card rules to facilitate its wider application to people in need of protection;
- The European Parliament should develop more robust tools for external monitoring of conditions in reception centres for asylum seekers;
- Proposals for support to first reception in 'frontline' Member States and registration, identification and fingerprinting at 'hotspots', with the assistance of personnel from other Member States and EU agencies, could, if appropriately designed and implemented, ensure more effective access to procedures. However, to achieve a positive impact, these must operate in full compliance with the safeguards and requirements of the asylum acquis and international law and standards.
- Past proposals for establishing reception centres and processing asylum claims outside EU territory raise significant questions of legal, practical and political feasibility which remain unaddressed. Such ideas, if formally put forward in the current context, would require careful reflection, in light of previous critical analysis, to ensure full compliance with the EU's legal and other obligations. Such ideas would need to address satisfactorily the current challenging context in the EU and its neighbourhood, and present a genuinely safe and viable alternative to dangerous maritime journeys for significant numbers of people in need of protection, on a large scale, in order to alleviate the pressure of arrivals at EU frontiers.

Conclusions: 2. Mutual recognition of positive asylum decisions:

Mutual recognition of positive asylum decisions will be an important further step in the development of the CEAS, promoting further harmonisation of standards and strengthening the rights of international protection beneficiaries in the EU. It would advance progress towards fulfilment of the Treaty requirement for a uniform status of asylum, valid throughout the Union, and encourage the EU and Member States to invest further in ensuring consistent, high-quality asylum decision-making across the EU.

Some of the harsh effects of Dublin on individuals would be ameliorated by introduction of mutual recognition and greater movement rights for protection beneficiaries. More extensive and earlier opportunities for those granted protection to reside and enjoy rights beyond the state which was responsible for their asylum claim - which may not be the state to which they have closest ties or the greatest potential to integrate successfully –

would increase the sustainability of protection. It would enable many protection beneficiaries to contribute more productively to their host societies, using relevant skills, knowledge and connections to best effect.

Mutual recognition of positive asylum decisions would also bring greater balance and coherence to a system which already reflects mutual recognition for negative decisions. The widely-accepted use of mutual recognition in other JHA areas, where the level of legislative harmonisation is less, adds to the likelihood of its feasibility for positive asylum decisions.

Rules on transfer of protection between Member States are needed to provide legal clarity and certainty around responsibility for ensuring respect for the rights of people granted protection who exercise free movement rights within the Union. Existing international and regional instruments regulate this to an extent, but an EU instrument could address outstanding gaps and ensure coherence with other asylum acquis rules. Amendments to the Long-term Residents' (LTR) Directive are recommended to provide for greater mobility rights under clearer conditions for protection holders.

Recommendations:

- The European Parliament should encourage the Commission to put forward a proposal for legislative changes to achieve mutual recognition of positive asylum decisions as soon as practicable. Relevant elements of such a proposal should include required amendments to the Qualification Directive, Asylum Procedures Directive, and Long Term Residents' Directive.
- Such a proposal could take one of two forms: (1) providing for the possibility to request mutual recognition, enhanced movement rights within the Union and transfer of protection rights immediately after the grant of protection in a Member State. (2) An alternative approach would involve mutual recognition and adjustment of the existing LTR framework to provide for LTR and the right to take up residence in another Member State after two years, providing for mobility in a more gradual way.
- These changes should also be accompanied by a proposal for an EU instrument on transfer of protection rights and status. An instrument is required for this purpose in any event to address an existing gap in the current framework, to avoid legal uncertainty which appears to serve as an obstacle to movement under the current LTR for protection beneficiaries in accordance with their rights.

Conclusions: 3. Alternatives to Dublin and systems of financial imbalance:

The workings of reception and allocation systems are closely related to the means of access to asylum set out in Section 1 and the status granted to those recognized as refugees, and rights associated with status, in Section 2. As Section 1 has demonstrated, if there were safe and legal access for those in need of international protection, asylum-seekers and resettled refugees would arrive in different EU Member States very differently to the present. If greater means of safe access were available, arrivals would in likelihood be dispersed across ports, airports, and land-borders of the EU. The problems of uneven distribution would be significantly mitigated. Those problems are also in part due to poor reception conditions and asylum systems in many states. Often asylum-seekers onward movement is wrongly characterised as 'irregular secondary movement', when in fact asylum seekers and refugees are seeking a place of refuge and access to reception standards and fair procedures in line with their entitlements under international and EU law.

The failings of the Dublin System are now well known. Root and branch reform of Dublin is long overdue. Dublin does not 'work' as an allocation mechanism, as it is so widely ignored and flouted by both Member States and asylum seekers. Dublin is weakly enforced; so many asylum seekers do exercise some degree of choice as to their country of asylum. However, in so doing, they risk being deported and detained, and may even use smugglers for onward movement within the EU. The Dublin system exacerbates their vulnerability, rather than enhancing protection.

Any reform must be informed by the importance of avoiding unnecessary coercion. Responsibility must be allocated with respect for existing fundamental rights obligations, taking account of asylum-seekers' well-informed choices, based on a range of reasonable options. For practical reasons too, asylum seekers' and refugees' participation into decisions about where they will live is important, if secondary movements are to be reduced.

The Commission on 27 May 2015 issued proposals in a Working Document which places particularly strong emphasis on the importance of fingerprinting all those who arrive, as required under the Eurodac Regulation. Coercive methods for securing fingerprinting raise serious legal, practical, and ethical concerns.

A European Migration, Asylum and Protection Agency could provide a means to ensure fulfilment of EU and Member States' collective goals.

The most obvious alternative to Dublin is a system based on asylum-seeker choice, as advocated by the UN Special Rapporteur on the Human Rights of Migrants and outlined in detail by a coalition of German NGOs. This is in keeping with current realities, were most asylum-seekers do exercise a degree of agency over their country of asylum. Moreover, it would avoid unnecessary coercion.

Other alternative proposals strive for fairer allocation based on various distribution keys, which identify the reception capacity of states based on various indicators, such as population, GDP, economic success and current hosting of asylum-seekers and refugees. Such an allocation key could compel closer attention to the extent to which Member States are meeting their responsibilities. They can also provide benchmarks for developing institutional capacity.

However, distribution keys should not lead to coercive transfers or allow Member States to buy their way out of their protection responsibilities. On the other hand, additional financial support for those who provide protection over and above their allocation should be made available.

The Commission's proposal of 27 May 2015 for an emergency Council Decision on relocation is an important first move towards an allocation key across the EU. However, there are concerns about the use of past recognition rates to determine groups for relocation and the absence of asylum-seeker's consent to transfer.

Financial support, properly focused and monitored, can encourage and support Member States to meet their obligations. It could be more effectively used to achieve strategic goals and to further incentivize assumption of responsibility.

Recommendations:

- The European Parliament should invite the Commission to put forward a proposal for legislative changes for root and branch reform of the Dublin System;
- The European Parliament should ensure future legislation avoids coercion. If 'free choice' is not employed, then preference matching or other mechanisms to offer asylum-seekers a reasonable range of options should be explored as regards the Member State which shall be responsible for their asylum claim determination and protection;
- The European Parliament should support the use of distribution keys, based on a rigorous assessment of the extent to which States are meeting their obligations, and measures to help develop reception capacity;
- The European Parliament is not a co-legislator on the current Commission proposal to relocate 40,000 Syrian and Eritrean asylum-seekers from Italy. However, it should work to ensure that political support for the proposal emerges, and that it is implemented without coercion;
- Some features of the Commission's proposal of 27 May 2015 should be significantly adjusted in the proposal foreshadowed in the Agenda on Migration for a future legislative measure for a mandatory and automatically-triggered scheme, on which the EP will play a co-deciding role. The European Parliament should ensure that future general legislation does not use of past recognition rates to determine groups for relocation or leave unclear the necessity for transfers to be voluntary, based on proper information and presentation of a reasonable range of options;
- The European Parliament should investigate, or ensure the launching of an appropriate investigation of, claims of excessive force used to fingerprint asylum-seekers;
- The European Parliament should scrutinize national action plans under the AMIF, and ensure that the indicators in Annex IV of the AMIF Regulation, for assessing whether the Regulation's objectives are being met, are applied to ensure transparency;

- To address imbalances which are caused or exacerbated by significant arrival numbers and limited capacity, AMIF resources for emergency measures should be increased in future budgets to ensure that sufficient resources can be made available swiftly to address situations of 'heavy migratory pressure' as foreseen under the AMIF Regulation's provisions;
- The European Parliament should examine whether legislative reform is needed to extend AMIF funding to support voluntary Dublin transfers (where the asylum-seeker wishes to join family in another Member State in particular) or other voluntary transfers. At present, it appears that AMIF funding is targeted towards relocation of recognized refugees, rather than asylum-seekers;
- The European Parliament should advocate for creation of an EU Migration, Asylum and Protection Agency, with powers to grant EU-wide protection status, and develop further methods of external monitoring of compliance with EU and international standards.

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Glossary

Acquis	Accumulated legislation and jurisprudence constituting the body of European Union law
Asylum seeker(s) or protection seeker(s)	Person(s) seeking international protection, whether recognition as a refugee, subsidiary protection beneficiary or other protection status
Königsteiner Schluessel	German key for the distribution of asylum applicants between *Bundesländer*
Humanitarian visa	Visa authorising a non-national's entry on humanitarian grounds
Legal support	Legal information, advice and representation
***Non-entrée* policies**	Policies directed towards restricting the entry of non-nationals into a state
Praesidium	Project on first screening of persons arriving by sea, coordinated by the Italian Ministry of Interior
Refugee(s)	The term is used throughout to refer to persons falling under the definition of the 1951 Refugee Convention and/or subsidiary protection beneficiaries
Refugee status determination	The term is used throughout to refer to determinations concerning both refugee status and subsidiary protection

List of Abbreviations

AFSJ Area of Freedom Security and Justice	Area of Freedom Security and Justice
AIDA	Asylum Information Database
AMIF	Asylum, Migration and Integration Fund
APD	Asylum Procedures Directive
ARIO	International Law Commission Articles on Responsibility of International Organisations
ASR	International Law Commission Articles on State Responsibility
CAT	United Nations Convention against Torture 1984
CEAS	Common European Asylum System
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COREPER	Permanent Representatives Committee (Council of the European Union configuration)
CPT	Council of Europe Committee for the Prevention of Torture
CSR	United Nations Convention Relating to the Status of Refugees 1951
DRC	Democratic Republic of the Congo
GAMM	Global Approach to Migration and Mobility
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EEAS	European External Action Service
EMAPA	EU Migration, Asylum and Protection Agency
EMN	European Migration Network
ENARO	European Network of Asylum reception Organisations
EPRA	European Platform of reception Agencies
ERF	European Refugee Fund
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EU-LISA	European Union Agency for Large-Scale IT Systems in the Area of Home Affairs
EUREMA	EU pilot project on Intra-EU Relocation from Malta

EURODAC	European fingerprint database
EUROSTAT	European Commission Directorate-General in charge of providing statistical information
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
ICMPD	International Centre for Migration Policy Development
IHL	International Humanitarian Law
IHRL	International human rights law
ILC	International Law Commission
IOM	International Organisation for Migration
JRS	Jesuit Refugee Service
LIBE	Civil Liberties, Justice and Home Affairs Committee
LVT	Limited Territorial Validity
LTR	Long Term Residence
NATO	North Atlantic Treaty Organisation
NGO(s)	Non-governmental organisation(s)
QD	Qualification Directive
QMV	Qualified majority voting
RCD	Reception Conditions Directive
RSD	Refugee status determination (includes subsidiary protection status determination)
SAR	Search and Rescue
SBC	Schengen Borders Code
SCO	Safe country of origin
STC	Civil Liberties, Justice and Home Affairs Committee
TEU	Limited Territorial Validity
UDR	Long Term Residence
UK	North Atlantic Treaty Organisation
UN	Non-governmental organisation(s)
UNHCR	United Nations High Commissioner for Refugees