

REPORT

OFFSHORING ASYLUM AND MIGRATION IN AUSTRALIA, SPAIN, TUNISIA AND THE US

LESSONS LEARNED AND FEASIBILITY FOR THE EU

Sergio Carrera

Nora El Qadim

Maryellen Fullerton

Blanca Garcés-Mascareñas

Susan York Kneebone

Ana López Sala

Ngo Chun Luk and

Lina Vosyliūtė

OPEN SOCIETY
EUROPEAN POLICY
INSTITUTE



CONTENTS

3	ACKNOWLEDGEMENTS
4	ABOUT THE AUTHORS
5	LIST OF ABBREVIATIONS
6	1. INTRODUCTION
7	1.1 NOTE ON CONCEPTS AND STRUCTURE
9	2. COMPARATIVE COUNTRY EXPERIENCES
9	2.1 AUSTRALIA
17	2.2 SPAIN
27	2.3 TUNISIA
33	2.4 THE UNITED STATES
46	3. LESSONS LEARNED FROM THE COMPARATIVE COUNTRY EXPERIENCES
50	4. THE FEASIBILITY OF OFFSHORING ASYLUM IN THE EU CONTEXT
54	5. CONCLUSIONS: PORTABLE RESPONSIBILITY IN ACTION
57	BIBLIOGRAPHY
67	APPENDIX I. US CROSS-COUNTRY EXPERIENCE
70	APPENDIX II. THE CONCEPT OF ‘PORTABLE RESPONSIBILITY’ AND ROLE OF EU AGENCIES AND EU FUNDING IN EXTRATERRITORIALISATION
70	AII.1 PORTABLE RESPONSIBILITY IN EU LAW AND THE ROLE OF REGIONAL AND INTERNATIONAL STANDARDS
74	AII.2 EU AGENCIES AND EXTRATERRITORIALITY: EU LEGAL STANDARDS
78	AII.3 RESPONSIBILITY VIA EU FUNDING AND EU POLITICAL ARRANGEMENTS WITH THIRD COUNTRIES
81	ENDNOTES

FIGURES

21	FIGURE 1. Irregular arrivals in the Canary Islands, 1999–15: Total number of interceptions
22	FIGURE 2. Distribution of arrivals by maritime migration routes, 1999–2012 (%)
24	FIGURE 3. Irregular immigrants arriving in Spain, 1999–2012: Total number of interceptions (maritime routes)
25	FIGURE 4. Evolution in the dynamics of the Spanish maritime routes, 1999–2015
25	FIGURE 5. Evolution in the dynamics of the Spanish land and maritime routes, 2010–15
39	FIGURE 6. Estimated arrivals from offshore refugee processing in Cuba
40	FIGURE 7. Unaccompanied children apprehended at the southwestern US border, 2008–17
55	FIGURE 8. The main components of portable responsibility and portable justice
67	FIGURE AI.1 US overseas refugee processing
68	FIGURE AI.2 US Refugee Admissions Program: Central American Minors flowchart
71	FIGURE AII.1 Determining jurisdiction and responsibility: Council of Europe (de jure and de facto control) vs EU (functional approach/portable responsibility)
74	FIGURE AII.2 Legal framework on EU asylum and migration, hierarchy of EU norms and relation to international and regional (human rights) instruments

TABLES

23	TABLE 1. Immigrants arriving in the Canaries, distribution by nationality, 2004–07 (%)
37	TABLE 2. US Coast Guard interceptions of Haitians at sea
38	TABLE 3. US Coast Guard interdictions of Cuban nationals at sea
44	TABLE 4. US Coast Guard migrant interdictions by nationality of alien
69	TABLE AI.1 US Coast Guard migrant interdictions by nationality of alien (full data)

ACKNOWLEDGEMENTS

This Report has been prepared by a research team under the coordination of the Justice and Home Affairs Unit of CEPS (Brussels). Sergio Carrera has been responsible for the overall scientific coordination of the research. It has been supported by the Open Society European Policy Institute (OSEPI).

The authors would like to express their gratitude to OSEPI, in particular to Giulia Laganà, Cecilia Rodrigues and Annalisa Buscaini, for their support and trust in the undertaking of this project. Special thanks go to all the participants of the roundtable on “Does Offshoring Asylum and Migration Actually Work?”, organised by OSEPI and CEPS on 15 February 2018 in Brussels. Their comments and insights were of great value in fine-tuning and improving the quality of the report.

Special thanks go to Jens Vedsted-Hansen (Professor of Law at Aarhus University) and Simon Cox (Legal Officer, Open Society Justice Initiative) for their excellent comments and substantive feedback on an earlier draft of this Report. The authors remain solely responsible for the research findings and conclusions, and any possible error or inaccuracy, included in the Report.

The Report takes into account relevant developments until May 2018. The views expressed are attributable only to the authors and not to any institution with which they are associated or to the Open Society Foundations.

ABOUT THE AUTHORS

Sergio Carrera is a Senior Research Fellow and Head of the Justice and Home Affairs Programme at the Centre for European Policy Studies (CEPS) in Brussels, as well as a part-time Professor at the Migration Policy Centre, European University Institute in Florence. He is also Visiting Professor at the Paris School of International Affairs (PSIA) at Sciences Po, Paris.

Nora El Qadim is an Associate Professor of Political Science at the University of Paris 8 Vincennes Saint-Denis, and a researcher at the CRESPPA-LabTop.

Maryellen Fullerton is Professor of Law at the Brooklyn Law School.

Blanca Garcés-Mascareñas is a Senior Research Fellow at the Barcelona Centre for International Affairs (CIDOB), as well as a Visiting Professor at the Department of Political and Social Sciences of the Universitat Pompeu Fabra in Barcelona.

Susan York Kneebone is a Professorial Fellow and Associate at the Asian Law Centre, Melbourne Law School.

Ana María López Sala is a Research Fellow at the Institute of Economics, Geography and Demography, Spanish Council for Scientific Research (CSIC).

Ngo Chun Luk is a Researcher at the Justice and Home Affairs Unit at the Centre for European Policy Studies (CEPS) in Brussels.

Lina Vosyliūtė is a Researcher at the Justice and Home Affairs Unit at the Centre for European Policy Studies (CEPS) in Brussels.

LIST OF ABBREVIATIONS

CAM	Central American minors
CEAR	Comisión Española de Ayuda al Refugiado (Spanish Commission for Refugees)
CEAS	Common European Asylum System
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EUAA	EU Agency on asylum
FRA	EU Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
IHMS	International Health and Medical Services
IOM	International Organization for Migration
MoU	Memorandum of Understanding
OSB	Operation Sovereign Borders
PNG	Papua New Guinea
RPC	Regional processing centres
RSD	Refugee status determination
SBC	Schengen Borders Code
SIVE	Integrated External Surveillance System (Spain)
UNHCR	UN High Commissioner for Refugees

1. INTRODUCTION

Ideas for the EU to set up ‘asylum reception centres’ in third countries have been advanced, unsuccessfully, during the last 15 years. These have usually come from specific representatives of individual Member States (most often ministries of interior or similar ministries), and have been put forward without careful consideration of their practical repercussions or their compatibility with obligations under EU law and policy or with regional and international standards in these domains.¹

A previous proposal was put forward in 1986 by Denmark to the UN General Assembly, which suggested the setting-up of UN processing centres in regions of origin that would manage resettlement, but it failed to attract the necessary support and was subsequently abandoned.²

A somewhat similar proposal was made by the Netherlands in 1993–94 for European processing centres at the Intergovernmental Consultations on Migration, Asylum and Refugees.³ Subsequently, a number of Member State representatives have (at different intervals) advanced various versions of ‘offshoring’ asylum management to non-EU countries, i.e. Denmark (2001), the UK (2003), Germany (2014) and more recently France (2017).⁴ Austria proposed a model of offshore asylum processing with no subsequent resettlement in the EU as a key policy initiative for its 2018 Presidency of the Council of the EU.⁵ None of these past proposals have found consensus among EU Member State representatives or at any international and European fora.

Until now, there has not been any formal EU initiative for extraterritorial asylum processing. Indeed, the above-mentioned past ideas have usually originated and been framed ‘outside’ the EU, with rather little understanding of their actual feasibility or implications for the EU legal system. They have tended to mean ‘less EU’ in domains where there is a very well-developed EU legal and policy regime and a human rights framework to which Member States have to abide.

Among the similarities of past calls for extraterritorial asylum processing is moreover the lack of a common understanding of ‘what’ we are talking about precisely. What is *new* from these kinds of extraterritorial initiatives, in comparison with existing extraterritorial policies and practices for ‘migration control’ in the EU, is that they appear to put special emphasis on the need to offshore the assessment of asylum applications. This would entail partially extending or ‘externalising’ EU asylum processing to foreign territories – regarding the decision on the actual merits of an international protection claim, the issue of an entry visa to those receiving positive decisions or their resettlement in another non-EU country. This in turn begs new questions and poses profound difficulties with respect to jurisdiction, effectiveness and financial considerations.

An important element of these calls to offshore asylum processing is the reference to models outside Europe. In particular, the Australian approach to the extraterritorial processing of asylum has been championed by various parties in EU Member States.⁶ This report therefore examines the feasibility of extraterritorial processing of asylum claims and external management of migration. It offers a comparative account of experiences of extraterritorialisation of asylum and migration by four countries: Australia, Spain, Tunisia and the US. We investigate the specific aspects shaping each of these experiences, draw ‘lessons learned’ and identify challenges from these examples. Finally, we offer some insight into whether these international experiences could be applied in the EU context.

1.1 NOTE ON CONCEPTS AND STRUCTURE

The notion of ‘offshoring asylum’ constitutes an empty shell in itself. There is not a commonly accepted understanding of what this concept means or entails. This report shows how this term has taken on different guises and features depending on the characteristics and background of the countries under assessment. A key idea behind its use is that the reach of ‘controls’ are extended or performed in the territory of third states, which has previously been referred to as ‘remote control’.⁷ The distinguishing quality of ‘extraterritoriality’ is that the external borders of the State, and the common external border of the EU resulting from the Schengen system, are no longer *the* venue or loci where ‘executive power’ and ‘authority’ is supposed to take place over individuals.

This report uses the concept of *extraterritorialisation*,⁸ which entails a matrix of strategies, practices and technologies encompassing the examination, processing and/or implementation of asylum and migration management (including border

surveillance) policies before individuals’ arrival on the territory of the state concerned. Particular attention is paid to various manifestations of extraterritorialisation in asylum processing, and to those migration management practices that have come in conjunction with or in close relation to it. As noted above, this is studied in selected international jurisdictions – Australia, Spain, Tunisia and the US.

The notion of ‘*extraterritorial processing*’ generally applies to the area of asylum. It usually entails that the processing of an asylum claim takes place elsewhere, i.e. in the territory of third states. A key controversy surrounding extraterritoriality is that of determining ‘*jurisdiction*’ in cases of potential fundamental rights violations, and the ‘responsibility’ of the authorities involved. This idea has been particularly contentious in relation to refugees and their access to international protection policies, where states have committed themselves to fully respect a solid body of international, regional and EU human rights benchmarks.

This report puts special focus on extraterritorial processing or offshoring of asylum claims. There is a need to be more specific as to what qualifies as ‘offshoring asylum’ and what does not. Goodwin-Gill defines this notion as “one state uses another’s territory, with or without the assistance of an international organisation, in order to decide claims to asylum which either have already been lodged on its own territory or might have been lodged there if the claimant had not been intercepted en route”.⁹ The asylum system is in this way partially extended into foreign territory – which may take different degrees and forms – to process asylum claims.¹⁰

This report includes other practical cases that do not fully comply with this working definition, but which present important extraterritorial or transnational components when thinking more generally about the dilemmas inherent to extraterritorial asylum

and migration policies, such as resettlement and emergency evacuation mechanisms. It addresses the following question: *Is the extraterritorial processing of asylum feasible in the EU or does it entail ever more profound challenges?*

The notions of ‘feasibility’ or ‘success’ for the purposes of our investigation take into account both the effectiveness *and* the compliance of extraterritorialisation with fundamental rights and the rule of law. The scope of the ‘effectiveness’ test not only covers the extent to which the explicit/implicit public goals of these policies and initiatives have been duly met, but also their actual societal effects and compatibility with fundamental rights and rule of law obligations.¹¹

The report is structured as follows: **Section 2** provides a detailed examination of previous and

current policies, practices or initiatives that are involved in the extraterritorialisation of asylum processing and migration management in the four selected countries. Specific attention is given to the scope and nature of these initiatives, their effectiveness, practical and societal repercussions and fundamental rights implications. **Section 3** highlights a number of challenges and insights from the four case studies. **Section 4** examines the lessons learned and their applicability and feasibility within the EU context. **Section 5** concludes by giving substance to the notions of *portable responsibility* and *portable justice*, and the ways in which they show far-reaching potential in capturing responsibility for human rights violations in the context of extraterritorial processing of asylum and migration management. For readers interested in the EU legal and institutional landscape for such policies, Appendix II provides a substantive description.

2. COMPARATIVE COUNTRY EXPERIENCES

2.1 AUSTRALIA¹²

Key findings and lessons learned

Since 2001, Australia has operationalised its 'Pacific Plans' of interdictions at sea, thereby preventing asylum seekers from reaching Australian territory. These operations have involved taking interdicted asylum seekers to regional processing centres (RPCs) in Nauru, Papua New Guinea (PNG) and Christmas Island for processing their asylum claims. Since 2013, however, under the Pacific Plan II even successful claimants of international protection in these RPCs have been permanently denied the opportunity to settle in Australia.

Both Pacific Plans have been subject to concerns about human rights violations. Under Pacific Plan I, concerns about the harsh physical conditions in the RPCs, mental health impacts of prolonged detention and uncertainty about future prospects, the standard of healthcare provided and procedural deficits (such as the lack of the right to legal representation and lack of clarity as to the existence of channels for independent review), have been identified as key human rights concerns.

Similar human rights issues have been identified in respect of Pacific Plan II. In particular, the inadequate and unhygienic living conditions (including lack of security and privacy), instances of sexual and physical abuse by RPC staff, inadequate medical and psychological treatment, failure to treat detainees with dignity and respect for their right to seek asylum, and failure to respect the rights and best interests of children have been identified as human rights challenges in the RPCs under Pacific Plan II.

Notably, these Pacific Plans and the responsibilities for asylum seekers are based on Memoranda of Understanding (MoUs) between Australia and the Republic of Nauru and PNG respectively. Under these MoUs and Administrative Arrangements, the management and security of RPCs are contracted and subcontracted to private parties. The legal standards and judicial safeguards under Pacific Plan II are disengaged under the MoUs and placed under the responsibility of Nauru and PNG. The provision of healthcare at the RPCs has similarly been placed outside the responsibility of the Australian government, as this healthcare service comes under the responsibility of the International Health and Medical Services (IHMS).

In 2013 the Australian government operationalised the Operation Sovereign Borders (OSB) initiative, whereby military resources are employed to enforce the closure of the Australian mainland to asylum seekers. Under OSB, the Australian government conducts turn-backs (removing vessels from Australian waters and returning them to just outside the territorial waters of the country of departure, i.e. tow-backs) and takebacks (returning crew and passengers interdicted at sea). OSB has particularly been challenged as a clear example of direct and indirect *refoulement* in contravention of the 1951 Refugee Convention.

No evidence has been found for the effectiveness of the Australian model of extraterritorial asylum processing in the reduction of migration flows *deviating from the global trend*. Any perceived increase in the number of asylum seekers arriving in Australia has coincided with the global trends identified by organisations such as the UN High Commissioner for Refugees (UNHCR) as a response to, for instance, the Syrian refugee crisis and the movement of the Rohingya people from Myanmar.

2.1.1 Practices

The visa regime under the Migration Act 1958 (Cth)

Australia's experience with refugee 'boat people', which began with the Indo-China refugee crisis in the 1970s and 1980s, has shaped its policies and approaches to refugees, including a preference for offshore resettlement of refugees and its demonization of 'spontaneous' boat arrivals. Officially recognised in 1996, the resettlement programme for refugees operates through the Humanitarian Programme, which has been consistently capped at between 12,000 to 13,750 places since 1996.

Under the Humanitarian Programme the number of places available to offshore applicants is linked to the number granted onshore. The Minister responsible for immigration has the power to 'cap' the number of onshore visas granted.¹³ Between 1996 and 2003, 10,000 places were notionally allocated for offshore resettlement and 2,000 for onshore asylum seekers.¹⁴ In the 2015–16 period, 11,762 places were allocated to offshore applicants (mainly from Iraq and Syria) and 2,003 places for onshore asylum seekers.¹⁵

Decisions about the outcome of visa applications under the Humanitarian Programme are made by the Department of Immigration, sometimes relying on UNHCR assessments. The Australian government

decides the size and regional composition of the programme annually, taking into consideration advice from the UNHCR on global resettlement needs and priorities and Australia's capacity to provide settlement support services.¹⁶

Australia controls the entry of all persons through a visa regime established under the Australian Migration Act 1958.¹⁷ There is no dedicated visa for refugees and asylum seekers, who must obtain another class of visa (such as a tourist, visitor or student visa) to be admitted as 'lawful non-citizens' and to apply for asylum in Australia. Because of Australia's isolated geographical position and its ability to control its borders, it does not experience 'mixed flows' of asylum seekers and illegal workers, and the greater proportion of 'boat people' are found to be 'genuine' refugees.

In the period leading up to 2001 (Pacific Plan I operated in 2001-07), Australia introduced new policies intended to deter the movement of 'spontaneous' asylum seekers to Australia. These were mainly persons moving by boat from the Middle East via Indonesia and Malaysia. The policies were mandatory detention of 'unlawful non-citizens' and the introduction of a temporary protection visa. These policies and the pattern of 'spontaneous' asylum seekers' movement are largely unchanged.

Only 'lawful non-citizens' (visa-ed) asylum seekers in Australia are eligible for a permanent protection visa, which is a pre-condition to applying for citizen status. Under legislation introduced in 2013, no asylum seeker without a valid visa can make a claim for protection in Australia, under the Australian legal system.

Interdictions of boats at sea and transfers of asylum seekers to offshore processing centres or to Christmas Island

Australia has instigated two Pacific Plans, both involving agreements with the Nauru and PNG as sites for offshore processing centres. Under Pacific Plan I (2001-07), asylum seekers interdicted at sea were transferred to Nauru and Manus Island.

Some other groups of asylum seekers were taken to Christmas Island, which is Australian territory close to Indonesia, during this period.¹⁸

The second Pacific Plan has operated from 2012 to the present time. The RPC on Manus Island in PNG is currently being wound down following the decision of the PNG Supreme Court of Justice in *Namah v State of PNG*,¹⁹ which declared that the detention of asylum seekers on Manus Island was unlawful as it breaches the guarantee of personal liberty in s42 of the PNG Constitution.

Under both Pacific Plans maritime interdictions by Australian officials of boats of asylum seekers have been conducted. They were initially carried out by the Australian Navy under Operation Relex (2001-07). Currently they are supported by the OSB initiative introduced in September 2013. The practices of interdiction raise questions about consistency and compliance with international law, refugee law and the law of the sea, including the duty to rescue.²⁰ During Operation Relex a number of deaths occurred at sea in the course of interdiction operations.²¹ At least three ships were known to have been turned back during this period.²²

Transfers of asylum seekers from RPCs to the Australian mainland (and vice versa)

To enable offshore processing, the Australian government also transfers some selected and selected categories of 'non-visa-ed' asylum seekers who arrive in Australia to RPCs and Christmas Island and vice versa. Starting on 13 August 2012, asylum seekers without a valid visa who arrived in Australia by boat (or who were intercepted at sea and brought to Australia) were transferred to 'offshore processing' in the RPCs on Nauru and on Manus Island in PNG, although some were sent to the Australian mainland and some to Christmas Island.

Asylum seekers who are or have been subject to offshore processing since 2012 are divided into two cohorts of people, depending on when they arrived in Australia and the agreements that were in place with

Nauru and PNG at that time. Asylum seekers who arrived in Australia by boat between 13 August 2012 and 18 July 2013 were the first cohort of people. Some were sent offshore to Nauru and PNG, while others remained in Australia. More than 600 asylum seekers were sent to Nauru and more than 350 to PNG during this period. No one transferred offshore in this cohort ever completed the refugee status determination (RSD) process there or received an outcome. After 19 July 2013, everyone in this cohort who was still offshore began to be brought back to Australia, where they were required to wait extended periods of time (either in the community or in detention) before being permitted to lodge fresh claims for asylum. This group, termed the 'Legacy Caseload' is now subject to a simplified 'fast-track' RSD in Australia.²³

Asylum seekers who arrived in Australia by boat on or after 19 July 2013 comprise the second cohort of people. They were subject to a new policy, under which they were all sent offshore for processing in either Nauru or PNG and permanently denied the opportunity to settle in Australia. Under the terms of the MoU with Nauru, they were expected to be settled temporarily in Nauru (for up to 10 years) if found to be refugees, and in the case of PNG there was agreement that they could settle locally. No new asylum seekers have been transferred from Australia to PNG or Nauru since 2014. All new asylum seekers trying to reach Australia by boat since this time have instead been interdicted and turned back at sea or otherwise returned to their countries of origin.²⁴

Operation Sovereign Borders initiative – Turn-backs and tow-backs of asylum seekers' boats (from September 2013)

OSB is "a military-led inter-agency border security initiative which incorporates offshore processing, activities to disrupt and deter people smuggling, and interception of boats. Under OSB the government's policy is to turn back boats 'where it is safe to do so'.²⁵ Few details are publicly available regarding the conduct of turn-back operations due to the government's policy of secrecy about 'on-water operations'.

However, the Australian government releases some data through monthly updates.²⁶ A distinction is made between *turn-backs*, where a vessel is removed from Australian waters and returned to just outside the territorial seas of the country from which it departed (*tow-backs*), and *takebacks*, which involve the return of crew and passengers. Interdiction at sea under OSB is regulated by the Maritime Powers Act 2013 (Cth).²⁷ It takes place in both the territorial sea and in the contiguous zone as well as in the high seas.

Resettlement to Australia throughout the implementation of the Pacific Plans

Between 2001 and September 2003, a total of 1,544 asylum seekers (mostly from Afghanistan and Iraq) were detained under Pacific Plan I, with a peak population of 1,515 in February 2002. By September 2003 there were only 335 asylum seekers remaining on Nauru and none remaining on Manus Island. A ministerial press release in February 2008 said that a total of 1,637 people had been detained in the Nauru and Manus RPCs between 2001 and 2008, including 786 Afghans, 684 Iraqis and 88 Sri Lankans. It revealed that 70% were resettled to Australia or other countries, including New Zealand and Sweden. Of those, around 61% (705 people) were resettled in Australia.²⁸

Under Pacific Plan I, the UNHCR refused to process the asylum seekers on Nauru, and the procedures did not include a right to external review.²⁹

Under Pacific Plan II, New Zealand has offered to resettle a small number of refugees from PNG and/or Nauru, but to date Australia has refused to accept the offer. A small number of refugees on Nauru were relocated to Cambodia (6 in total) under an agreement with the Australian government but most have subsequently left Cambodia.³⁰ In late 2015, a resettlement deal was announced with the US.³¹ The US has agreed to take up to 1,200 refugees and to date about 300 refugees have been moved to the US from Manus Island and Nauru.

2.1.2 Human rights implications

Nauru is the world's smallest island nation, stretching to just 21 square km, some 3,000 km north east of Cairns on Australia's east coast in the Pacific Ocean. It has a population of about 10,000. Due to the lack of arable land for agriculture, the degradation of land, coastal and marine resources, and water contamination and scarcity, the island faces serious food and water insecurity and is dependent on foreign imports.³²

Papua New Guinea is an independent Pacific nation, north of Australia across the Torres Strait, with a population of around 7.3 million people; 600 islands make up its 463,000 square km. Manus Island, a former World War II naval base is 350 km from the PNG mainland and 800 km north of the PNG capital of Pt Moresby.

Both countries are now Parties to the Refugee Convention. Nauru has signed but not ratified the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on Civil and Political Rights (ICCPR), whereas PNG is a Party to both Conventions and the International Covenant on Economic, Social and Cultural Rights. Unlike PNG, Nauru is a Party to the Convention against Torture.

Pacific Solution I (2001-07)

Under Pacific Plan I, the asylum seekers were denied the right to seek asylum in Australia and instead were sent to Nauru and Manus Island, PNG. By 2006 the human rights implications of Pacific Solution or 'Plan' I had become clear. Concerns centred on the harsh physical conditions in the RPCs, the mental health impacts of prolonged detention and uncertainty as to future prospects, as well as processing issues.³³ Additionally, there were concerns about the level of healthcare provided, and the rights of children, especially in relation to education.

In human rights and international refugee law, the implications fall under i) arbitrary detention (ICCPR,

Article 9) and a breach of Article 31 of the Refugee Convention (non-penalisation for method of arrival); ii) constructive *refoulement* (that is, effective denial of a hearing through inadequate processing – Article 33 of the Refugee Convention); and iii) freedom from discrimination (Refugee Convention, Article 3).³⁴ Refugees resettled in Australia under temporary protection visas were denied family reunion and their freedom of movement was restricted. They were denied certain basic services to which other refugees and entrants were entitled.³⁵

Pacific Solution II (2012 to the present)

Similar issues have been raised in numerous reports relating to Pacific Solution II.³⁶ The issues arise largely from the fact that asylum seekers are held on remote tropical islands, where the capacity to care for them in decent and humane conditions cannot be guaranteed. A number of the issues are exacerbated by the administrative arrangements in place for daily management of the RPCs. They can be clustered as follows:

- inadequate and unhygienic living conditions, including lack of security and privacy in the RPCs;
- abuse, including sexual assaults and physical abuse by RPC staff;
- inadequate medical and psychological treatment;
- failure to treat detainees with dignity and respect for their right to seek asylum; and
- failure to respect the rights and the best interests of children.

Offshore processing in RPCs

– MoUs with the Republic of Nauru and PNG

Australia's Pacific Plan I (2001-07) or the 'Pacific Solution' or 'Pacific Strategy', arose from the arrival of the Norwegian-registered container ship, the *MV Tampa*, with a cargo of 433 asylum seekers travelling from Indonesia, off Christmas Island in late August 2001. The Australian government refused to allow the asylum seekers to land, and made agreements

with New Zealand, Nauru and PNG to transfer the asylum seekers to their territories for processing. On Nauru, the International Organization for Migration (IOM) had responsibility for the management and administration of the sites. Camp security was managed by a private company, Chubb Protection Services, based on a protocol made between the Nauru Police Force, the IOM and Australian Protective Service. Under this arrangement, the officers of the Australian Protective Service were appointed reserve officers of the Nauru Police Force.

Although the Australian government funded and directed the Pacific ‘protection’ centres (as the Australian government described RPCs), there was little protection for asylum seekers under local laws,³⁷ and a lack of transparency about the conditions of detainees. The Australian government basically managed and controlled the destinies of the asylum seekers, while leaving them in the care of others.³⁸

This model has been replicated under Pacific Plan II (2012 to the present). Current arrangements between Australia and PNG and Nauru arise from three MoUs of August and September 2012 and August 2013, and a Regional Resettlement Arrangement. Under the terms of the MoUs Australia agreed to bear all the costs for establishing ‘processing centres’. The detail of implementation of the MoUs, which began to trickle out in various reports following complaints and incidents, was discussed in the High Court decision of *Plaintiff M68/2015*.³⁹

– Arrangements under the MoUs for the delivery of care and services

The RPCs are managed by a series of contracts and subcontracts with the Department of Immigration and Border Protection, which has directly contracted with Transfield Services (Australia) Pty Ltd (‘Transfield’) as a service provider. On Nauru, from March 2014 Transfield undertook to provide ‘garrison and welfare services’ to transferees and personnel at the regional processing centres. ‘Garrison services’ include security, cleaning and catering services. As a service provider, Transfield was required to ensure that the security of the perimeter of the site

was maintained. The Department provided fencing, lighting towers and other security infrastructure. Transfield in turn subcontracted with Wilson Security Pty Ltd (‘Wilson Security’) to monitor ingress and egress to the RPC.⁴⁰

On Nauru, the Australian government agreed to engage and fund contractors to assist with the refugee status assessment process. The relevant determinations are made pursuant to Nauruan law, and Nauru is required to provide access to a merits review, which is funded by Australia.⁴¹ Further, the MoU and the Administrative Arrangements provide for the establishment of a Joint Committee, cochaired by representatives from the Department of Immigration and Border Protection and Nauru, which is responsible for overseeing the practical arrangements to implement the MoU.⁴²

The delivery of healthcare services for asylum seekers on Nauru and Manus Island is governed by heads of the Agreement between the Australian government (represented by the Department of Immigration and Border Protection) and the International Health and Medical Services (IHMS). The IHMS is required to provide ‘primary level healthcare’ to asylum seekers and to establish a network of healthcare providers on Nauru and Manus Island. The IHMS works with local healthcare providers for emergency and acute care.

This is a challenging environment for healthcare workers both physically and professionally. Riots, violence, abuse, self-harm and a number of deaths have been reported in offshore centres.⁴³ A number of reports raise serious concerns about the quality of medical care provided and whether healthcare professionals have been able to fulfil their professional and ethical obligations to patients in RPC facilities.⁴⁴ The death of Hamid Kehazaei from an untreated skin infection in 2015 illustrated the risk that medical recommendations for treatment may be ignored.⁴⁵

Official reports also detail the lack of control by the Australian government of the daily conditions in the RPCs, and breach of its duty of care to the detainees.

Parliament's 2015 report⁴⁶ was specifically concerned with numerous allegations regarding the treatment of asylum seekers and refugees, through the conduct of employees of Transfield and Wilson Security. These included allegations of sexual and physical abuse.⁴⁷

- Processing of claims for refugee status in Nauru and PNG

Under Pacific Plan I, it was intended that the 1,550 asylum seekers on Nauru and Manus Island would be processed within six months of their arrival. Australian immigration officials conducted RSD using 'UNHCR standards', rather than those operating on mainland Australia. It was reported that they relied almost wholly on oral submissions – that there was no right to legal representation, and lawyers were repeatedly denied access to potential clients, contrary to s5(2) of the Nauruan Constitution (which provides that each person has the right “to consult in the place in which he [sic] is detained a legal representative of his own choice”). In the case of negative determinations, decisions were reviewed by a senior officer (that is, there was solely an internal review).⁴⁸ In addition to evidence of constructive *refoulement*, there were direct *refoulements* and forced repatriations.⁴⁹

Pacific Plan II – processing on Manus Island.

Although 1,300 asylum seekers were transferred to Manus Island between July 2013 and December 2014, the first RSD decision was not made (by Australian Immigration Department officers seconded to PNG) until late April 2014.⁵⁰ The delay in commencing RSD was a key factor behind the tensions that led to the riot in the RPC in February 2014 in which one asylum seeker was killed.

PNG is a Party to the Refugee Convention (although it has made a number of significant reservations), but it did not have an RSD process in place or the national laws until November 2014. The first refugees were recognised in January 2015 and permitted to leave the RPC. By December 2016, 1,015 RSD assessments had been made, of which roughly 50/50% were positive/negative. Such assessments are made applying UNHCR standards using the UNHCR Handbook.⁵¹

Yet, the UNHCR has expressed great concern about the capacity of PNG to conduct quality RSD and has produced numerous reports and statements on the issue. Following the *Namah* decision in October 2016, the Manus Island RPC was closed.

Pacific Plan II – processing on Nauru. By contrast with PNG, Nauru has established a formal RSD system. It acceded to the Refugee Convention in 2011 and in 2012 it passed the Refugee Convention Act, which adopts the Convention definition (unlike PNG).⁵² It has established the Nauruan Secretary for Justice and Border Control and a Refugee Status Review Tribunal, and has created its own RSD Handbook.⁵³ The first group of refugees were recognised in May 2014.

- Summary of reports on the conditions and circumstances of asylum seekers in RPCs

A number of enquiries have been conducted and reports issued on conditions in the RPCs.⁵⁴ The chief findings of these reports are the lack of transparency about conditions and operations in the RPCs, the lack of capacity of the local governments to handle the situation of large numbers of unhappy asylum seekers in their midst, and the failure of the Australian government to acknowledge its responsibility and duty of care to those detained against their will in the RPCs. In addition to complaints about conditions, the lack of security in the RPCs and the conduct of staff, the mental health issues caused by the lack of durable solutions is endemic.

Turn-backs and tow-backs of asylum seekers' boats: Claims of direct and indirect refoulement

Australia has practised turn-back and tow-back policies of dubious legality under international law.⁵⁵ Boats are known to have been turned back to the edge of and into Indonesian waters under OSB.⁵⁶ Takebacks are known to have occurred in consultation with the governments of Sri Lanka and Vietnam, and concerns have been raised about the fate of the returned asylum seekers at the hands of

their governments.⁵⁷ These processes raise concerns about direct and indirect *refoulement*. Additionally, there is evidence of constructive *refoulement*.⁵⁸

The *Minasa Bone* incident of 2003 and other turn-backs⁵⁹ provide evidence of indirect or ‘chain’ *refoulement* as the asylum seekers were returned to Indonesia. In the course of interceptions and tow-backs, an ‘enhanced screening’ process that was introduced in October 2012 raises considerable concerns about the nature and quality of the process and whether individualised assessments of protection needs are being identified.⁶⁰ No post-return monitoring is conducted in such cases.⁶¹

2.1.3 Effectiveness in reducing migration flows

Under Pacific Plan I the majority of the ‘boat people’ were part of the ‘Afghan diaspora’ of 2001, when an estimated 900,000 people fled Afghanistan.⁶² At that time the number of asylum seekers intending to reach Australia was neither disproportionate to the contemporary global movements, nor did it represent a big shift in the numbers moving. The change in movements that Australia experienced in the period leading up to the 2001 *MV Tampa* incident was in the mode of arrival (as well as the nationality of the asylum seekers). Up to that point, most asylum seekers intending to seek asylum in Australia travelled by air. In fact, the number of boat arrivals had decreased in the period up to July 2001.⁶³

Similarly, although the number of asylum seekers seeking entry to Australia decreased from 2005 onwards,⁶⁴ this was consistent with global trends.⁶⁵ In 2009 when the number of refugees worldwide increased, so did the number seeking to enter Australia by boat.⁶⁶

For Pacific Plan II (2012 to the present) the increase in the number of asylum seekers attempting to reach Australia from 2012 coincided with the Syrian refugee crisis. From 2013, asylum seeker applications increased globally by 18%, with the largest number being Syrians.⁶⁷ Within the region to the north

of Australia, a parallel crisis became evident in early 2015 with the departure of the Rohingya boat people from Myanmar to Thailand, Malaysia and Indonesia.⁶⁸ The UNHCR Fact Sheet for South-East Asia dated September 2014 records an estimated 20,000 ‘irregular migrant’ departures by sea in 2014 in the region.⁶⁹ The UNHCR estimates that 500,000 refugees from different ethnic groups have been fleeing for several decades in search of protection from ethnic conflict and violence.⁷⁰ In early April 2017, the Minister for Immigration advised that 30 boats (carrying about 765 people) had been intercepted since the beginning of OSB (in 2013).⁷¹

2.1.4 Impact on intra-regional mobility

Australian policy on refugees reaches into and influences other countries in the region. To deter secondary movements, Australia refuses to resettle refugees from Indonesia.⁷² This has a knock-on effect on the capacity of the UNHCR to provide assistance to refugees in Indonesia: it has left approximately 14,000 refugees stranded in Indonesia with limited opportunities for a ‘durable solution’ and pushed destitute refugees into Australia-funded, IOM-managed detention centres. Within the region, Thailand and Malaysia are hosting much larger numbers of refugees and asylum seekers (approximately 156,000 and 148,000 respectively). It is reported that 94% of movements to these two countries are from Myanmar.

Cambodia, which is a signatory to the Refugee Convention, was singled out by the Australian government as a potential party to an MoU following the failed Malaysia swap arrangement of 2011, and in order to take some pressure off the Nauru/Manus Island situation. Cambodia was provided with A\$40 million in ‘development aid’ and A\$15 million for a resettlement programme. In all, 6 refugees accepted the offer and it is believed that 2 remain in Cambodia.⁷³ Meanwhile, Cambodia is known to have forcibly returned refugees from minority populations to neighbouring countries.

2.2 SPAIN⁷⁴

Key findings and lessons learned

The arrival of a large number of persons to the Canary Islands in 2005–06 (termed the ‘cayuco crisis’) led to an increase in Spanish efforts to cooperate with African countries towards the reduction of migratory flows. Spain’s policies focus on three pillars of dissuasion, i.e. preventive, coercive and repressive dissuasion. Spain increased its bilateral cooperation with Mauritania in its efforts to reduce migratory flows, leading inter alia to the establishment of the Migrant Reception Centre in Nouadhibou in April 2006.

The Nouadhibou centre – referred to by Spanish and Mauritanian authorities as a Migrant Reception Centre and by the Red Cross as a Centre for Temporary Stay of Immigrants – worked in practice as a detention or internment centre for migrants returned from Spain or detained in transit in Mauritania. The centre was heavily criticised, with a number of reports noting that it did not meet the minimum conditions for guaranteeing adequate treatment.

The Nouadhibou centre and the activities of the Spanish and Mauritanian authorities have further been subject to concerns about their human rights implications. These include the lack of any legal process for the persons detained, arbitrary arrests and the deportation of migrants returned from Spain or detained in Mauritania to Mali and Senegal without a legal basis and or any form of judicial review.

In terms of the ‘effectiveness’ of the Spanish policies in reducing irregular arrivals, the available statistical data note a reduction of the volume of arrivals since 2007 to the Canary Islands. However, the specific impacts of the Nouadhibou centre in this reduction of arrivals is difficult to separate from Spain’s multi-layered strategy to contain irregular flows in cooperation with African countries. There are some indicia that the reduction of migratory flows to the Canary Islands may have merely diverted these flows eastward towards other routes, including the Western Mediterranean route and the land route through Ceuta and Melilla.

2.2.1 Introduction

Spain's maritime border has a total length of 4,964 km. There are three main arrival points used by irregular immigrants to reach Spanish shores: the autonomous cities of Ceuta and Melilla, the Strait of Gibraltar and the Canary Islands. The first boats with irregular immigrants started to arrive across the Strait of Gibraltar at the end of the 1980s. From small wooden boats (*pateras*) with mostly Moroccan immigrants on-board, arrivals took place first in the Andalusian provinces closest to Morocco and later in provinces located farther away.⁷⁵

From 2000 to 2008, arrivals increased substantially and the main route shifted from the Strait of Gibraltar and the Alboran Sea (the Western Mediterranean route) to the Atlantic (the West African route). Between 1995 and 2004, boats launched from the southern regions of Morocco arrived in the Canary archipelago. By the end of 2005, this corridor had shifted, with most boats departing from the coasts of Senegal, Gambia, Guinea-Conakry and Mauritania. The boats (now called *cayucos*) increased in size and the number of immigrants on-board, mostly coming from Sub-Saharan countries. This shift was accompanied by a surge in the number of arrivals: whereas 4,718 people landed in the Canary Islands in 2005, this number rose to more than 30,000 in 2006, representing 81% of all maritime arrivals intercepted by Spain that year. This peak in the number of arrivals came to be known as the '*cayuco* crisis'.

After 2006, the West African route gradually diminished in terms of volume, though it remained the main route until 2008. By 2010, the Canary Islands accounted for 11% of all arrivals in Spain but by 2012 this percentage had diminished to 5%.⁷⁶ In 2012, the Spanish government stated that the West African route was almost inactive. Since then, the Western Mediterranean route has been the main point of entry, although with smaller volumes than were observed in the mid-2000s. As discussed in this report, migration flows in the three main migration routes to Spain have been directly linked to a broad spectrum of border control measures.

2.2.2 Policies to contain flows

Gradual implementation over time and space

The changes in Spain's immigration policies since the 1990s can be summed up as narrowing the legal channels and reducing the permissiveness of illegal immigration.⁷⁷ On the one hand, changes in Spain's visa policy with regard to African countries contributed to reducing the chances of legal migration. This gradual closure took place during a period of economic expansion, with strong employment growth in areas of low productivity and a high degree of informality. On the other hand, the 'fight against irregular migration', as it was called by the Ministry of Interior, developed fast with i) the build-up of barrier technology at land borders; ii) the expansion of surveillance, detection and interception at maritime borders; iii) the detection of (potential) departures from transit countries, particularly along the African coast; and iv) the identification and return of migrants intercepted in Spain.

These changes took place over several stages of an incremental border-control process. The first stage, which lasted until 2000, was characterised by the gradual sealing-off of the land and maritime borders at Ceuta and Melilla. From 2000 to 2005, efforts focused on the Strait of Gibraltar. This maritime border was sealed through the implementation of the Integrated External Surveillance System (SIVE), a radar-based system for intercepting and detecting maritime crossings. The SIVE became one of the most effective mechanisms to control maritime irregular immigration in the Strait of Gibraltar. From 2006 to 2009, a new set of measures focused on the Atlantic route, combining the expansion of the SIVE to the Canary Islands and the monitoring of the African coast. Finally, from 2009 onwards, attention refocused on the Mediterranean route, particularly Ceuta and Melilla.⁷⁸

Policies towards Africa

Since the *cayuco* crisis in 2006, migration control policies have been among the key priorities of Spain's political agenda on external affairs. In this context, Spain has signed bilateral agreements and implemented operational initiatives with African countries with the triple aim of discouraging potential immigrants from migrating (*preventive dissuasion*), controlling and containing irregular immigrants in transit or at the Spanish external borders (*coercive dissuasion*), and controlling and preventing irregular immigrants from settling down once in Spain (*repressive dissuasion*).⁷⁹

Among the most important *preventive measures* has been Spain's development of 'publicity and information campaigns' providing information about the dangers involved in irregular immigration. Since 2007, a series of initiatives has also been implemented linked to Spain's agenda on cooperation, which has reorganised its priorities towards Africa with the so-called African Plan.⁸⁰ Actions pertaining to *coercive dissuasion* have been articulated via two instruments, based on the formal collaboration between Spanish authorities and the Moroccan and Mauritanian police forces: the creation of binational coordination commissions on immigration and the deployment of joint surveillance patrols at sea. Since 2007, surveillance of maritime migration routes to Spain has also been carried out through multilateral initiatives, including the Frontex operations Hera and Indalo. As part of these initiatives, the testing and use of the latest generation technology has been considered a strategic factor to achieve what has been defined by some interlocutors as a "definitive blockade".⁸¹

In the deployment of these policies, the protection of asylum seekers has been neglected. As a consequence of the social and political 'construction' of African irregular migration as a paradigm of economically motivated flows, no specific mechanisms are in place to guarantee the rights and protection of potential asylum seekers detected on the routes to Spain or at the external maritime

borders. As was mentioned in a report published by the EU Agency for Fundamental Rights (FRA), "asylum applications are usually not formally registered during the identification interview but a later stage, after the person is transferred to a pre-removal detention facility or a reception facility for asylum seekers. Spain generally gives no information on asylum during the short identification interview after disembarkation."⁸²

Finally, apart from internal control within Spanish territory, *repressive dissuasion* measures include readmission agreements with transit and origin countries. The first agreement was in 1992 with Morocco, followed in 2003 by the agreement with Mauritania and in 2006 by those with Guinea-Bissau, Guinea-Conakry and Senegal. The effective application of the agreements with Morocco and Mauritania, the main transit countries for African immigration and the only two that include in their agreements the expulsion of third-country nationals, has been a key aspect in reducing irregular migration. Moreover, in the case of Morocco, in 2005 a 'rapid return system' for Moroccan citizens requiring only an administrative procedure was activated. In all, these measures have deeply worried national and international human rights organisations, because not only have significant irregularities been observed, but also in practice these measures have hindered the guarantee of international protection.⁸³

Cooperation with Mauritania

Substantial cooperation between Spain and Mauritania began with the immigration agreement signed by the two countries in July 2003. This agreement allowed Spain to request Mauritania to readmit not only its nationals but also those citizens of third countries presumed to have attempted to reach Spain from the Mauritanian coast. In 2006, in the midst of the *cayuco* crisis, Spain and Mauritania signed another cooperation agreement to carry out joint surveillance operations of the Mauritanian coastline.

It is in the context of these agreements that we must understand the creation of a Migrant Reception Centre in Nouadhibou in April 2006. The centre was located in a former school and restored by members of the Spanish army with funding from the Spanish Agency for International Development Cooperation (AECID). The centre remained under the management of the Mauritanian authorities but the Spanish Red Cross and the Mauritanian Red Crescent took charge of the humanitarian aid programme.

According to a report issued by the Red Cross in 2009, the humanitarian aid had three axes: i) receiving the migrants, with food and non-food aid (such as the distribution of a kit including basic needs items); ii) healthcare, with the presence of a nursing service and hospital referral if necessary; and iii) the reestablishment of family ties, with the possibility of making telephone calls to family members, and psychological support.⁸⁴

The Spanish and Mauritanian authorities called the centre in Nouadhibou a Migrant Reception Centre, while the Red Cross report referred to it as a Centre for Temporary Stay of Immigrants (CETI). Nevertheless, the Nouadhibou centre worked, fundamentally, as a detention or internment centre for immigrants returned from Spain as part of the removal process or detained in Mauritania as they allegedly attempted to set off in an irregular manner for Spain. In reference to the conditions at the centre, the inhabitants of Nouadhibou and later the Spanish press called it ‘Guantanamo’. It is true that internment tended to be for a very short period of time. According to the Mauritanian authorities, the centre was designed for stays of between 3 and 15 days, with the aim of carrying out repatriations more quickly. But it is also true, as discussed in the next section, that the conditions were not those expected of a reception centre for immigrants.

2.2.3 Human rights implications

Extra-legal process. The intention to migrate to a third country was not considered an offence under Mauritanian law. As a result, there were no

regulated procedures or administrative resolutions for determining how to go about the repatriation of immigrants. As detention was not subject to any control by the judicial authorities, the people detained did not have access to legal assistance or interpreters, or the possibility of appealing the internment decision. A maximum detention period was also not stipulated.⁸⁵ According to the Spanish Commission for Refugees (CEAR), the Nouadhibou centre also lacked a legal foundation.

Arbitrary arrests. Reports by Amnesty International, CEAR and the Red Cross all note arbitrary arrests in streets and homes where there was no sign of people preparing to emigrate to Europe. The arbitrary nature of these arrests was condemned by the UN Working Group on Arbitrary Detention, which, after its visit to Mauritania in 2008, denounced detentions without relevant court orders and even the detention of people whose documentation was in order.⁸⁶ These arbitrary arrests seem to suggest that the agreement with Spain had the effect of increasing internal control and securitising immigration, extending far beyond the border areas and those proposing to depart for Spain. Considering that Mauritania was not only a transit country, but also one of immigration (in 2008 it was calculated that a million immigrants lived in Mauritania), this increased internal control also affected those who habitually lived there. The Amnesty International report additionally denounced cases of abuse, theft and extortion during the detention.⁸⁷

Inadequate conditions. Immigrants, social organisations, government officials and authorities responsible for custody all noted that the Nouadhibou centre did not meet the minimum conditions for guaranteeing adequate treatment.⁸⁸ According to the reports by Amnesty International, CEAR and the Red Cross, the centre showed signs of significant deterioration and did not guarantee basic hygiene conditions. These reports also document that the detainees were concentrated in a few rooms, in overcrowded conditions and were unable to go outside. According to Amnesty International, the Nouadhibou centre’s conditions did not seem to fulfil the provisions of the Body of Principles for

the Protection of All Persons under Any Form of Detention or Imprisonment.⁸⁹

Deportations at the border. Migrants from third countries removed by Spain or arrested in Mauritania when they (allegedly) sought to travel towards Spain irregularly, were removed to the borders with Mali and Senegal. According to a Mauritanian official interviewed by Amnesty International, in 2006 the number was 11,600 and in 2007 it was 7,100. Malians and those who had supposedly entered Mauritania through Mali were removed to Mali; the rest, regardless of their nationality, were removed to Senegal. Amnesty International observed that migrants were often abandoned close to the border with little food and no means of transport.⁹⁰ For those detained who lived and worked in Mauritania and who apparently had no intention of emigrating, the detention and subsequent removal meant the forced abandonment of their lives and the near certainty of losing their habitual work and activity.

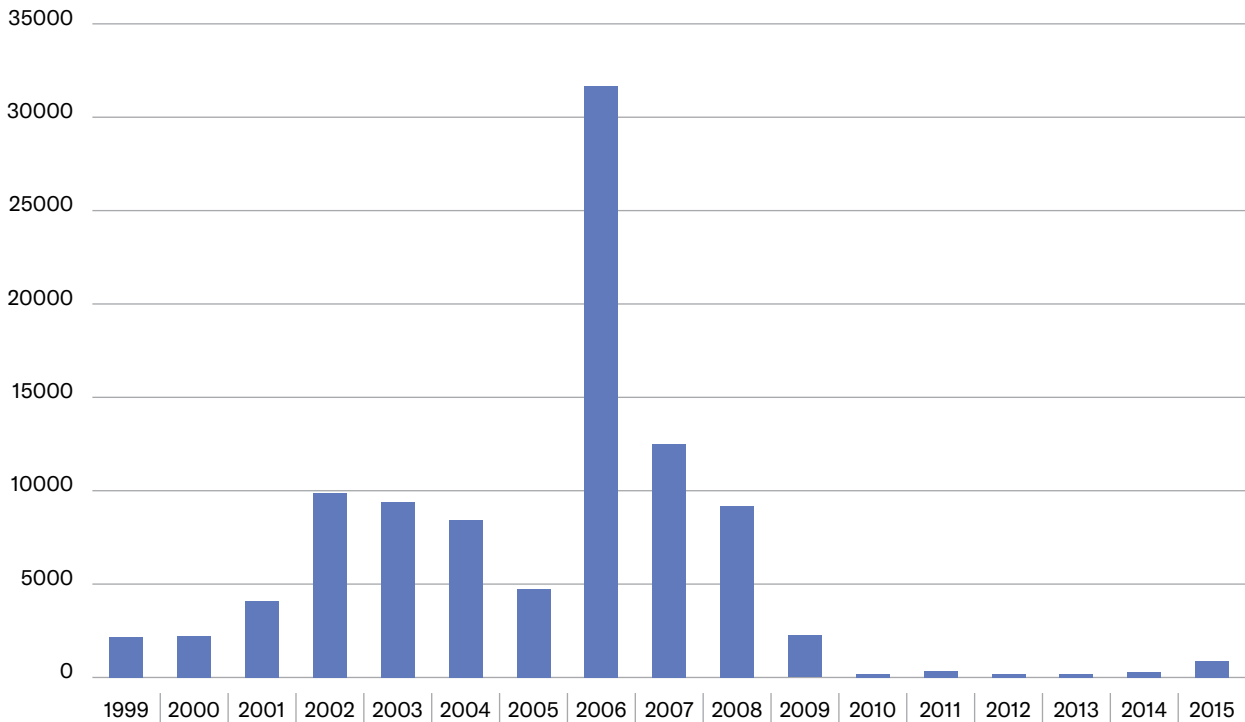
2.2.4 Effectiveness in reducing irregular arrivals

Volume of arrivals

The implementation of a comprehensive strategy to detect, intercept and detain irregular migrants on their way to Spain across the maritime West African route had a seminal effect, reducing the volume of arrivals in the Canary Islands. According to the official data provided by the Ministry of Interior, in 2006 more than 30,000 immigrants arrived in the archipelago (Figure 1). During the following years the number of arrivals in the Canary Islands dropped very sharply: 12,478 in 2007, 9,181 in 2008, 2,246 in 2009, and 196 in 2010. In 2012, the Canary Islands accounted for only 5% of all arrivals on the Spanish coasts, representing a 99% reduction as compared with 2006 (Figure 2).

FIGURE 1.

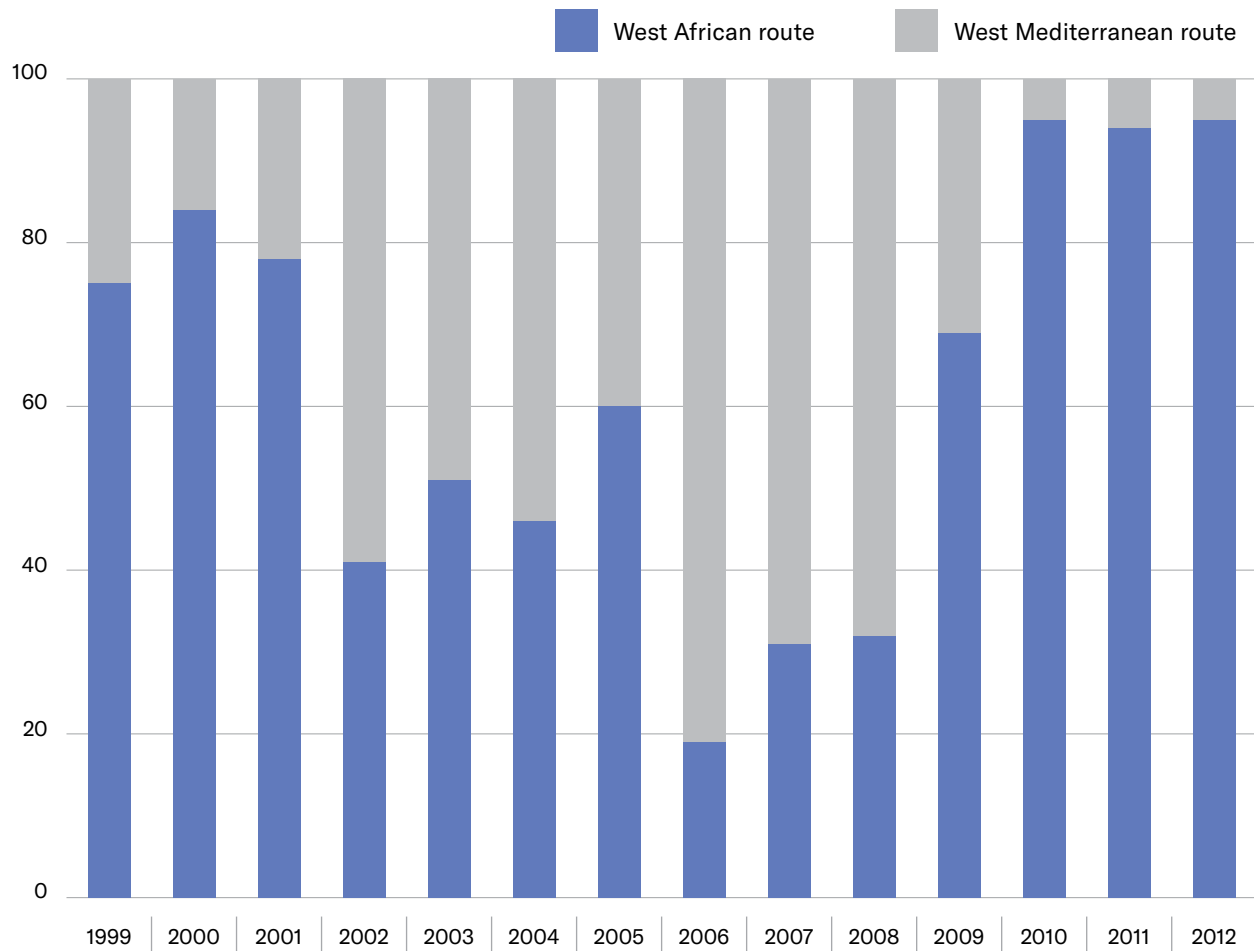
Irregular arrivals in the Canary Islands, 1999–15: Total number of interceptions



Source: Ministry of Interior.

FIGURE 2.

Distribution of arrivals by maritime migration routes, 1999–2012 (%)



Source: Ministry of Interior.

This reduction in arrivals in the Canary Islands can be interpreted as the direct result of the implementation of a multi-layered strategy to contain irregular flows and to improve the effectiveness of surveillance procedures through early detection and prevention. This strategy included joint surveillance and police cooperation. The specific effect of the Nouadhibou centre, as an instrument to deport migrants in transit through Mauritania on their way to the Canary Islands, is difficult to isolate in the framework of this comprehensive deterrence policy. The detention centre at Nouadhibou was part of the implementation of a ‘blocking strategy’ to contain irregular flows, affecting mostly migrants in transit.

Composition of flows

According to the data provided by the regional government,⁹¹ in 2006 over half of all immigrants arriving in the Canary Islands were from Senegal (53.9%), followed by nationals from Gambia (12%), Mali (11.4%) and the Ivory Coast (5.6%) (Table 1). Moroccans represented 4.1% of the total.⁹² Then, in 2007, the distribution of immigrants by nationality changed significantly. The shares of Senegalese and Malians dropped to 23.6% and 9.2% respectively, while the shares of immigrants from Gambia, Ghana, Guinea and Guinea-Bissau slightly increased.⁹³

This decline in the number of immigrants from Senegal and Mali arriving in the Canaries could be a combined effect of the expansion of pre-emptive and externalisation policies in Senegal and Mauritania, on the one hand, and the deterrent effect of an increasing number of deported immigrants under the readmission agreements, on the other. Between

2006 and 2007, the number of returnees under the readmission agreements increased 35.4%.⁹⁴ Unfortunately, there are no official data on the annual number of readmissions disaggregated by nationality, so the direct effects of these policies on the national composition of the flows are unclear.

TABLE 1.

Immigrants arriving in the Canaries, distribution by nationality, 2004–07 (%)

	2004	2005	2006	2007
Gambia	20.1	26.5	12.1	19.7
Ghana	4.4	4.3	0.6	3.5
Guinea	6.3	4.3	2.4	8.0
Guinea-Bissau	4.3	7.1	3.2	4.9
Ivory Coast	3.7	5.7	5.6	6.2
Mali	34.4	28.0	11.4	9.2
Mauritania	2.3	1.4	0.6	3.6
Morocco	11.0	16.9	4.1	7.6
Senegal	0.3	2.5	53.9	23.6
Others	13.2	3.3	6.1	13.7

Source: Godenau (2014), op. cit.

The case of the Nouadhibou centre

There are no available data about the total number of immigrants detained at the Nouadhibou centre and deported from Mauritania under the readmission agreement with Spain. According to the Red Cross report,⁹⁵ 9,733 immigrants received assistance at the Nouadhibou centre between 2006 and 2008 (4,103 in 2006, 3,538 in 2007, and 2,092 in 2008). Red Cross interviewed 5,170 of them. All the immigrants interviewed were male. In terms of nationalities, 54% were from Senegal, 31% from Mali and 5.5% from Gambia. Among them, 82% had travelled on boats, which shows the significant number of detainees who had either been intercepted at sea or deported from Spain. The share of those being deported for the first time to their countries of origin was 98.8%.

In terms of the migrants' future migratory plans, in 2006 79.1% declared that they had a plan to try again to reach Spanish soil, with this percentage dropping to 10.84% in 2007 and 0.2% in 2008. This reduction may be explained by the practices of deterrence, control in transit and deportation – framed in an environment of uncertainty and insecurity.

2.2.5 Impact on intra-regional mobility

Effects on the maritime migration system in Spain

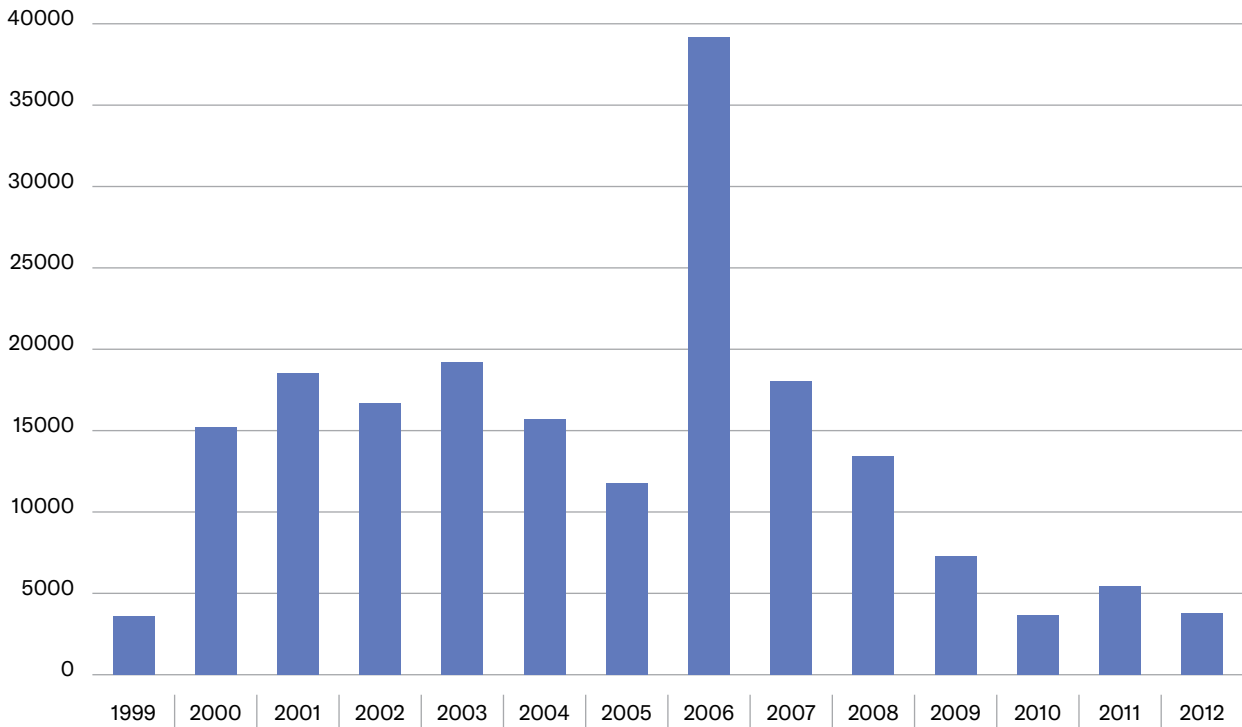
The deployment of this comprehensive and multi-layered externalisation and surveillance policy contained the total numbers of arrivals throughout

the last decade. In 2000, when this strategy started to be deployed in the Strait of Gibraltar and the Alboran Sea, 15,195 immigrants were intercepted at the Spanish coast. This number reached a peak of 39,180 in 2006, with the Canary Islands as the main

destination point. In 2012, just over 3,800 irregular immigrants were intercepted on the Spanish coast, less than 10% of the total interceptions in 2006 (Figure 3).

FIGURE 3.

Irregular immigrants arriving in Spain, 1999–2012: Total number of interceptions (maritime routes)



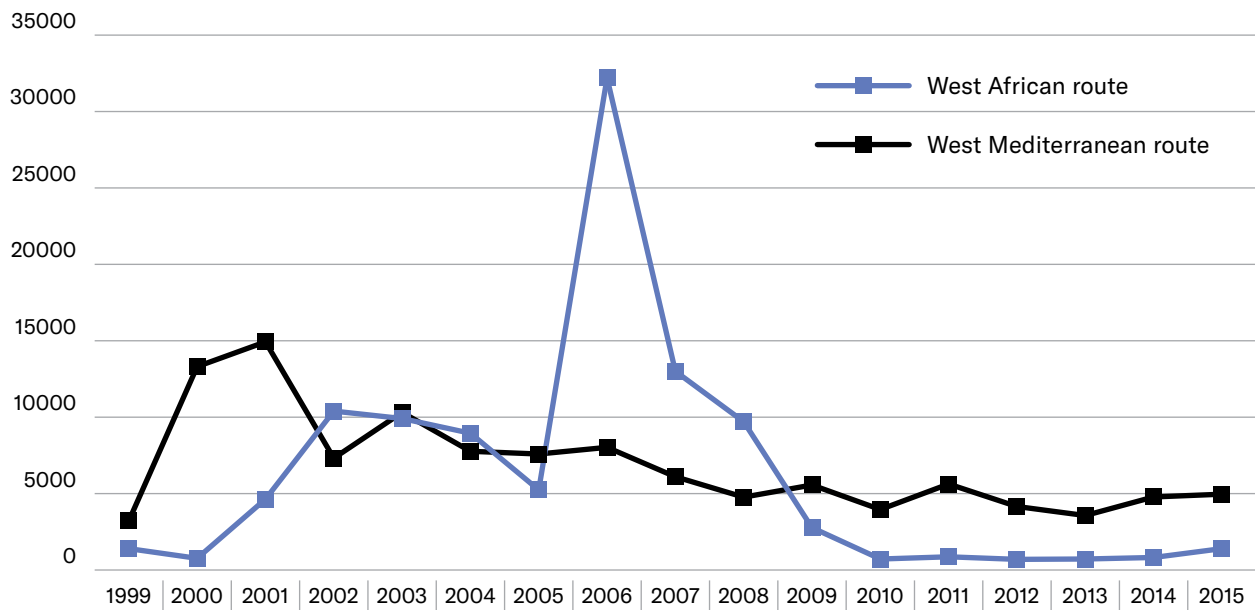
Source: Ministry of Interior.

The geographical sequence of the implementation of this strategy had a dynamic effect on the maritime route system with changes over the years, including, as mentioned previously, a diversion of the flows from the Western Mediterranean to the West African route (Figure 4).⁹⁶ The blockage of transit migration through Mauritania and Senegal diverted the flows from the Atlantic routes to the Saharan routes across Mali, Niger, Morocco, Algeria, Tunisia and Libya.

The Western Mediterranean route is currently the main point of entry to Spain, although with smaller volumes than observed in the mid-2000s (see Figure 5). An increase in arrivals via Ceuta and Melilla through the land route has also been observed since 2010 and especially since 2013 (Figure 5).

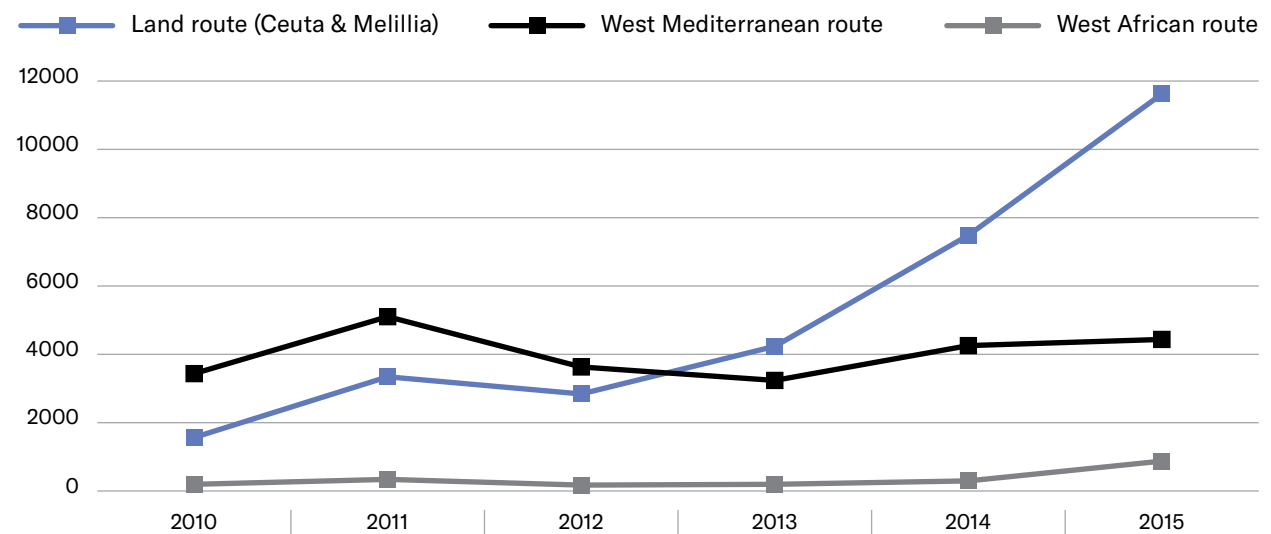
FIGURE 4. Evolution in the dynamics of the Spanish maritime routes, 1999–2015

Note: No official data have been provided by the Ministry of Interior since September 2016 (the last annual number available is for 2015). According to data provided by Frontex, in 2016 10,231 immigrants reached Spain through the Western Mediterranean route and 671 through the West African route (see <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>). The latest data provided by the UNHCR (updated 20 December 2017) show that the total sea arrivals in Spain in 2017 was 21,258 (see <https://data2.unhcr.org/en/country/esp>).



Source: Ministry of Interior.

FIGURE 5. Evolution in the dynamics of the Spanish land and maritime routes, 2010–15



Source: Ministry of Interior.

Intra-regional effects: Heading east, criminalised in Mauritania and stuck in Morocco

The increasing surveillance of the West African and Western Mediterranean routes during the 2000s may have contributed to diverting the flows to the Central Mediterranean route, with Tunisia and Libya as main departure countries and Malta and Italy as main destination countries. In 2008, almost 40,000 immigrants were detected on the Central Mediterranean route while 15,700 were detected on the West African and Western Mediterranean routes. Six years later, in 2014, according to the data provided by Frontex, 170,000 immigrants were detected on the Central Mediterranean corridor and 8,115 on the Spanish ones.⁹⁷

While there might have been other important factors at play beyond the changing nature of entries from the Western to the Central Mediterranean route, the implementation of these policies could be expected to have played an important role in deviating mobility patterns to alternative routes. The Central Mediterranean route became more active in 2011, during the ‘Arab Spring’, and again after 2013, following the collapse of the Gaddafi regime and the rise of violence in Libya.⁹⁸

Spanish migration policies have also had a significant impact on Mauritania’s migration management. In the 2000s, Mauritania became a notable transit country in the Western Mediterranean migration system. But before becoming a country of transit for migrants, Mauritania had had a long history as a destination country.⁹⁹ As a member of the Economic Community of West African States (ECOWAS), nationals from other African countries could move there freely. After leaving this organisation in 1999, Mauritania signed bilateral agreements with Senegal and Mali,¹⁰⁰ which again allowed most immigrants to move freely to Mauritania. In practice, the state did not really control entry and residence. After the agreement signed with Spain, however, irregularity

became central to the Mauritanian migration policy. Mauritanian police forces started to patrol not only harbours and coastal areas but also the land borders with Senegal and Mali and the most important towns. As Dünwald highlights, this external interference fuelled “the introduction of controls, administrative regulations and criminal offences”, with the irregularisation and criminalisation of migration as the main consequence.¹⁰¹ Amnesty International severely criticised Mauritania for the ill-treatment of irregular immigrants and refugees and the Mauritanian Association for Human Rights (AMDH) warned of an increasingly racist approach to immigrants.¹⁰²

Since the 2000s, Morocco has been a fundamental part of the Spanish – and European – externalisation policy as a main transit country. Over the years the growing difficulties of reaching Spain (and the returns of Sub-Saharan nationals, including pushbacks) have increased the volume of transit migrants trapped in Morocco. A survey conducted in 2008 by AMERM (Association Marocaine d’Etudes et de Recherche sur les Migrations) estimated that most transiting irregular migrants came from Nigeria, Mali, Senegal, Congo and the Ivory Coast. Almost 60% of the interviewees indicated that they did not have any income, 18% lived by begging, 12% worked occasionally and 8% received some support from charity organisations.¹⁰³

The average duration of their stay was 2.5 years and, in terms of migration intentions, 11% wanted to return to their countries of origin, 73% to go to a third country and 2% to stay in Morocco, according to AMERM (2008).¹⁰⁴ This survey also highlighted the difficulties of their daily life in Morocco in terms of precariousness and discrimination by Moroccan society.¹⁰⁵ Since 2010, several international reports have highlighted the poor living conditions and the vulnerability of Sub-Saharan immigrants who are unable to move to Europe or return to their countries of origin.¹⁰⁶

This new immigration reality and the aim of changing the country's image regarding the reception of irregular immigrants fuelled important changes in Moroccan immigration policy, especially with regard to transit migration.¹⁰⁷ The 2011 Constitution introduced provisions regarding non-discrimination and the protection of immigrants' rights, and strongly affirmed the central importance of human rights. In 2013, the National Council for Human

Rights (CNDH) published a report demanding the elimination of police violence against irregular immigrants, the implementation of measures to fight discrimination, access to basic services for irregular immigrants and a regularisation programme.¹⁰⁸ Despite these new trends, there is still a long way ahead to ensure the respect of human rights and adequate living conditions of transiting Sub-Saharan immigrants living in Morocco.

2.3 TUNISIA¹⁰⁹

Key findings and lessons learned

The Tunisian and Libyan revolutions in 2011 led to large flows of persons to Tunisia, particularly Libyans and persons fleeing from Libya. These migratory flows in turn led to an emergency response from the Tunisian authorities, inter alia with the establishment of camps near the Tunisian–Libyan border. Of these camps, in which the IOM and UNHCR were involved, the Choucha camp was directly managed by the UNHCR.

Despite Tunisia being a Party to the 1951 Refugee Convention and the prohibition of extraditing 'political refugees' in its Constitution, Tunisia does not have legislation on asylum describing specific administrative measures available to asylum seekers.

The UNHCR was responsible for the refugee status determination (RSD) procedures in the Choucha camp, as well as resettlement efforts for recognised refugees registered in the Choucha camp prior to 1 December 2011. The UNHCR was further responsible for offering options for recognised refugees to settle in Tunisia, as well as the repatriation of other asylum seekers.

A number of challenges have been identified in respect of the Choucha camp. The UNHCR was found to be unable to protect asylum seekers from potential threats or harassment. The procedures in the Choucha camp moreover suffered from inappropriate behaviour of the camp's staff, the lack of access to interpreters and irregularities in the management of files. Additional violations were found in respect of the lack of a reasoned decision in writing for rejected asylum seekers, and the lack of the right to review by an independent authority.

The Choucha camp was characterised by deficiencies in the reception conditions. The lack of adequate protection from harsh weather conditions and the inability of the UNHCR and the Tunisian army to guarantee the safety of persons in the Choucha camp were noted. Furthermore, the division/segmentation of the Choucha camp's occupants based on nationality and ethnicity led to tensions between the different communities within the camps.

There is insufficient evidence to conclude that the establishment of the Choucha camp had any direct impact on avoiding departures to Europe through irregular channels. Some have argued that the presence of the UNHCR attracted asylum seekers to the Choucha camp and Tunisia, thereby acting as an incentive for departure and displacement.

The UNHCR has also been involved in efforts to create a legal framework for asylum in Tunisia. However, a recognised and effective protected status for asylum seekers and refugees, while certainly required and useful, cannot be a substitute for a European asylum policy.

2.3.1 Introduction

It can be considered that the outsourcing of asylum in Tunisia began in 2011, after the Tunisian and Libyan revolutions, mainly with the setting-up of a UNHCR programme to determine refugee status. While in the midst of a revolution, the country had to face the arrival of thousands from neighbouring Libya. Several camps were prepared near the Libyan border to house refugees and exiles in border towns such as Medenine, Tataouine or Dhehiba. The UNHCR assumed direct responsibility for the management of the Choucha camp, right at the border. The UNHCR considers the operation to be a success, providing statistics on resettlements and 'voluntary returns'. However, various international human rights organisations have criticised the management of the camp, the processing of asylum claims, and, paradoxically, the closing down of the camp. These difficulties encountered by the UNHCR show the pitfalls of outsourcing asylum.

2.3.2 Context

In January 2011, four weeks of mass demonstrations and sit-ins around the country led to the departure of then President Ben Ali, who had been president of the Tunisian Republic since 1987. This revolution was considered an example for similar protest

movements in other countries in the Middle East and North Africa region. In Libya, the revolution against the regime of Muammar Qaddafi was much less peaceful: a civil war unfolded between February and October 2011 and led to an international military intervention. These events gave rise to important changes in migration patterns and in the profiles of migrants and refugees in the whole region.

Indeed, migration was not a new experience. Undocumented emigration from Tunisia had been a long-term phenomenon. Moreover, non-Tunisians, mainly from countries to the south, also tried to leave Tunisian shores towards Malta or Italy. This was also the case in Libya, where many people from other African countries went to find work or to try to leave for Italy. This had resulted in European countries adopting policies that externalised migration control before the Tunisian revolution. Since the 1990s, European countries have put increasing pressure on departure countries, and since the 2000s, the EU has joined them in pressuring third countries, classified as 'origin' or 'transit' countries.

One of the main tools of externalisation is the negotiation of readmission agreements. The purpose of these negotiations of more or less formal agreements¹¹⁰ is to ensure the cooperation of departure countries in the implementation of

deportation from European countries. Another related policy has been to enrol these countries in North Africa in border control, for example by organising common operations with Frontex, or by pressuring them to adopt new migration laws, criminalising in particular irregular *exit* from their country.¹¹¹ As a result, the Tunisian legal context for migration had already been modified before the revolution.

After 2011, with the collapse of the Ben Ali regime and the civil war in Libya, thousands of people took to the roads or to sea. Tunisia had to deal with a very different situation, in the midst of important institutional and political changes. After the beginning of the conflict in Libya, during a six-month period, an estimated 1 million people arrived in Tunisia, including 200,000 non-Libyans.¹¹² The Euro-Mediterranean Human Rights Network identified four waves of migrants and exiles:¹¹³

- first, ‘tens of thousands’ of young Tunisians, mostly men, leaving for Italy. The temporary collapse of the security and coastal surveillance systems might have encouraged these departures;
- a second, incoming wave, of approximately 400,000 refugees and foreign workers from Libya;
- third, Libyans, including many families, fleeing the conflict and NATO bombings. The Tunisian National Institute of Statistics estimated that 800,000 Libyans entered Tunisia between March and October 2011; and
- fourth, people from other African countries who were in Libya and who were forced onto boats by the Qaddafi regime. Most reached Italy, many also lost their lives, and a number of boats reached Tunisian shores or were towed to Tunisian ports.

In this context, the UNHCR started its activities in the country, as an emergency response to this sudden arrival of thousands of people, including many asylum seekers, in Tunisia.

2.3.3 An emergency response

As Libyans and others were arriving in great numbers in Tunisia after February 2011, camps were

established in Tunisia, mainly in border towns and communities near Libya. The IOM and the UNHCR were involved in these efforts. The IOM carried out the ‘voluntary repatriation’ of some of the foreigners in humanitarian camps. The UNHCR was involved in humanitarian support (such as distribution of tents and food) and in the organisation of refugee status determination (RSD). It also assumed direct responsibility for the management of one camp 7 km away from the border post of Ras Jedir, the Choucha camp, for which it delegated the management and provision of services to the Danish Refugee Council.¹¹⁴

Indeed, although Tunisia had been a Party to the 1951 Geneva Convention, and the constitution of 1959 (which was repealed in December 2011) prohibited the extradition of ‘political refugees’, no legislation on asylum described specific administrative measures available to asylum seekers. In 1968, the UNHCR signed an agreement with the Tunisian government granting it the status of honorary representation. Yet, until mid-2011, the UNHCR’s presence had been limited to this. A headquarters agreement was signed in June 2011. This allowed the UNHCR to open offices in the south of the country and to start regional missions.¹¹⁵

In the Tunisian case, the UNHCR’s activities in North Africa can be considered an emergency response. They are nonetheless part of an increased trend for the UNHCR being enrolled in the European policy of externalisation not only of border and migration control, but also of asylum and asylum processing. The EU, for example, largely funded the launch of the UNHCR’s activities in Morocco in 2004. The EU and European countries have reaffirmed their choice to favour the external processing of asylum claims and resettlement programmes. European countries reinforced border controls in times of crises and war in North Africa did not allow many people to claim asylum directly in Europe. Since then, part of the EU’s effort to externalise asylum has also consisted of supporting the UNHCR’s project to help the Tunisian government draft specific legislation on asylum.

The activities of the UNHCR in Tunisia are thus an interesting case for examining the offshoring of asylum, in particular through its activities of RSD at the Choucha camp. The camp officially opened on 24 February 2011.¹¹⁶ At the height of

the conflict in Libya, it received an average of 18,000 people per day.¹¹⁷ The UNHCR started a resettlement programme for people registered before 1 December 2011 and recognised as refugees. This led to a situation in which a variety of people lived in the Choucha camp. In January 2013, the Tunis Centre for Migration and Asylum (CeTuMa) distinguished four different administrative categories of people in the Choucha camp:¹¹⁸

- refugees recognised by the UNHCR but not yet resettled. Even for them, in spite of the UNHCR's decision, resettlement was not guaranteed since it depended on the decision of potential host countries;
- refugees who had obtained the refugee status but could not claim resettlement because their cases had been registered after the deadline of the programme (1 December 2011);
- asylum seekers who had been denied refugee status and were not under the responsibility of the UNHCR anymore, but who did not have anywhere else to go; and
- asylum seekers who arrived after 1 December 2011 and who were still waiting for a decision on their refugee status.

In 2011, the UNHCR examined 4,670 asylum claims, of which 3,500 were given refugee status.¹¹⁹ According to UNHCR reports, in all more than 4,000 people were granted refugee status. Of these 4,000, almost 3,600 persons were accepted for resettlement in the framework of the Global Resettlement Solidarity Initiative, and between 3,270 and 3,567 people had already left in 2014 for a host country, mostly the US, Norway, Sweden and Germany.¹²⁰ In this process, the IOM helped to coordinate logistical aspects for the relocation¹²¹ of 3,728 people between March 2011 and 2014.¹²²

Moreover, the IOM organised the 'voluntary return' of more than 400,000 people in 2011, mostly between March and April, in just two months. Large shares of these returns were to Egypt (approximately 86,000 people) and to Bangladesh (approximately 28,000 people). Many other returns were organised to Sudan, Chad or the Philippines,¹²³ where the political context is far from safe.

While the impact and results of setting up the Choucha camp are difficult to measure, a number of problems have been underlined in different reports. These problems fall within two categories: first, issues in the processing of asylum claims and resettlement applications; and second, issues in the management of the camp.

2.3.4 Processing of asylum seekers and impact on refugee rights

A 2014 report¹²⁴ examined in detail the legal deficiencies of the UNHCR's RSD procedure, with special attention to the case of Choucha. It converges with other similar assessments¹²⁵ and concludes that the actual procedure is far from the Procedural Standards for Refugee Status Determination under the UNHCR's Mandate (RSD Standards) issued internally by the UNHCR in 2003 and published in September 2005.¹²⁶

Conditions of access to the RSD procedure

The UNHCR has the obligation to provide facilities where asylum seekers are protected from potential threats or harassment (section 2.4 of the RSD Standards). Nevertheless, the reporting team found that this condition was not ensured, for example for Chadian nationals, who complained that the presence of Chadian officials in the camp put them at risk. This also raised questions about the UNHCR's impartiality.¹²⁷ Similar cases were raised about the access of Nigerian authorities to personal files.¹²⁸ Security issues also arose from the proximity of the camp to the Libyan border.¹²⁹

Another issue was access to the procedure and staff behaviour: some testimonies pointed to ignored asylum claims and pressures to return. No information was available to asylum seekers on the complaint procedure, contrary to what section 2.6 of the RSD Standards states.¹³⁰

The 2014 report also underlines that, contrary to provision 2.5.1 of the RSD Standards, the asylum seekers' right to an interpreter at all stages of the process was not always respected in Choucha, mostly due to a lack of professional interpreters.¹³¹ Moreover, reports also highlight the fact that some

interpreters might have been part of tribes or ethnic groups that were enemies of those of the asylum seekers.¹³²

Finally, in spite of provision 2.2 of the RSD Standards, which states that each camp should establish detailed procedures for the management of files, irregularities were reported in the handling of documents by the UNHCR at the Choucha camp. This led for example to the loss of passports by the UNHCR.¹³³ Other irregularities were reported, such as errors in the transcription of names or inconsistencies in the designation of citizenship from one part of the file to the next.¹³⁴

Fairness and impartiality in RSD

In spite of the unclear status of the ICCPR in international law, the UNHCR has instructed its employees to respect the spirit of this covenant. Article 14 stipulates that all people should be considered equal before courts, which should be competent, independent and impartial.¹³⁵ However, RSD Standards are sometimes in breach of this right to a fair trial and due process. More specifically, this concerns the information given to rejected asylum seekers and the process of appeal.¹³⁶

This overview shows the difficulty of ensuring the respect of due process for refugee status determination in an emergency context in a camp with limited means.

2.3.5 Management of the camp

The difficult conditions of life in the Choucha camp have been underlined in several reports and press articles. Choucha is located in the desert, and residents were exposed to very wide variations in temperatures and frequent sandstorms. Mostly living in tents, they were not adequately protected from these harsh conditions.¹³⁷ Hygiene was also an issue, as there were at first only “two sanitation blocs for 10,000 persons, no showers and only a very few water points”.¹³⁸ Overpopulation quickly led to fears of epidemics.¹³⁹

In coordination with the Tunisian Health Ministry, EU representatives, the World Health Organization, Unicef, as well as nongovernmental organisations,

efforts were directed towards hygiene. Latrines and points of access to water were built. Waste management services were organised with the collaboration of the neighbouring town Ben Guerdane.¹⁴⁰ Other health actions concentrated on mental health and maternal/perinatal care.¹⁴¹ Within the UNHCR, the general assessment of the camp in 2012–13 was that the facilities exceeded the expected standards and were much better than in other camps.¹⁴²

At the same time, the safety of residents was difficult to maintain. The distance from the Libyan border did not guarantee an escape from the conflict there. Moreover, although safety was in principle ensured by the Tunisian army, the scarcity of different resources and of services led to tensions inside the camp, mostly between different refugee communities, and between residents of the camp and the inhabitants of the nearby town, Ben Guerdane.

Within the camp, the UNHCR divided lodgings and areas on the basis of nationality and ethnicity. The segregation of people upon arrival was based on their identification papers or on self-declaration, though subject to verification by the UNHCR. The UNHCR’s explanation for this organisation was that it was more favourable to a peaceful functioning of the camp on a daily basis. Others have underlined that this segregation of populations also made it easier to locate and control people.¹⁴³ Even so, this organisation actually seemed to heighten tensions, especially as treatment by the UNHCR seemed to depend on these categorisations; the separation of Oromos from other Ethiopians and of Darfuris from other Sudanese¹⁴⁴ was also tied to a quasi-automatic access to refugee status for these populations (considered to be persecuted minorities in their countries of origin), but not for others.¹⁴⁵

A few months before the camp was closed down, these distinctions became essential: rejected asylum seekers were pushed to leave, and provision of food and services was restricted to recognised refugees. The UNHCR tried to reorganise the camp based on administrative status, progressively shutting off services like water provision from some sectors and restricting them to two of the initial five sectors.¹⁴⁶ Thus, rather than pacifying the camp, categorisation only seemed to heighten tensions and may have

played a role in the participation of residents in riots in 2011.¹⁴⁷

Tensions also emerged between the local population and residents in the camp. This was probably related in large part to the unstable and complicated situation of Tunisia at the time, and to the scarcity of some goods. The camp was targeted by arson twice, in May 2011 and March 2012. Following the 2011 arson, riots erupted and involved the local population, the population of the camp, and the authorities; the camp faced attacks, including destruction of its church.¹⁴⁸ Overall, it thus seemed very difficult for the UNHCR and the Tunisian army to ensure the safety of residents at the camp.

2.3.6 Failed closure of the camp and continued issues with asylum seekers in Tunisia and beyond

The Choucha camp was officially closed on 30 June 2013. After most inhabitants had been resettled or encouraged to leave, water and electricity were shut down, toilets and showers were destroyed.¹⁴⁹ According to the UNHCR and Tunisian officials, the Choucha camp did “not exist anymore”.¹⁵⁰ Still, different reports by journalists and by nongovernmental organisations claim that some people remained: at first, around 700 people stayed behind;¹⁵¹ 150 people by August 2014;¹⁵² and 60 by the end of 2016, with some leaving for different places in Tunisia or elsewhere.¹⁵³

Since their organisation did not have jurisdiction over the camp anymore, UNHCR officials denied any responsibility for the people who stayed behind, claiming they were rejected asylum seekers. However, others found that while rejected asylum seekers were there, a number of people with a recognised status as refugees were also present. Rejected asylum seekers demanded a reappraisal of their situation. Refugees demanded resettlement, given the absence of a specific Tunisian residence or work permit for them. Although the Tunisian government announced that those who remained could get residency permits, they never

received them because they did not meet the legal requirements. In addition, some ‘new residents’ were coming and going from the camp.¹⁵⁴

The ‘people of Choucha’, although limited in numbers, organised and gained public attention, mostly through a blog, *Voice of Choucha*, and sit-ins in front of official buildings such as the EU delegation’s building in Tunis.¹⁵⁵ These actions had started even before the camp was closed down, for example in 2013, when refugees protested against the UNHCR’s plan for local integration.¹⁵⁶ Several articles in international newspapers concentrated on their claims: “UNHCR finish your job”, “I want resettlement”.¹⁵⁷ In June 2017, Tunisian authorities forcibly evacuated the camp and 30 to 40 people were relocated in Tunisia. Human rights organisations denounced the non-compliance of the Tunisian government and the UNHCR with refugee law and human rights.¹⁵⁸

This attracted attention to the absence of asylum law in Tunisia. Some of the activities of the UNHCR in Tunisia have been directed at improving the situation of refugees in the country. For example, in 2016 it established an agreement with the Tunisian Post Office to provide cash assistance to ‘vulnerable refugees’, a mechanism that could be expanded to up to 100,000 people if needed. With the Arab Institute for Human Rights, they have also supported the preparation of a code of conduct for reporting on refugee and asylum issues (with the Union of Tunisian Journalists), and also advocated the adoption of a national law on asylum. In 2017, it worked on supporting the setting-up of a comprehensive national protection system.¹⁵⁹ It was announced in February 2017 that the Tunisian government was indeed working on the preparation of such a law.¹⁶⁰

Yet, the situation of Tunisia is politically unstable and the economy is not thriving (unemployment was 15.6% in 2016). Migrants can find it difficult to establish themselves in Tunisian cities. A recognised and effective protected status for asylum seekers and refugees, while certainly required and useful, cannot be a substitute for a European asylum policy.

2.4 THE UNITED STATES¹⁶¹

Key findings and lessons learned

The adoption by the US of the standards set forth by the 1951 Refugee Convention has led to two channels for refugee processing: an overseas refugee processing and resettlement programme and an asylum procedure for those who reached the US by their own means. Typically, the US President sets a worldwide annual quota for the number of refugees who will be resettled in the US. There is no quota on the number who receive asylum each year.

Many individuals who could not reach an overseas refugee processing centre attempted to travel to the US to apply for asylum. Starting in the 1980s the US Coast Guard established interdiction programmes to prevent asylum seekers from reaching US shores. This led to the US Supreme Court ruling in *Sale v Haitian Centers Council* that the international and domestic *non-refoulement* obligations apply only to actions taken on US territory, and not to actions in international waters.

The maritime interdiction programme and subsequent developments led to two additional types of extraterritorial asylum processing: i) cursory screenings on-board US maritime vessels immediately following interdictions at sea; and ii) in-country asylum processing centres in Haiti, Cuba and Central America (El Salvador, Guatemala and Honduras). These small extraterritorial refugee processing programmes allowed individuals fleeing persecution to apply for protection without having left their homeland and were coupled with resettlement within the US.

The on-board screenings of potential refugees interdicted at sea have been criticised for multiple deficiencies from a human rights perspective, including the lack of procedural fairness (owing to inter alia the extremely taxing conditions in which the screening process takes place, the lack of legal assistance, lack of an impartial decision-maker and lack of possibilities to review negative decisions). These inadequate screening procedures result in the potential *refoulement* of international protection seekers, as well as subjecting them to the risk of torture and inhuman or degrading treatment.

The in-country asylum processing in Haiti, Cuba and Central America has been substantially better than the shipboard screening and the truncated tent camp proceedings in terms of the physical settings for interview, the amount of time devoted to interviews, the availability of interpreters or bilingual decision-makers, and the automatic review of negative decisions (under the Central American Minors (CAM) refugee programme), but significant human rights concerns still remain. For example, processing asylum applicants in their country of origin subjects them to the fear of persecution and violence. Furthermore, none of the extraterritorial processing centres provide for channels of *judicial* review.

There is insufficient evidence to draw definitive conclusions about the impact of US extraterritorial asylum policies on the migratory flows from Haiti, Cuba and Central America. With regard to Haitian asylum seekers, the maritime interdiction appears to have prevented many individuals from reaching the US and to have rejected the protection claims of an implausibly large number of individuals. The small in-country refugee processing programme closed after several years, while interdictions at sea have continued for more than three decades.

With regard to Cuban asylum seekers, the results of the maritime interdiction that started in the mid-1990s appear more equivocal. Simultaneously, the US launched both a large traditional migrant processing programme and a small in-country asylum processing office in Cuba. Although dwarfed by the 20,000 immigrant visas provided per year, an average of 3,300 Cuban refugees have been processed in Cuba and resettled in the US every year since 1995. Further analysis is needed to establish whether there is an independent correlation between the offshore asylum processing in Cuba and the reduction in number of maritime interdictions at sea of Cuban nationals.

With regard to Central American asylum seekers, the CAM in-country processing programme limited eligibility to a small segment of the population and lasted for only three years. Just as the programme developed expertise and established a record of resettlement in the US, the Trump Administration terminated it. During its brief existence, the CAM programme did not appear to reduce migration from Central America to the US.

2.4.1 Introduction

The US has a long history of offshoring asylum processing. In the 1940s in the aftermath of World War II, the US accepted refugees and displaced persons who had been vetted in camps in Europe.¹⁶² In the 1950s, after the failed Hungarian revolt against the Soviet Union, the US resettled Hungarians who had been processed as refugees in Austria.¹⁶³ In the 1970s, in the wake of the Vietnam War, the US began a decades-long Orderly Departure Program that processed applicants in Ho Chi Minh City and in Bangkok for resettlement as refugees in the US.¹⁶⁴ All of these programmes originated in the pre-modern era of refugee law, an era marked by vast discretion wielded by sovereign states.

The modern era, launched by the 1951 Convention relating to the Status of Refugees and its prohibition against *non-refoulement*,¹⁶⁵ led the US to enact the Refugee Act of 1980, which establishes two avenues for protecting refugees: an overseas refugee processing and resettlement programme and an asylum procedure for those who reached the US by their own means.¹⁶⁶ More than 3 million refugees have arrived in the US via the overseas processing.¹⁶⁷ They underwent elaborate offshore screening in multiple sites outside the US, including assessment by the UNHCR and refugee nongovernmental organisations, individual interviews by US officials, security screening, medical examinations, cultural orientation and travel arrangements.¹⁶⁸

Refugees and asylum seekers fleeing persecution in the Americas have generally sought protection in the US via the asylum process, not via the overseas refugee programme. The asylum process allows individuals at the border or within the US to apply for asylum, which involves interviews with asylum officers, hearings in Immigration Court and appeals to administrative and judicial tribunals. In contrast to the overseas refugee resettlement process, which has a yearly quota, there are no numerical limitations on those granted asylum.

When political instability in the Caribbean led large numbers of asylum seekers to board small boats and set sail for the US in 1980, the US did not treat them as refugees or channel them into the overseas refugee programme.¹⁶⁹ Instead, alarmed by the potential for large migration surges from Caribbean islands, the US established maritime interception strategies that included a variety of ad hoc offshore refugee screening processes.

This case study examines the three major offshore programmes in the Americas: the Haitian interdiction strategy in the 1980s, the Cuban offshore refugee programme in the 1990s and the 2014 CAM offshore refugee programme.

2.4.2 Practices in response to regional migration surges

Haiti

The largest and most intense US efforts to interdict asylum seekers in the Caribbean and to process their claims outside US territory have targeted Haitian nationals. When the Refugee Act of 1980 came into effect, Haitians who landed in the US could rely on the statutory right to seek asylum. Shortly thereafter, in 1981, US President Reagan proclaimed that “illegal migration by sea of large numbers of undocumented aliens ... [has] threatened the welfare and safety of ... [the US].”¹⁷⁰ He directed the US Coast Guard to interdict vessels suspected of carrying undocumented migrants and to return them to their homeland, with the proviso that “no person who is a refugee will be returned without his consent.”¹⁷¹

As a consequence, US officials conducted shipboard interrogations, or screening interviews, to determine which passengers had a credible fear of persecution. Those who did not were returned to Haiti; the others were sent to the US for full asylum hearings. During the first decade of maritime interdiction, US Coast Guard ships intercepted 364 ships in the strait

between Haiti and Cuba.¹⁷² Only 28 of the Haitian passengers were transferred to the US for full asylum hearings;¹⁷³ more than 23,000 were sent back to Haiti.¹⁷⁴ In light of multiple reports that the Duvalier government in Haiti committed widespread human rights abuses,¹⁷⁵ the minuscule number of Haitians acknowledged to have asylum claims is not plausible. In 1990, democratic elections brought Jean-Bertrand Aristide to the Haitian presidency, and the number of boats leaving Haiti plummeted.¹⁷⁶ The correlation between democratic rule and the steep decline in departures is strong evidence that the prior exodus was not primarily due to poor economic conditions.

After a military coup deposed President Aristide in September 1991, US Coast Guard interdictions skyrocketed: from 2,000 in 1991 to 40,000 in 1992, 5,000 in 1993, and 25,000 in 1994.¹⁷⁷ The US temporarily suspended all returns to Haiti in early 1992 as reports circulated of widespread extrajudicial killings.¹⁷⁸ This led to severe overcrowding on US vessels, and the US attempted to establish offshore asylum processing in Central America and the Caribbean.¹⁷⁹ Ultimately, the US brought interdicted individuals to the US Naval Base in Guantánamo Bay, Cuba,¹⁸⁰ an area of Cuban sovereignty, but under total US control.¹⁸¹ US officials carried out streamlined asylum screenings; despite the harsh conditions and lack of attorneys and courts, the officials concluded that more than 10,000 individuals had a credible fear of persecution that qualified them for full asylum hearings in the US.¹⁸² When the asylum screening facilities at the US Guantánamo navy base filled to capacity, President George H.W. Bush directed the US Coast Guard to return all Haitian boats to Haiti.¹⁸³ All asylum screening – on shipboard, at Guantánamo, and in other countries – ended.

At this point, the US established small refugee processing centres in Haiti itself.¹⁸⁴ These centres, in Port-au-Prince, Les Cayes and Cap Haitien, received applications on behalf of 106,000 individuals between 1992 and 1995.¹⁸⁵ Many satisfied the refugee definition, but only the prominent – political prisoners, former government officials, targeted dissidents, well-known religious leaders and human rights activists – were resettled in the US.¹⁸⁶

In May 1994, the US halted blanket repatriations to Haiti and resumed shipboard screening.¹⁸⁷ Large numbers of Haitians intercepted at sea soon overwhelmed these new locations,¹⁸⁸ and the US again delivered interdicted Haitians to the US Naval Base at Guantánamo Bay.¹⁸⁹ Starting in July 1994, the US arranged that full refugee determination hearings would take place in Guantánamo, but that no Haitian refugees would be resettled in the US. Those deemed refugees would be offered refuge in UNHCR-run camps in other countries in the region.¹⁹⁰ Several months later, President Aristide returned to Haiti,¹⁹¹ and the majority of Haitians housed at Guantánamo Bay or at other “safe havens” in the region returned to Haiti voluntarily.¹⁹²

When political violence erupted in Haiti again in 2004, more Haitians set sail for the US. The US Coast Guard intercepted the small boats, held shipboard interviews and returned all the passengers to Haiti.¹⁹³ Human rights advocates derided the screenings as the ‘shout’ test, alleging that only Haitian passengers who shout that they fear persecution received even a cursory interview.¹⁹⁴ Over two decades later, the maritime interdiction policy remains in place, and US Coast Guard vessels routinely intercept small Haitian boats. Table 2 shows the significant variations over the years in US interception of Haitians at sea.

TABLE 2.**US Coast Guard interceptions of Haitians at sea**

YEAR	INTERCEPTIONS	YEAR	INTERCEPTIONS	YEAR	INTERCEPTIONS
1982	171	1992	37,618	2002	1,486
1983	511	1993	4,270	2003	2,013
1984	1,581	1994	25,302	2004	3,229
1985	3,721	1995	909	2005	1,850
1986	3,422	1996	2,295	2006	1,198
1987	2,866	1997	288	2007	1,610
1988	4,262	1998	1,369	2008	1,582
1989	4,902	1999	1,039	2009	1,782
1990	871	2000	1,113	2010	1,000*
1991	2,065	2001	1,391	2011	1,000*

Note: The Coast Guard reports statistics by fiscal year, which begins on October 1. For example, the 2009 fiscal year began on 1 October 2008 and ended on 30 September 2009. Table 532 reports data through 2009; the complete table is reproduced in Appendix I, Table AI.1. The 2010 and 2011 entries (marked with asterisks) are estimates based on Coast Guard reports of the total number of interdictions, from 1982 to 1 February 2017, produced in response to a May 2017 Freedom of Information Act Request and posted at Migrants at Sea.org (https://migrantsatsea.files.wordpress.com/2017/06/2017-06-15_uscg-foia-rspns_amio-data-fy-1982_2017-02-01_2017-cgfo-02153.pdf).

Source: US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, available at the US Census Bureau website (<http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>).

Cuba

From 1959 through 1973, more than 450,000 Cubans entered the US,¹⁹⁵ and were quickly afforded lawful permanent resident status.¹⁹⁶ In 1965 and again in 1980, Cuban authorities allowed mass departures from Cuba via small boats, which were welcomed by the US.¹⁹⁷ Things were different in 1994, after a decade of US Coast Guard interdiction in the Caribbean Sea. When anti-government protesters and thousands of Cubans embarked in small boats,¹⁹⁸ US Coast Guard cutters stopped the boats and delivered 32,000 Cubans to the US Naval Station

at Guantánamo Bay,¹⁹⁹ where they joined 15,000 Haitians.²⁰⁰ The US convinced the Panama Canal Zone to house approximately 8,000 Cubans,²⁰¹ but no offshore processing took place.²⁰² US authorities negotiated new migration policies with the Cuban government in 1994 and 1995.²⁰³ Cuba agreed to curb unsafe and disorderly departures by sea,²⁰⁴ while the US agreed to establish a programme in Havana to process visas for the admission of 20,000 Cuban immigrants per year.²⁰⁵ As Table 3 shows, the interdictions of Cubans declined dramatically after the new migration measures took effect in 1995.

TABLE 3.

US Coast Guard interdictions of Cuban nationals at sea

1993	1994	1995	1996	1997	1998	1999	2000	2001
2,882	38,560	525	411	421	903	1,619	1,000	777

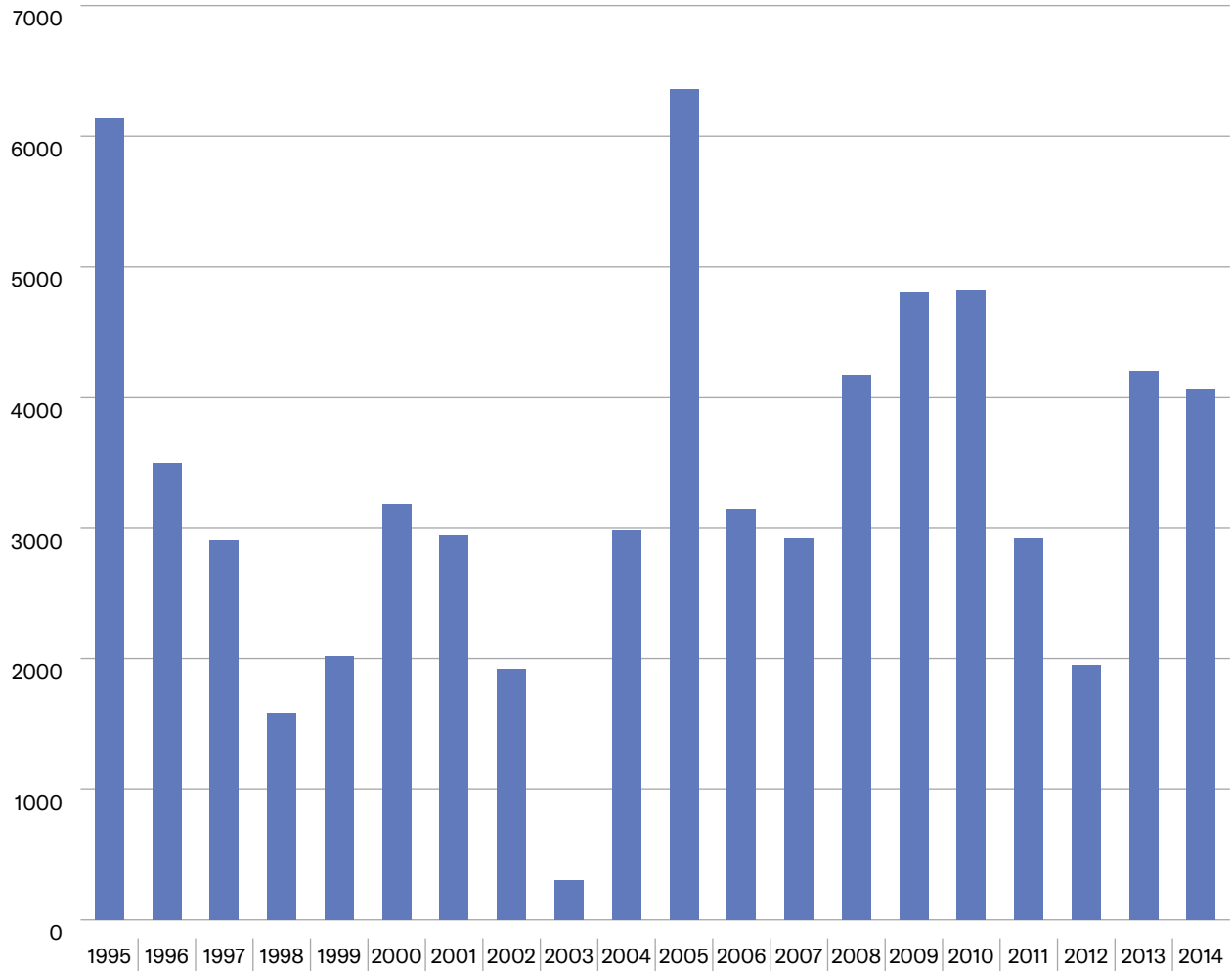
Source: US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, available at the US Census Bureau website (<http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>).

The new migration policies had two offshore processing components. Cubans intercepted at sea would be entitled to an asylum interview, and those deemed to have a well-founded fear of persecution would not be sent back to Cuba. They would not be transferred to the US, but, like the Haitians, would be eligible for resettlement in other countries.²⁰⁶

In addition, the US opened a refugee processing and resettlement programme in Cuba itself.²⁰⁷ Applicants completed a questionnaire and submitted it to the US Interests Section in Havana. US refugee officers

screened the applications and scheduled interviews in Havana to determine refugee status.²⁰⁸ In 1995, the first year of refugee processing in Cuba, 6,000 Cubans came to the US as refugees.²⁰⁹ As Figure 6 shows, refugee processing in Havana has continued; an average of 3,300 Cuban refugees have successfully completed offshore refugee processing each year since 1995.²¹⁰ Refugee processing still takes place in Havana,²¹¹ as does the processing of 20,000 immigrant visas per year, and few Cubans attempt to reach the US by boat.²¹²

FIGURE 6.
Estimated arrivals from offshore refugee processing in Cuba



Sources: R.E. Wasem, "Cuban Migration to the United States: Policy and Trends", CRS Report for Congress, Congressional Research Service, Washington, DC (2009) (www.fas.org/sgp/crs/rowR40566.pdf); MPI analysis of US Department of State, WRAPS, "Arrival by Processing County and Nationality" ([www.wrapsnet.org/Portals/1/Arrivals/Arrivals%20FY202014/Arrivals%20Processing%20Country%20and%20Nationality%20-%20Map\(10.6.2014\).pdf](http://www.wrapsnet.org/Portals/1/Arrivals/Arrivals%20FY202014/Arrivals%20Processing%20Country%20and%20Nationality%20-%20Map(10.6.2014).pdf)); Department of Homeland Security, "Yearbook of Immigration Statistics 2011" and "Yearbook of Immigration Statistics 2013", Washington, DC (2012 and 2014) (www/dhs.gov/yearbook-immigration-statistics).

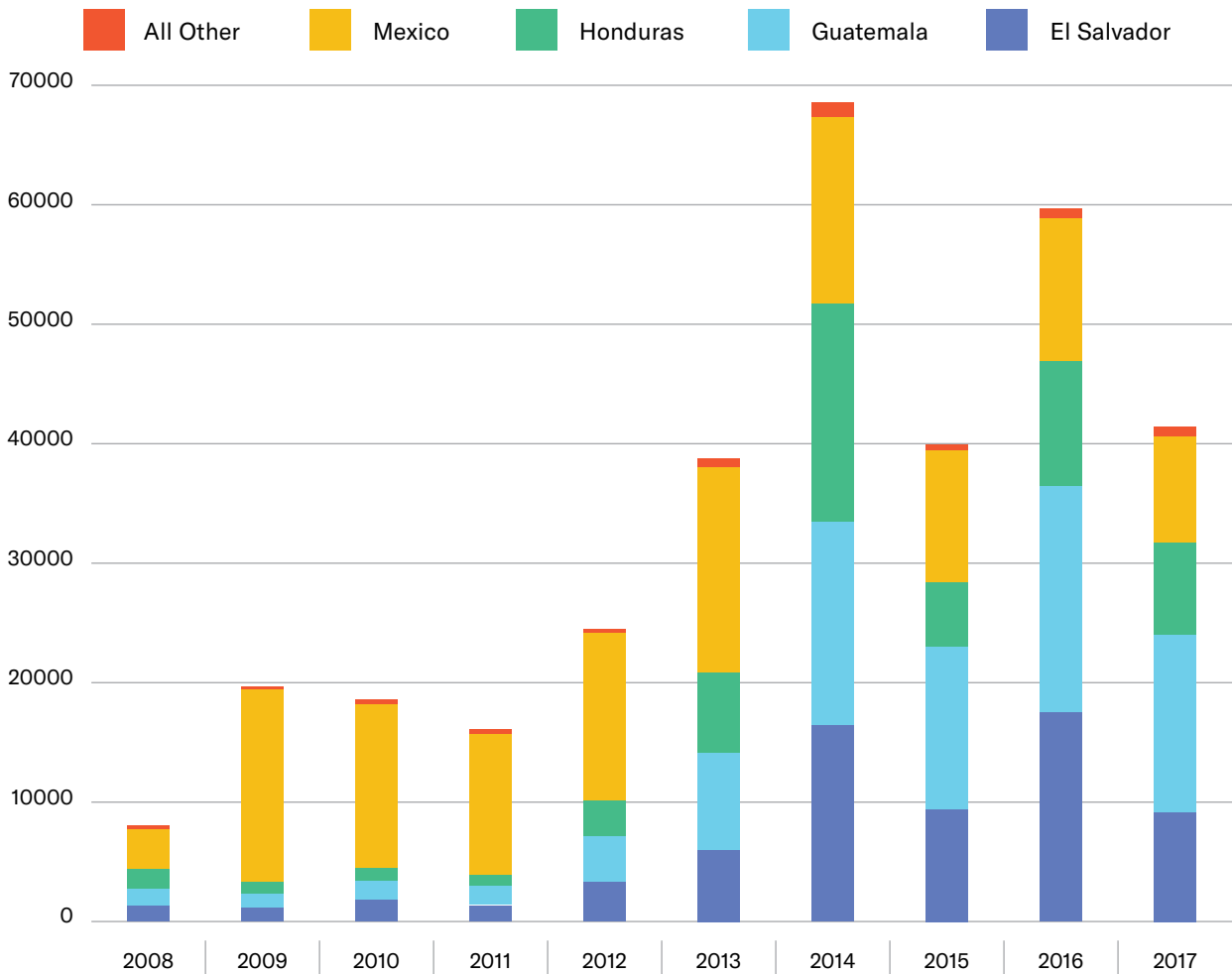
Central American minors

Turning from the sea lanes to the land borders, the first decade of the 21st century saw dramatic declines in the overall numbers of undocumented individuals arriving at the southern border of the US.²¹³

Around 2010, the numbers of children arriving at the border began to grow in startling dimensions. From 16,000 in 2011 and 24,000 in 2012,²¹⁴ the numbers of unaccompanied youth increased to 39,000 in 2013 and 68,000 in 2014.²¹⁵ After 40,000 unaccompanied children were apprehended in 2015, the number increased to 60,000 in 2016.²¹⁶

In addition to the sizeable increases in vulnerable asylum seekers, there were significant demographic changes. As shown in Figure 7, Mexican nationals comprised 80% of the unaccompanied youth at the US–Mexico border in 2008. A decade later, only 20% came from Mexico, while the remaining 80% were from Guatemala, El Salvador and Honduras, three countries experiencing unusually high rates of violence.²¹⁷

FIGURE 7.
Unaccompanied children apprehended at the southwestern US border, 2008–17



Source: Hipsman and Meissner (2015), op. cit., p. 3, Figure 1.

Driven in part by public outcry at the sudden rise in the flow of migrants reaching US borders, US authorities detained many of the undocumented minors in deplorable conditions, subjected them to accelerated processing known as expedited removal, and provided hearings to determine if they had a credible fear of persecution.²¹⁸

Hoping to deter minors from travelling to the US, the US government established offshore asylum processing in Central America. Children from El Salvador, Guatemala and Honduras could be evaluated in their home country for refugee status that would allow them to resettle in the US if they had a parent lawfully residing in the US.²¹⁹ Those rejected as refugees because they could not show a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a social group could seek protection on humanitarian grounds. If successful, they would be paroled into the US with a two-year renewable residence permit.²²⁰

The CAM refugee programme began in December 2014, as the US partnered with the IOM, which manages Resettlement Support Centres in Latin America. After US resident parents filed applications on behalf of their children, the IOM contacted the children in their homelands and conducted pre-screening examination of the cases. US immigration officials then conducted in-depth interviews, which were followed by security checks and medical exams.²²¹

The programme started slowly. After 18 months, 9,500 Central American children had applied and almost 3,000 had been granted protected status, but only 267 had entered the US.²²² Improvements to the process gradually made a difference. In the summer of 2016, Costa Rica consented to shelter vulnerable Central American minors as they underwent refugee screening and processing.²²³ The Obama Administration expanded the scope of the programme to include young people over the age of 21, siblings of refugee children, and parents and caretakers of children at risk of persecution.²²⁴ Two and a half years after the CAM programme began,

2,200 Central American children had been resettled in the US as refugees.²²⁵ Another 1,500 had received two-year residence permits on humanitarian grounds.²²⁶

By mid-2017, more than 13,000 had applied,²²⁷ and there were thousands of pending applications in a process that generally took 12 to 13 months. Applications rejected for refugee status, often due to the lack of sufficient documentation, were automatically screened for humanitarian consideration, and individuals had the right to request a review of the denial of their refugee application.²²⁸ The results, though slow, were overwhelmingly positive. One refugee resettlement expert estimated that 30% received refugee status, while 68% received humanitarian parole.²²⁹ She predicted the refugee approval rates would have been much higher if the applicants had been assisted by lawyers and had better access to obtaining supporting evidence.²³⁰

When the Trump Administration came to power in January 2017, US officials ended the programme. Those already approved but not yet in the US received notice that their resettlement in the US had been cancelled. Those already in the US were warned that they could not count on renewal when their two-year residence permits expire.²³¹

2.4.3 Human rights implications

Sale v Haitian Centers Council

The US interdiction, offshore processing, and repatriation strategy in the Caribbean in the 1980s and 1990s drew strenuous protest, but human rights challenges had a mixed record in the US courts. When the dispute ultimately reached the US Supreme Court in 1993 in *Sale v Haitian Centers Council*,²³² the Court advanced a constricted view of international refugee law. Acknowledging that it was uncontested that “hundreds of Haitians [had] been killed, tortured, detained without warrant, or subjected to violence and the destruction of their property because of their political beliefs,”²³³ the Court nonetheless upheld the US decision to

interdict and forcibly repatriate Haitians without first determining whether they qualify as refugees. The Court concluded that both the international and US statutory prohibition against *refoulement* applied only with regard to actions taken on its territory. Accordingly, it ruled that the US policy to interdict refugees on the high seas and return them to Haiti without any screening or other processing did not violate international law.²³⁴

International bodies,²³⁵ refugee scholars²³⁶ and jurists²³⁷ around the world criticised the *Sale* decision, as did numerous US scholars and advocates. The UNHCR decried the *Sale* reasoning as a “setback to modern international refugee law”.²³⁸ The Inter-American Commission on Human Rights ruled that US interdiction and repatriation of Haitians violated the rights to life, liberty, security of the person, the right to resort to the courts, and the right to seek and receive asylum secured by the American Declaration of Human Rights.²³⁹

Human rights at stake

Notwithstanding the US Supreme Court’s disavowal of US obligations under international law, the US Coast Guard’s interdiction and offshore processing programme has raised profound human rights concerns. cursory interviews of human beings fleeing persecution, torture, extrajudicial killing and other violence, followed by forcible repatriation, may deliver individuals into the hands of their oppressors. Human rights law exists to prevent this type of harm. US maritime interdiction runs afoul of the protection against *non-refoulement* enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,²⁴⁰ the *non-refoulement* obligation contained in the Convention against Torture, the guarantees set forth in the ICCPR against arbitrary detention, discriminatory treatment, and inhuman and degrading treatment,²⁴¹ and the right to seek asylum recognised by the American Declaration of the Rights and Duties of Man,²⁴² as well as the Universal Declaration of Human Rights.²⁴³ In evaluating the human rights implications of the offshore processing strategies employed by the US in the Americas, it is useful to distinguish between i) the

screening systems carried out on shipboard and at the US Naval Station at Guantánamo Bay and ii) the in-country refugee processing carried out in Haiti, Cuba and Central America.

Asylum screening

The inadequacy of the screening interviews has been well documented. The maritime interception of migrants en route to the US has involved thousands of shipboard interrogations and streamlined offshore asylum procedures. Though these settings varied in detail, they all have taken place in highly pressured situations, under extremely taxing physical conditions, in the absence of legal advice, without an impartial decision-maker and without access to review of negative decisions. Sometimes the screening of Haitian asylum seekers took place in the presence of Haitian officials; frequently it took place without adequate interpreters. The circumstances varied from outrageous (the ‘shout’ test aboard ship) to deplorable to merely dreadful, but they all lack basic elements of procedural fairness. It is impossible to conclude that they have led to accurate and reliable results. Consequently, the possibility – indeed, likelihood – is great that refugees have been returned to lands where their lives or freedom have been threatened, in violation of the basic *non-refoulement* prohibition of international refugee law.

In addition to returning many Haitians to the hands of their persecutors, the inadequate screening process likely returned them and others to the likelihood of torture. This contravenes the obligations the US assumed as a State Party to the Convention against Torture.²⁴⁴ In recent decades reports of conditions in Haiti and in Honduras, El Salvador and Guatemala have featured widespread extrajudicial killing, bodily assault and other infliction of severe physical or mental pain.²⁴⁵ Although US jurisprudence does not recognise the extraterritorial effect of human rights treaties, it does recognise that torture can take many forms. Turning back migrants to these countries in the absence of adequate screening procedures violates the international law concerning torture.

In addition to the threats to *non-refoulement*, the interdiction and offshore processing efforts have contravened other human rights protections. There were many arbitrary ad hoc detentions in deplorable conditions. Migrants did not have notice about their legal rights nor the resources to make their plight understandable. In many instances US officials treated migrants differently based on their race and their national origin. In these and many other respects basic ICCPR guarantees were flouted, and the right to seek asylum, enshrined in the Universal Declaration of Human Rights and in the American Declaration of the Rights and Duties of Man, was impeded.

The onshore imprisonment of thousands of unaccompanied children at the southern border of the US also produced many instances of arbitrary detention, with children held overnight in *hieleras*, extremely cold holding cells with inadequate food, water and medical care. Others were inappropriately housed in prison-like detention centres with adults. In May 2018, US officials announced they would separate young children and parents who had arrived at the southern border together in order to deter asylum seekers.²⁴⁶ These situations present clear violations of international human rights norms.

In-country processing

The offshore processing the US established in more permanent settings in the countries from which people were trying to flee raise different concerns. These programmes generally avoided cursory screenings, detention and inexperienced and ill-equipped interviewers. The physical settings compared are immeasurably superior to those on shipboard or in tent camps, and the time constraints inherent in shipboard processing do not play a major role in in-country processing. Asylum seekers know in advance where and when they must file applications, allowing them to prepare their explanations and gather supporting evidence.²⁴⁷ Further, the availability of interpreters or bilingual decision-makers in stationary facilities enhances the asylum seekers' ability to communicate their claims. Moreover, it is easier to deploy trained

asylum officers to in-country processing offices, and to enhance the effectiveness of the interview itself. For example, both the CAM refugee process and the Cuba refugee programme employ bilingual, experienced US asylum officers to conduct in-depth interviews with the applicants.²⁴⁸ Additionally, the CAM refugee programme contained a provision allowing all those denied refugee status to file a request for review within 90 days of the negative decision.²⁴⁹

Clearly, in-country refugee processing is less desirable than the asylum process that takes place in the US, where asylum seekers typically have less fear that government officials, their neighbours or other non-state actors will persecute or otherwise harm them. There is also greater access to legal advice in the US, as well as multiple levels of appeals, culminating in review by life-tenured federal judges. Nonetheless, if in-country refugee programmes can assure adequate access by individuals in need of protection, sufficient preparation time, experienced asylum interviewers and opportunities for review of negative decisions, they are more likely to be congruent with international human rights.

2.4.4 Consequences

On migration to the US

Clearly, the floating 'Berlin Wall' deployed off the northern coast of Haiti and in the Straits of Florida north of Cuba has stopped many boats from reaching US waters. As Table 4 shows, the past quarter century of maritime interdiction has most frequently intercepted migrants from two islands: Cuba and Hispaniola, which Haiti and the Dominican Republic share. The major effects were to reduce the number of Haitians seeking refuge in the US in the 1980s and 1990s and the number of Cubans attempting to reach the US in the early 1990s. The data do not reveal what happened to the seaborne migrants after the Coast Guard deposited them back in Haiti and Cuba, nor indicate how many migrants decided not to attempt to reach the US. Unmistakably, the US goal was to deter seaborne migration, and there is no reason to think that deterrence failed.

TABLE 4.

US Coast Guard migrant interdictions by nationality of alien

YEARS	HAITI	CUBA	DOMINICAN REPUBLIC
1982	171	0	0
1983	511	44	6
1984	1,581	7	181
1985	3,721	51	113
1986	3,422	28	189
1987	2,866	46	40
1988	4,262	60	254
1989	4,902	257	664
1990	871	443	1,426
1991	2,065	1,722	1,007
1992	37,618	2,066	588
1993	4,27	2,882	873
1994	25,302	38,56	232
1995	909	525	3,388
1996	2,295	411	6,273
1997	288	421	1,2
1998	1,369	903	1,097
1999	1,039	1,619	583
2000	1,113	1	499
2001	1,391	777	659
2002	1,486	666	177
2003	2,013	1,555	1,748
2004	3,229	1,225	5,014
2005	1,85	2,712	3,612
2006	1,198	2,81	3,011
2007	1,61	2,868	1,469
2008	1,582	2,99	688
2009	1,782	799	727

Source: US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, available at the US Census Bureau website (<http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>). See Table AI.2 in the Appendix for the complete interdiction data provided by the US Coast Guard.

Assessing the impact of the offshore refugee processing programmes in Haiti, Cuba and Central America on migration flows is more challenging. Refugee processing in Haiti lasted for only three years, and resettlement opportunities in the US were limited. The Central American in-country processing, also limited to three years, can more accurately be viewed as a family reunification effort rather than an offshore asylum programme. Its reach did not address the sizeable need for protection that exists in El Salvador, Guatemala and Honduras.

In contrast, offshore refugee processing in Cuba has been steady and ongoing. It is impossible to assess its impact, though, because from the beginning it was coupled with a much larger traditional immigrant processing programme. Making available 20,000 immigrant visas per year likely had a negative impact on launching small boats to make risky clandestine journeys. Further, the US decision to refuse to admit Cubans intercepted at sea in the US also likely deterred sea voyages. The conjunction of the offshore refugee processing in Havana, the sizeable offshore immigrant processing programme, and the prohibitions on resettlement in the US of intercepted migrants, appear to have made a great difference. Some pressing refugee needs have been addressed while significant humanitarian avenues to safety have been provided.

On migration within the region

Data on migration of Haitians and Cubans within the region is difficult to obtain. The waters surrounding Haiti and Cuba present substantial natural barriers to migration. The risks to life are considerable and the distances are significant. A voyage from Haiti to Mexico, the nearest mainland country, is approximately 1,500 km. There are no reports of a sizeable post-interdiction migration from Haiti to Mexico or Central America. On the island of Hispaniola, however, hundreds of thousands of Haitians have moved to the Dominican Republic to seek work over the past century, movement likely encouraged by the US maritime interdiction strategy.

The distance from Cuba to Mexico by sea is smaller, approximately 500 km, and recent years have seen an increase in the number of Cuban migrants in Latin America. Roughly 24,000 Cubans travelled by air to Ecuador or other countries and then travelled overland to the US in 2016; more than 78,000 arrived in the US in 2015.²⁵⁰ This regional migration appears to be correlated more with the political changes in the relations between Cuba and the US than with maritime interdiction, however. As relations between the US and Cuba have warmed during recent years, many Cubans have feared that US visa requirements would be applied to Cubans, thus ending their preferential treatment. This has impelled more Cubans to seek a land route to the US.²⁵¹

3. LESSONS LEARNED FROM THE COMPARATIVE COUNTRY EXPERIENCES

It is important to start by taking note that in the cases of Spain, Tunisia and the US, the examples of extraterritorial asylum processing and migration management seem to have been introduced as measures to prevent the arrival of asylum seekers and irregular migrants as a reaction to ‘crises’. This was the case with the Spanish Migrant Reception Centre in Nouadhibou (Mauritania) (following the 2005–06 *cayuco* crisis), the Tunisian camps at the border with Libya (following the migratory flows from Libya after the Tunisian and Libyan revolutions in 2011), and the migrant interdiction activities of the US at sea and in-country asylum processing centres in Haiti, Cuba and Central America (following the increased flows of Haitian, Cubans and Central American minors). Australia stands in splendid isolation as the paradigmatic case of formally and consistently implementing offshoring of asylum and pushbacks at sea as key features characterising its entire asylum and migration management policy.

A key concern common to these four country experiences is the lack of clarity and publicly available information regarding the objectives of the measures, their implementation and their results. Their public policy objectives are not always clearly stipulated in publicly accessible and transparent legislation. While each country study presents its own specificities, concerning both the kinds of extraterritorial measures/practices implemented and the forms of cross-border irregular movement in each geographical area, none of them show irrefutable evidence of ‘effectiveness’ in reducing the number of irregular entries.

Even the few existing data presented in section 2 do not allow us to reach a conclusion about effectiveness in reducing the number of irregular entries. The full picture of factors playing a role in changes to the number of entries is often not attributable to a specific extraterritorial policy. Most of the examples under examination only lasted for a concrete period or a limited number of years. Little is often known about what actually happened to those whose applications for international protection received a negative decision.

The Australian example demonstrates that any recorded changes in irregular flows to Australia have been in line with the global trends. The case of the US illustrates that the number of arrivals of young people from Central American countries remains high. Similarly, as described in section 2.2, while Spain’s incremental border-control responses in cooperation with African countries led to a decrease in the volume of arrivals via the West African route, this might have caused a diversion of human mobility to other African routes, with many people being ‘trapped’ in North African countries like Morocco and Libya. As argued by Godenau and López Sala,²⁵² the reduction of arrivals on Spanish soil does not mean that they are not happening elsewhere. Thus, the question remains to be answered: Were these measures effective in reducing a given route and mode of entry, or were their effects more generic in the sense of reducing potential irregular migration to the EU as a whole?

Another feature of these examples is that extraterritorial arrangements and instruments tend to be developed *outside* the reach of national and international institutions (supervisory bodies, and specifically courts) designed to provide venues to scrutinise the actions and responsibilities of states in light of international human rights standards and commitments. Some of these extraterritorial instruments are often framed and implemented ‘outside the law’ or have an extra-legal nature as part of an *implicit or explicit strategy to evade or shift legal and fundamental rights responsibilities*.²⁵³

The clearest example of this is the US, where the US Supreme Court ruled (in *Sale v Haitian Centers Council*) that US national and international legal obligations, including the principle of *non-refoulement*, were restricted to actions taken on US territory. The US Supreme Court thereby legitimised the interdictions at sea and forced repatriations, regardless of potential *refoulement* or risk of torture and inhuman or degrading treatment of asylum seekers. The Australian Pacific Plans and Operation Sovereign Borders also exemplify this approach, with the establishment of regional processing centres in Nauru and Papua New Guinea, and the ‘outsourcing’ of the management of these centres to inter alia private parties.

The evasion and shifting of responsibility is closely interlinked with another commonality among the four case studies examined in section 2 of this report. Namely the involvement, if not reliance, on third countries, international organisations and private parties in the management and provision of service in the places of extraterritorial asylum processing. In the Spanish case, the multi-layered approach to the containment of irregular flows has seen the signature of a number of bilateral agreements between Spain and African countries (including Morocco, Mauritania and Senegal), specifically in respect of the readmission/return of irregular migrants. Many authors have noted the secretive nature of these bilateral agreements, which undermines and escapes proper democratic accountability.²⁵⁴

The Australian approach to the extraterritorialisation of asylum processing involved MoUs with the third countries concerned, i.e. Nauru and Papua New

Guinea. The involvement of the UNHCR and IOM, among other international organisations, is also prevalent in the examples of extraterritorialisation examined. The most prominent example of the IOM and UNHCR’s involvement is in Tunisia, where the UNHCR provided humanitarian support and refugee status determination at the various camps (notably the Choucha camp, managed by the UNHCR), while the IOM played an important role in carrying out voluntary repatriation.

The examples in section 2 demonstrate that well-documented fundamental rights violations and challenges emerge in all the countries covered during the various phases of implementation, particularly those engaging in the formal offshoring of asylum. A critical consideration in refugee law is that refugees usually cannot apply for asylum abroad while they are still in their own State, as they are at risk of persecution and are normally fleeing from the authorities of their country. The establishment of asylum processing centres in Haiti, Cuba and Central America, coupled with the interception and forced repatriation of Haitian and Cuban asylum seekers intercepted at sea, clearly force asylum seekers to apply for asylum or other forms of international protection while remaining in fear of torture or violence in their country of origin. The example of the Choucha camp, though technically in the territory of Tunisia, also revealed security issues at the camps in light of their proximity to the Libyan border.

Furthermore, the countries under investigation provide evidence that the principle of *non-refoulement* has been violated, sometimes systematically. The Australian OSB, with its tow-back and takeback policies, raises concerns about direct and indirect *refoulement*. In fact, a number of Australian incidents, including the *Minasa Bone* incident in 2003, provided evidence of direct *refoulement*, and may even have led to chain-*refoulement*. Likewise, the Spanish-Mauritania cooperation to intercept and return irregular arrivals to Mali and Senegal raises concerns about *refoulement*. The US migrant interdiction operations and forced repatriation of Haitians and Cubans caught at sea to Haiti and Cuba, coupled with the return of ‘rejected asylum seekers’ after cursory on-board screening, are clear examples of *refoulement*.

Arbitrary arrests and indefinite detention under inhuman and degrading conditions are common practices in these programmes. These practices represent a direct threat to human dignity, the right to leave one's own country as well as the right to liberty and security. This is most patently demonstrated by the Australian case and confirmed by the decision of the Supreme Court of Justice of Papua New Guinea (in *Naham v State of PNG*), which declared that the detention of asylum seekers in the RPC on Manus Island was unlawful. Even in cases where extraterritorial processing takes the form of 'reception centres' that may not be 'closed' or where people have not stayed for long periods, such as the Migration Reception Centre in Nouadhibou (Spain–Mauritania), these centres have provided extraordinarily poor reception conditions for the inhabitants, without access to legal assistance or any independent judicial control.

Procedural *unfairness* is a recurring problem throughout these kinds of extraterritorial practices, chiefly in cases such as the one studied in Australia. A shared characteristic is that extraterritorial initiatives present acute challenges from the perspective of *access to effective remedies* in terms of (the lack of) independent review and/or judicial scrutiny in cases of negative decisions on applications for international protection or on entry and residence rights. Even where some form of review is foreseen, such as in the US CAM programme and in the UNHCR-managed Choucha camp, the *independence* of the review procedure or the lack of involvement of *judicial scrutiny* stand in the way of access to effective remedies. The lack of 'safety' for asylum seekers in the third countries involved makes access to justice, international protection and durable solutions undeliverable in practice.

Initiatives such as the Choucha camp in Tunisia have demonstrated how extraterritorial asylum centres – despite not falling within the notion of 'offshoring' used in this report – pose significant obstacles, even to international organisations with long-standing expertise like the UNHCR, to duly deliver its own refugee status determination procedures, in particular *accessibility, the right of appeal and due process*. In the example of the Choucha camp, asylum seekers were not always properly informed of their

right to appeal, nor could the 'appeal procedures' be considered impartial or independent, as they were conducted by the same UNHCR employees involved in the examination in the first instance.

This lack of procedural fairness has proved to be problematic in cases of extraterritorial border surveillance and interceptions at sea, such as the US interception practices at sea by the US Coast Guard. As explained in section 2.4, this US practice has involved carrying out thousands of shipboard interrogations²⁵⁵ as well as those at the naval base in Guantánamo, which have taken place "under extremely taxing physical conditions, in the absence of legal advice, without an impartial decision-maker and without access to review of negative decisions".

Shipboard screenings and other hastily conducted interviews in cramped and uncomfortable surroundings signal an unsatisfactory plan. When individuals have insufficient time and psychological support in which to prepare and convey a narrative of complex events, the process will be deficient. The lack of adequately trained asylum interviewers and absence of accommodation for language and other communication obstacles will lead to a shoddy system. Such screenings are oppressive and likely to result in inaccurate and unreliable decisions. They should never be a model for offshore processing.

Furthermore, despite a guarded hope for constructing fair offshore systems in the context of the US in-country refugee determination programmes in the Americas, major human rights concerns abound. More specifically, it will be crucial to determine whether asylum seekers can truly access an asylum process located in the land in which they fear persecution and violence. The three US experiments do not provide an answer to this dilemma.

Another common feature of the examples of extraterritorial asylum processing and migration management of the four countries examined is the nature of the centres as 'closed' detention facilities. The Australian example of offshoring asylum (i.e. in the RPCs in Nauru and Papua New Guinea) or the US examples on some Caribbean islands demonstrate that, irrespective of the original public intended

goal of the measures at hand, extraterritorial asylum and migration practices taking the form of ‘centres’ have a tendency to be or be converted into places of closed ‘detention’ (rather than ‘processing’). These often entail unacceptable and inhuman reception conditions, and are usually conflated (or blurred) with wider practices of border controls and surveillance.

This is especially the case for the Spanish example, where the Nouadhibou centre essentially functioned as a detention or internment centre for irregular migrants returned from Spain or detained in Mauritania. The setting-up of the Nouadhibou centre also raised important concerns. First, detention and deportation were neither regulated by law nor subject to any control by the judicial authorities. Second, there were denunciations of arbitrary arrests carried out without relevant court orders and even when documentation was in order. Cases of abuse,

theft and extortion at the time of the detention were also well documented. Third, the centre did not meet minimal living standards, with overcrowding and poor hygiene conditions. Finally, there remains a lack of clarity about the centre’s current situation: while some assume it is closed, there is no clear evidence that proves it.

The Spanish example of the Nouadhibou centre in Mauritania further denotes a worrying consequence of extraterritorial asylum processing and migration management policies. This concerns the developments towards the ‘criminalisation of migration’ in the third countries, often in opposition to previous practices. As noted in section 2.2, the signature of the agreement between Spain and Mauritania led to an increased focus on ‘irregularity’ in Mauritania’s migration policy, which hitherto had largely been absent.

4. THE FEASIBILITY OF OFFSHORING ASYLUM IN THE EU CONTEXT

The EU is a special supranational entity. The *raison d'être* of the Union since its inception has been to move beyond national closure and isolation. Based on past historical mistakes and human rights violations during war periods in Europe, regulatory frameworks of the Council of Europe and the EU have been designed and developed so as to offer international and (in the case of the EU) supranational venues of protection to individuals, irrespective of their migration status. They aim at guaranteeing people's rights and liberties when their states fail to do so by not upholding democracy, the rule of law and fundamental rights principles, which are in turn founding values for EU membership in the EU Treaties.

Actions and inactions by EU Member States' authorities, and those of the EU and its agencies, are first subject to the domestic *and* EU constitutional standards – judicial, democratic and legal/financial scrutiny. The acceptance by Member States' constitutional courts of the supremacy of EU law relies heavily on the daily compliance with these same democratic rule of law and fundamental rights standards by the EU in all its activities, including those outside the Schengen territory or in cooperation with third countries. They are also under the scrutiny of EU supranational checks and balances, and the legally binding and parallel application of the EU Charter of Fundamental Rights (EU CFR).

The material and personal scope of application of the EU CFR aims at guaranteeing that the notion of 'responsibility' in the EU legal system follows a '*functional*' or '*parallel*' approach.²⁵⁶ Compliance with the EU CFR must be upheld irrespective of

'*where*' and under 'whose control' actions effectively take place, and irrespective of any territorial connection with the EU. This falls under what can be denominated as '*portable responsibility*', which runs *in parallel* with the traditional notion of human rights jurisdiction in the scope of the European Convention on Human Rights (ECHR) (see Appendix II of this report for a detailed explanation). This remains the case even where EU law leaves discretion or margin of appreciation to Member States in the phases of implementation. That discretion must be exercised in light of the EU CFR and their commitments in the Treaties, which is equally essential when the EU goes abroad.

The challenges identified and the lessons learned from Australia, Spain/Mauritania, Tunisia and the US, when applied within the EU context, would pose significant feasibility issues for any initiatives for the extraterritorial asylum processing by the EU or its Member States. A first key challenge is in light of 'whose asylum law' that assessment would take place. Would the rules of the Common European Asylum System (CEAS) on qualification and procedures also apply to these extraterritorial practices? Taken in the negative, extraterritorial processing would face the risk of being an unlawful attempt to get around European asylum law on the processing of asylum applications.²⁵⁷ Reliance on the asylum laws of cooperating third countries has been demonstrated to be particularly problematic in the case studies under analysis in this report, even more so when a proper asylum system and procedural guarantees have not been established in these third countries or are only on 'paper' but not effectively delivered in daily practice.

Another challenge inherent to extraterritorial asylum policies in the EU context concerns the measures commonly associated with examples of offshore asylum processing, i.e. those focused on the prevention of irregular arrivals at sea and their direct incompatibility with human rights standards. As studied in section 2, common among the four countries examined are the preventive measures in the form of interceptions at sea and repatriation/return. EU standards are clear in this respect: interceptions at sea and the ‘pushbacks’ by Member States and/or EU agencies in international waters or territorial waters of third countries are simply illegal and would amount to a human rights violation. EU agencies and Member States applying pushbacks cannot escape their extraterritorial jurisdiction when there is *de facto* or *de jure* control,²⁵⁸ as demonstrated by the European Court of Human Rights in the 2013 case *Hirsi Jamaa and others v Italy*.²⁵⁹

The concept of ‘*portable responsibility*’ in the EU entails that, whenever Member States cooperate – directly or even indirectly through the provision or ‘support’ of tools, funding or ‘training’²⁶⁰ – with third-country authorities in asylum as well as migration management, they are equally subject to the lawfulness test in light of the Treaties and EU *acquis* irrespective of the actual degree of direct control. The specificities of the EU’s legal framework and institutional setting would require that any kind of intervention impacting individuals – including training, capacity building and funding – would be assessed against the EU’s fundamental rights and rule of law benchmarks and would need to be democratically accountable.

The FRA has rightly emphasised that “state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations”.²⁶¹ Even in the case where financial and/or technical “aid or assistance” by an EU Member State or an EU agency to a third country may not qualify as ‘exercising effective control’ for purposes of applying the *Hirsi* judgment benchmark, they could be still responsible in light of the EU CFR. The International Law Commission Articles of State Responsibility has expressly acknowledged

that an EU country could be held responsible if the assistance would have consciously facilitated “internationally wrong acts” (e.g. human rights violations) by the third country concerned.²⁶²

The notion of portable responsibility covers examples such as the EU Trust Fund for Africa being used by the Italian Ministry of the Interior to enhance the Libyan Coast Guard’s capabilities to carry out search and rescue operations and thus increasingly contributing to ‘integrated border management’.²⁶³ Around €46.3 million out of the EU Trust Fund for Africa’s North of Africa Window (around €237 million) has been directly used to “support both Libyan coast guards (under the Ministry of Interior and under the Ministry of Defence) in the form of training, including on human rights, and equipment”.²⁶⁴

Such support, compounded by the recent registration of an expanded Libyan search and rescue area,²⁶⁵ has led to more interceptions by the Libyan Coast Guard, which are *de facto* pushbacks at sea and fall within the EU concept of ‘border surveillance’ in light of the 2016 Schengen Borders Code.

The question is not only one of determining the extraterritorial application of fundamental rights or ascertaining the actual existence or degree of ‘control’ and ‘authority’. It is rather the extent to which *the kinds of* activities (operational support, training, funding or equipment) or inactivity (in the search and rescue zone of the EU’s Member States) fall within the scope of EU law or an ‘autonomous EU law concept’ provided in the EU borders, asylum and visa *acquis*, such as that of ‘border surveillance’.²⁶⁶

Another cross-cutting challenge among the four countries examined in this report is the responsibility over the reception conditions within extraterritorial processing centres. None of the past or current extraterritorial processing centres manage to provide for the standards required in light of international legal obligations, including the prohibition of torture and inhuman and degrading treatment, and the prohibition of arbitrary detention. In other words, the right to liberty was disregarded in all four case studies.

The example of the UNHCR's contribution in Tunisia is emblematic in demonstrating that any kind of extraterritorial centre, even when not engaging in extraterritorial processing, entails fundamental difficulties in terms of *practical operability*. Extraterritorial initiatives quickly become unmanageable creatures for the third-country governments or international organisations involved, with huge potential for profoundly undermining the legitimacy and credibility of both the third country and the international organisation. Within the current Libyan context, EU funding for the IOM and UNHCR in providing assistance to refugees and vulnerable migrants has often been used to justify or to claim that it is reducing the negative human rights impacts following extraterritorial border management practices in that country.²⁶⁷ International organisations must remain alert so as not to be captured by various political interests to offshore the responsibilities of the EU and its Member States and to avoid being seen as 'implementers' legitimising these unlawful practices.

Any attempts at extraterritorial asylum processing within the EU context would pose significant difficulties in ensuring a 'fair asylum procedure'. Procedural deficits emerging in existing extraterritorial practices include, among others, the lack of legal representation, the lack of or uncertainties in respect of access to a review of negative decisions, the lack of interpretation, and lack of a reasoned decision in case of a negative decision. Extraterritorial arrangements in third countries rely heavily on the adequacy of the legal system and guarantees available in the third countries concerned to provide access to asylum procedures and procedural guarantees to asylum seekers. This reliance on third countries has proven problematic, if not impossible in practice. Even where procedures and some standards may be available, these are not always compatible with or 'equivalent' to human rights and EU standards and therefore able to ensure 'safety' for asylum seekers and refugees.

The deficiencies identified in the implementation and practical operability of instances of extraterritorial asylum processing have usually led individuals to lose *trust* in these systems and the

procedures put in place for them to make it 'legally' to their desired destinations. In some of the country examples under examination in section 2 of this report, migrants and asylum seekers did not know for how long they would be living in or detained in the facilities set up in third countries and were often imprisoned against their will. They also lacked proper and accurate information about their prospects and future. These findings amount to a direct contravention of ECHR and EU Charter provisions on deprivation of liberty and constitute unlawful detention. If processing centres are 'open', there are very few incentives for individuals to stay if they know that their applications will not be adjudicated positively and fairly.

The *agency* of the individual on 'where to go' also seems to be completely disregarded in all the extraterritorial mechanisms assessed in this report. In addition to the above-mentioned factors, the lack of any preference-matching system can be expected to have contributed to the ineffectiveness of a majority of the extraterritorial asylum and migration experiences. When those preferences are not met, or when mistrust in the foreseen system prevails, individuals tend to look for other alternatives, including irregular means (such as having recourse to migrant smugglers) to reach their desired destinations.

Many of those measures that started as 'emergency' responses create a trend of exceptionalism, which then becomes a new 'normal' within the EU.²⁶⁸ The extra-legal nature of most extraterritorial practices and mechanisms studied in this report provides fertile ground for damaging the integrity of any of these and future systems. These are practices particularly vulnerable to corruption, fraud and clientelism during the *continuum* of implementation. This is especially the case in respect of the precise ways in which lists of beneficiaries are managed or handled in third countries, and regarding who gets to decide who has the opportunity to legally enter the country of final destination. The increasing privatisation and involvement of companies contracted to carry out the 'management' of extraterritorial facilitates gives rise to ever-increasing concerns about financial accountability and transparency.

This may become a critical issue in respect of instances where the EU is channelling funding to ‘support’ third countries in extraterritorial asylum processing and migration management. ‘Emergency funding’ is often symptomatic of a political choice favouring extraterritoriality in ways escaping proper democratic, legal, and judicial scrutiny and accountability. It is crucial to ensure that any activities and initiatives that the EU funds abroad are fully consistent with EU legal standards and offer clear EU added value in line with the EU Treaties and Better Regulation Guidelines.²⁶⁹ EU funding must be carefully followed up and scrutinised by the European Court of Auditors and the European Ombudsman.

It is questionable whether the extraterritorialisation of asylum processing in the EU context would be ‘effective’ in achieving the intended goals, whether publicly stated or not. None of the four examples studied in this report have provided any conclusive evidence that the extraterritorial policies have led to a reduction of irregular movement. Even where a significant reduction in people intercepted at sea has been identified (as was the case for US extraterritorial policies towards Cuban nationals), it is not possible to clearly distinguish the independent impact of the extraterritorial asylum policies from other measures, including channels of legal entry for migrants.

When Member States go abroad, EU law does not allow them to incur legal and fundamental rights violations that would not be permissible ‘inside’

the EU. This means that any current or new policy initiative pertaining to the extraterritorial reach of asylum and migration policies must be compatible with and must be read in light of the current state of the EU asylum, borders and visa *acquis*. This also includes the activities of EU agencies. Appendix II of this report shows how Frontex and the European Asylum Support Office can be seen as additional spheres of responsibility of EU Member States’ actions concerning borders and asylum. Irrespective of whether these EU agencies’ mandate is to ‘support’ or ‘coordinate’ EU Member States’ activities, their role and increasingly operational tasks bring them to the heart of third-party responsibility sharing and potential liabilities in cases of fundamental rights violations.

The responsibility of these agencies to respect EU law and fundamental rights has increasingly been acknowledged in their mandates, which include express legal obligations for them to comply with EU law and fundamental rights in their actions or operations in cooperation with (or in the territory of) third countries. The Court of Justice of the European Union has been conferred the competence in the Treaties to judicially control the activities of these EU agencies, and their mandates now include ‘complaint mechanisms’ for handling alleged fundamental rights violations during their operational activities on the ground.

5. CONCLUSIONS: PORTABLE RESPONSIBILITY IN ACTION

This report identifies a number of standards and rights with profound repercussions for responsibility sharing, all of which are closely related to offshoring asylum applications and the extraterritorialisation of migration (border) management from the perspective of the EU. A key feature of the EU's legal system is 'portable responsibility'. EU legal and fundamental rights standards must be upheld by all EU Member States and agencies when they engage in asylum and border processing abroad. The scope of the EU CFR encompasses every action or inaction falling directly or indirectly within the scope of EU law.

Our examination of past and current instances of offshoring asylum by Australia and the US reveals that a similar model would pose extensive legal, practical, political and fundamental rights challenges if it were adopted and put into practice by the EU. This conclusion holds both in terms of the model's effectiveness in achieving its publicly stated goals and also with respect to its compliance with the European framework for fundamental rights.

Offshore programmes and practices are directly incompatible with the standards of the EU and Council of Europe. They would amount to legal responsibility for EU and Member States' authorities. Any idea related to extraterritorial asylum processing

would fall within the areas where the EU has exercised legal competence or where the existing 'internal' EU standards and *acquis* travel abroad. Irrespective of the actual form that extraterritoriality might adopt, it would be subject to EU scrutiny and subject to EU legal benchmarks. Doing otherwise would mean *reversing Europeanisation* in these domains and would therefore be a direct violation of the Member States' commitments, to which they have ascribed themselves under the EU Treaties, chiefly the principle of sincere and loyal cooperation enshrined in the Treaties.

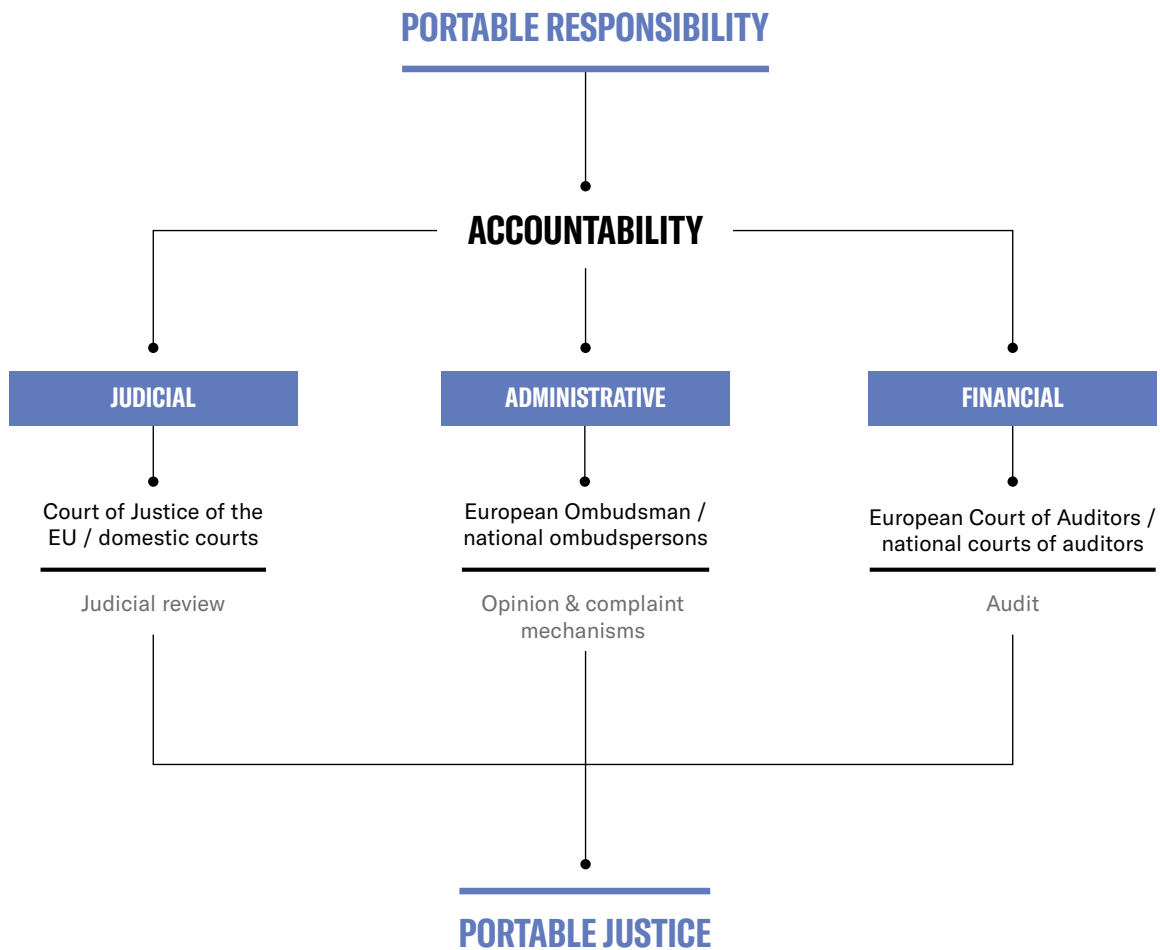
The parallel application of the concept of portable responsibility in the EU context plays an essential role in any extraterritorial actions of the EU, its agencies and the EU Member States implementing EU law. Our examination proves that the actions of the EU and its Member States abroad and/or inactions within the scope of EU law, or trying to evade it altogether, fall to varying degrees under EU and domestic *judicial, administrative* and *financial* accountabilities which, when effective and accessible, have the potential to bring '*portable justice*'.²⁷⁰ In this way, this report contributes to and suggests ways forward in "creative legal thinking"²⁷¹ to close the legal loopholes inherent in extraterritorial asylum processing and migration management.

Figure 8 provides a visual representation of the main components of portable responsibility and remedies to guarantee portable justice in the EU legal system. *Judicial accountability*, as guaranteed by the EU CFR in the form of the right to an effective remedy and to a fair trial (Article 47 EU CFR), involves the judicial scrutiny of inter alia extraterritorial acts falling under EU law by domestic courts and the Court of Justice of the European Union (CJEU). *Administrative responsibility*, which covers chiefly the

right to good administration (enshrined in Article 41 EU CFR), is overseen by actors such as the European Ombudsman, national ombudspersons and other human rights bodies. *Financial accountability* – including inter alia the legality and sound financial management (integrity) of the EU’s budget – is guaranteed, among others, by the European Court of Auditors and domestic courts of auditors (or similar bodies).

FIGURE 8.

The main components of portable responsibility and portable justice



Source: Own elaboration.

Each of these layers of responsibility and accountability provides venues and sites of resistance for individuals, human rights lawyers and civil society actors to seek effective remedies against unlawful actions and policies undermining human rights. Appendix II of this report shows how the various layers of portable responsibility apply irrespective of the actual nature, scope or territorial application of the action under scrutiny, whether legal, political or financial. They nonetheless rely on the *effectiveness* and *independence* of the judicial remedies, complaint (administrative or extrajudicial) mechanisms,²⁷² and monitoring systems and bodies at domestic and EU levels.

The combination of the three pillars of portable responsibility provide a multi-actor landscape of venues for seeking remedies with great potential for delivering portable justice. They have been designed to ensure that the EU's norms, standards and fundamental rights are upheld by the EU, its agencies and EU Member States, regardless of territoriality or degree of control. The current challenge is how to make them effective in practice and deliver justice and protection for those in need in light of international, regional and EU human rights commitments.

BIBLIOGRAPHY

AHRC (2014), “The Forgotten Children: National Inquiry into Children in Immigration Detention (2014)”, Australian Human Rights Commission, Sydney NSW, <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>.

Alcalde, A. (2007), “The Spanish Action Plan for Africa”, *Review of African Political Economy*, Vol. 34, No. 1, pp. 194-198.

Aleinikoff, T.A., D. Martin, H. Motomura, M. Fullerton and J. Stumpf (2016), *Immigration and Citizenship: Process and Policy*, 8th ed., Eagan, MN: West Publishing.

AMERM (2008), *De l’Afrique subsaharienne au Maroc: les réalités de la migration irrégulière. Résultats d’une enquête socio-économique*, Association Marocaine d’Etudes et de la Recherche sur les Migrations, Rabat, <http://amerm.ma/wp-content/uploads/2014/02/De-l%E2%80%99afrique-subsaharienne-au-Maroc-Les-r%C3%A9alites-de-la-migration-irreguli%C3%A8re.pdf>.

Amnesty International (1992), *Haiti: The Human Rights Tragedy, Human Rights Violations Since the Coup*, Amnesty International, London.

Amnesty International (2008), “Mauritania: ‘Nadie quiere tener nada que ver con nosotros’. Arrestos y expulsiones colectivas de migrantes a quienes se ha negado la entrada en Europa” [Mauritania: ‘Nobody wants to have anything to do with us’: Arrests and collective expulsions of migrants denied entry into Europe], Amnesty International, London, July, <https://www.amnesty.org/es/documents/document/?indexNumber=afr38%2f001%2f2008&language=es> (also available in Arabic, English and French).

Australian Border Force (2017), “Monthly Operational Update: October 2017”, *Australian Border Force Newsroom*, Belconnen ACT, November, <http://newsroom.border.gov.au/channels/operational-updates/releases/45c49e50-9be6-45b5-a569-foe693dea3af>.

Bender, L.D. (1975), *The politics of hostility: Castro’s revolution and United States policy*, Inter American University Press.

Bostock, C.M.-J. (2002), “The International Legal Obligations owed to the Asylum Seekers on the MV Tampa”, *International Journal of Refugee Law*, Vol. 14, pp. 279-301.

Carrera, S. and E. Guild (2017), “Offshore processing of asylum applications: Out of sight, out of mind?”, CEPS Commentary, Centre for European Policy Studies, Brussels.

Carrera, S. and M. Stefan (2018), *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* CEPS Paperback, Centre for European Policy Studies, Brussels.

Carrera, S., L. den Hertog and J. Parkin (2013), “The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?”, *European Journal of Migration and Law*, Vol. 15, No. 4.

Carrera, S., I. Rostas and L. Vosyliūtė (2017), “Responses and promising practices in the EU and selected Member States”, Centre for European Policy Studies, Brussels.

Carrera, S., L. den Hertog and M. Stefan (2017), “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS Policy Insight, Centre for European Policy Studies, Brussels, 28 April.

Carrera, S., L. den Hertog, J. Núñez Ferrer, R. Musmeci, M. Pilati and L. Vosyliūtė (2018), “Oversight and Management of the EU Trust Funds: Democratic Accountability Challenges and Promising Practices”, Study for the European Parliament, Centre for European Policy Studies, Brussels, 21 March, <https://www.ceps.eu/publications/oversight-and-management-eu-trust-funds-democratic-accountability-challenges-and>.

Cassarino, J.-P. (2007), “Informalising Readmission Agreements in the EU Neighbourhood”, *International Spectator*, Vol. 42, No. 2, pp. 179-196.

CEAR (2007), *La situación de los refugiados en España* [The situation of refugees in Spain], Comisión Española de Ayuda al Refugiado, Madrid, <https://cear.es/wp-content/uploads/2013/05/informe-2007-de-CEAR.pdf>.

CEAR (2008), *Informe de Evaluación del Centro de Detención de Migrantes en Nouadhibou (Mauritania)*, Comisión Española de Ayuda al Refugiado, Madrid, December.

CeTuMa (2013), “Rapport sur le camp des réfugiés et des demandeurs d’asile de Choucha”, Centre de Tunis pour la Migration et l’Asile, Tunis, January, https://afrique-europe-interact.net/873-2-Rapport-sur-Choucha.html%3Farticle_id%3D214%26aid%3D873%26clang%3D2+%&cd=1&hl=fr&ct=clnk&gl=fr.

Cherti, M. and P. Grant (2013), “The Myth of Transit: Sub-Saharan Migration in Morocco”, Institute for Public Policy Research, London, June, <https://www.ippr.org/research/publications/the-myth-of-transit-sub-saharan-migration-in-morocco>.

CNDH (2013), “Foreigners and Human Rights in Morocco: For a radically new asylum and migration policy”, Conseil national des droits de l’Homme, Rabat, Executive Summary available at http://www.cndh.ma/sites/default/files/foreigners_and_human_rights_summary.pdf.

Costello, C. (2016), *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press.

Dastaryi, A. (2015), *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay*, Cambridge: Cambridge University Press.

De Bel-Air, F. (2016), “Migration Profile: Morocco”, MPC Policy Brief 2016/05, Migration Policy Centre, European University Institute, Florence, April, <http://hdl.handle.net/1814/41124>.

Department of Immigration and Border Protection (2017), “Fact Sheet: Australia’s Refugee and Humanitarian programme”, Australian Government, 28 November, <https://www.border.gov.au/about/corporate/information/fact-sheets/6orefugee>.

Di Bartolomeo, A., T. Fakhoury and D. Perrin (2010), “CARIM – Migration Profile: Mauritania”, European University Institute, Florence, March, <http://hdl.handle.net/1814/22440>.

Dourgnon, P. and H. Kassar (2014), “Refugees in and out North Africa: A study of the Choucha refugee camp in Tunisia”, *European Journal of Public Health*, Vol. 24, Supplement 1, pp. 6-10.

Dünnwald, S. (2016), “Europe’s global approach to migration management: Doing border in Mali and Mauritania”, in R. Zaiotti (ed.), *Externalizing Migration Management: Europe, North America and the spread of ‘remote control’ practices*, Abingdon: Routledge, pp. 129-149.

Dyer, Z. (2016), “U.S.-bound Cuban Migrants Stranded in Costa Rica Camps”, *L.A. Times*, 20 January.

ECRE (2017), “Agent of Protection? Shaping the EU Asylum Agency: ECRE’s Analysis of the Potential and Risks Contained in the Proposal to Transform EASO into an EU Asylum Agency”, ECRE Policy Note No. 4, European Council on Refugees and Exiles, Brussels, <https://www.ecre.org/wp-content/uploads/2017/01/Policy-Note-04.pdf>.

Essex, R. (2016), “Healthcare and clinical ethics in Australian offshore immigration detention”, *International Journal of Human Rights*, Vol. 20, No. 7, pp. 1039-1053.

European Commission (2015), “Better Regulation Guidelines”, Commission Staff Working Document, SWD(2015) 111 final, Strasbourg, 19.5.2015.

European Commission (2016), “Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen – A Roadmap”, COM(2016) 120 final, Brussels, 4.3.2016.

European Commission (2017), “Better Regulation Guidelines”, Commission Staff Working Document, SWD(2017) 350, Brussels, 7.7.2017, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>.

Euro-Mediterranean Human Rights Network (2012), “Asylum and migration in the Maghreb, Country Fact Sheet: Tunisia”, Euro-Mediterranean Human Rights Network, Copenhagen, December, <http://www.refworld.org/docid/514d78422.html>.

European Court of Auditors (2017), “The Békou EU Trust Fund for the Central African Republic: A Hopeful Beginning despite Some Shortcomings”, Special Report No. 11/2017, Luxembourg.

Fargues, P. and S. Bonfati (2014), “When the best option is a leaky boat: Why migrants risk their lives crossing the Mediterranean and what Europe is doing about it”, MPC Policy Brief 2014/05, Migration Policy Centre, European University Institute, Florence, October, <http://hdl.handle.net/1814/33271>.

FRA (2013), “Fundamental rights at Europe’s southern sea borders”, EU Agency for Fundamental Rights, Vienna, <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>.

FRA (2014), *Handbook on European law relating to asylum, borders and immigration*, EU Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union.

FRA (2016), *Scope of the principle of non-refoulement in contemporary border management: Evolving areas of law*, EU Agency for Fundamental Rights, Luxembourg: Publication Office of the EU.

Frelick, B. (2005), “Abundantly Clear: Refoulement”, *Georgetown Immigration Law Journal*, Vol. 19, No. 1.

Frenzen, N. (2010), “US Migrant Interdiction Practices in International and Territorial Waters”, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers.

Frenzen, N.W. (2017), “The Legality of Frontex Operation Hera-Type Migration Control Practices in Light of the Hirsi Judgement”, in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York: Routledge, pp. 294-313.

FTDES (2017), “Tunisie: évacuation du camp de Choucha”, Forum Tunsien pour les Droits Economiques et Sociaux, Tunis, 23 June, <http://bit.ly/2z9he4z>.

Fullerton, M. (2004), “Cuban Exceptionalism: Migration and Asylum in Spain and the United States”, *Inter-American Law Review*, Vol. 35, No. 3.

Gammeltoft-Hansen, T. (2013), “Creative Legal Thinking and the Evolution of International Refugee Law”, *Lakimies*, 112, No. 1, pp. 99-103.

Gammeltoft-Hansen, T. and J. Vedsted-Hansen (2017), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York, NY: Routledge.

Garcés-Mascareñas, B. (2016), “Frontera sur: laboratorio de las políticas europeas”, CIDOB Opinion, Barcelona Centre for International Affairs, Barcelona, March.

Garelli, G. and M. Tazzioli (2017), “Choucha beyond the Camp: Challenging the Border of Migration Studies”, in N. De Genova (ed.), *The Borders of “Europe”: Autonomy of Migration, Tactics of Bordering*, Durham, NC: Duke University Press, pp. 165-184.

German Ministry of the Interior (2005), “Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Einrichtung einer EU-Aufnahmeeinrichtung in Nordafrika”, Berlin, 9 September.

Ghezelbach, D. (2015), “Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia”, in J.-P. Gauci, M. Giuffré and E. Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Boston/Leiden: Brill.

Gleeson, M. (2016a), “Where to from here? Report from the Expert Roundtable on regional cooperation in the Asia-Pacific”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, 12-13 September, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Where_to_from_here.pdf.

Gleeson, M. (2016b), “FactCheck Q&A: How much was spent on the Cambodia refugee deal and how many were settled?”, *The Conversation*, 21 November, <https://theconversation.com/factcheck-qanda-how-much-was-spent-on-the-cambodia-refugee-deal-and-how-many-were-settled-68807>.

Gleeson, M. (2017a), “Factsheet: Refugee status determination on Manus Island, PNG”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, January, <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-refugee-status-determination-asylum-seekers-manus-island>.

Gleeson, M. (2017b), “Factsheet: Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, January, <http://www.kaldorcentre.unsw.edu.au/publication/cambodia-agreement>.

Gleeson, M. (2017c), “Factsheet: Refugee status determination in Nauru”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, January, <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-refugee-status-determination-asylum-seekers-nauru>.

Godenau, D. (2012), “An institutional approach to bordering in islands: The Canary Islands on the African-European migration routes”, *Island Studies Journal*, Vol. 7, No. 1, pp. 3-18.

Godenau, D. (2014), “Irregular Maritime Immigration in the Canary Islands: Externalization and Communitarisation in the Social Construction of Borders”, *Journal of Immigrant & Refugee Studies*, Vol. 12, No. 2, pp. 123-142.

Godenau, D. and A. López Sala (2016), “Multi-layered Migration Deterrence and Technology in Spanish Maritime Border Management”, *Journal of Borderland Studies*, Vol. 31, No. 2, pp. 151-169.

Godenau, D. and V.M. Zapata Hernández (2008), “The Canary Islands: A transit region between Africa and Europe”, in *Documentos CIDOB*, No. 17, Barcelona Centre for International Affairs, Barcelona, pp. 13-43, https://www.cidob.org/es/publicaciones/series_pasadas/documentos/migraciones/immigration_flows_and_the_management_of_the_eu_s_southern_maritim_borders.

Goodwin-Gill, G. (2007), “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations”, in S. Blay, J. Burn and P. Keyzer (eds), *Offshore Processing of Asylum Seekers: The Search for Legitimate Parameters*, UTS Law Review No. 9, New South Wales: Halstead Press, pp. 26-40.

Goodwin-Gill, G.S. and J. McAdam (2007), *The Refugee in International Law*, 3d ed., Oxford: Oxford University Press.

Haon, N. (2012), “Tunisie: pas de printemps pour les migrants”, *Plein Droit*, No. 94, <https://www.gisti.org/spip.php?article2935>.

Hathaway, J.C. (2005), *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press.

Helton, A. (1993), “The US Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects”, *New York Law School Journal of Human Rights*, Vol. 10.

Henken, T. (2005), “*Balseros, Boeros, and El Bombo*: Post-1994 Cuban Immigration to the United States and the Persistence of Special Treatment”, *Latino Studies*, Vol. 3, No. 3.

Hipsman, F. and D. Meissner (2015), “In-Country Refugee Processing in Central America: A Piece of the Puzzle”, Migration Policy Institute, Washington, DC, August.

HRW (2002), “‘By invitation only’: Australian Asylum Policy”, *Australia*, Vol. 14, No. 10(C), Human Rights Watch, New York, NY, December, <https://www.hrw.org/reports/2002/australia/australia1202.pdf>.

HRW (2014), “Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco”, Human Rights Watch, New York, NY, February, https://www.hrw.org/sites/default/files/reports/morocco0214_ForUpload_o.pdf.

IGC (1994), “Working Paper on Reception in the Region of Origin”, Intergovernmental Consultations on Migration, Asylum and Refugees, September, http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3084.

IOM (2009), “Migration en Mauritanie: Profil National 2009”, International Organisation for Migration, Geneva, http://www.iomdakar.org/profiles/sites/default/files/Mauritanie_Profile_2009.pdf.

IOM Tunisia (2014), “Migrants Statistical Overview Assisted Voluntary Return, Reintegration and Resettlement”, International Organization for Migration, Tunis, May, <https://tunisia.iom.int/sites/default/files/activities/documents/Migrants%20assisted%20oby%20IOM%20-%20June2014.pdf>.

Kaldor Centre (2017), “Fact Sheet: Australia-United States Resettlement Arrangement”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, November, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australia_US_Resettlement_Arrangement%20November%202017.pdf.

Kaldor, A. and R. Kaldor (2016), “Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors [2016] HCA 1”, Case Note, Centre for International Refugee Law, NSW, July, <http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1>.

Kandel, W.A. (2016), “Unaccompanied Alien Children: An Overview”, CRS Report for Congress, Congressional Research Service, Washington, DC, 11 May.

Klein, N. (2014), “Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants”, *Melbourne Journal of International Law*, Vol. 15, No. 2, pp. 413-422.

Kneebone, S. (2006), “The Pacific Plan: The Provision of ‘Effective Protection’?”, *International Journal of Refugee Law*, Vol. 18, No. 3-4, pp. 696-721.

Kneebone, S. (2010), “Migration Control at Sea – The Australian case”, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden/Boston: Martinus Nijhoff Publishers, pp. 347-374.

Kneebone, S.Y. (2015), “Introduction to Special Issue on Access to Asylum: Current Challenges and Future Directions”, *Immigration Asylum and Nationality Law*, Vol. 29, No. 2, pp. 135-140.

Kneebone, S.Y. (2016), “Comparative regional protection frameworks for refugees: Norms and norm entrepreneurs”, *International Journal of Human Rights*, Vol. 20, No. 2, pp. 153-172.

Kneebone, S.Y. (2017), “Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia”, *Refugee*, Vol. 33, No. 1, pp. 29-41, <https://refuge.journals.yorku.ca/index.php/refuge/article/view/40446>.

Kneebone, S.Y. (ed.) (2009), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, Cambridge: Cambridge University Press.

Kneebone, S.Y. and S. Pickering (2007), “Chapter 7: Australia and the Pacific Region”, in S. Kneebone and F. Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead*, Oxford: Berghahn Books, pp. 167-187.

Krogsad, J. and J. Radford (2017), “Key Facts about Refugees in the U.S.”, *Fact Tank*, Pew Research Center, Washington, DC, 30 January, <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>.

Lahlou, M. (2015), “Morocco’s Experience of Migration as a Sending, Transit and Receiving Country”, IAI Working Papers 15|30, Instituto Affari Internazionali, Rome, September, <http://www.iai.it/en/publicazioni/moroccos-experience-migration-sending-transit-and-receiving-country>.

Lahlou, M. (2017), “La politique migratoire marocaine, un exemple à suivre?”, *Orient XXI*, 31 January, <https://orientxxi.info/magazine/la-politique-migratoire-marocaine-un-exemple-a-suivre,1689>.

Legomsky, S.H. (2006), “The USA and the Caribbean Interdiction Program”, *International Journal of Refugee Law*, Vol. 18.

Léonard, S. and C. Kaunert (2016), “The extra-territorial processing of asylum claims”, *Forced Migration Review*, No. 51, pp. 48-50, <http://www.fmreview.org/destination-europe/leonard-kaunert.html>.

López Sala, A. (2015), “Exploring Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border”, *Geopolitics*, Vol. 20, No. 3, pp. 513-534.

Macron, E. (2017), “Initiative pour l’Europe: Discours d’Emmanuel Macron pour une Europe souveraine, unie, démocratique”, Paris, 26 September, <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>.

Magner, T. (2004), “A Less than ‘Pacific’ Solution for Asylum Seekers in Australia”, *International Journal of Refugee Law*, Vol. 16, No. 1, pp. 53-90.

Martin, D.A. (2005), *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement*, Migration Policy Institute, Washington, DC.

Martin, D.A. T.A. Aleinikoff, H. Motomura and M. Fullerton (2013), *Forced Migration*, 2nd ed., Eagan, MN: West Publishing.

McMahon, S. and N. Sigona (2016), “Boat migration across the Central Mediterranean: Drivers, experiences and responses”, MEDMIG Research Brief No. 3, September, <http://www.medmig.info/research-brief-03-boat-migration-across-the-central-mediterranean/>.

Millbank, A. (2001), “The Detention of Boat People”, Current Issues Brief 2000-2001, No. 8, Parliament of Australia, Department of the Parliamentary Library, Canberra ACT, February, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0001/01CIB08.

Ministerio del Interior (2008), “Balance de la lucha contra la Inmigración Ilegal”, Spanish Ministry of the Interior, Madrid, January, <http://www.interior.gob.es/documents/10180/1209647/Balance+de+la+lucha+contra+la+inmigraci%C3%B3n+ilegal.pdf/ebd49ee1-155d-4807-b505-5e0696aed4a>.

Mole, N. and C. Meredith (2010), *Asylum and the European Convention on Human Rights*, Human rights files, No. 9, Strasbourg: Council of Europe Publishing.

Moreno-Lax, V. (2017), “The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia”, Policy Brief No. 4, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, May, https://uploads.guim.co.uk/2017/05/02/Policy_Brief_4_Interdiction_of_asylum_seekers_at_sea.pdf.

Moreno-Lax, V. and C. Costello (2014), “The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model”, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *Commentary on the EU Charter of Fundamental Rights*, Oxford: Hart Publishing, pp. 1657-1683.

Moss, P. (2015), “Review into recent allegations relating to the conditions and circumstances of the Regional Processing Centre in Nauru” (The Moss Review), Parliament of Australia, Canberra ACT, February, <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>.

Mottet, A. (2016), “Répartition et circulation : les enjeux de la catégorisation dans le camp de Choucha (Tunisie)”, *Critique internationale*, No. 72, pp. 21-34.

MSF (2011), “De la fuite à la deshérence: les victimes négligées du conflit en Libye”, Médecins Sans Frontières, Paris, June, <https://www.msf.fr/sites/www.msf.fr/files/12e66f05d7569d4d8cc2c7496c7ddof6.pdf>.

MSF (2013), “Violence, Vulnerability and Migration: Trapped at the Gates of Europe”, Médecins Sans Frontières, Barcelona, June, https://www.doctorswithoutborders.org/sites/usa/files/Trapped_at_the_Gates_of_Europe.pdf.

Nauruan Department of Justice & Border Control (2013), “Refugee Status Determination Handbook”, Government of Nauru, August, http://www.naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf.

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*, Vol. 5, No. 3, pp. 303-341.

Noll, G. and J. Fagerlund (2002), “Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests”, *Refugee Research Programme* 04/2002, Danish Centre for Human Rights, Copenhagen, April, <http://www.unhcr.org/3cd000a52.html>.

Parliament of Australia (2002), “A certain maritime incident”, Main Report of the Select Committee for an inquiry into a certain maritime incident, Parliament of Australia, Canberra ACT, October, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/index.

Parliament of Australia (2015), “Taking responsibility: Conditions and circumstances at Australia’s Regional Processing Centre in Nauru”, Final Report of the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra ACT, August, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report.

Parliament of Australia (2016), “Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea”, Interim Report of the Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra ACT, May https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs.

Parliament of Australia (2017), “Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre”, Report of the Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra ACT, April, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report.

Pastor, P. (2016), “The American Reception and Resettlement of Hungarian Refugees in 1956-1957”, *Hungarian Cultural Studies*, Vol. 9, pp. 197-205, <https://ahea.pitt.edu/ojs/index.php/ahea/article/viewFile/255/440>.

Phillips, J. (2012), “The ‘Pacific Solution’ revisited: A statistical guide to the asylum seeker caseload on Nauru and Manus Island”, Parliamentary Library Background Note, Parliament of Australia, Canberra ACT, 4 September, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf;fileType=application%2Fpdf.

Phillips, J. (2015), "Asylum seekers and refugees: What are the facts?", *Parliamentary Library Research Paper*, Parliament of Australia, Canberra ACT, March, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/HGNW6/upload_binary/HGNW6.pdf;fileType=application/pdf#search=%22asylum%20seekers%20and%20refugees%22.

Phillips, J. (2017), "Boat arrivals and boat 'turnbacks' in Australia since 1976: A quick guide to the statistics", Research Paper Series, 2016-17, Parliament of Australia, Department of Parliamentary Services, Canberra ACT, January, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4068239/upload_binary/4068239.pdf;fileType=application/pdf.

Phillips, M. (2013), "Out of sight, out of mind: Excising Australia from the migration zone", *The Conversation*, 17 May, <https://theconversation.com/out-of-sight-out-of-mind-excising-australia-from-the-migration-zone-14387>.

Planes-Boissac, V. (2012), "Asylum and Migration in the Maghreb – Country Fact Sheet: Tunisia", Euro-Mediterranean Human Rights Network, Copenhagen, December, <http://www.refworld.org/docid/514d78422.html>.

Red Cross (2009), "Migraciones africanas hacia Europa. Estudio cuantitativo y comparativo. Años 2006–2008. Centro nº 6 de Nouadibou, Mauritania" [African migration towards Europe. Quantitative and comparative study. Years 2006–2008. Centre No. 6 of Nouadhibou, Mauritania], Cruz Roja Española, Madrid, http://www.cruzroja.es/pls/portal30/docs/PAGE/CANCRE/COPY_OF_ACCIONINTERNACION/DOCUMENTACION/INFODOCUS/DOCUTEK/MIGRACIONES_FINAL.PDF.

Renwick, D. (2016), "Central America's Violent Northern Triangle", CFR Backgrounder, Council on Foreign Relations, New York, NY, January, <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.

Reynolds, S. and H. Muggeridge (2008), "Remote Controls: How the UK Border Controls are Endangering the Lives of Refugees", Refugee Council Report, London, December, https://www.refugeecouncil.org.uk/assets/0001/7043/Remote_Controls.pdf.

Rivera, M.A. (1991), *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis*, Lanham, MD: University of America Press.

Roesch, R., G. Jacovella, A. Bezzi and J. Garms (2014), "The Deficiencies of UNHCR's RSD Procedure: The Case of Choucha Refugee Camp in Tunisia", *Oxford Monitor of Forced Migration*, Vol. 14, No. 1, pp. 46-49.

Ryan, B. and V. Mitsilegas (2010), *Extraterritorial Immigration Control: Legal Challenges*, Leiden/Boston: Martinus Nijhoff Publishers.

Sanggaan, J.-P., G. Ferguson and B. Haire (2014), "Ethical Challenges for Doctors Working in Immigration Detention", *Medical Journal of Australia*, Vol. 201, No. 7, pp. 377-378.

Sbouaï, S. (2013), "Sit-in d'une trentaine de réfugiés du camp de Choucha à la Kasbah", *Nawaat.org*, 11 April, <https://nawaat.org/portail/2013/04/11/sit-in-dune-trentaine-de-refugies-du-camp-de-choucha-a-la-kasbah/>.

Skolnik, C. (2017), "Trump Admin Ends Program for Central American Children", *Long Island Business News*, 23 August.

Tarvieso-Diaz, M.F. (1998), "Immigration Challenges and Opportunities in a Post-Transition Cuba", *Berkeley Journal of International Law*, Vol. 16, No. 2.

UNHCR (1986), "Denmark: Draft resolution, International procedures for the protection of refugees", UN Doc. A/C.3/41/L.51, UN General Assembly, 12 November, UN High Commissioner for Refugees, Geneva, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/41/L.51.

UNHCR (2011), "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees", UN High Commissioner for Refugees, Geneva, December, <http://www.refworld.org/docid/4f33c8d92.html>.

UNHCR (2014), "UNHCR Factsheet - Regional Office for South-East Asia", UNHCR Regional Office for South-East Asia, Bangkok, September, <http://www.unhcr.org/en-au/protection/operations/519f67fc9/south-east-asia-fact-sheet.html>.

UNHCR (2015), "UNHCR Mid-year Trends 2014", UN High Commissioner for Refugees, Geneva, January, <http://www.unhcr.org/statistics/unhcrstats/54aa91d89/mid-year-trends-june-2014.html>.

UNHCR (2016), "UNHCR Resettlement Handbook, Country Chapter: Australia - By the Government of Australia", UN High Commissioner for Refugees, Geneva, <http://www.unhcr.org/3c5e542d4.html>.

UNHCR (2017), "European Monthly Report", UN High Commissioner for Refugees, Geneva, July.

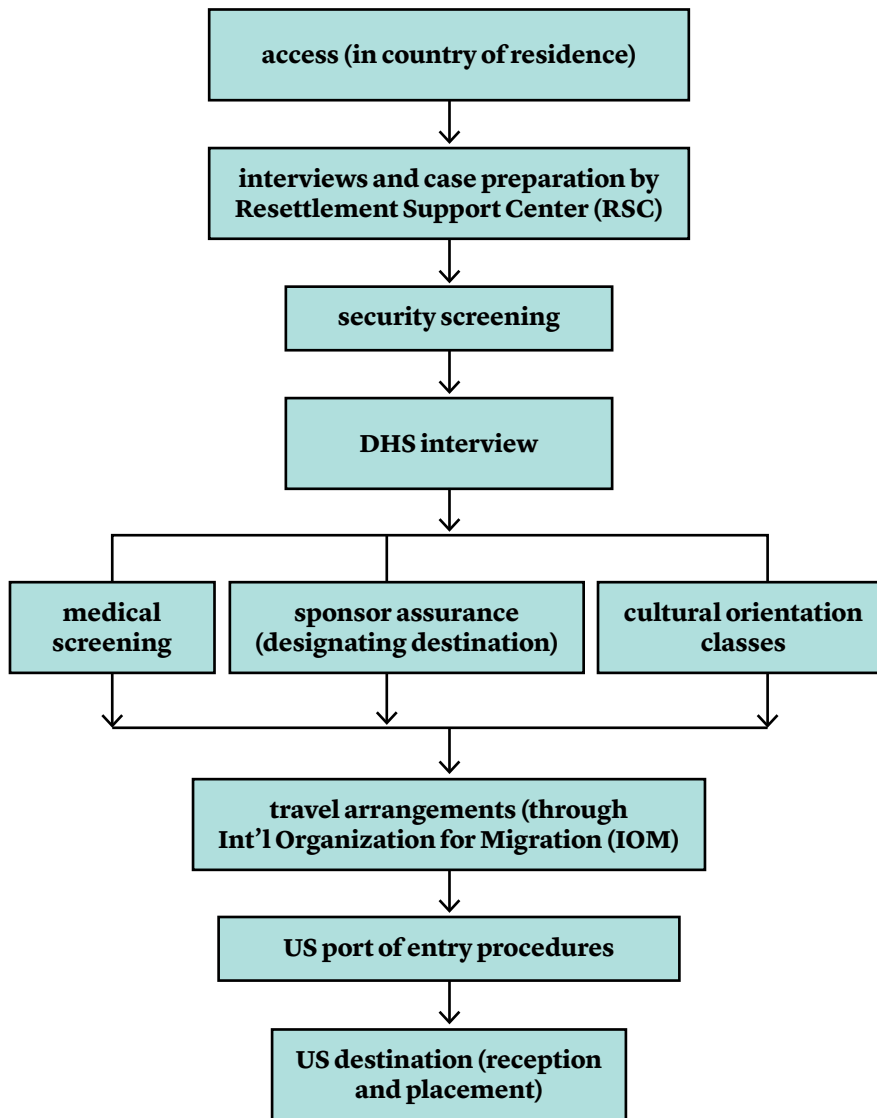
Voon, F. (2017), "Factsheet: Turning Back Boats", Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, May, <http://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats>.

Wasem, R.E. (2009), "Cuban Migration to the United States: Policy and Trends", CRS Report for Congress, Congressional Research Service, Washington, DC, June, <https://fas.org/sgp/crs/row/R40566.pdf>.

Wyman, M. (1998), *DPs: Europe's Displaced Persons, 1945-51*, Ithaca, NY: Cornell University Press.

APPENDIX I. US CROSS-COUNTRY EXPERIENCE

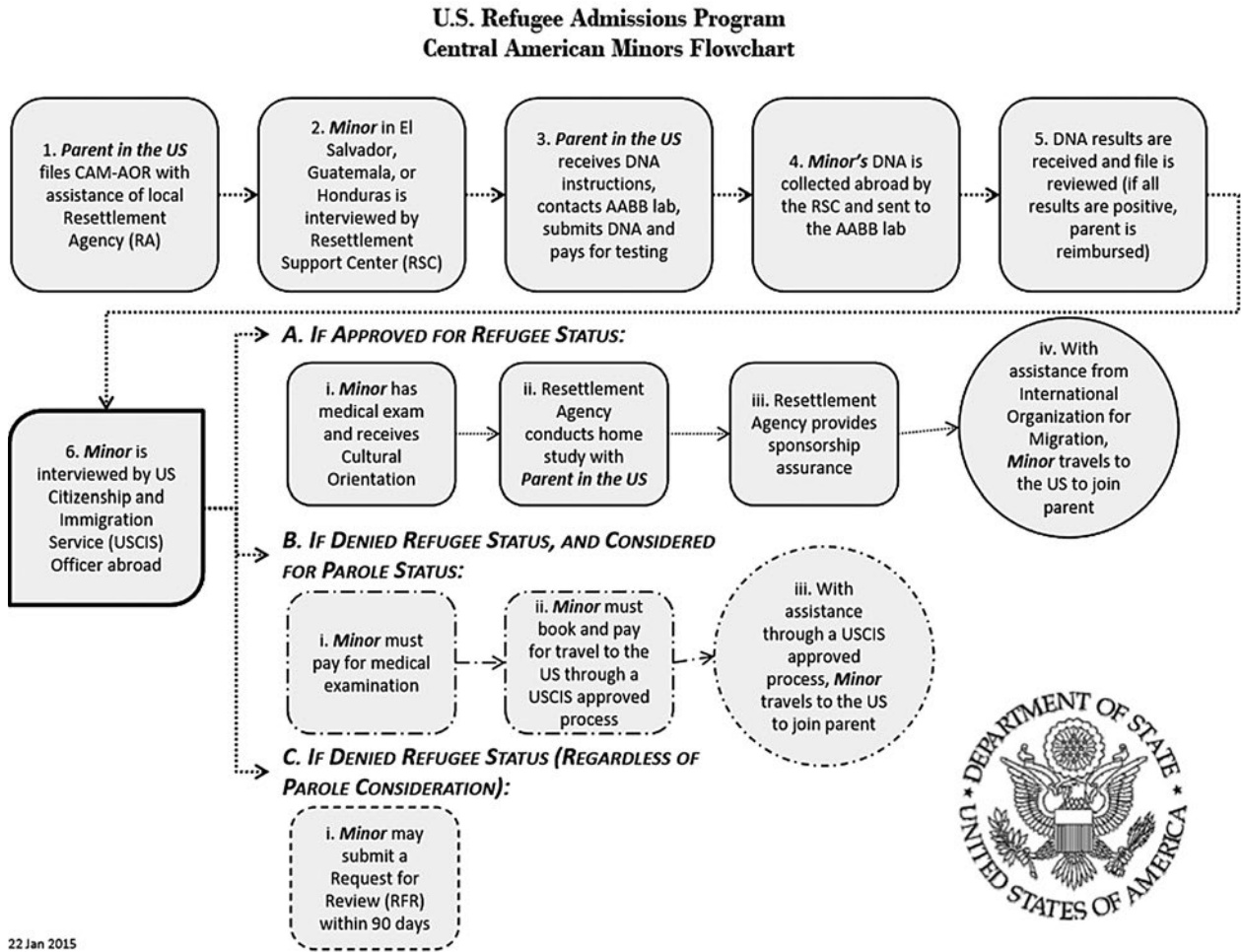
FIGURE AI.1
US overseas refugee processing



Sources: Martin et al. (2013), op. cit., pp. 896-906; D.A. Martin, The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement, Migration Policy Institute, Washington, DC (2005), pp. 67-68.

FIGURE AI.2

US Refugee Admissions Program: Central American Minors flowchart



Source: US Department of State, Refugee Processing Center, CAM Flowchart (January 2015) (<http://www.wrapsnet.org/cam-program/>).

TABLE AI.1

US Coast Guard migrant interdictions by nationality of alien (full data)

YEARS	HAITI	DOMINICAN REPUBLIC	CHINA	CUBA	MEXICO	ECUADOR	OTHER
1982	171	0	0	0	0	0	0
1983	511	6	0	44	0	0	5
1984	1,581	181	0	7	2	0	37
1985	3,721	113	12	51	0	0	177
1986	3,422	189	11	28	1	0	74
1987	2,866	40	0	46	1	0	38
1988	4,262	254	0	60	11	0	13
1989	4,902	664	5	257	30	0	5
1990	871	1,426	0	443	1	0	95
1991	2,065	1,007	138	1,722	0	0	58
1992	37,618	588	181	2,066	0	0	174
1993	4,270	873	2,511	2,882	0	0	48
1994	25,302	232	291	38,560	0	0	58
1995	909	3,388	509	525	0	0	36
1996	2,295	6,273	61	411	0	2	38
1997	288	1,200	240	421	0	0	45
1998	1,369	1,097	212	903	30	0	37
1999	1,039	583	1,092	1,619	171	298	24
2000	1,113	499	261	1,000	49	1,244	44
2001	1,391	659	53	777	17	1,020	31
2002	1,486	177	80	666	32	1,608	55
2003	2,013	1,748	15	1,555	0	703	34
2004	3,229	5,014	68	1,225	86	1,189	88
2005	1,850	3,612	32	2,712	55	1,149	45
2006	1,198	3,011	31	2,810	52	693	91
2007	1,610	1,469	73	2,868	26	125	167
2008	1,582	688	1	2,99	47	220	65
2009	1,782	727	35	799	77	6	41

Source: US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, available at the US Census Bureau website (<http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>).

APPENDIX II. THE CONCEPT OF ‘PORTABLE RESPONSIBILITY’ AND ROLE OF EU AGENCIES AND EU FUNDING IN EXTRATERRITORIALISATION²⁷³

AII.1 PORTABLE RESPONSIBILITY IN EU LAW AND THE ROLE OF REGIONAL AND INTERNATIONAL STANDARDS

The legal framework in which the EU’s actions in the area of asylum and migration management are situated is well developed and multi-layered. To understand the EU legal framework, norms and standards that must be respected in EU action in the field of asylum and migration, it is essential to note the interrelationship between the EU *acquis* itself, the standards in regional human rights law (i.e. the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) jurisprudence), and relevant norms and standards flowing from international (human rights) law, such as those developed under the remit of the UN.

A specificity of EU law, in comparison with these regional and international standard-setting venues, is the existence of a ‘functional approach’ to the applicability of EU law and fundamental rights in cases of extraterritorial policies and practices. This entails that acts of EU institutions, bodies, agencies and offices, as well as acts of EU Member States in the scope of EU law, are covered by the norms and standards set out in the EU *acquis*, the Treaties and the EU Charter of Fundamental Rights (EU CFR). In other words, the applicability of EU norms and standards ‘abroad’ is sufficiently determined by

whether the issue falls within the scope of EU law. In fact, this is clearly set forth, for example, regarding the applicability of EU fundamental rights standards in Article 51 EU CFR. EU constitutional standards therefore run in parallel with actions or inactions of Member States and EU actors when these fall under the remit of EU law.²⁷⁴

EU standards are different from the applicability of, for instance, the human rights standards set forth in the ECHR. The applicability of the ECHR is contingent on Article 1 ECHR, which states that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. The ECtHR has, on a number of occasions, interpreted this provision to include certain instances of the extraterritorial exercise of jurisdiction, especially where the state concerned exercises effective control of an area outside its national territory.²⁷⁵ In the case of *Hirsi Jamaa and others v Italy*, the ECtHR ruled that – in the context of the “pushback operations” by the Italian armed forces – Italy had assumed both continuous and exclusive *de jure* and *de facto* control over the applicants.²⁷⁶

Costello identifies three relevant scenarios under which the ECtHR would consider the activities of a State Party to fall within its *de facto* jurisdiction: first, where a State exercises control over a territory; second, where the State exercises control over people, and third, based on “a combination of the territorial and personal factors and a background

exercise of public powers”.²⁷⁷ More recently, the ECtHR has confirmed its doctrine of *Hirsi* on de jure and de facto control in respect of extraterritorial jurisdiction in *N.D. and N.T. v Spain*.²⁷⁸ In the latter case, concerning the operational border-control practices by Spanish authorities in Melilla (as discussed in section 2.2), the Strasbourg Court reiterated that the *Hirsi* doctrine would be applicable to the case studies on extraterritorial border management, mentioned above (see section 4).

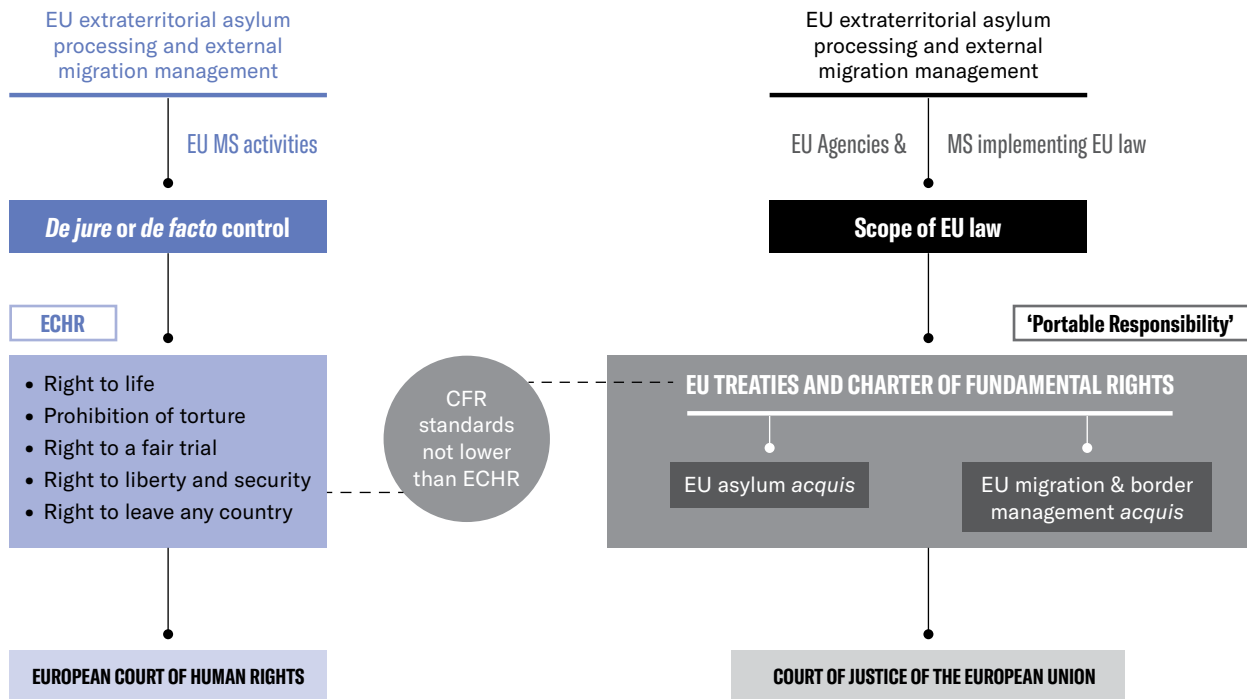
The functional approach to the applicability of EU law escapes from the shackles of having to determine de jure or de facto control. The ‘portable justice’ approach characterising the notion of fundamental rights jurisdiction in EU law therefore allows for a more liberal applicability of norms and standards to the actions of the EU (and its Member States

and agencies) in respect of the extraterritoriality of asylum processing and migration management. The ECHR and the case law of the Strasbourg Court relate to EU norms and standards in another manner.

Article 52(1) of the EU CFR states that “in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection.” In other words, the scope of EU fundamental rights applicable to the extraterritorial processing of asylum and migration management are at least at the same level as those offered by the ECHR. Nevertheless, the ECHR cannot address the issues related to the EU’s specificities or the activities of the EU’s Justice and Home Affairs agencies.

FIGURE AII.1

Determining jurisdiction and responsibility: Council of Europe (de jure and de facto control) vs EU (functional approach/portable responsibility)



Note: MS = Member State.

Source: Authors' own elaboration.

The very foundations of the EU acquis in the area of asylum and migration (primary EU law) are, first and most importantly, the EU Treaties and the EU CFR. Unlike other international jurisdictions, this is the first point of entry in any standard-setting exercise applying to extraterritorial jurisdiction in the areas of asylum, migration and borders in the EU. In the EU's Area of Freedom, Security and Justice, the EU is committed to "frame[ing] a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals".²⁷⁹ For migration or rather border management, this entails developing a policy with a view to "carrying out checks on persons and effective monitoring of the crossing of external borders" (border management) as well as to "develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows [and] fair treatment of third-country nationals residing legally in Member States" (immigration policy).²⁸⁰ For asylum policies, the EU Treaties prescribe the establishment of the Common European Asylum System (CEAS), in accordance with inter alia the 1951 Geneva Convention and the 1967 Protocol. Full compliance with both the Convention *and* the Protocol are therefore the minimum EU benchmark in asylum processing, which is formally enshrined in the right to asylum in Article 18 of the EU CFR.

The EU CFR applies to and is legally binding on all European institutions, bodies, offices and agencies, as well as on Member States in the implementation of EU law (Article 51 EU CFR). A number of fundamental rights in the Charter are relevant in respect of (the extraterritorialisation of) asylum and migration (border) management. These include the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to asylum, the prohibition of collective expulsion and *refoulement*, and the right to an effective remedy and to a fair trial. In respect of the rights contained in the EU CFR, it should be noted that the level of protection of the fundamental rights in the Charter may not be inferior to inter alia the same rights enshrined in the ECHR (Article 53 EU CFR).

The EU legal system, and in particular the EU CFR, offers a 'human rights+' framework for determining states' responsibility in the areas of asylum, borders

and migration management abroad falling within the scope of EU law and policies. The EU fundamental rights system provides an additional safeguard to the ECHR standards when assessing the lawfulness and feasibility of extraterritorial asylum and border practices, particularly in cases where the human rights jurisdiction cannot be sufficiently proven or ascertained.

Examining the EU standards in relation to border management that have extraterritorial implications, relevant secondary EU legislation includes primarily the Schengen Borders Code (SBC), which covers activities related to border controls and surveillance.²⁸¹ The SBC prescribes a number of norms that are relevant for the extraterritorial application of migration management. Thus, refusal of entry into the Schengen area requires a "substantiated decision stating the precise reasons for the refusal" by "an authority empowered by national law". People who have been refused entry into the Schengen area have the right to appeal in accordance with national law.

Importantly, the SBC explicitly requires Member States, when applying the provisions of the SBC, to "act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), relevant international law, including the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights" (emphasis added).²⁸²

In respect of asylum processing abroad, relevant secondary legislation instruments of the CEAS are, among others, the Receptions Conditions Directive,²⁸³ and the Asylum Procedures Directive,²⁸⁴ which are currently being revised and are under interinstitutional renegotiation. The Receptions Conditions Directive outlines a number of standards that must be respected for the reception of applicants for international protection, including the right to information and access to judicial review of the detention measure. The Asylum Procedures Directive guarantees seekers of international protection the right of access to the procedure and in respect of a decision on an asylum application rights to a 'fair

procedure', along with the right to legal assistance and the right to an effective remedy. Furthermore, both the Reception Conditions Directive and the Asylum Procedures Directive promote adherence to fundamental rights, in particular the EU CFR.²⁸⁵

All of these aforementioned standards in secondary EU asylum law find their counterpart in the right to an effective remedy in the EU CFR and/or the ECHR (and thus indirectly also in the EU CFR).²⁸⁶ These secondary EU asylum acquis standards can therefore be seen as specifications of or 'giving substance' to the right to asylum and the right to an effective remedy under the EU CFR, notwithstanding the limited territorial scope of the Reception Conditions and the Asylum Procedures Directives.

Having briefly identified the relevant EU legal framework concerning the offshoring of asylum and extraterritorial migration (border) management, it is important to highlight the European human rights standards that are relevant to the extraterritoriality of asylum and migration management as set forth by the ECHR. The first ECHR standard relevant in this regard is the prohibition of torture in Article 3 ECHR. The Court has on numerous occasions considered that, notwithstanding the right of States to control migration, measures for that purpose may be in contravention of the prohibition of torture in cases of a breach of the *non-refoulement* obligation of States.²⁸⁷ Another important right enshrined in the ECHR in respect of the extraterritorial processing of asylum and external migration management is the right to an effective remedy (Article 13 ECHR).²⁸⁸

The various judgments of the ECtHR have set out the obligations of States concerning the right to a fair trial, which includes the right of access to a court. Regarding the right to an effective remedy, an example of a breach thereof can be found in *Hirsi Jaama and others v Italy*, in which the ECtHR found that the pushback activities of the Italian authorities to Libya rendered the applicants in a situation in which they were "deprived of any remedy which would have enabled them to lodge their complaints ... with a competent authority and to obtain a thorough and rigorous assessment of their request".²⁸⁹ Other important Convention rights include inter alia the right to liberty and security (Article 5 ECHR),

including the right to challenge the lawfulness of detention in front of a court, and the right to leave any country (Article 2 of Protocol No. 4 to the ECHR).

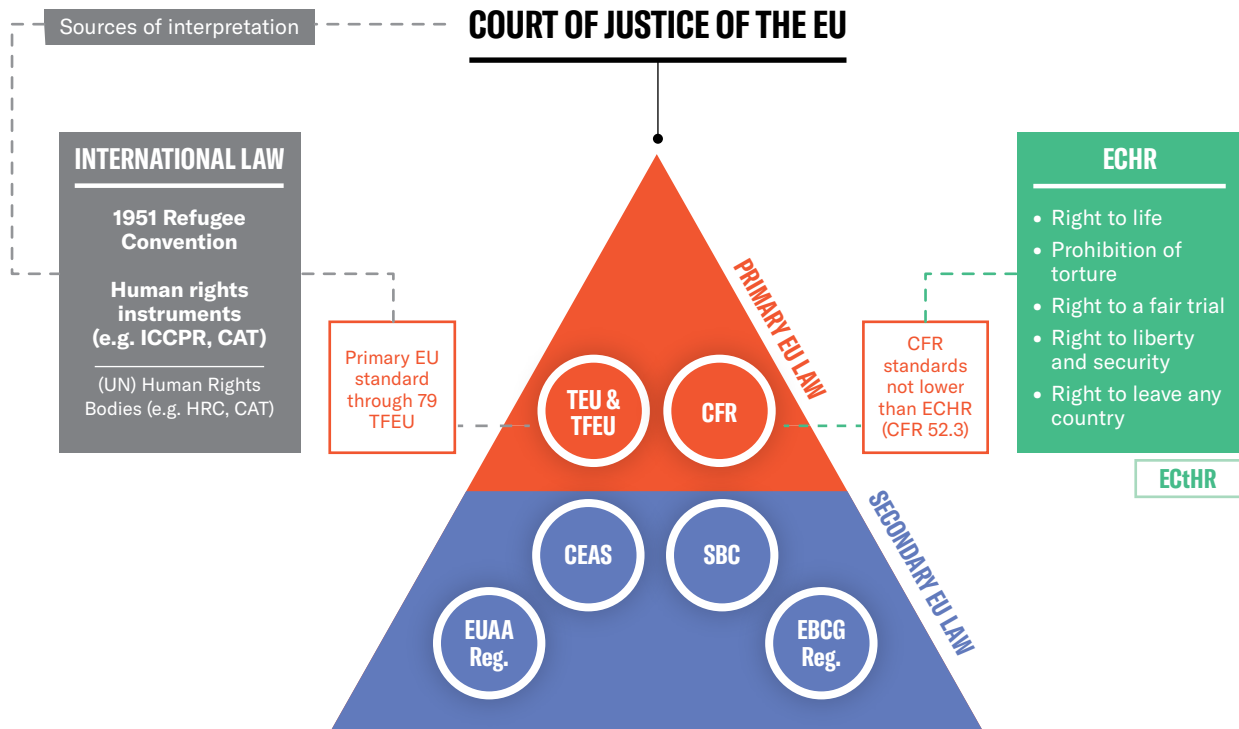
Aside from the ECHR, a number of international (human rights) instruments may also be referred to. As stated above, in relation to asylum, the clearest indication of the application of international law can be discerned from the Treaty on the Functioning of the European Union, which explicitly refers to the 1951 Refugee Convention and the 1967 Protocol thereto. The 1951 Refugee Convention guarantees to refugees the right of access to courts and the prohibition of expulsion or return (*refoulement*). Further international legal instruments that are relevant for understanding the applicable EU norms and standards include, among others, the International Covenant on Civil and Political Rights (ICCPR), in particular the right to leave any country and the right to liberty and security, as well as the UN Convention against Torture.

The views adopted by the Human Rights Committee (for the ICCPR) and the Committee against Torture constitute an additional source of interpretation of international human rights standards in inter alia the area of asylum and migration, and when reviewing EU and Member State actions or omissions abroad. The Human Rights Committee, for example, has concluded that long-term or indefinite detention of asylum seekers may lead to a violation of Article 9(1) ICCPR if the State cannot demonstrate that other, less intrusive measures could not have achieved the same result.²⁹⁰ The human rights provisions in among others the ICCPR and the Convention against Torture, as well as the views adopted by the Human Rights Committee and the Committee against Torture, may play a role as sources of interpretation when determining the legality and responsibility of EU and Member State actors by the Court of Justice of the European Union (CJEU). The reports of these international bodies in their monitoring of human rights may potentially serve as sources of evidence in cases brought before the CJEU.

The fundamental rights standards set out above, which are applicable to the EU's activities in the extraterritorial processing of asylum and migration management are summarised in Figure AII.2.

FIGURE AII.2

Legal framework on EU asylum and migration, hierarchy of EU norms and relation to international and regional (human rights) instruments



Note: EBCG = European Border and Coast Guard; EUAA = EU agency on asylum; HRC = Human Rights Committee; TEU = Treaty on European Union; TFEU = Treaty on the Functioning of the European Union.

Source: Own elaboration.

AII.2 EU AGENCIES AND EXTRATERRITORIALITY: EU LEGAL STANDARDS

This section examines EU legal standards that are applicable to EU justice and home affairs agencies with mandates covering asylum and migration (border) management tasks, in particular regarding their extraterritorial operational activities. It provides an analysis of the legal framework or mandates for agencies' cooperation with third countries, the set of existing legal safeguards and some potential feasibility challenges.

In the EU context, there are two key agencies of direct relevance to the current report, namely the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex). In both cases, some kind of cooperation with third countries is envisaged. Despite their stated tasks of mainly supporting and coordinating EU Member State actions, previous research has shown that their tasks do not evade the possibility of these agencies being liable and judicially accountable before the CJEU in Luxembourg in cases of fundamental rights violations.²⁹¹ The extended mandate of Frontex and the foreseen enhancement of EASO provide further grounds for that argument, as they include

a strengthened role for these agencies not only in capacity building, but also in operational cooperation and activities, including in third-country territories. This raises questions of state and EU responsibility and compliance with EU fundamental rights and international law standards laid down above.

All.2.1 EASO and its cooperation with third countries

EASO was created in 2010 and is tasked with implementation of the CEAS.²⁹² EASO provides the expertise along with practical, technical and operational support to the Member States in implementing their international and EU obligations in the area of asylum. The increase in the number of asylum seekers arriving in Europe since 2015 has made apparent the need for fairer responsibility sharing in asylum applications and for establishing a truly European asylum authority tasked with ensuring that the asylum *acquis* is properly and consistently applied by Member States.²⁹³ The European Commission presented a proposal on how the current EASO's mandate could be extended and enhanced by creating an EU Agency on Asylum (EUAA).

The Commission's proposal establishes that the key tasks of the new agency would include a central role in supporting and coordinating Member States' cooperation with third countries "in matters related to asylum, in particular as regards resettlement".²⁹⁴ In addition, the proposal foresees that the EUAA "shall support Member States in relation to the external dimension of the CEAS".²⁹⁵ Such support extends to coordinating information exchange and "other action taken".²⁹⁶

One of the main innovations included in the Commission's proposal can be found in Article 35, which details and expands the reach of the agency's role in fostering cooperation with third states in the area of asylum. The proposal provides for a central contribution by the EUAA to operational cooperation between Member States and third countries. Importantly, the proposal requires the EUAA, as well as the Member States, to act in compliance with EU norms and standards, including in the protection of fundamental rights, even when they are carrying out activities on the territory of third countries.

Furthermore, the proposal allows for the EUAA to cooperate with third countries in 'capacity building' of their asylum and reception systems in accordance with EU law and policy and subject to prior approval of the Commission. Under the proposal, the EUAA "may, with the agreement of the host Member State, invite officials from third countries to observe the operational and technical measures". This provision has raised ethical and legal concerns on the part of the European Council on Refugees and Exiles (ECRE), which noted that "in order not to compromise an applicant's trust in the asylum process and to avoid any unlawful sharing of information, any participation of third-country officials in practical cooperation activities on the territory of a Member State should be excluded".²⁹⁷ ECRE's analysis also stressed the risk of external facets of the future agency's work potentially violating the EU asylum *acquis*, in particular the principles of confidentiality and non-disclosure of information to third-country officials who could belong to a government that persecuted the person involved.

An additional provision in the proposed regulation envisages a role for the future EUAA in cooperation with third countries on resettlement, including a rather vague arrangement for exchanging information with these non-EU states. The EUAA would be obliged, under the proposed regulation, to participate in international agreements between the Union and third countries on matters pertaining to asylum. It is important to recall, however, that the much-discussed EU-Turkey Statement has been presented by EU institutions as not constituting an international agreement concluded by the Union but rather a political declaration.²⁹⁸ Yet, EASO has already been tasked with providing assistance in this case, in fast-track procedures in Greece. The proposal further foresees additional funding from the "instruments supporting the external relations policy of the Union", which would allow the use of the EU trust funds. Interestingly, the EUAA itself could distribute the funding to third countries as it "may launch and finance technical assistance projects in third countries regarding matters covered by this Regulation".

The provisions covering cooperation with third countries are framed in a fashion that lacks legal clarity and certainty, providing wide room for interpretation. What are the standards and fundamental rights set out in the proposed EUAA regulation? Recital 24 of the Commission's proposal summarises three key conditions for operational cooperation with third countries, which must i) be based on the Commission's prior approval; ii) not depart from the external policies of the European External Action Service; iii) meet the "norms and standards at least equivalent to those set by Union legislation also when the cooperation with third countries takes place on the territory of those countries" (emphasis added).²⁹⁹ Thus, when the EUAA engages in any way with a third country, the EU fundamental rights framework and general principles of EU law should also follow. This functional understanding of jurisdiction corresponds with the one enshrined in the EU CFR.

Articles 26 and 27 of the same proposal set out the civil and criminal liability without mentioning third countries, only "third parties". As an example, the proposal, in respect of civil liability, provides that Member States shall waive all claims against host Member States or any other Member State for damages, except in cases of gross negligence or wilful misconduct.³⁰⁰ It is not entirely clear how such a clause would apply if a third country were a host country.

In addition, whereas one of the envisaged tasks of the EUAA is the coordination of information exchange with third countries, Article 30 (which covers data protection) prohibits "the transfer of personal data processed by the Agency and the onward transfer by Member States to authorities of third countries or third parties, including international organisations".³⁰¹ Thus, it is not clear how any kind of personal data collection, for example of asylum applicants, could take place on the territory of a third country. As the European Data Protection Supervisor has explained in an opinion on the CEAS, there would be a general prohibition of data exchanges with third countries and data exchanges would happen as an exception, for example, "only the data strictly necessary for the purpose of return can be transferred by the Member States".³⁰² Therefore,

as already established in the above-mentioned case of *Hirsi*, jurisdiction regarding the obligation by the agency to respect the EU fundamental right of privacy would equally follow in the area of asylum.

All.2.2 European Border and Coast Guard Agency (Frontex) cooperation with third countries

Frontex is another EU Justice and Home Affairs agency tasked with the monitoring and protection of the common EU external borders, and the implementation of the SBC. Frontex defines its own mission as to "coordinate and develop European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management".³⁰³ Besides its tasks to assist Member States in monitoring and border surveillance, to provide operational and technical support along with capacity building for Member State officials, it is foreseen that Frontex will assist in integrated border management, including with third countries. The EU Fundamental Rights Agency (FRA) has elaborated that such assistance or cooperation comprises a four-tier model: i) measures in third countries (such as training, capacity building and the deployment of teams); ii) cooperation with third countries (i.e. joint operations); iii) measures at the external borders; and iv) measures within EU territory, including returns.³⁰⁴

In 2016, as a response to the so-called 'EU refugee crisis' and related developments in a number of countries to reintroduce internal border controls in the Schengen area of free movement, the European Commission proposed to enhance and extend the mandate of Frontex in its role of protecting external EU borders and proceeding faster with the returns.³⁰⁵ The co-legislators, the Commission, Council and the European Parliament, concluded negotiations at the speed of light for such a process and adopted Regulation (EU) No. 2016/1624 of 14 September 2016 establishing the European Border and Coast Guard (hereinafter: EBCG Regulation).³⁰⁶

This regulation stipulates that cooperation with third countries is an essential component of European integrated border management and provides a broad description of countries the agency is able cooperate

with, including neighbouring and third countries that “have been identified through risk analysis as being countries of origin and/or transit for illegal immigration”. One of the tasks foreseen in the new regulation is to “provide technical and operational assistance to Member States and third countries in accordance with Regulation (EU) No 656/2014 [on sea operations coordinated by Frontex] and international law, in support of search and rescue operations for persons in distress at sea which may arise during border surveillance operations at sea”.

The EBCG Regulation (2016/1624) lays down the fundamental rights and the *non-refoulement* principle that must be respected when Frontex is coordinating sea operations. Even though reference is made to the regulation on sea operations, it seems that land operations have a lower threshold of safeguards. In situations at the external borders requiring ‘urgent’ action, the Regulation also foresees that Frontex will “coordinate activities for one or more Member States and third countries at the external borders, including joint operations with neighbouring third countries”. The operational plans are binding on the Agency, the host Member State and the participating Member States, and the plans have to cover the terms of cooperation with third countries as well as with international organisations.

Cooperation between Frontex and third countries must take place within the framework of the external relations policy of the Union, with due regard to the protection of fundamental rights and the principle of *non-refoulement*. The EBCG Regulation additionally makes explicit that Frontex and the Member States cooperating with third countries must comply with EU law, norms and standards, including where cooperation with third countries takes place on the territory of those countries.

The Regulation foresees various degrees of cooperation between Frontex and third countries – from general cooperation to deployment of Frontex teams onto the territory of third countries – with changing conditions depending on the level of engagement with third countries. For general cooperation with the border and coast guard authorities of third countries, the ‘working arrangements’ need to be concluded in accordance

with Union law and policy. The Regulation also details the obligation for the Agency and Member States to obtain the Commission’s approval of ‘draft arrangements’ and foresees an obligation to inform the European Parliament “before a working arrangement is concluded”.

Any kind of cooperation at the external borders with neighbouring third countries by Frontex is subject to a joint operation plan. The Regulation allows for the possibility of such joint operations to be deployed “onto the territory of [a] third country”. Member States may opt out of participating in such joint operations. The Commission shall be informed of such “joint operations onto the territory of [a] third country”, but the role of the European Parliament is not explicitly mentioned. The Regulation further anticipates the possibility for Frontex teams to be deployed onto the territory of a third country “in actions where the team members will have executive powers”. Such deployment requires a fully-fledged international agreement between the EU and the third country concerned. This requirement of an international agreement guarantees democratic accountability, as the European Parliament has a role in approving international agreements with the EU.

Despite these ‘safeguards’, the Regulation foresees the possibility to involve the Agency in bilateral agreements between a Member State and a third country on the conditions that i) Frontex agrees; ii) “the role and competence of the Agency [is] in accordance with this Regulation”; and iii) the Commission is informed. The possibility to involve the EU’s Agency in the implementation of bilateral agreements (with the exception of deploying teams and joint operations onto the territory of a third country) raises certain concerns about EU added value and democratic accountability, as the European Parliament would not be informed in a timely way about such a decision. While for any kind of cooperation with third countries Frontex is, in general, obliged to inform the European Parliament as foreseen by Article 54, no timeframe has been provided for this. In addition, Frontex is required to “include an assessment of the cooperation with third countries in its annual reports”. Nevertheless, these ‘annual’ assessments may not qualify as human rights impact assessments (see the next subsection).

Despite the above-mentioned issues of responsibility, the EBCG Regulation foresees participation in relevant international agreements in the area of external relations of the EU, as well as the possibility to obtain and disburse funding to third countries (Article 54). As the next subsection indicates, even disbursing EU funding to third countries carries a set of responsibilities for its impact on human rights.

The EBCG Regulation defines the role of liaison officers who can be deployed to third countries, in particular those identified by a risk assessment as being transit or origin countries, as “part of the local or regional cooperation networks of immigration liaison officers and security experts”. The deployment of the officers is possible “to third countries in which border management practices comply with minimum human rights standards”, though it remains unclear who decides (or how they assess) whether these conditions are met. This requirement seems to preclude liaison officers from third countries coming on a reciprocal basis, though it is not obvious whether such a condition should preclude other forms of cooperation with the agency (e.g. observers from third countries coming to learn and participate in the activities of Frontex). This raises analogous issues, like ECRE raised vis-à-vis observers coming to the EUAA.

The deployment of Frontex liaison officers to third countries is subject to the prior “opinion of the Commission” and subsequently informing the European Parliament. Nonetheless, it remains unclear how many ‘liaison officers’ could be considered part of a Frontex deployed team, which would require a prior international agreement. This is especially problematic, as the Frontex liaison officers are tasked with “contributing to the prevention of and fight against illegal immigration and the return of returnees” (Article 55, para. 3).

When it comes to cooperating with third countries in return operations, the Regulation reiterates the obligation for Frontex to comply with the principles of *non-refoulement*, fundamental rights and international law in activities abroad. Various specific conditions must be met for the implementation of returns, for instance concerning the number of forced-return monitors, forced-return escorts and

return specialists who should be tasked to ensure fundamental rights among other things. Both forced-return monitors and escorts “shall remain subject to the disciplinary measures of their home Member State in the course of a return operation or return intervention”.

As with the proposed Regulation for the EUAA, Frontex is obliged by the EBCG Regulation to guarantee the protection of fundamental rights in all its operations and to lay down its fundamental rights strategy. The more relevant components of the fundamental rights strategy are the establishment of a (non-independent) complaint mechanism, a fundamental rights officer with an advisory role and a consultative forum. In respect of fundamental rights, the Regulation clearly states that the exchange, with third countries, of personal data of people rescued or otherwise obtained during sea operations is prohibited where the person could be subjected to the above-mentioned violations. Data protection issues are further reiterated in Article 45 of the EBCG Regulation itself.

AII.3 RESPONSIBILITY VIA EU FUNDING AND EU POLITICAL ARRANGEMENTS WITH THIRD COUNTRIES

Capacity-building activities at first sight might not look like they have a direct link to EU and Member State responsibilities and potential liabilities for fundamental rights violations. Yet when countries are funded from the EU budget or EU financial instruments, such as the EU Trust Funds, the European Commission would have a responsibility to assess the potential impact and compliance of the activities abroad covered by that EU funding with the fundamental rights enshrined in the EU CFR as part of the fundamental right of ‘good administration’. These issues are carefully followed by two independent EU institutions – the European Ombudsman and the European Court of Auditors (ECA).

The European Ombudsman cannot intervene in individual cases at the Member State level or within third countries. It has a mandate to act like a

watchdog to ensure that EU institutions do their best to ensure that fundamental rights, in particular those flowing from the right to good administration, are respected. The European Ombudsman can either investigate complaints or start own-initiative inquiries so as to intervene proactively in situations where there is a risk of systemic fundamental rights breaches.³⁰⁷

For example, in 2015 the European Ombudsman concluded that “the fact that the Commission is not directly responsible for managing the funds should never be used as a reason for not acting if fundamental rights have been, or risk being violated”.³⁰⁸ In this case the European Ombudsman looked at how EU Cohesion Funds were spent, sometimes in clear violation of fundamental rights, such as funding segregated settlements for Roma or people with mental disabilities. Still, the analogy could be easily applied to EU funding going to third countries, for various purposes, including building asylum capacity or boosting their operational and technical capabilities for migration management, where human rights standards apply (recital 46):

[The] Commission should not allow itself to finance, with EU money, actions which are not in line with the highest values of the Union, that is to say, the rights, freedoms and principles recognised by the Charter. The Commission regularly subjects cooperation with third countries, which are not bound by the Charter, to a clause concerning respect for human rights. The standard required from Member States necessarily needs to be significantly higher.³⁰⁹

In January 2017, the European Ombudsman elaborated that EU fundamental rights standards should follow not only the EU’s funding, but also various kinds of ‘political agreements’ and non-legally binding deals, such as the above-mentioned EU–Turkey Statement.³¹⁰ The Ombudsman concluded that “neither its political nature, nor indeed the title ‘Agreement’ or ‘Statement’, in any way diminish the responsibility of the Commission to ensure that its actions are in compliance with the EU’s fundamental rights commitments”.³¹¹ Further, the Ombudsman emphasised the need to conduct a human rights impact assessment before any kind of ‘political arrangement’ is made as part of the Commission’s

responsibility for good administration, which analogically could be applied to EU Justice and Home Affairs agencies when undertaking various kinds of working arrangements with third countries.³¹² The role of the consultative forums could be further strengthened to alert and enable the Ombudsman’s investigations.

In the latter case, the European Ombudsman highlighted that current progress reports provided by the European Commission on the implementation of the EU–Turkey Statement are too general, do not identify human rights at risk and lack analysis of these issues; thus, they do not replace a proper impact assessment. The Ombudsman cited its earlier decision on the EU–Vietnam trade agreement,³¹³ where it explained that a proper tool for human rights impact assessments should identify “the sources of risks and the human rights impacts on the affected stakeholders at each stage of the project’s life. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into”.³¹⁴ The Ombudsman also clarified that such impact assessments would need to be systematic and conducted on a regular basis to identify any kinds of changes. Therefore, it can be concluded that fundamental rights impact assessments would also need to be part of any kind of international agreement or other ‘arrangement’, such as political agreements and deals to cooperate with third countries.

The ECA has an explicit mandate to ensure financial compliance and perform audits. The ECA also oversees whether EU institutions manage EU funding in light of principles of “sound financial management, transparency, proportionality, non-discrimination and equal treatment” set by the EU regulation on financial rules.³¹⁵ The funding aimed at extraterritorial border management and/or supporting the asylum capacity of third countries is allocated either from the EU budget (the Development Cooperation Instrument, Investment Partnership Agreements, the Facility for Refugees in Turkey, etc.) or, increasingly, from instruments falling outside the EU budget (via the European Development Fund and EU Trust Funds).³¹⁶

Nevertheless, even the 'extra-EU budget' instruments, aimed at more flexibility, need to be implemented in line with the general principles of EU funding, and hence the ECA has a role to play. For example, the ECA in its Special Report on the Békou Trust Fund scrutinised the extent to which the European Commission carried out a formal analysis of whether EU funding was spent in compliance with the EU's financial rules.³¹⁷ Such special reports and their follow-ups could be requested on a regular basis on the EU Trust Funds aiming at extraterritorial

migration management (for example, the EU Trust Fund for Africa) or when the European Border and Coast Guard or the new EASO distributes funding to third countries.³¹⁸ Here again, access to information and involvement by the respective consultative forums could be crucial. In addition, the Ombudsman and ECA reports could be used in a systemic and complementary manner, as for example has been done when investigating whether the EU Cohesion Funds respected principles of non-discrimination of Roma people.³¹⁹

ENDNOTES

- 1 See for instance the speech by UK Home Secretary Jack Straw at the European Conference on “Asylum, Towards a Common Asylum Procedure”, Lisbon, 6 June 2000; refer also to UK Home Office, “A New Vision for Refugees”, as mentioned in S. Mille and A. Travis, “Safe havens plan to slash asylum numbers”, *Guardian* (5 February 2003), <https://www.theguardian.com/society/2003/feb/05/asylum.immigrationasylumandrefugees>; and German Ministry of the Interior, “Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Einrichtung einer EU-Aufnahmeeinrichtung in Nordafrika”, Berlin (9 September 2005).
- 2 As acknowledged in G. Noll and J. Fagerlund, “Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests”, *Refugee Research Programme* 04/2002, Danish Centre for Human Rights, Denmark (April 2002). Refer to UNHCR, “Denmark: Draft resolution. International procedures for the protection of refugees”, UN Doc. A/C.3/41/L.51, UN General Assembly (12 November 1986). According to Noll, the Netherlands followed Denmark in putting forward the topic of reception in third countries in 1993. See the speech by the Dutch Secretary of Justice Aad Kosto at the Fifth Conference of European Ministers Responsible for Migration Affairs, Athens, 18-19 November 1993. See G. Noll, “Visions of the Exceptional: Legal and Theoretical Issues raised by Transit Processing Centres and Protection Zones”, *European Journal of Migration and Law*, Vol. 5, No. 3 (2003), p. 312.
- 3 Noll (2003), *supra*, p. 312; S. Léonard and C. Kaunert, “The extra-territorial processing of asylum claims”, *Forced Migration Review*, No. 51 (2016), pp. 48-49. See also IGC, “Working Paper on Reception in the Region of Origin”, Intergovernmental Consultations on Migration, Asylum and Refugees (September 1994).
- 4 Refer to E. Macron, “Initiative pour l'Europe: Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique”, Paris (26 September 2017).
- 5 P. Tiede, “Österreich will neue EU-Obergrenze”, *Bild.de* (5 January 2017), <http://www.bild.de/politik/ausland/fluechtlingskrise/neuer-schlachtplan-gegen-fluechtlingsschwelle-49603820.bild.html>.
- 6 See for example J. Glenday, “Denmark urged to adopt ‘Australian solution’ and send asylum seekers to Greenland”, *ABC News* (1 March 2016), <http://www.abc.net.au/news/2016-02-24/denmark-considers-other-solutions-to-stop-asylum-seekers/7191334>; A. Jakubowicz, “European leaders taking cues from Australia on asylum seeker policies”, *The Conversation* (7 November 2016), <https://theconversation.com/european-leaders-taking-cues-from-australia-on-asylum-seeker-policies-66336>; S. Polakow-Suransky, “How Europe’s far right fell in love with Australia’s immigration policy”, *Guardian* (12 October 2017), <https://www.theguardian.com/world/2017/oct/12/how-europes-far-right-fell-in-love-with-australias-immigration-policy>.
- 7 S. Reynolds and H. Muggeridge, “Remote Controls: How the UK Border Controls are Endangering the Lives of Refugees”, Refugee Council Report, Refugee Council, London (December 2008).
- 8 B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges*, Leiden/Boston: Martinus Nijhoff Publishers (2010).
- 9 G. Goodwin-Gill, “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations”, in S. Blay, J. Burn and P. Keyzer (eds), *Offshore Processing of Asylum Seekers: The Search for Legitimate Parameters*, UTS Law Review No. 9, New South Wales: Halstead Press (2007), p. 26.
- 10 *Ibid.*
- 11 This understanding of ‘effectiveness’ finds inspiration from the EU Better Regulation guidelines, which call for a detailed examination of EU legislation on the basis of requiring a more detailed and qualitative assessment (instrument by instrument) of its effectiveness (how successful EU action has been in achieving or progressing towards its objectives), efficiency (whether the costs and benefits of EU action are justified and proportionate), coherence (how well or not different actions work together), and EU added value. Refer to European Commission, “Better Regulation ‘Toolbox’”, European Commission, Brussels, https://ec.europa.eu/info/better-regulation-toolbox_en; see also European Commission, “Better Regulation Guidelines”, Commission Staff Working Document, SWD(2015) 111 final, Strasbourg (19.5.2015) and “Better Regulation Guidelines”, Commission Staff Working Document, SWD(2017) 350, Brussels (7.7.2017).
- 12 This case study has been written by Susan Kneebone.
- 13 Migration Act 1958 (Cth), s85.
- 14 S.Y. Kneebone and S. Pickering, “Chapter 7: Australia and the Pacific Region”, in S. Kneebone and F. Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead*, Oxford: Berghahn Books (2007), pp. 171-172.
- 15 Department of Immigration and Border Protection, “Fact Sheet: Australia’s Refugee and Humanitarian programme”, Australian Government (28 November 2017), <https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee>. In 2015 the Australian government agreed to resettle an additional 12,000 Syrian refugees in addition to the Humanitarian Programme.

- 16 The process for selecting applicants and the visa requirements are described in detail in UNHCR, “UNHCR Resettlement Handbook. Country Chapter: Australia – By the Government of Australia”, UN High Commissioner for Refugees, Geneva (2016), <http://www.unhcr.org/3c5e542d4.html>. See Department of Immigration and Border Protection, “Fact Sheet: Australia’s Refugee and Humanitarian programme”, Australian Government (28 November 2017), <https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee>.
- 17 Australian Migration Act 1958, Act No. 62 of 1958 as amended (this compilation was prepared on 24 November 2012, taking into account amendments up to Act No. 125 of 2012), <https://www.legislation.gov.au/Details/C2012C00855>.
- 18 For instance, in 2003, 53 Vietnamese and in 2005, 43 West Papuans; see S. Kneebone, “The Pacific Plan: The Provision of ‘Effective Protection?’”, *International Journal of Refugee Law*, Vol. 18, No. 3-4 (2006), p. 714 ff.
- 19 *Namah v State of PNG*, SCA No. 84 of 2013, Supreme Court of Justice (26 April 2016).
- 20 N. Klein, “Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants”, *Melbourne Journal of International Law*, Vol. 15, No. 2 (2014), pp. 413-422; M. Gleeson, “Where to from here? Report from the Expert Roundtable on regional cooperation in the Asia-Pacific”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW, (12-13 September 2016a); V. Moreno-Lax, “The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia”, Policy Brief No. 4, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (May 2017).
- 21 See Kneebone (2006), op. cit., p. 707; F. Voon, “Factsheet: Turning back boats”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (May 2017); Parliament of Australia, “A certain maritime incident”, Main Report of the Select Committee for an inquiry into a certain maritime incident, Parliament of Australia, Canberra ACT (October 2002). C.M.-J. Bostock cites a figure of 374 (see “The International Legal Obligations owed to the Asylum Seekers on the MV Tampa”, *International Journal of Refugee Law*, Vol. 14 (2002), p. 291).
- 22 T. Magner, “A Less than ‘Pacific’ Solution for Asylum Seekers in Australia”, *International Journal of Refugee Law*, Vol. 16, No. 1 (2004), p. 58.
- 23 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, <https://www.legislation.gov.au/Details/C2014A00135>.
- 24 M. Gleeson, “Factsheet: Refugee status determination on Manus Island, PNG”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (January 2017a).
- 25 Voon (2017), op. cit.
- 26 See Australian Border Force, “Monthly Operational Update: October 2017”, *Australian Border Force Newsroom*, Belconnen ACT (November 2017).
- 27 *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, January 2015.
- 28 J. Phillips, “The ‘Pacific Solution’ revisited: A statistical guide to the asylum seeker caseload on Nauru and Manus Island”, Parliamentary Library Background Note, Parliament of Australia, Canberra ACT (4 September 2012). See Appendix D for the details on the countries of resettlement.
- 29 S. Kneebone, “Migration Control at Sea – The Australian case”, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden/Boston: Martinus Nijhoff Publishers (2010), p. 365. See also Kneebone (2006), op. cit.
- 30 M. Gleeson, “Factsheet: Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (January 2017b).
- 31 Kaldor Centre, “Factsheet: Australia–United States Resettlement Arrangement”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (November 2017).
- 32 M. Gleeson, “Factsheet: Refugee status determination in Nauru”, Andrew & Renata Kaldor Centre for International Refugee Law, Sydney NSW (January 2017c).
- 33 Phillips (2012), op. cit.
- 34 Kneebone (2006), op. cit., pp. 711-721.
- 35 *Ibid.*, pp. 719-720.

- 36 Parliament of Australia, "Taking responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru", Final Report of the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, Canberra ACT (August 2015); Parliament of Australia, "Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea", Interim Report of the Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra ACT (May 2016); Parliament of Australia (2017), "Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre", Report of the Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra ACT (April 2017); AHRC, "The Forgotten Children: National Inquiry into Children in Immigration Detention (2014)", Australian Human Rights Commission, Sydney NSW (2014); P. Moss, "Review into recent allegations relating to the conditions and circumstances of the Regional Processing Centre in Nauru" (The Moss Review), Parliament of Australia, Canberra ACT (February 2015).
- 37 HRW, "'By invitation only:' Australian Asylum Policy", *Australia* Vol. 14, No. 10(C), Human Rights Watch, New York, NY (December 2002), p. 651.
- 38 Kneebone (2006), op. cit., pp. 710-711.
- 39 *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1.
- 40 These details are from the judgments at paras 12-13, 85-89 and 107.
- 41 *Ibid.*, para. 205.
- 42 *Ibid.*, para. 206.
- 43 R. Essex, "Healthcare and clinical ethics in Australian offshore immigration detention", *International Journal of Human Rights*, Vol. 20, No. 7 (2016), pp. 1039-1053.
- 44 J.-P. Sanggaan, G. Ferguson and B. Haire, "Ethical Challenges for Doctors Working in Immigration Detention", *Medical Journal of Australia*, Vol. 201, No. 7 (2014), p. 377.
- 45 Essex (2016), op. cit., p. 1042.
- 46 See the Final Report of the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (Parliament of Australia (2015), op. cit.).
- 47 *Ibid.*, para. 2.55.
- 48 Kneebone (2006), op. cit., p. 715.
- 49 *Ibid.*, pp. 716-717.
- 50 This section draws on Gleeson (2017a), op. cit.
- 51 See UNHCR (2011), "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees", UN High Commissioner for Refugees, Geneva (December 2011).
- 52 Gleeson (2017c), op. cit.
- 53 See the Nauruan Department of Justice & Border Control, "Refugee Status Determination Handbook", Government of Nauru (August 2013).
- 54 See the Final Report of the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (Parliament of Australia (2015), op. cit.); the Interim Report of the Legal and Constitutional Affairs References Committee (Parliament of Australia (2016), op. cit.); and the Report of the Legal and Constitutional Affairs References Committee (Parliament of Australia (2017), op. cit.).
- 55 Klein (2014), op. cit.; Gleeson (2016a), op. cit.; Moreno-Lax (2017), op. cit.
- 56 Voon (2017), op. cit.
- 57 *Ibid.*, p. 4.
- 58 Constructive *refoulement* refers, in essence, to measures taken by States that do not directly result in the removal of the individual concerned, but place the asylum seeker in the position whereby he or she is left without a choice but to leave the country in which that individual is seeking asylum.
- 59 Kneebone (2006), op. cit., pp. 707-708; Magner (2004), op. cit., p. 58.
- 60 Voon (2017), op. cit., p. 5.

- 61 Gleeson (2016a), op. cit., para. 67, p. 20.
- 62 F. Farouque and D. Gray, "The Afghan diaspora", *The Age* (30 August 2001), p. 2 (with *The Guardian*).
- 63 A. Millbank, "The Detention of Boat People", Current Issues Brief 2000-2001, No. 8, Parliament of Australia, Department of the Parliamentary Library, Canberra ACT (February 2001); Kneebone and Pickering (2007), op. cit., p. 172.
- 64 J. Phillips, "Boat arrivals and boat 'turnbacks' in Australia since 1976: A quick guide to the statistics", Research Paper Series, 2016-17, Parliament of Australia, Department of Parliamentary Services, Canberra ACT (January 2017), Table 1.
- 65 S.Y. Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, Cambridge: Cambridge University Press (2009), p. 4, citing UNHCR figures from 2006.
- 66 Phillips (2017), op. cit., Table 1.
- 67 UNHCR, "UNHCR Mid-year Trends 2014", UN High Commissioner for Refugees, Geneva (January 2015); S.Y. Kneebone, "Introduction to Special Issue on Access to Asylum: Current Challenges and Future Directions", *Immigration Asylum and Nationality Law*, Vol. 29, No. 2 (2015), n. 2.
- 68 See S.Y. Kneebone, "Comparative regional protection frameworks for refugees: Norms and norm entrepreneurs", *International Journal of Human Rights*, Vol. 20, No. 2 (2016), pp. 158-162.
- 69 See UNHCR, "UNHCR Factsheet – Regional Office for South-East Asia", UNHCR Regional Office for South-East Asia, Bangkok (September 2014).
- 70 See UNHCR, "Where we work – Asia and the Pacific", UNHCR website, <http://www.unhcr.org/pages/4a02d8ec6.html>.
- 71 See the website of Peter Dutton, "Press Conference with AVM Stephen Osborne" (7 April 2017), <http://www.minister.border.gov.au/peterdutton/2017/Pages/press-conference-07042017.aspx>.
- 72 S.Y. Kneebone, "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia", *Refuge*, Vol. 33, No. 1 (2017), pp. 29-41.
- 73 M. Gleeson, "FactCheck Q&A: How much was spent on the Cambodia refugee deal and how many were settled?", *The Conversation* (21 November 2016b), <https://theconversation.com/factcheck-qanda-how-much-was-spent-on-the-cambodia-refugee-deal-and-how-many-were-settled-68807>.
- 74 This case study has been written by Blanca Garcés-Mascareñas and Ana López Sala.
- 75 A. López Sala, "Exploring Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border", *Geopolitics*, Vol. 20, No. 3 (2015), p. 8.
- 76 D. Godenau, "Irregular Maritime Immigration in the Canary Islands: Externalization and Communitarisation in the Social Construction of Borders", *Journal of Immigrant & Refugee Studies*, Vol. 12, No. 2 (2014), p. 132.
- 77 Ibid., p. 135.
- 78 D. Godenau and A. López Sala, "Multi-layered Migration Deterrence and Technology in Spanish Maritime Border Management", *Journal of Borderland Studies*, Vol. 31, No. 2 (2016), p. 157.
- 79 López Sala (2015), op. cit., p. 12.
- 80 A. Alcalde, "The Spanish Action Plan for Africa", *Review of African Political Economy*, Vol. 34, No. 1 (2007), pp. 194-198.
- 81 López Sala (2015), op. cit.
- 82 FRA, "Fundamental rights at Europe's southern sea borders", EU Agency for Fundamental Rights, Vienna (2013), p. 91.
- 83 CEAR, *La situación de los refugiados en España* [The situation of refugees in Spain], Madrid: Comisión Española de Ayuda al Refugiado (2007); FRA (2013), op. cit.
- 84 Red Cross, "Migraciones africanas hacia Europa. Estudio cuantitativo y comparativo. Años 2006-2008. Centro nº 6 de Nouadibou, Mauritania" [African migration towards Europe. Quantitative and comparative study. Years 2006-2008. Centre No. 6 of Nouadhibou, Mauritania], Cruz Roja Española, Madrid (2009).
- 85 Amnesty International, "Mauritania: 'Nadie quiere tener nada que ver con nosotros'. Arrestos y expulsiones colectivas de migrantes a quienes se ha negado la entrada en Europa" [Mauritania: 'Nobody wants to have anything to do with us': Arrests and collective expulsions of migrants denied entry into Europe], Amnesty International, London (July 2008), p. 19; CEAR, *Informe de Evaluación del Centro de Detención de Migrantes en Nouadhibou (Mauritania)*, Comisión Española de Ayuda al Refugiado, Madrid (December 2008), p. 21.

- 86 Amnesty International (2008), *supra*, p. 19.
- 87 *Ibid.*, p. 18.
- 88 *Ibid.*
- 89 *Ibid.*, p. 21.
- 90 *Ibid.*, p. 23.
- 91 Partial data for the period 2004–07 was provided by the Tenerife Observatory of Immigration (OBITEN) (see Godenau (2014), *op. cit.*; D. Godenau and V.M. Zapata Hernández, “The Canary Islands: A transit region between Africa and Europe”, *Documentos CIDOB*, No. 17, Barcelona Centre for International Affairs, Barcelona (2008), pp. 13-43.
- 92 Godenau and Zapata Hernández (2008), *supra*.
- 93 See Godenau (2014), *op. cit.*
- 94 Ministerio del Interior, “Balance de la lucha contra la Inmigración Ilegal”, Spanish Ministry of the Interior, Madrid (January 2008).
- 95 Red Cross (2009), *op. cit.*
- 96 D. Godenau, “An institutional approach to bordering in islands: The Canary Islands on the African-European migration routes”, *Island Studies Journal*, Vol. 7, No. 1 (2012), pp. 3–18; López Sala (2015), *op. cit.*; Godenau and López Sala (2016), *op. cit.*
- 97 In 2014, only 3% of the interceptions in the Mediterranean migration system took place on the Spanish routes.
- 98 P. Fargues and S. Bonfati, “When the best option is a leaky boat: Why migrants risk their lives crossing the Mediterranean and what Europe is doing about it”, MPC Policy Brief 2014/05, Migration Policy Centre, European University Institute, Florence (October 2014); S. McMahon and N. Sigona, “Boat migration across the Central Mediterranean: Drivers, experiences and responses”, MEDMIG Research Brief No. 3 (September 2016).
- 99 A. Di Bartolomeo, T. Fakhoury and D. Perrin, “CARIM – Migration Profile: Mauritania”, European University Institute, Florence (March 2010).
- 100 IOM, “Migration en Mauritanie: Profil National 2009”, International Organisation for Migration, Geneva (2009), p. 76.
- 101 S. Dünwald, “Europe’s global approach to migration management: Doing border in Mali and Mauritania”, in R. Zaiotti (ed.), *Externalizing Migration Management: Europe, North America and the spread of ‘remote control’ practices*, Abingdon: Routledge (2016), p. 120.
- 102 Amnesty International, “Mauritania: ‘Nadie quiere tener nada que ver con nosotros’. Arrestos y expulsiones colectivas de migrantes a quienes se ha negado la entrada en Europa” [Mauritania: ‘Nobody wants to have anything to do with us’: Arrests and collective expulsions of migrants denied entry into Europe], Amnesty International, London, (July 2008).
- 103 AMERM, *De l’Afrique subsaharienne au Maroc: les réalités de la migration irrégulière. Résultats d’une enquête socio-économique*, Association Marocaine d’Etudes et de la Recherche sur les Migrations, Rabat (2008).
- 104 *Ibid.*
- 105 See also M. Cherti and P. Grant, “The Myth of Transit: Sub-Saharan Migration in Morocco”, Institute for Public Policy Research, London (June 2013).
- 106 MSF, “Violence, Vulnerability and Migration: Trapped at the Gates of Europe”, Médecins Sans Frontières, Barcelona (June 2013); HRW, “Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco”, Human Rights Watch, New York, NY (February 2014).
- 107 M. Lahlou, “La politique migratoire marocaine, un exemple à suivre?”, *Orient XXI* (31 January 2017). See also M. Lahlou, “Morocco’s Experience of Migration as a Sending, Transit and Receiving Country”, IAI Working Papers 15 | 30, Istituto Affari Internazionali, Rome (September 2015).
- 108 F. De Bel-Air, “Migration Profile: Morocco”, MPC Policy Brief Issue 2016/05, Migration Policy Centre, European University Institute, Florence (April 2016); CNDH, “Foreigners and Human Rights in Morocco: For a radically new asylum and migration policy”, Conseil national des droits de l’Homme, Rabat (2013).
- 109 * This case study has been written by Nora El Qadim.
- 110 J.-P. Cassarino, “Informalising Readmission Agreements in the EU Neighbourhood”, *International Spectator*, Vol. 42, No. 2 (2007), pp. 179-196.

- 111 For example, Law No. 02/03 adopted in 2003 in Morocco; Law No. 2004-6 adopted in Tunisia in 2004; Law No. 2 (2004) and Law No. 19 (2010) in Libya.
- 112 D. Al Aichi, “UNHCR closes camp in south Tunisia, moves services to urban areas”, *UNHCR News*, UN High Commissioner for Refugees, Geneva (2 July 2013), <http://www.unhcr.org/news/latest/2013/7/51d2a40e9/unhcr-closes-camp-south-tunisia-moves-services-urban-areas.html>.
- 113 Euro-Mediterranean Human Rights Network, “Asylum and migration in the Maghreb, Country Fact Sheet: Tunisia”, Euro-Mediterranean Human Rights Network, Copenhagen (December 2012).
- 114 *Ibid.*, p. 21.
- 115 *Ibid.*, p. 20.
- 116 A. Mottet, “Répartition et circulation: les enjeux de la catégorisation dans le camp de Choucha (Tunisie)”, *Critique internationale*, No. 72 (2016), p. 23.
- 117 Al Aichi (2013), *op. cit.*
- 118 CeTuMa, “Rapport sur le camp des réfugiés et des demandeurs d’asile de Choucha”, Centre de Tunis pour la Migration et l’Asile, Tunis (January 2013).
- 119 *Ibid.*, p. 1.
- 120 A UNHCR Factsheet puts the number at 3,567 (HCR Tunisie, *Bulletin d’information*, April 2014, <http://www.unhcr.org/fr/publications/operations/523959e39/unhcr-tunisie-fact-sheet.html>). Detailed statistics from the UNHCR’s Online Resettlement Data Finder give the lower number of 3,270, with 401 resettlements in 2011, 1,933 in 2012, 872 in 2013, and 64 in 2014, <http://rsq.unhcr.org/#0Ye8>.
- 121 Euro-Mediterranean Human Rights Network, “Asylum and migration in the Maghreb, Country Fact Sheet: Tunisia”, Euro-Mediterranean Human Rights Network, Copenhagen (December 2012), p. 50, <http://www.refworld.org/docid/514d78422.html>.
- 122 IOM Tunisia, *Migrants Statistical Overview Assisted Voluntary Return, Reintegration and Resettlement*, Update, International Organization for Migration, Tunis (May 2014), <https://tunisia.iom.int/sites/default/files/activities/documents/Migrants%20assisted%20by%20IOM%20-%20June2014.pdf>.
- 123 Euro-Mediterranean Human Rights Network (2012), *op. cit.*, pp. 50-51.
- 124 R. Roesch, G. Jacovella, A. Bezzi and J. Garms, “The Deficiencies of UNHCR’s RSD Procedure: The Case of Choucha Refugee Camp in Tunisia”, *Oxford Monitor of Forced Migration*, Vol. 14, No. 1 (2014), pp. 46-49.
- 125 See for example, N. Haon, “Tunisie: pas de printemps pour les migrants”, *Plein Droit*, No. 94 (2012), <https://www.gisti.org/spip.php?article2935>, and CeTuMa (2013), *op. cit.*
- 126 See the document at <http://www.unhcr.org/publications/legal/4317223c9/procedural-standards-refugee-status-determination-under-unhcrs-mandate.html>.
- 127 Roesch et al. (2014), *op. cit.*, p. 47.
- 128 Haon (2012), *op. cit.*
- 129 P. Dourgnon and H. Kassar, “Refugees in and out North Africa: A study of the Choucha refugee camp in Tunisia”, *European Journal of Public Health*, Vol. 24, Supplement 1 (2014), p. 9.
- 130 Roesch et al. (2014), *op. cit.*, p. 47.
- 131 *Ibid.*
- 132 CeTuMa (2013), *op. cit.*, p. 1.
- 133 Roesch et al. (2014), *op. cit.*, p. 47.
- 134 CeTuMa (2013), *op. cit.*, p. 1.
- 135 International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966, Registered ex officio on 23 March 1976, <https://treaties.un.org/doc/publication/unts/Vol.%20999/Vol.-999-i-14668-english.pdf>.
- 136 Roesch et al. (2014), *op. cit.*, p. 48.
- 137 CeTuMa (2013), *op. cit.*, p. 1.
- 138 Quote from the Tunisian Health Ministry and WHO Bulletin, in Dourgnon and Kassar (2014), *op. cit.*, p. 8.

- 139 "L'hygiène, priorité numéro un sur le camp de la frontière tunisienne", *Ladepeche.fr* (5 March 2011), <https://www.ladepeche.fr/article/2011/03/05/1028463-hygiene-priorite-numero-camp-frontiere-tunisienne.html>.
- 140 N. Bouabid, "Les oubliés du camp de réfugiés de Choucha. Récit poignant", *Le Temps* (Tunisie) (8 September 2011), <https://www.turess.com/fr/letemps/58800>.
- 141 MSF, "De la fuite à la deshérence: les victimes négligées du conflit en Libye", Médecins Sans Frontières, Paris, (June 2011), <https://www.msf.fr/sites/www.msf.fr/files/12e66f05d7569d4d8cc2c7496c7dd0f6.pdf>.
- 142 Dourgnon and Kassar (2014), op. cit., p. 8.
- 143 Mottet (2016), op. cit., p. 25.
- 144 Haon (2012), op. cit.
- 145 Mottet (2016), op. cit., p. 28.
- 146 Ibid., pp. 29-30. see also FTDES, "FTDES – Appel urgent pour les réfugiés de Choucha en Tunisie" (19 April 2013) <http://www.lacimade.org/ftdes-appel-urgent-pour-les-refugies-de-choucha-en-tunisie/>.
- 147 *Jeune Afrique*, "Tunisie: un scandale nommé Choucha" (17 August 2011), <http://www.jeuneafrique.com/190513/societe/tunisie-un-scandale-nomm-choucha/>.
- 148 Ibid.
- 149 T. Bouraque, "Camp de Choucha: les damnés de la crise libyenne", *Tel Quel* (Maroc) (1 December 2014), http://telquel.ma/2014/12/01/camp-choucha-les-damnees-crise-libyenne_1424690.
- 150 Ibid.
- 151 T. Lageman, "Life in Tunisia's closed refugee camp: 'I lost my mind'", *Al Jazeera*, 20 December 2016, <http://www.aljazeera.com/news/2016/10/life-tunisia-closed-refugee-camp-lost-mind-161008081353159.html>.
- 152 G. Garelli and M. Tazzioli, "Choucha beyond the Camp: Challenging the Border of Migration Studies", in N. De Genova (ed.), *The Borders of "Europe": Autonomy of Migration, Tactics of Bordering*, Durham, NC: Duke University Press (2017), pp. 165-184.
- 153 Lageman (2016), op. cit.
- 154 Ibid.; Garelli and Tazzioli (2017), op. cit.
- 155 See <https://voiceofchoucha.wordpress.com/>.
- 156 See for example, S. Sbouaï, "Sit-in d'une trentaine de réfugiés du camp de Choucha à la Kasbah", *Nawaat.org* (11 April 2013), <https://nawaat.org/portail/2013/04/11/sit-in-dune-trentaine-de-refugies-du-camp-de-choucha-a-la-kasbah/>; E. Malfatto, "En Tunisie, la colère gronde chez les réfugiés du camp de Choucha", *Le Monde.fr* (27 June 2013), http://www.lemonde.fr/tunisie/article/2013/06/27/en-tunisie-la-colere-gronde-chez-les-refugies-du-camp-de-choucha_3438002_1466522.html.
- 157 See for example Lageman (2016), op. cit.; Malfatto (2013), *supra*.
- 158 See FTDES, "Tunisie: évacuation du camp de Choucha", Forum Tunsien pour les Droits Economiques et Sociaux, Tunis (June 2017), <http://bit.ly/2z9he4z>; *Jeune Afrique*, "Tunisie: évacuation controversée dans l'ancien camp de demandeurs d'asile de Choucha" (20 June 2017), <http://www.jeuneafrique.com/449466/societe/tunisie-evacuation-controversee-lancien-camp-de-demandeurs-dasile-de-choucha/>.
- 159 See UNHCR-Global Focus, "2016 Year-End Report", <http://reporting.unhcr.org/sites/default/files/pdfsummaries/GR2016-Tunisia-eng.pdf> and "2017 Planning Summary", <http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2017-Tunisia-eng.pdf>.
- 160 K. Ben Saïd, "Une loi sur l'accueil des réfugiés verra prochainement le jour: entretien avec Nebil Benbekhti, attaché principal de protection au bureau de Tunis du Haut commissariat des Nations Unies pour les réfugiés", *La Presse* (25 February 2017), <http://www.lapresse.tn/component/nationals/?task=article&id=127037>; TAP, "Le gouvernement prépare un projet de loi sur le droit d'asile. L'intégration des réfugiés est en jeu", *HuffPost Tunisie* (24 February 2017), http://www.huffpostmaghreb.com/2017/02/24/tunisie-gouvernement-droi_n_14980836.html.
- 161 * This case study has been written by Maryellen Fullerton.
- 162 M. Wyman, *DPs: Europe's Displaced Persons, 1945-51*, Ithaca, NY: Cornell University Press (1998).
- 163 P. Pastor, "The American Reception and Resettlement of Hungarian Refugees in 1956-1957", *Hungarian Cultural Studies*, Vol. 9 (2016).

- 164 F. Hipsman and D. Meissner, "In-Country Refugee Processing in Central America: A Piece of the Puzzle", Migration Policy Institute, Washington, DC (2015), p. 15.
- 165 Article 33, 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, done 28 July 1951.
- 166 Immigration and Nationality Act (INA) §§ 207 and 208, 8 USC §§ 1.
- 167 J. Krogsad and J. Radford, "Key Facts about Refugees in the U.S.", *Fact Tank*, Pew Research Center, Washington, DC (30 January 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>.
- 168 For details of the offshore refugee process, see US Department of State, US Refugee Admissions Program FAQs, Fact Sheet (20 January 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm>. See also D.A. Martin, T.A. Aleinikoff, H. Motomura and M. Fullerton, *Forced Migration*, 2d ed., Eagan, MN: West Publishing (2013), pp. 896-906. Appendix I, Figure AI.1 depicts the multiple levels of screening and review.
- 169 President Carter decided not to treat them as refugees and subject them to the Refugee Act of 1980; see M.A. Rivera, *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis*, Lanham, MD: University of America Press (1991), pp. 12, 16.
- 170 Presidential Proclamation No. 4865, 29 Sept 1981, 46 Federal Register 48107.
- 171 Executive Order 12324, High Seas Interdiction of Illegal Aliens, 29 Sept. 1981, 46 Federal Register 48109, § 2(c)(3).
- 172 S.H. Legomsky, "The USA and the Caribbean Interdiction Program", *International Journal of Refugee Law*, Vol. 18 (2006), pp. 677, 679.
- 173 H. French, "U.S. Is Holding 200 Haitians on 2 Ships", *New York Times* (8 November 1991); A. Dastaryi, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay*, Cambridge: Cambridge University Press (2015), p. 20.
- 174 A. Helton, "The US Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects", *New York Law School Journal of Human Rights*, Vol. 10, p. 325 (1993); Dastaryi (2015), op. cit., p. 20; see note 13 in Martin et al. (2013), op. cit., p. 776.
- 175 Legomsky (2006), op. cit., p. 680.
- 176 *Ibid.*; the US Coast Guard reported 2,836 interdictions in 1990 (*Miami Herald*, 20 March 1991).
- 177 US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, available on the US Census Bureau website, <http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>.
- 178 Amnesty International, *Haiti: The Human Rights Tragedy, Human Rights Violations Since the Coup*, London (1992); Dastaryi (2015), op. cit., p. 21.
- 179 Belize, Honduras, Venezuela, and Trinidad and Tobago agreed to receive a total of 550 Haitians intercepted at sea. Dastaryi (2015), op. cit., p. 22.
- 180 *Ibid.*, p. 25.
- 181 In 1901 the US Congress enacted the Platt Amendment, which conditioned the independence of Cuba on the leasing of land by Cuba to the US for use as naval stations. This condition became an appendix to the Constitution of Cuba. In 1903, Cuba leased the land for the Guantánamo Bay Naval Station to the US, with the proviso that "the ultimate sovereignty" remains with Cuba, while the US "shall exercise complete jurisdiction and control over and within" the leased land. Dastaryi (2015), op. cit., pp. 6-8.
- 182 The initial screening of 34,000 Haitians resulted in decisions that 10,500 had a credible fear of persecution; those with a credible fear were transferred to the US between November 1991 and May 1993. Starting in 1992, HIV-positive Haitians were transferred to the US only if they showed a well-founded fear of persecution, while HIV-negative Haitians were eligible for transfer if they satisfied the less stringent 'credible fear' standard. Dastaryi (2015), op. cit., pp. 24-26.
- 183 Executive Order 12807, 57 Fed. Register 23133, 24 May 1992.
- 184 Hipsman and Meissner (2015), op. cit., p. 17. US legislation includes the 1951 refugee definition, which is predicated on individuals who are outside their homelands (INA § 101(a)(42)(A)), and it also includes individuals still within their homelands if the President specially designates them as persecuted (INA § 101(a)(42)(B)).
- 185 *Ibid.*, note 61.
- 186 *Ibid.*, note 59.

- 187 The US authorities scheduled hearings on a US ship in Jamaican territorial waters. D. Ghezelbach, "Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia", in J.-P. Gauci, M. Giuffr  and E. Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Boston/Leiden: Brill (2015), p. 97. The Memorandum of Understanding between the US and Jamaica for a refugee processing facility in Jamaican waters, KAV 3901, Temp State Dept No. 94-153, entered into force 2 June 1994. The US authorities also scheduled hearings in Turks and Caicos Islands. The Memorandum of Understanding between the UK, the Government of the Turks and Caicos Islands, and the US, KAV 3906, Temp State Dept No. 94-158, entered into force 18 June 1994.
- 188 Ghezelbach (2015), *supra*, p. 98.
- 189 *Ibid.*
- 190 Antigua, Grenada, Suriname, St. Lucia and the Dominican Republic committed to accept 11,000 Haitians; *ibid.*
- 191 The UN, at the request of the US, called for a global trade embargo on Haiti, together with a variety of financial sanctions on military officers who supported the coup against Aristide. The coup withstood these measures, but finally gave way when US-led multinational military forces landed in Haiti in September 1994. Dastaryi (2015), *op. cit.*, pp. 33-35; Legomsky (2006), *op. cit.*, p. 681.
- 192 Although the majority of Haitians returned to Haiti, the US forcibly returned some Haitians from Guant nomo. Dastaryi (2015), *op. cit.*, p. 36.
- 193 Legomsky (2006), *op. cit.*, p. 682.
- 194 *Ibid.*, quoting B. Frelick, "Abundantly Clear: Refoulement", *Georgetown Immigration Law Journal*, Vol. 19, No. 1 (2005), p. 245.
- 195 M. Fullerton, "Cuban Exceptionalism: Migration and Asylum in Spain and the United States", *Inter-American Law Review*, Vol. 35, No. 3 (2004), pp. 527, 551-553 (200,000 arrived between 1959 and 1963; 260,000 between 1965 and 1973). Most arrived by air, and US officials allowed them to enter and remain in the US via an administrative procedure known as 'parole'. No screening to determine if they were fleeing persecution took place. T. Henken, "*Balseros, Boeros, and El Bombo*: Post-1994 Cuban Immigration to the United States and the Persistence of Special Treatment", *Latino Studies*, Vol. 3, No. 3 (2005), pp. 393, 396.
- 196 The Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161, provided that Cubans paroled into the US could become lawful permanent residents after two years of residence, a period that was later reduced to one year. Amended by Pub. L. No. 94-571, 90 Stat. 2706 (1976) and Pub. L. No. 96-212, 94 Stat. 108 (1990), codified as amended at 8 U.S.C.   1255.
- 197 For a discussion of the 5,000 Cubans who embarked from Camarioca, Cuba in 1965 to the US, see Fullerton (2004), *op. cit.*, p. 553; M.F. Tarvieso-Diaz, "Immigration Challenges and Opportunities in a Post-Transition Cuba", *Berkeley Journal of International Law*, Vol. 16, No. 2 (1998), pp. 234, 241; L.D. Bender, *The Politics of Hostility*, Inter American University Press (1975), p. 117. For a description of the exodus of 125,000 Cubans from Mariel, Cuba in 1980, see Fullerton (2004), *op. cit.*, pp. 560-561; Rivera (1991), *op. cit.*, p. 6.
- 198 Fullerton (2004), *op. cit.*, p. 564.
- 199 Ghezelbach (2015), *op. cit.*, p. 99.
- 200 Dastaryi (2015), *op. cit.*, p. 47.
- 201 Ghezelbach (2015), *op. cit.*, p. 99; Fullerton (2004), *op. cit.*, p. 564.
- 202 Ghezelbach (2015), *op. cit.*, p. 99.
- 203 The Joint Communique between the United States and Cuba Concerning Normalizing Migration Procedures, 9 September 1994, 35 I.L.M. 327, specified that Cuba would reinstate measures to stop illegal and unsafe departures by sea and that the US would accept 20,000 Cuban immigrants annually, with immigration processing to take place in Cuba. In May 1995, a Joint Statement by Cuba and the US pledged that Cuba would not prosecute Cubans intercepted by the US and sent back to Cuba. In return, the US agreed to return the future interdicted Cubans to Cuba. The US also agreed to admit to the US the 21,000 Cubans who remained at Guant nomo Naval Base, as well as to establish a refugee processing office in Cuba and to resettle the Cuban refugees in the US. Cuba-United States: Joint Statement on Normalization of Migration, Building on the Agreement of 9 September 1994, 2 May 1995, 35 I.L.M. 327.
- 204 Fullerton (2004), *op. cit.*, p. 564.
- 205 *Ibid.*, p. 566.
- 206 *Ibid.*, p. 566.

- 207 Hipsman and Meissner (2015), op. cit., p. 16. In the aftermath of the Mariel boatlift in 1980, migration agreements between Cuba and the US included a process of annual immigrant admissions. There also was an in-country refugee processing programme for former political prisoners, which began in 1984, was suspended in 1985 and resumed in 1987 (ibid., pp. 15-16). By the early 1990s, US officials determined that demand for resettlement by former political prisoners had generally been satisfied, and that the programme could expand to a wider group of refugees (ibid., p. 16).
- 208 Hipsman and Meissner (2015), op. cit., p. 16.
- 209 Ibid.
- 210 Ibid.
- 211 Ibid.
- 212 US Department of Homeland Security, Coast Guard Migrant Interdictions by Nationality of Aliens, Table 532, US Census Bureau website, <http://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls>; *Associated Press*, “Figures Show Dramatic Drop in Cuban Interdictions, Coast Guard Says” (16 May 2017b), <http://www.sun-sentinel.com/news/florida/fl-reg-cuban-interdictions-20170516-story.html>.
- 213 The US Border Patrol apprehended 1.6 million in 2000 and the number had dropped to 325,000 in 2011. The average apprehended each year from 2012 to 2015 was 400,000. F.S. Mandelman and A. Zlate, “The Slump in Undocumented Immigration to the United States”, *Economist* (5 October 2016) (data from the US Department of Homeland Security).
- 214 W.A. Kandel, “Unaccompanied Alien Children: An Overview”, CRS Report for Congress, Congressional Research Service, Washington, DC (11 May 2016), p. 2.
- 215 Ibid.
- 216 Ibid.
- 217 Ibid.
- 218 T.A. Aleinikoff, D.A. Martin, H. Motomura, M. Fullerton and J.P. Stumpf, *Immigration and Citizenship: Process and Policy*, 8th ed., Eagan, MN: West Publishing (2016), pp. 859-861.
- 219 Hipsman and Meissner (2015), op. cit., p. 4.
- 220 Ibid., p. 5.
- 221 US Department of State, “Expansion of the CAM Program”, Fact Sheet, Washington, DC (20 November 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/266363.htm>. The multiple stages of the process are detailed in US Department of State, “Refugee Processing Center”, CAM Flowchart, Washington, DC (January 2015), <http://www.wrapsnet.org/cam-program/>.
- 222 D. Nakamura, “US to Expand Refugee Program for Central American Minors”, *Washington Post* (26 July 2017).
- 223 J.H. Davis, “US to Admit More Central American Refugees”, *New York Times* (26 July 2016).
- 224 Ibid.
- 225 V. Yee and K. Semple, “Trump Policy blocks Obama-Era Path to US for Central Americans”, *New York Times* (16 August 2017).
- 226 Ibid.
- 227 R. Anspach, “Unimaginable Cruelty”, *Slate* (9 October 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/trump_s_revocation_of_the_central_american_minors_program_is_unfathomably.html.
- 228 US Department of Homeland Security, US Citizenship and Immigration Services (USCIS), “Central American Minors (CAM): Information for Parole Applicants, Requests for Review”, Washington, DC, <https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-parole-applicants>.
- 229 Anspach (2017), op. cit.
- 230 Ibid.
- 231 Ibid. Those with humanitarian residence permits can apply for renewal of residence on a case by case basis. USCIS “may re-parole individuals who demonstrate urgent humanitarian reasons or a significant public benefit”, 82 Fed Register 38927, 16 August 2017. Those who entered as refugees can remain, but the Trump Administration refused to process any further refugee applications, announcing the termination of the entire CAM refugee processing programme in November 2017. US Department of Homeland Security, US Citizenship and Immigration Services, “In-Country Refugee/Parole Processing (CAM)”, <https://www.uscis.gov/CAM> (accessed 19 November 2017).

- 232 509 U.S. 155, 113 S. Ct. 2549, 125 L.Ed.2d 128 (1993).
- 233 *Ibid.*, p. 162.
- 234 *Ibid.*, p. 159.
- 235 For instance, the UNHCR and Inter American Commission on Human Rights.
- 236 See, e.g. G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3d ed., Oxford: Oxford University Press (2007), pp. 246-250; J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press (2005), pp. 335-342.
- 237 The English Court of Appeal concluded that it is “impermissible to return refugees from the high seas to their country of origin,” and that the *Sale* opinion’s interpretation of international law is incorrect. *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport*, EWCA Civ 666 (Eng. CA, 20 May 2003), paras 34-35.
- 238 United Nations High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993).
- 239 *The Haitian Center for Human Rights v United States*, Decision of the Commission, Case No. 10,675, Report No. 51/96, Inter-Am.C.H.R. OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (13 March 1997). The Commission also noted violations of the right to equality before the law, and recommended that the US pay compensation to those whose rights had been violated.
- 240 Article 33, 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, done 28 July 1951; 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, done 31 January 1967.
- 241 ICCPR, Article 2 (prohibition against discrimination), Article 6 (right to life), Article 7 (prohibition against torture), Article 9 (arbitrary detention), Article 10 (human dignity of those deprived of liberty).
- 242 Article 27, American Declaration of the Rights and Duties of Man, 1948, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003).
- 243 Article 14, Universal Declaration of Human Rights, General Assembly Resolution 217 A(III) of 10 December 1948.
- 244 Article 3, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1468 U.N.T.S. 85, done 10 December 1984, entered into force 26 June 1987.
- 245 See, e.g. D. Renwick, “Central America’s Violent Northern Triangle”, CFR Backgrounder, Council on Foreign Relations, New York, NY (19 January 2016), <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.
- 246 C. Dickerson and R. Nixon, “Trump Administration Considers Separating Families to Combat Illegal Immigration”, *New York Times*, 21 December 2016.
- 247 The need to gather supporting information remains a major hurdle for asylum seekers in societies where violence is rampant and powerful forces employ persecution against disfavoured individuals and groups. See e.g. Hipsman and Meissner (2015), *op. cit.*
- 248 See the flowchart (Figure AI.2) on the US Refugee Admissions Program, Central American Minors in Appendix I. Personal interviews by author of US Department of Homeland Security asylum officers detailed to in-country refugee processing in Cuba.
- 249 See the Central American Minors flowchart in Appendix I (Figure AI.2); see also Yee and Semple (2017), *op. cit.* For a discussion of the administrative review process employed by the US Department of State for visa denials by US consular officers, see Aleinikoff et al. (2013), *op. cit.*, pp. 500-501.
- 250 Dyer (2016), *op. cit.*
- 251 *Ibid.* As noted earlier, under the Cuban Adjustment Act, Cubans who reach the US by land without a visa are not turned away at the border. This evolved into a ‘wet foot, dry foot’ policy that allows Cubans arriving by land (‘dry foot’) to enter the US but turns away Cubans interdicted at sea (‘wet foot’). In January 2017, the US terminated the wet foot, dry foot policy, and returned 680 Cubans to Cuba from the US and Mexico (*Associated Press*, “680 Cubans Returned Home Since End of ‘Wet Foot, Dry Foot’”, *L.A. Times* (18 February 2017a)). Now Cubans, like Haitians or Hondurans or citizens of most countries, need a visa to enter the US. Those without visas who reach the border can apply for asylum, but they must prove a well-founded fear of persecution; those stopped at sea are returned to Cuba. Since the change in policy, the US Coast Guard has intercepted only a small number of Cubans in recent months. See *Associated Press* (2017b), *op. cit.*
- 252 Godenau and López Sala (2016), *op. cit.*, p. 165.
- 253 T. Gammeltoft-Hansen and J. Vedsted-Hansen, *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York, NY: Routledge (2017).
- 254 See Carrarino (2007), *op. cit.*, pp. 185-187, 193-194.

- 255 See also N. Frenzen, "US Migrant Interdiction Practices in International and Territorial Waters", in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Leiden: Martinus Nijhoff Publishers (2010), pp. 375-396.
- 256 See C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press (2016). See also V. Moreno-Lax and C. Costello, "The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model", in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *Commentary on the EU Charter of Fundamental Rights*, Oxford: Hart Publishing (2014), pp. 1657-1683.
- 257 S. Carrera and E. Guild, "Offshore processing of asylum applications: Out of sight, out of mind?", CEPS Commentary, Centre for European Policy Studies, Brussels (2017).
- 258 Refer to a letter, dated 28 September 2017, from the Commissioner for Human Rights of the Council of Europe, Mr N. Mužnieks, to the Italian Minister of the Interior, Mr M. Minniti, <https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea>.
- 259 *Hirsi Jamaa and Others v Italy*, Application No. 27765/09, ECtHR (23 February 2013).
- 260 Refer to a letter from the Commissioner for Human Rights of the Council of Europe to the Italian Minister of the Interior (2017), op. cit.
- 261 FRA, "Scope of the principle of non-refoulement in contemporary border management: Evolving areas of law", European Union Agency for Fundamental Rights, Luxembourg: Publication Office of the EU (2016).
- 262 Article 16 ASR states: "Aid or assistance in the commission of an internationally wrongful act ... A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." As Frenzen has rightly argued in this regard, "the practical problem presented when seeking to analyse or challenge EU member state assistive practices is establishing the nature of the specific migration control practice". See N.W. Frenzen, "The Legality of Frontex Operation Hera-Type Migration Control Practices in Light of the Hirsi Judgement", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York, NY: Routledge (2017), pp. 294-313.
- 263 European Commission, "EU Trust Fund for Africa: Support to Libya", Factsheet, Brussels (1 March 2018), <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf-noa-ly-01032018.pdf>.
- 264 Ibid.
- 265 S. Scherer and A. Lewis, "Exclusive: Italy plans big handover of sea rescues to Libya coastguard", *Reuters* (15 December 2017), <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG>.
- 266 In the *Hirsi* case the European Commission issued a Letter by former Vice-President of the European Commission Jacques Barrot of 15 July 2009, which stated that "the Commission is of the opinion that border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone, the exclusive economic zone or the high seas, fall within the scope of application of the Schengen Borders Code ... our preliminary legal analysis would suggest that the activities of the Italian border guards correspond to the notion of 'border surveillance' as set forth in Article 12 SBC". The Commission Letter also acknowledged the obligation by Italian border guards to comply with the principle of *non-refoulement* when carrying out any border control activity, including border surveillance.
- 267 *The Guardian*, "EU's policy of helping Libya intercept migrants is 'inhuman', says UN", Agence France-Presse in Geneva (14 November 2017), <https://www.theguardian.com/world/2017/nov/14/eu-libya-coastguard-detention-centres-migration-mediterranean-un-zeid-raad-al-husseini>.
- 268 T. Gammeltoft-Hansen and J. Vedsted-Hansen, *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York, NY: Routledge (2017).
- 269 See European Commission, "Better Regulation Guidelines", Commission Staff Working Document, SWD(2015) 111 final, Strasbourg (19.5.2015); See also S. Carrera, L. den Hertog, J. Núñez Ferrer, R. Musmeci, M. Pilati and L. Vosyliūtė, "Oversight and Management of the EU Trust Funds: Democratic Accountability Challenges and Promising Practices", Study for the European Parliament, Centre for European Policy Studies, Brussels (21 March 2018), <https://www.ceps.eu/publications/oversight-and-management-eu-trust-funds-democratic-accountability-challenges-and>.
- 270 The notion of portable justice has been used in the US in the field of labour migration law by the Global Workers Justice Alliance (new name: Justice in Motion; see <http://www.globalworkers.org/advocates/defender-network> and <http://justiceinmotion.org/>) and Centro de Derechos del Migrante (Mexico).

- 271 Refer to Gammeltoft-Hansen and Vedsted-Hansen (2017), op. cit.; and T. Gammeltoft-Hansen, "Creative Legal Thinking and the Evolution of International Refugee Law", *Lakimies*, 112, No. 1 (2013), pp. 99-103.
- 272 For a detailed study on the effectiveness of 'administrative' or extra-judicial complaint mechanisms refer to S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* CEPS Paperback, Centre for European Policy Studies, Brussels (2018).
- 273 * This Appendix has been written by Sergio Carrera, Chun Luk and Lina Vosyliute.
- 274 C. Costello (2016), op. cit.; Moreno-Lax and Costello (2014), op. cit., pp. 1657-1683.
- 275 *Loizidou v Turkey* (Preliminary Objections), para. 62; *Hirsi Jamaa and others v Italy*, para. 73.
- 276 *Hirsi Jamaa and others v Italy*, para. 81.
- 277 Costello (2016), op. cit., pp. 242-243, referring to *Loizidou v Turkey*, *Medvedyev v France* and *Al-Skeini v United Kingdom*, respectively.
- 278 See *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15, ECtHR (3 October 2017), para. 54. On 29 January 2018, the case was referred to the Grand Chamber.
- 279 Article 67(2) TFEU.
- 280 See Articles 77(1) and 79(1) TFEU. Not cited is the requirement for the EU to develop a policy on "the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings".
- 281 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1-52.
- 282 Article 4, Schengen Borders Code.
- 283 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, OJ L 180, 29.6.2013, pp. 96-116 (hereinafter: Reception Conditions Directive).
- 284 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, OJ L 180, 29.6.2013, pp. 60-95 (hereinafter: Asylum Procedures Directive).
- 285 See the Reception Conditions Directive, preamble, para. 35, and Asylum Procedures Directive, preamble, para. 60.
- 286 See N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights*, Human rights files, No. 9, Strasbourg: Council of Europe Publishing (2010), https://www.echr.coe.int/Documents/Pub_coe_HFfiles_2000_09_ENG.pdf; FRA, *Handbook on European law relating to asylum, borders and immigration*, EU Agency for Fundamental Rights Luxembourg: Publications Office of the European Union (2014), <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>.
- 287 Cf. *Hirsi Jamaa and others v Italy*, para. 114-115; cf. http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf, pp. 36-39.
- 288 In respect of the right to an effective remedy, it should be noted that Article 13 ECHR is not a self-standing right. Instead, it must always be linked to the violation of a Convention right.
- 289 *Hirsi Jamaa and others v Italy*, para. 205.
- 290 See for example, *F.J. et al. v Australia* in Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, UN Doc. CCPR/C/116/D/2233/2013 (22 March 2016), paras 10.2-10.4.
- 291 S. Carrera, L. den Hertog and J. Parkin, "The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?", *European Journal of Migration and Law*, Vol. 15, No. 4 (2013).
- 292 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29.5.2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>.
- 293 European Parliament, "Improving the Common European Asylum System", Press Release (30 June 2017), [URL](#).
- 294 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM(2016) 271 final/2016/0131 (COD), Brussels, 4 May 2016, p. 22, Article 2 "Tasks", para. 1(m).
- 295 *Ibid.*, Article 2, para. 2.
- 296 *Ibid.*

- 297 ECRE, "Agent of Protection? Shaping the EU Asylum Agency: ECRE's Analysis of the Potential and Risks Contained in the Proposal to Transform EASO into an EU Asylum Agency", ECRE Policy Note No.4, European Council on Refugees and Exiles, Brussels (2017), <https://www.ecre.org/wp-content/uploads/2017/01/Policy-Note-04.pdf>.
- 298 S. Carrera, L. den Hertog and M. Stefan, "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", CEPS Policy Insight, Centre for European Policy Studies, Brussels (28 April 2017).
- 299 See European Commission, COM(2016) 271 final (2016), op. cit., p. 16, Recital 24.
- 300 Ibid., p. 36, Article 26, para. 3.
- 301 Ibid., p. 38, Article 30.
- 302 European Data Protection Supervisor, Opinion 07/2016 EDPS on the first reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations), Brussels (21 September 2016), paras 47-49. https://edps.europa.eu/sites/edp/files/publication/16-09-21_ceas_opinion_en.pdf.
- 303 See the Frontex website, "Mission and Tasks" (2017), <http://frontex.europa.eu/about-frontex/mission-and-tasks/>.
- 304 FRA, *Scope of the principle of non-refoulement in contemporary border management: Evolving areas of law*, European Union Agency for Fundamental Rights, Luxembourg: Publication Office of the EU (2016).
- 305 European Commission, Communication "Back to Schengen – A Roadmap", COM(2016) 120 final, Brussels, (4 March 2016), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf.
- 306 Regulation (EU) No. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L 251, 16.9.2016, http://frontex.europa.eu/assets/Legal_basis/European_Border_and_Coast_Guard.pdf.
- 307 S. Carrera, I. Rostas and L. Vosyliūtė, "Responses and promising practices in the EU and selected Member States", Centre for European Policy Studies, Brussels (2017).
- 308 European Ombudsman, "Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission", Strasbourg (11 May 2015), <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/59836/html.bookmark>.
- 309 Ibid.
- 310 European Ombudsman, "Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement", Strasbourg (18 January 2017).
- 311 Ibid.
- 312 Ibid.
- 313 European Ombudsman, "Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement", Strasbourg (2016), <http://www.ombudsman.europa.eu/cases/decision.faces/en/64308/html.bookmark>.
- 314 European Ombudsman, "Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ" (2017), op. cit.
- 315 Article 187(2) of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the Financial Rules Applicable to the General Budget of the Union and Repealing Council Regulation (EC, Euratom) No. 1605/2002, OJ L 298, 26.10.2012.
- 316 S. Carrera, L. den Hertog, J. Núñez Ferrer, R. Musmeci, M. Pilati and L. Vosyliūtė, "Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices", Study for the European Parliament, Centre for European Policy Studies, Brussels (21 March 2018).
- 317 European Court of Auditors, "The Bêkou EU Trust Fund for the Central African Republic: A Hopeful Beginning despite Some Shortcomings", Special Report No. 11/2017, Luxembourg (2017), pp. 17-20.
- 318 In accordance with Article 287(4) TFEU, the ECA may "at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union". Such requests may therefore be submitted, for example, by the European Parliament on its own initiative or following a petition by European citizens or civil society organisation in the EU in accordance with Article 227 TFEU.
- 319 Carrera, S., I. Rostas and L. Vosyliute (2017), op. cit.

