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Sara Vassalo Amorim

Is Offshoring the Solution? The EU and the Extraterritorial Processing of Asylum Claims

EMA, The European Master's Programme
in Human Rights and Democratisation

SARA VASSALO AMORIM

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THE EU AND THE EXTRATERRITORIAL
PROCESSING OF ASYLUM CLAIMS

FOREWORD

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The selected theses demonstrate the richness and diversity of the EMA programme and the outstanding quality of the work performed by its students. On behalf of the Governing Bodies of EMA and of all participating universities, we congratulate the authors.

Prof. Manfred NOWAK
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EMA Programme Director

This publication includes the thesis *Is Offshoring the Solution? The EU and the Extraterritorial Processing of Asylum Claims*, by Sara Vassalo Amorim and supervised by Lisa Heschl, University of Graz.¹

BIOGRAPHY

Sara studied Law (BA), Administration of Justice (MA), and Human Rights and Democratisation (EMA). In Portugal, she worked as lawyer and volunteered with the Portuguese Red Cross. She worked at the Court of Justice of the European Union and is currently policy officer in justice policy and rule of law in the European Commission.

ABSTRACT

This thesis explores the topic of the extra territorialisation of processing of asylum claims by the European Union (EU) and its member states (MS). In particular, it focuses on the compatibility of the creation of processing centres in the territory of third countries by the EU and MS' with their obligations under human rights, international and EU law. The creation of these centres has been presented as an alternative to the EU's legal and policy framework on migration and asylum, which has proved inadequate and ineffective to respond to the growing migratory pressure, marked by the mixed nature of the migratory flows. The thesis problematises the consequences of severing the territorial link to the EU asylum system, namely regarding the legal protection of migrants and asylum seekers. Considering the current proposals and existing cases of extraterritorial processing in other regions of the world, this thesis shows that, a priori, the EU and the MS are not exempted from their obligations towards refugees, asylum seekers and migrants when acting extraterritorially, even in cases of delegation of powers and indirect participation. However, practical constraints may limit the possibility to hold the EU and MS accountable for violations occurred extraterritorially.

Keywords: EU; EU Law; ECHR; Migration and asylum; Extra territorialisation; Extraterritorial processing of asylum.

¹ The content of this publication does not reflect the official opinion of the European Union. Responsibility for the information and views expressed therein lies entirely with the author.

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TABLE OF ABBREVIATIONS

APD	Asylum Procedures Directive (Recast)
CAT	Committee Against Torture
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DARIO	Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts
DARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
EAM	European Agenda on Migration
EASO	European Asylum Support Office
EC	European Commission
EP	European Parliament
EPC	Extraterritorial processing centre
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
ECSC	European Coal and Steel Community
EU	European Union

GAMM	Global Approach to Migration and Mobility
GC	General Court
HRC	Human Rights Committee
HRW	Human Rights Watch
ICJ	International Court of Justice
ILC	International Law Commission
IO	International organisation
IOM	International Organisation for Migration
MS	Member states
NGO	Non-governmental organisation
PACE	Parliamentary Assembly of the Council of Europe
RCD	Reception Conditions Directive (Recast)
RPP	Regional protection programmes
TCN	Third-country nationals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America

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PART I
INTRODUCTION

1. BACKGROUND

When pronouncing his declaration proposing the creation of the European Coal and Steel Community (ESCS), Schuman stated that ‘Europe [would] not be made all at once’.¹ Few areas represent so well this idea of progressive construction as migration and asylum, the focus of the present study.

In 1950, the idea of ‘an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum [and] immigration’² was very distant. The European Union (EU) as we know it, including its asylum system, is the result of over 60 years of evolution. As Schuman had foreseen, it was ‘built through concrete achievements’.³ However, the *solidarity* that Schuman had set as the basis of the construction of a united Europe has not always been present. This lack of solidarity has been particularly acute in the area of migration and asylum, as recent events have exposed.

In October 2015, the arrival of migrants at the Mediterranean borders of the EU reached an unprecedented number of over 220.000 people, adding up to the thousands – and ever-growing number – of people who had been trying to reach Europe since the beginning of that year.⁴ For many of them, the European dream would never materialise – according to the United Nations High Commissioner for Refugees (UNHCR), 5,096 people perished while crossing the Mediterranean.⁵ The reasons that force these people to undertake the perilous journey, with Europe as final destination, are manifold and range from fleeing poverty to the search for a safe haven from persecution and war. Therefore, the mass of people trying to reach Europe is not uniform, but rather composed of economic migrants and people in need of international protection alike, hence triggering the application of different legal regimes and international standards.

¹ Robert Schuman, ‘The Schuman Declaration – 9 May 1950’ (*European Union*) <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> accessed 14 July 2018.

² Consolidated version of the Treaty on European Union [2016] OJ C 202/1 (TEU), art 3(2).

³ Schuman (n 1).

⁴ In total, 1,015,078 arrivals were registered in 2015 (see UNHCR ‘Operational Portal - Refugee Situations’ (*UNHCR*) <<https://data2.unhcr.org/en/situations/mediterranean>> accessed 14 July 2018).

⁵ *ibid.*

The mixed nature of these migratory flows and the fact that a significant part of these migrants attempted to reach Europe through the Mediterranean route, placed particular pressure in some countries on the southern EU border. Greece and Italy, which, in 2015, received 856,723 and 153,842 people respectively, were particularly affected.⁶ These events revealed the lack of coordination between the EU and its members states (MS), and the clamorous unwillingness of some MS to share the burden affecting the MS located in the external borders. It evidenced the need to rethink the EU's migration policies and its asylum system. It has become increasingly clear that there is need for new strategies that not only allow MS to better cope with the migratory flows, but also comply with the EU's and MS' obligations under international, human rights, humanitarian and EU law.

In this context, an old suggestion was revisited – the processing of asylum claims in the territory of third states.⁷ This idea is not new, nor exclusive to the EU, and it should be understood as the consequence of 'a shift towards an extraterritorial enforcement of law',⁸ which flows from the realisation that 'migration cannot be "managed"' unilaterally, let alone turned off'.⁹ In fact, it has long been acknowledged that 'access to the [EU]'s external borders is not only being restricted on [MS] territory and at the Union's external borders, but also through external action', with migration 'being stopped by means of measures taken in countries of origin and transit'.¹⁰ Such a degree of extraterritorialisation as the one required by the processing of asylum claims in third states is, nonetheless, unprecedented at the European level.

⁶ UNHCR 'Operational Portal - Refugee Situations' (UNHCR) <<https://data2.unhcr.org/en/situations/mediterranean>> accessed 14 July 2018)

⁷ The proposal was raised by Italy (Nick Squires and Bruno Waterfield, 'Italy calls for migration centres outside EU' *The Telegraph* (Rome and Brussels, 11 March 2015) <www.telegraph.co.uk/news/worldnews/europe/italy/11463400/Italy-calls-for-migration-centres-outside-EU.html> accessed 14 July 2018) and Austria (Nikolaj Nielsen, 'Austria proposes to offshore EU asylum' *EUObserver* (Brussels, 6 January 2017) <<https://euobserver.com/migration/136462>> accessed 14 July 2018).

⁸ Andrea Spagnolo, 'Offshore law The tension between the universality of human rights and the practice of states in the management of migration flows' (2017) 52 (218) *Biblioteca della libertà* 127.

⁹ Guy S Goodwin-Gill, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' (20 March 2015) Keynote Address at An International Workshop National and Kapodistrian University of Athens Faculty of Law 1.

¹⁰ Steven Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?' in Jan Orbie (ed), *Europe's Global Role External Policies of the European Union* (Routledge 2008) 117, 136.

If, in the past, the EU and the MS regarded extraterritorial processing as a mere hypothesis, recent developments show that it has never been as close to becoming a reality as nowadays. As this study was being developed, the Austrian government, days before assuming the presidency of the Council of the EU, called for asylum requests to be decided at centres established beyond EU borders.¹¹ Furthermore, the EU Summit of 28 June 2018 opened the door to the creation of ‘regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and [International Organisation for Migration (IOM)]’.¹²

However, more doubts than certainties surround extraterritorial processing of asylum claims. While its advocates argue that processing along migration routes will save lives and deter the ‘abuse’ of the EU asylum system by those without legitimate claims for protection, opponents counter with legal arguments, ranging from the uncertainty of the applicable procedural rules, to the real risk of lower level of protection. These counterarguments cannot be ignored, especially considering the particularities of the European regional human rights system and the specificities that may arise from the participation of a very particular nonstate actor, the EU.

It is not clear if the legal obligations – originating from different sources – that bind the EU and its MS to the protection of asylum seekers and refugees still apply in case of extraterritorial – or offshore – processing of asylum claims. This issue is precisely the object of this thesis.

2. OBJECTIVES AND SCOPE OF THE STUDY

Considering the background described, the creation of EU extraterritorial processing centres (EPCs) may be imminent. Extraterritorial processing challenges the asylum institution as we know it, and implies a change in the paradigm of the relationship between states and migration.¹³ While the ineffectiveness of the current regional

¹¹ François Murphy and William McLean, ‘Austria’s Kurz says to push for rapid EU action on migration’ *Reuters* (Linz, 20 June 2018) <www.reuters.com/article/uk-europe-migrants-austria/austrias-kurz-says-to-push-for-rapid-eu-action-on-migration-idUKKBN1JG1TC> accessed 14 July 2018.

¹² European Council, Conclusions 28 June 2018.

¹³ Gregor Noll, ‘Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones’ (2003) 5(3) *European Journal of Migration and Law* 303, 304.

and national asylum policies calls for change, extraterritorialisation, by severing the territorial link between asylum seekers and the destination state, raises questions regarding the effectiveness of the protection granted to those in need of it, such as refugees and asylum seekers.

The present study analyses the legal aspects that contend with the creation and administration of EPCs, particularly to the extent that they interact with provisions on refuge and asylum enshrined in international, human rights, and EU law that bind the EU and the MS. Therefore, this thesis aims to answer the following questions:

- Is the processing of asylum claims by the EU and/or its MS in third countries in accordance with international, human rights and EU Law?
- How could the EU and/or its MS be held accountable for human and fundamental rights violations occurred in extraterritorial processing centres?

To answer these questions, this thesis will be divided into three main chapters:

- Chapter 1 will deal with the discussion of EPCs at the EU level, and the reasons that triggered it. The chapter will be divided into sections: the first will explore the evolution of the EU asylum legislation and policies, and why structural changes are needed; the second will describe the EPCs and why they are perceived as an alternative, presenting the cases of United States of America (USA) and Australian EPCs as examples; the final section will outline the debate surrounding EPCs in the EU;
- Chapter 2 will focus on the main questions of this thesis. Composed of two sections, the first will deal with the main legal concerns raised by the EPCs, and the second will be dedicated to the issues of jurisdiction, legal responsibility and access to remedy;
- Chapter 3 will present some solutions to the problems identified in chapter 2. Strategies to overcome the legal questions will be proposed, and an alternative to EPCs will be presented – the creation of an EU Asylum Agency.

3. METHODOLOGY

The issues of extraterritorial processing of asylum claims, and of the creation of EPCs, will be analysed from the point of view of their interplay with the EU's legal framework in the fields of migration, asylum, external action, and human and fundamental rights, as well as its engagements and responsibilities in terms of international law. For this purpose, I will rely on the analysis of the relevant EU legal (treaties, regulations, directives) and policy documents in the aforementioned areas. In the case of EU MS, in addition to the EU law and policy, the European Convention on Human Rights (ECHR)¹⁴ will also be analysed.

Particular attention will be given to the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), especially in chapter 2, when addressing the issues of jurisdiction, responsibility and access to remedy. When pertinent, case law of other international courts and opinions of international organs will also be analysed.

Relevant academic works will be referenced and opposing views will be used to illustrate the ongoing debate.

Since EUled EPCs are not a reality yet, the assessment will be based on the configurations they will most likely assume, considering existing EPCs in other regions, and proposals presented so far.

To the extent allowed by the time frame of this study, the developments in this field will be considered, and for this purpose I will rely on EU documents and press articles.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) .

PART II

1.

EXTRATERRITORIAL PROCESSING OF ASYLUM CLAIMS

1.1 INTRODUCTION

The present chapter focuses on the potential and shortcomings of the proposals to process asylum in the territory of third states and situates them in the current state of evolution of EU's migration and asylum policies. Hence, it aims to answer the following questions: Why are alternatives to classic processing of asylum perceived as necessary? Can extraterritorial processing of asylum be a valid alternative? How has the idea of extraterritorial processing been addressed in the EU to date?

To identify why and if the extraterritorial processing of asylum claims is an alternative to the flaws of the current asylum processing strategies, I will explore the reasons that have been presented to support this solution, especially in the European context. For this purpose, I will address the current EU legal and policy framework, framing its current state in the context of the evolution in the areas of migration and asylum since the creation of the EU. To contextualise the discussion and problematise it, I will present the cases of USA and Australia, as examples of extraterritorial processing of asylum, and the development of this idea in the EU.

1.2 ASYLUM IN THE EU – POLICY AND LEGISLATION

1.2.1 *Evolution*

When the first steps towards a united Europe were taken with the creation of the ECSC, and, later, of the European Economic Community (EEC), migration and asylum were not yet part of the European project. In fact, this area mirrors the progressive construction of what is nowadays the EU, and the continuing evolution of the areas it embraces and their communitarisation.

However, the EU originated from the search for a peaceful continent, and migration and asylum cannot be understood independently from the overarching framework of human rights. Furthermore, the creation of the Council of Europe (CoE), with an explicit aim of protection and promotion of human rights, preceded the ECSC. All founding MS of the ECSC were already members of the CoE, and had signed and ratified the ECHR, thus being bound to respect the rights enshrined in it.

These events occurred in the postWorld War II context, marked by the momentum achieved by the protection of human rights, which led to the proclamation of the United Nations (UN) Universal Declaration of Human Rights (UDHR).¹⁵ The UDHR foresees the right to freedom of movement, in article 13, and the right ‘to seek and to enjoy in other countries asylum from persecution’ in article 14. The latter set the ground for further regulation of the international refugee protection, through the 1951 Convention Relating to the Status of Refugees (Geneva Convention),¹⁶ which remains the ‘primary standard of refugee protection’.¹⁷ This Convention enshrines a single definition of the term ‘refugee’ and the criteria thereto,¹⁸ provisions on the juridical status of refugees,¹⁹ a catalogue of minimum standards of treatment of refugees, and is ‘underpinned by a number of fundamental principles’.²⁰

¹⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹⁶ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Geneva Convention).

¹⁷ James C Hathaway, ‘Refugees and asylum’ in Brian Opeskin and others (eds), *Foundations of International Migration Law* (CUP 2012) 178.

¹⁸ Geneva Convention (n 16) art 1.

¹⁹ *ibid* ch II.

²⁰ *ibid* introductory note.

The principle of *nonrefoulement*,²¹ in particular, is of capital importance since it binds states independently from the formal recognition of the refugee status. From the moment the individual comes under its jurisdiction, the state is under an obligation not to expel or return him or her to ‘territories where his life or freedom would be threatened’.²² The Geneva Convention was followed by the 1967 Protocol,²³ which eliminated the geographic and temporal limitations to the definition of ‘refugee’ contained in the Convention.²⁴ The Convention and Protocol represent a step forward in the protection of refugees, namely through the non-penalisation of the illegal entry or presence in order to seek asylum,²⁵ but still grant the states control over the whole refugee protection system.²⁶

In the EEC, migration and asylum were initially matters of the states’ sovereignty. Notwithstanding, the expansion of the European project required the communitarisation of migration and asylum, which was the result of the ‘pressure of events rather than [of] a pre-existing will of [MS]’.²⁷

Migration and asylum only ceased to be exclusively under the competence of the MS in the decade of 1990, as a by-product of the construction of a Europe without internal frontiers, enabling the free movement of goods, persons, services and capital. The abolition of internal borders was increasingly perceived as requiring ‘the strengthening of external border controls, and cooperation in the field of asylum and immigration as compensatory measures’,²⁸ together with the harmonisation of asylum in order to avoid secondary movements of asylum seekers.

These developments led to the adoption of the Schengen

²¹ Geneva Convention (n 16) art 33.

²² *ibid.*

²³ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

²⁴ Geneva Convention (n 16) arts 1(A)(2) and 1(B)(I)(a).

²⁵ *ibid* art 31.

²⁶ Hathaway (n 17) 179.

²⁷ Lisa Heschl, *Protecting the Rights of Refugees Beyond European borders – Establishing Extraterritorial Legal Responsibilities* (Intersentia 2018) 43.

²⁸ European Asylum Support Office (EASO), ‘An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis’ (2016) 13.

Convention,²⁹ and of the Dublin Convention.³⁰ The latter established principles that still apply in the present EU asylum system, and set the criteria to determine the MS responsible for examining asylum claims, decided ‘without regard to asylum seekers’ wish or preference’.³¹ Although based on the premise that every MS conferred similar treatment to asylum seekers, regarding ‘refugee definition, asylum procedure and reception standards’,³² the Dublin Convention was not preceded by the harmonisation of the domestic legislation.

The cooperation on migration and asylum remained of intergovernmental nature until the Treaty of Amsterdam³³ brought asylum into the European Community’s competence. Finally, in the Tampere European Council, it was ‘agreed to work towards establishing a Common European Asylum System [(CEAS)], based on the full and inclusive application of the Geneva Convention’.³⁴

Composed by a network of legislative documents, the CEAS remains a work in progress, as the following section will show.

1.2.2 *The CEAS*

The CEAS constitutes the EU’s legislative framework in the field of asylum, which ‘regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU [MS]’.³⁵ Although based on and developed in accordance with the Geneva Convention and Protocol, it goes beyond their scope, since it regulates all facets of asylum.

²⁹ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 293/19.

³⁰ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1990] OJ L 254/1.

³¹ Vincent Chetail, ‘The Common European Asylum System: Bric-à-Brac or System?’ in Vincent Chetail and others (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2016) 6.

³² *ibid* 7.

³³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ L 340/115.

³⁴ European Council, Presidency Conclusions, Tampere European Council, 15-16 October 1999 (Tampere Conclusions) 13.

³⁵ EASO (n 28) 14.

The current CEAS is the product of a gradual evolution. Its first phase was marked by the adoption of legislative acts that have ‘shaped the contours of Europe’s asylum’:³⁶ the Eurodac Regulation,³⁷ the Temporary Protection Directive,³⁸ the Dublin II Regulation,³⁹ the Asylum Reception Conditions Directive,⁴⁰ the Asylum Qualification Directive⁴¹ and the Asylum Procedures Directive.⁴² These instruments were characterised by a ‘harmonisation *ad minima*’,⁴³ which ultimately evidenced that the MS’ practices regarding reception of applicants, procedures and assessment of qualification for international protection differed substantially, resulting in ‘divergent outcomes for applicants, which went against the principle of providing equal access to protection across the EU’.⁴⁴ The understanding that the desired degree of harmonisation had not been achieved prompted the reform of the CEAS.

The Treaty of Lisbon⁴⁵ provided the legal basis for this reform. Article 78 of the Treaty on the Functioning of the European Union (TFEU)⁴⁶ marks the first time the CEAS is expressly mentioned in EU primary law. Consequently, the CEAS ceased to be a policy objective to become a legal duty. This article also reaffirms the mandatory

³⁶ Kay Hailbronner and Daniel Thym, ‘Legal Framework for EU Asylum Policy’ in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law* (CH Beck Hart Nomos 2016) 1023, 1025.

³⁷ Council Regulation (EC) No 2725/2000/EC of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

³⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

³⁹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

⁴⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

⁴¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2003] OJ L 304/12.

⁴² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

⁴³ Chetail (n 31) 12.

⁴⁴ EASO (n 28) 16.

⁴⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 [2007] OJ C 306/1.

⁴⁶ TEU (n 2).

compliance of the EU asylum policy with the Geneva Convention and other relevant treaties. Consequently, secondary EU asylum legislation must comply with the Geneva Convention, under penalty of infringing the TFEU, which could lead to the annulment of said legislation.⁴⁷ Moreover, the principles of solidarity and fair sharing of responsibility between MS in the implementation of the CEAS were enshrined in article 80 TFEU. The solidarity between MS is also referred to in article 67(2) TFEU, which establishes that the common asylum policy shall be fair towards third country nationals (TCN).

Article 78(2) TFEU defines the scope of EU's competences, enumerating the core components of the CEAS. Article 78(2)(g), which foresees the possibility to adopt measures comprising the 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection', is particularly relevant for this study. This provision is seen as 'establish[ing] a favourable political and practical context for the realisation of the ... proposal to establish asylum reception centres'.⁴⁸

The Treaty of Lisbon also introduced important amendments to the Treaty on European Union (TEU),⁴⁹ in particular to article 6(1), which recognises the Charter of Fundamental Rights of the European Union (CFREU)⁵⁰ as having the same legal value as the treaties. Article 18 CFREU enshrines the right to asylum, 'with due respect for the rules of the Geneva Convention'. Consequently, the EU (including institutions and agencies) – which, unlike the MS, is not party to the Geneva Convention – is also bound by the international law framework regarding asylum.

The new treaty base called for the recast of the secondary law instruments of the CEAS.⁵¹ The CEAS secondary legislation is currently composed of the following instruments:

⁴⁷ Hailbronner and Thym (n 36) 1029.

⁴⁸ *ibid* 1040.

⁴⁹ TEU (n 2).

⁵⁰ Charter of Fundamental Rights of the European Union [2016] OJ C 202/389.

⁵¹ For an overview of the main differences introduced by the recast instruments in relation to the previous ones, see Steve Peers, 'The second phase of the Common European Asylum System: A brave new world-or lipstick on a pig?' (Statewatch, 8 April 2013) <www.statewatch.org/analyses/no-220-ceas-second-phase.pdf> accessed 14 July 2018.

- Dublin III Regulation,⁵² setting the rules on responsibility for the examination of applications for international protection. It establishes the primary rule of the ‘first country of entry’; accordingly, the responsibility for the asylum claim is allocated to the MS of arrival of the asylum seeker;
- Recast Eurodac Regulation;⁵³
- Recast Qualification Directive;⁵⁴
- Recast Procedures Directive (APD),⁵⁵ establishing common procedures for granting and withdrawing international protection and enshrining several procedural guarantees;
- Recast Reception Conditions Directive (RCD),⁵⁶ defining the standards for the reception of applicants for international protection, which aims to limit secondary movements motivated by different conditions of reception between MS; and
- Temporary Protection Directive, the only instrument of the CEAS’ first phase not to be recast.⁵⁷

To support the implementation of the CEAS and facilitate the cooperation between MS, a new agency was created, the European Asylum Support Office (EASO).

⁵² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L 180/31.

⁵³ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1.

⁵⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

⁵⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

⁵⁶ 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 [2013] OJ L 180/96.

⁵⁷ n 38.

Both at the primary and secondary level, the CEAS legislation defines the rules MS should follow in every stage of the processing of asylum claims, and provides asylum seekers with a set of procedural and legal guarantees that go beyond the minimum standards of protection foreseen in the Geneva Convention. Furthermore, the Treaty of Lisbon placed the CEAS under the jurisdiction of the CJEU. Through its interpretation, the CJEU plays ‘a key role in the enhancement of the standards set in the legislation’,⁵⁸ and has consistently reaffirmed the importance of the Geneva Convention as the cornerstone of the international legal regime for the protection of refugees.⁵⁹ The CJEU’s interpretation is binding to the EU and MS, and, correspondingly, is part of the EU asylum *acquis*.

However, the CEAS has a limited territorial scope of application.⁶⁰ Consequently, these legal guarantees and rights are only conferred to the asylum seekers once they reach EU territory. In practice, many potential asylum seekers are deprived of those rights and guarantees due to the application of EU migration policies that prevent their arrival to its territory. Such measures have, in great extent, external effect, as it will be explained below.

1.2.3 *The external dimension of the EU migration and asylum policy*

This section presents some of the migration and asylum management strategies adopted by the EU and MS that produce effects beyond their borders and that require close cooperation with third parties. These measures are relevant to the present study, since they can be seen as an intermediate step towards the extraterritorialisation of the processing of asylum.

The communitarisation that prompted the creation of the CEAS also evidenced that effective migration and asylum measures required the involvement of third countries. The Tampere Conclusions explicitly mentioned the need for a comprehensive approach to migration,

⁵⁸ Hélène Lambert, ‘Conclusion: Europe’s normative power in refugee law’ in Hélène Lambert and others (eds), *The Global Reach of European Refugee Law* (CUP 2013) 265.

⁵⁹ See, *inter alia*, CJEU, Case C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECLI:EU:C:2010:351. For a detailed enumeration of the CJEU case law relative to each CEAS instruments, see EASO n 38.

⁶⁰ See Dublin III, art 3(1), APD, art 3(1) and RCD, art 3(1).

‘addressing political, human rights and development issues in countries and regions of origin and transit’.⁶¹ The 2002 Seville European Council reiterated this idea, recognising the importance of cooperation with third countries to ‘prevent abuse of the [asylum] system’.⁶² Therefore, the idea that presided the extension of the effects of EU measures beyond its borders was the need to preserve the EU area from migrants perceived as security threats, serving the ‘primary function of helping to fulfil the objectives to establish an [area of freedom, security and justice]’.⁶³

This focus on the protection of the EU’s external borders coined the term ‘Fortress Europe’, and the engagement of third countries is depicted as the expansion of this fortress, to the territories of said countries.⁶⁴ The EU and its MS seek to supplement the control of the border through ‘geographical relocation of border controls (to the open seas and the territories of third countries) and the transfer (or sharing) of responsibilities for controlling the border to (with) states at the other sides of the border’.⁶⁵

The rationale being the prevention of the arrival of unsolicited migrants – disregarding the nature and motives of the flows, the mobilisation of countries of origin and transit aims to stem migration and asylum flows at the source. If successful, the engagement of third countries – or simply third parties⁶⁶ – in the EU migration and asylum policies will reduce the pressure at the external borders. The cooperation of third countries is also important to implement some essential CEAS features, such as the operationalisation of the concept of ‘safe third country’.⁶⁷

⁶¹ Tampere Conclusions 1999 (n 34) 11.

⁶² European Council, Presidency Conclusions, Seville European Council, 21-22 June 2002, 29.

⁶³ Heschl (n 27) 14.

⁶⁴ Steven Sterckx, ‘The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?’ in Jan Orbie (ed), *Europe’s Global Role External Policies of the European Union* (Routledge 2008) 117.

⁶⁵ Maarten Den Heijer, ‘Europe beyond its borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control - Legal Challenges* (Martinus Nijhoff 2010) 191.

⁶⁶ The carriers’ obligations regarding the screening of passengers is an example of the engagement of private actors in border and migration control (see Bernard Ryan, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control - Legal Challenges* (Martinus Nijhoff 2010) 19-22).

⁶⁷ APD (n 55) art 38.

The cooperation with third countries is foreseen in several EU policy instruments. In particular, the Global Approach to Migration and Mobility (GAMM)⁶⁸ called for a ‘coherent and comprehensive migration policy for the EU’⁶⁹ and established the enhancement of the external dimension of asylum policy as one of its pillars. It set the strengthening of third countries’ asylum systems and legislation as a priority, as well as the creation and enhancement of already existing regional protection programmes (RPP) and resettlement programmes.⁷⁰

The European Agenda on Migration (EAM)⁷¹ sets forth similar initiatives. It endorsed the idea of ‘working in partnership with third countries to tackle the migration upstream’ in regions of origin and transit,⁷² namely through regional development and protection programmes. Regarding forced displacement, the EAM refers the need to address the *root causes* for such in third countries, both through a long-term approach and through the mitigation of the immediate impacts, to be developed by the EU external cooperation assistance.⁷³ The importance of cooperation with third countries regarding the return of migrants whose asylum claims are refused is also highlighted.⁷⁴ Regarding border management, the EU offers to ‘support third countries developing their own solution to better manage their borders’,⁷⁵ either through the support of Frontex⁷⁶ or through EU funding. Many of the ideas of the EAM were also endorsed in the Action Plan drafted in the Valletta Summit on Migration, which gathered European and African heads of state.⁷⁷ This action plan is based on the assumption that migration is a shared responsibility between countries of origin, transit and destination, and highlights the importance of cooperation.

⁶⁸ ‘Communication from the Commission and the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility’ COM(2011) 743 final 18 November 2011 (GAMM).

⁶⁹ *ibid* 3.

⁷⁰ Samuel Cogolaty and others, *Migrants in the Mediterranean – Protecting Human Rights* (EP - Directorate General for External Measures 2015) 53-55.

⁷¹ ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration’ COM(2015) 240 final 13 May 2015 (EAM).

⁷² *ibid* 5.

⁷³ *ibid* 7-8.

⁷⁴ *ibid* 9-10.

⁷⁵ *ibid* 11.

⁷⁶ European Border and Coast Guard Agency (Frontex), established by Regulation (EU) 2016/1624 on the European Border and Coast Guard [2016] OJ L 251/1 (Frontex Regulation).

⁷⁷ Valletta Summit on Migration, 11-12 November 2015.

In 2016, the European Commission (EC) adopted the Partnership Framework with Third Countries (Partnership Framework),⁷⁸ which stressed the need for MS, EU institutions and third countries to work together in order to ‘tackle the root causes of irregular migration and forced displacement’.⁷⁹ The achievement of a:

coherent and tailored engagement where the [EU] and its [MS] act in a coordinated manner putting together instruments, tools and leverage to reach comprehensive partnerships (*compacts*) with third countries to better manage migration in full respect of [their] humanitarian and human rights obligations...

was defined as its ultimate aim.⁸⁰ It expressly foresees the use of ‘a mix of positive and negative incentives’⁸¹ to encourage third states to cooperate, ‘rewarding’ those countries that cooperate through readmission, migration management and hosting people in need of protection, and defining ‘consequences for those who do not cooperate on readmission and return’.⁸²

A common aspect to these instruments is the importance assigned to cooperation with third countries to combat irregular migration, smuggling and trafficking of human beings, core aspects of the EU migration policy.

Under article 3(5) TEU, the EU is bound to contribute to the protection of human rights in external relations. Article 21 TEU reiterates that:

[The EU’s] action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the [UN] Charter and international law.

⁷⁸ Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration COM(2016) 385 final 7 June 2016.

⁷⁹ *ibid* 2.

⁸⁰ *ibid* 6.

⁸¹ *ibid*.

⁸² *ibid* 9.

Consequently, these obligations also apply in the cooperation with third states in the fields of migration and asylum.

However, the EU's external action has been subject of critics, which add to the flaws that are also pointed to the CEAS. The following section addresses the limitations and negative aspects of the EU legal and policy framework regarding asylum.

1.2.4 Limitations (and overcoming them)

The present section will critically assess some of the legal and policy instruments previously referred, and analyse their implementation in response to the increase in the migratory flows.

As evidenced above, the discourse surrounding migration and asylum in the EU has predominantly adopted a rhetoric based on security concerns. The EU asylum policy was developed with a 'focus on restrictive measures, trying to prevent migrants from reaching Europe, mirroring the original concept of flanking measures to compensate states for the loss of control over internal borders'.⁸³ This has:

rendered [the CEAS] inaccessible to its addressees, either through indiscriminate border and migration controls deployed extraterritorially that block prospective beneficiaries *en route*, or through the operation of procedural devices ... that, combined with a robust return and readmission policy, push responsibility away from the [MS].⁸⁴

Consequently, contrary to the principle of protection subjacent to the international refugee law framework, growing numbers of people in need of protection are prevented from reaching the EU asylum system in a safe and legal manner.⁸⁵ The UNHCR has expressed concerns that the EU's interception and migration control measures may impede access to the CEAS, and urged the EU to commit to protection-sensitive border management.⁸⁶

⁸³ Hailbronner and Thym (n 36) 1026.

⁸⁴ Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward' [2015] Red Cross EU Office 6.

⁸⁵ Jane McAdam, 'Extraterritorial processing in Europe Is 'regional protection' the answer, and if not, what is?' [2015] Andrew & Renata Kaldor Centre for International Refugee Law, University of NSW 4.

⁸⁶ Den Heijer (n 65) 176.

The experience has also evidenced the CEAS' incapacity to cope with the demands of an era in which '[e]xternal migratory pressure is the "new normal"'.⁸⁷ Moreover, despite the long process of communitarisation, 'a balance between [MS] with respect to burden-sharing and solidarity'⁸⁸ is still lacking. The provisions of the Dublin Regulation concerning the allocation of the responsibility for examining applications for international protection are particularly prone to criticism. On the one hand, the Dublin Regulation's 'first country of entry' rule does not ensure solidarity between MS, and 'shifts, rather than shares, responsibility',⁸⁹ placing uneven pressure on the countries on the external borders, hindering their capacity to shelter and provide for asylum seekers. On the other hand, the system implemented by the Dublin Regulation is based on the existence of a *level playing field* between the MS.⁹⁰ However, the presumption that asylum seekers face the same reception conditions, procedures and levels of protection regardless of the MS that receives and processes their claims, does not correspond to the reality. Most of the CEAS' instruments take the form of directives, conferring the MS leeway to adopt more favourable provisions. Moreover, 'refugee status ... is legally constructed as a treatment to be accorded on par with nationals in such fields as education, welfare and healthcare'.⁹¹ Since these matters fall under MS competences, it is not possible to guarantee the uniformity of this status throughout the EU.

Furthermore, the mutual trust between MS that the Dublin Regulation is based upon, and that justifies the possibility of transfer to the MS considered responsible, has been judicially challenged. The ECtHR⁹² and the CJEU⁹³ have declared that a MS cannot simply rely on the presumption that all MS fulfil the fundamental rights standards.

⁸⁷ EAM (n 71) 5.

⁸⁸ Zara Rabinovitch, 'Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing' (Migration Policy Institute 2014) <www.migrationpolicy.org> accessed 14 July 2018.

⁸⁹ Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24(5) Maastricht Journal of European and Comparative Law 740, 753.

⁹⁰ Maarten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System' (2016) 53(3) Common Market Law Review 607, 610.

⁹¹ *ibid* 609-610.

⁹² *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

⁹³ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Ireland* [2011] ECLI:EU:C:2011:865.

MS should refrain from proceeding with transfers under the Dublin Regulation whenever they:

cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that [MS] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.⁹⁴

Also important is that, under the CEAS, and especially the Dublin Regulation, preferences of asylum seekers are disregarded, translating into ‘an almost dehumanising approach to the asylum seeker as object ... disentitled from any right to express a preference, let alone choose his or her destination.’⁹⁵ Asylum seekers are coerced to remain in a given MS, which fosters disobedient behaviours⁹⁶ and incentivises secondary movements, instead of avoiding them. However, the disobedience also exists from the MS’ side. The growing number of arrivals triggered unilateral responses from the most affected MS, which have reacted by suspending the CEAS and not processing asylum claims.⁹⁷

In practice, the CEAS, and particularly the Dublin Regulation, did not translate into faster, streamlined asylum procedures, but, conversely, slowed them down and did not have the expected impact on secondary movements. Aware of these shortcomings, the EU deployed strategies to help frontline MS to cope with the pressure of the surge of arrivals. As foreseen in the EAM, ‘hotspots’ were created in areas of the external border ‘characterised by specific and disproportionate migratory pressure’.⁹⁸ These hotspots constitute a common platform ‘where [EASO], Frontex and Europol [work] on the ground with frontline [MS] to swiftly identify, register and fingerprint incoming migrants’,⁹⁹ in an integrated manner. The hotspots were conceived to ensure proper reception, identification and processing of arrivals. However, reality

⁹⁴ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Ireland* [2011] ECLI:EU:C:2011:865 para 106.

⁹⁵ Guy S Goodwin-Gill, ‘Regulating “Irregular” Migration: International Obligations and International Responsibilities’ (20 March 2015) Keynote Address at An International Workshop National and Kapodistrian University of Athens Faculty of Law 1, 8.

⁹⁶ Den Heijer, Rijpma and Spijkerboer (n 90) 610.

⁹⁷ *ibid* 612.

⁹⁸ Federico Casolari, ‘The EU’s Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?’ (2015) 25(1) *The Italian Yearbook of International Law* 117.

⁹⁹ EAM (n 71) 6.

proved otherwise, with hotspots being criticised for the poor reception and detention conditions and the lack of personal safeguards during the procedure and of information about the possibility to request international protection,¹⁰⁰ pointing to violations of EU primary and secondary law. The unsatisfactory functioning of the hotspots was acknowledged by the EU,¹⁰¹ and has inclusively led to closure of hotspots.¹⁰²

Moreover, hotspots should facilitate the implementation of the relocation mechanism adopted through the Council Decision (EU) 2015/1601.¹⁰³ Reaffirming the importance of the solidarity between MS, enshrined in the treaties, the European Parliament (EP) had already called for the establishment of ‘a binding quota for the distribution of asylum seekers among all [MS]’,¹⁰⁴ and the EAM also endorsed the idea. However, the Council Decision, based on the provision of article 78(3) TFEU, was not well received by MS,¹⁰⁵ and the relocation scheme failed to materialise. By end of the decision’s application period, only Malta had fulfilled its relocation quota, while Poland and Hungary had not accepted any asylum-seekers.¹⁰⁶ The EC referred Czech Republic, Hungary and Poland to the CJEU for non-compliance with their legal obligations on relocation,¹⁰⁷ but the three MS, together with Slovakia, still oppose any mandatory relocation scheme.^{108 109}

¹⁰⁰ Casolari (n 98) 111-112.

¹⁰¹ See European Council, Conclusions, European Council 17-18 December 2015.

¹⁰² Ylenia Gostoll, ‘Italy to temporarily close Lampedusa ‘hotspot’ refugee centre’ (Aljazeera, 15 March 2018) <www.aljazeera.com/news/2018/03/italy-temporarily-close-lampedusa-hotspot-refugee-centre-180315101258703.html> accessed 14 July 2018.

¹⁰³ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ 2 248/53.

¹⁰⁴ EP, ‘Resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies’ (2015/2660(RSP)) para 9.

¹⁰⁵ Slovakia and Hungary sought the annulment of the Council Decision before the CJEU, which ultimately dismissed the appeals (Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631).

¹⁰⁶ Amnesty International, ‘EU: Countries have fulfilled less than a third of their asylum relocation promises’ (25 September 2017) <www.amnesty.org/en/latest/news/2017/09/eu-countries-have-fulfilled-less-than-a-third-of-their-asylum-relocation-promises/> accessed 14 July 2018.

¹⁰⁷ Cases C-715/17 *European Commission v Poland*, C-718/17, *European Commission v Hungary*, and C-719/17 *European Commission v Czech Republic*, decisions pending.

¹⁰⁸ See Nikolaj Nielsen, ‘Aquarius, Dublin: Is EU losing grip on asylum reform?’ *EUObserver* (Brussels, 14 June 2018) <<https://euobserver.com/migration/142094>> accessed 14 July 2018.

¹⁰⁹ This position has also contributed to the stalemate of the Dublin reform, referred to below.

Regarding the engagement of third countries in the EU's migration and asylum policies, like at the internal level, the measures adopted have been more reactive than preventive.

Despite the declarations of intentions of protection and promotion of the human rights conditions in the countries of origin and transit, the tone is mostly set in the management, or rather containment, of migration flows and reinforcement of border control.¹¹⁰ Moreover, these initiatives are developed in EU's interest, disregarding 'the wider, international dimensions'.¹¹¹ Thus, the EU instrumentalises these third countries to pursue its own interests, rather than engaging with them on an equal basis.¹¹² Besides, the conditionality nexus, making financial aid dependant on controlling migration flows, 'risks creating the circumstances for violations of the human rights of migrants and *refoulement*'.¹¹³

The focus on the prevention of arrivals in Europe, showing little or no consideration for the protection of migrants, is particularly striking in the case of the initiatives put forward by the MS individually. The case of the Italian pushbacks in the Mediterranean is particularly attention-worthy. These pushbacks took place in the context of Italy's cooperation with Libya, following the conclusion of bilateral agreements, in the spirit of the cooperation with third states encouraged by the EU. These operations consisted in the interception by Italian authorities of vessels boarded by migrants trying to reach the Italian coast, and their subsequent return to Libyan authorities, with no prior screening or consideration of the weak legal protection granted by Libya, which is not party to the Geneva Convention. Such practices were eventually abandoned, following the seminal decision of the ECtHR in the *Hirsi* case,¹¹⁴ which found that they breached article 3 ECHR, 'Prohibition of Torture'.

¹¹⁰ Bill Frelick and others, 'The impact of externalization of migration controls on the rights of asylum seekers and other migrants' (2016) 4(1) *Journal on Migration and Human Security* 190, 193.

¹¹¹ Guy S Goodwin-Gill, 'Legal and practical issues raised by the movement of people across the Mediterranean' (2016) 51(1) *Forced Migration Review* 84.

¹¹² *ibid.*

¹¹³ Mattia Toaldo and Luca Barana, 'The EU's migration policy in Africa: five ways forward' (2016) *European Council on Foreign Relations*.

¹¹⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012). The relevance of this judgment for the development of the concept of extraterritorial jurisdiction will be addressed in chapter 2.

Among the biggest critics of the EU approach, Goodwin-Gill has pointed out that ‘[l]ooking at the interception and return measures adopted in the Mediterranean and off the west coast of Africa ... one may rightly wonder what has happened to the values and principles considered fundamental to the [EU] MS’.¹¹⁵ Nevertheless, critics also come from within the EU. For instance, the EP has referred ‘the need for the EU to base its response ... on solidarity and fair sharing of responsibility, as stated in Article 80 [TFEU], and to take a comprehensive European approach’.¹¹⁶

In conclusion, neither the measures adopted at the internal nor at the external level have conferred the EU the necessary tools to deal with the challenges it faces. The EU’s response has been described as ‘chaotic and utterly inadequate’,¹¹⁷ and has evidenced the lack of solidarity, both intra-EU and between EU and the external partners.¹¹⁸ There is also a pervasive contradiction between declarations of intent and policy implementation.¹¹⁹ The EU has shown awareness and willingness to address these problems and limitations. In this context, the EC set in motion the reform of the CEAS, with the objective of:

mov[ing] from a system which ... places a disproportionate responsibility on certain [MS] and encourages uncontrolled and irregular migratory flows to a fairer system which provides orderly and safe pathways to the EU for [TCN] in need of protection or who can contribute to the EU’s economic development.¹²⁰

However, in parallel to suggestions for improving the CEAS, the idea of increasing the involvement of third parties in the asylum process, including outsourcing the processing of asylum claims, namely through the creation of processing centres located in third countries, has also been considered. This idea will be presented in the following section.

¹¹⁵ Guy S Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of NonRefoulement’ (2011) 23(3) *International Journal of Refugee Law* 443, 445.

¹¹⁶ EP (n 104) para 3.

¹¹⁷ Sterkx (n 64) 131.

¹¹⁸ See Heschl (n 27); Moreno-Lax (n 89).

¹¹⁹ Sterkx (n 64) 131.

¹²⁰ ‘Communication from the Commission to the European Parliament and the Council - Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ COM(2016) 197 final 6 April 2016.

1.3 EXPLORING NEW ALTERNATIVES

1.3.1 Extraterritorial processing of asylum claims

The concerns about the functioning of the European asylum system are not new.¹²¹ Nonetheless, they have never been as evident as in the present decade, with a *perfect storm* – a combination of regional instability, protracted conflicts and economic crisis – unravelling at the doors of Europe, causing a mass influx of people fleeing to the continent.

Faced with the failure of the measures adopted under the CEAS,¹²² the EU is under pressure to find alternatives, suitable not only to stem the migratory flows, but also to comply with the values of respect for human dignity and human rights that are paramount to the EU and MS.¹²³ Furthermore, the EU and MS must comply with the international obligations regarding migrants and refugees rights, and with the additional obligations enshrined in EU law¹²⁴ and the ECHR.

In this context, an even closer and demanding cooperation with third states was suggested – the extraterritorial processing of asylum claims. While there is a ‘wide variety of practices whereby a protection claim is examined to some extent *before* arrival in an asylum country’,¹²⁵ the new suggestions have focused on ‘the assessment of claims for asylum in nonEU countries under arrangements operated or supported by the [EU] collectively’,¹²⁶ including the creation of processing centres in third countries. The idea is that ‘the processing of the merits of an application for international protection by and/or subject to the responsibility of the EU or one of its [MS] [would take] place at a location outside the borders of that state or of the EU’.¹²⁷ The ideas suggested often refer to the creation of centres outside the destination state to which

¹²¹ References to a ‘crisis in the asylum system’ can be found, eg, in the ‘Communication on the common asylum policy and the Agenda for protection’ COM(2003) 152 final 26 March 2003.

¹²² S 2, present ch.

¹²³ As enshrined in EU primary law (TEU, art 2).

¹²⁴ These obligations derive from primary EU law, such as the CFREU, and secondary law, such as multiple provisions of the instruments composing the CEAS.

¹²⁵ Madeline Garlick, ‘The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims’ (Migration Policy Institute 2015) <www.migrationpolicy.org> accessed 14 July 2018.

¹²⁶ *ibid.*

¹²⁷ Rabinovitch (n 88).

spontaneous-arrival asylum seekers are sent, and where their claims are assessed. In case refugee status is granted, applicants can either be returned to the destination state or to an alternative safe country.¹²⁸

As for how the external processing would take place, the most common suggestion is the creation of processing centres – the EPCs. In such cases, ‘one state uses another’s territory ... 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*’.¹²⁹ The question remains if they would function as ‘extraterritorial enclaves under international or European rule’,¹³⁰ or if their management and control would be seconded to the host countries, or international organisations (IOs). Regarding the structure of EPCs, they are generally framed as a physical and administrative infrastructure in the territory of a third country, potentially located along previously identified migratory routes. Ideally, their creation would be preceded by:

an agreement on allocative mechanisms and the sharing of responsibility for protection seekers, on the sharing of costs for operating the centres, and, finally a delimitation of state responsibility under international law born by each [MS] for the activities carried out at the centre.¹³¹

Other questions remain, namely as if EPCs should operate as closed or open centres.

To date, proposals for the creation of EPCs have been endorsed and conceived by states, but have not been exempt from polemic and criticism. For this reason, I will present the arguments used to support the proposals.

The motive alleged by these states for resorting to this solution relies primarily on humanitarian grounds. Indeed, processing asylum claims

¹²⁸ Alexander Betts, ‘The international relations of the “new” extraterritorial approaches to refugee protection: Explaining the policy initiatives of the UK government and UNHCR’ (2004) 22(1) *Refuge: Canada’s Journal on Refugees* 58, 59.

¹²⁹ Guy S Goodwin-Gill, ‘The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations’ (2007) 9(1) *UTS L Rev* 26.

¹³⁰ Sandra Lavenex, ‘Shifting up and out: The foreign policy of European immigration control’ (2006) 29(2) *West European Politics* 329, 343-344.

¹³¹ Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, ‘Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure’ [2003] *European Communities* 63.

in transit countries may present positive aspects. First, the proposals point that ‘removing the obligation to be on European soil in order to apply for asylum’,¹³² would ‘reduce the incentive to embark on perilous journeys’.¹³³ Consequently, the death toll would be, if not halted, at least reduced. It would fulfil a parallel goal of reducing the resort to smuggling networks, which ‘exploit irregular migration and put at risk the lives of migrants for their own business profits’.¹³⁴ Migrants and asylum seekers would also benefit from the certainty of harmonised procedures, thus avoiding the abovementioned shortcomings of the Dublin system. Simultaneously, the countries hosting EPCs would also benefit, through the monetary assistance of countries of destination and capacity building,¹³⁵ thus improving their own asylum systems and ameliorating the level of protection granted to asylum seekers.

However, this is not only a humanitarian exercise for the countries of destination. Certainly, the EU and MS do benefit from stemming the migration flow before it reaches Europe. For instance, weakening the smuggling networks and, consequently, reducing their profits,¹³⁶ would solve the internal and seriously challenging problem that smuggling represents to the EU and MS.

Likewise, the economic factor should not be overlooked. Extraterritorial processing can be used as a step forward towards a truly harmonised system of determination of asylum claims on an EU level, leading to ‘a more efficient use of resources such as expertise, staff and infrastructure’.¹³⁷ On the same note, by carrying out the processing in third countries, the costs incurred by the EU and MS, including with the removal of rejected applicants, are expected to be lower.¹³⁸

¹³² Sarah Léonard and Christian Kaunert, ‘The extra-territorial processing of asylum claims’ (2016) 51(1) *Forced Migration Review* 48, 49.

¹³³ Nikolaj Nielsen and Eric Maurice, ‘EU summit set to outsource asylum’ *EUObserver* (Brussels and Prague, 19 June 2018) <<https://euobserver.com/migration/142132>> accessed 14 July 2018.

¹³⁴ EP (n 104).

¹³⁵ Frelick and others (n 110) 194.

¹³⁶ According to Europol, 90% of the migrants arriving in the EU use facilitation services, often provided by migrant smuggling networks. Smuggling generates an estimate yearly turnover of 3 to 6 billion euros (Europol, ‘Migrant Smuggling in the EU – Report’ (2016) <www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu> accessed 14 July 2018).

¹³⁷ Léonard and Kaunert (n 132) 50.

¹³⁸ Elspeth Guild and others, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ [2015] CEPS Paper in Liberty and Security in Europe 19.

Extraterritorial processing may also have a deterrent effect regarding the alleged ‘abuse’ of the EU MS’ asylum system. In its EAM, the EC referred the existence of too many unfounded asylum requests,¹³⁹ which ‘hamper[ed] the capacity of [MS] to provide swift protection to those in need’.¹⁴⁰ Such an ‘abuse’ of the system is in part attributable to its own flaws. Aware of the inefficiency and of the low rates of returns following negative decisions, many migrants may use the legal avenue of asylum as an entrance door to Europe, especially due to the lack of alternatives for a regular arrival. Processing in third countries would thus deter such migrants, and consequently avoid economic, social and political issues to the EU and its MS.¹⁴¹ Simultaneously, a better allocation of the resources available towards those whose need for protection has already been established would be achieved.

Furthermore, the political aspect also plays a role. The rise of the populist rhetoric and surge of political extremism leads traditionally moderate political parties to adopt the discourse linking migration and asylum to security, bringing the issue to the political agenda. On the other hand, questions internal to the MS often acquire European dimension, as the recent disputes within the German government illustrate.¹⁴² Faced with German threats of expulsion of asylum seekers not entitled to seek asylum in the country, other MS, like Austria and Italy, threatened to reintroduce border controls, jeopardising the freedom of movement in the Schengenarea.¹⁴³ Antonio Tajani, president of the EP, referred that the EU’s own survival depended on an agreement on migration matters.¹⁴⁴ Upon this turmoil, and unable to find an internal solution based on cooperation between MS, the EU focuses on extraterritorialisation, as the conclusions of the EU Summit of 28 June illustrate.¹⁴⁵

¹³⁹ ‘... in 2014, 55% of the asylum requests resulted in a negative decision and for some nationalities almost all asylum requests were rejected (EAM (n 71) 12).

¹⁴⁰ *ibid.*

¹⁴¹ ‘Unsuccessful asylum claimants who try to avoid return, visa overstayers, and migrants living in a permanent state of irregularity constitute a serious problem’ (*ibid* 7).

¹⁴² Paola Tamma, ‘Horst Seehofer: Migration feud with Angela Merkel is over’ *Politico* (Brussels, 8 July 2018) <www.politico.eu/article/germany-cdu-csu-horst-seehofer-migration-feud-with-angela-merkel-is-over/> accessed 14 July 2018.

¹⁴³ Jacopo Barigazzi and David Herszenhorn, ‘Austria backs migration centers in nonEU countries’ *Politico* (Brussels, 10 July 2018) <www.politico.eu/article/sebastian-kurz-austria-backs-migration-centers-in-non-eu-countries/> accessed 14 July 2018.

¹⁴⁴ Nielsen (n 108).

¹⁴⁵ n 12.

Despite the alleged positive aspects, extraterritorial processing of asylum claims has encountered opposition. Critics come not only from IOs and non-governmental organisations (NGOs), but also from other states. Without entering into the legal questions that will necessarily arise, and that will be discussed in chapter 2, I will now refer some of the criticisms that have been directed to the extraterritorialisation processing of asylum claims.

First, there is a ‘deceptive’ side to the way that extraterritorialisation is framed as ‘a life-saving humanitarian endeavour’, when it is often a mere ‘strategy of migration containment and control’.¹⁴⁶ Noll speaks of a means of subjugating the movement of asylum seekers to a ‘grand design of migrational plan economy’.¹⁴⁷

Consequently, another problem evidenced is that there seems to be little care about the need for protection of some migrants, when ‘it is impossible to know in advance which irregular migrants need protection and which do not’ and, moreover, ‘[t]he status of a person can change’.¹⁴⁸ The complexity of the assessment proceedings appears to be overlooked, with the migration management rhetoric taking primacy. The extraterritorial processing suggestions and strategies put forward so far always focus on the reduction of migration flows of every kind. Little consideration – and if so, only belated – is dedicated to the principles and rules that should preside to their implementation.¹⁴⁹ Considering the international and EU law provisions enshrining the right to seek asylum, the denial of this right through such containment measures amounts to a violation of human rights law.¹⁵⁰

Also mentionworthy is the fact that, even admitting the positive impact that extraterritorial processing may have in terms of lives saved, it is not, *per se*, a solution. In fact, ‘[a]ny regional framework must genuinely foster better protection within the region as a whole, and not deflect responsibilities on to other states’.¹⁵¹ The creation of EPCs appears to pursue exclusively this last goal.

¹⁴⁶ Frelick and others (n 110) 193.

¹⁴⁷ Gregor Noll, ‘Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones’ (2003) 5(3) *European Journal of Migration and Law* 303, 313.

¹⁴⁸ Steve Peers, ‘Immigration and asylum’ in Steve Peers and others (eds), *EU Immigration and Asylum Law* (Martinus Nijhoff 2012) 798.

¹⁴⁹ Goodwin-Gill (n 115) 446.

¹⁵⁰ This aspect will be analysed in ch 2.

¹⁵¹ McAdam (n 85) 4.

This comes to show that, behind the humanitarian purposes, extraterritorial processing is an attempt to ‘reconcile migration control on the one hand with a fair and efficient asylum process on the other’.¹⁵² However, the latter is merely a side effect of the primary purpose, which remains the migration management and, moreover, the limitation of access to EU territory. It mirrors the crossroads where the EU stands – it must protect its borders and make concessions to the demands of some MS claiming for stricter measures, but must remain faithful to the principles it stands for. Nevertheless, it appears unarguable that the extraterritorial processing’s ‘ultimate goal is to restrict access to [MS] territory and their systems of asylum protection’.¹⁵³ It is equally clear that it would introduce ‘a paradigm shift in EU asylum and migration policies’.¹⁵⁴

Despite the criticism surrounding the creation of EPCs, this solution has been gaining momentum and growing support. The UNHCR has reportedly admitted that ‘large-scale processing of migrants and refugees outside Europe, in countries such as Egypt, Libya or Sudan, may be necessary’.¹⁵⁵ Similarly, the EP has called on the MS ‘to consider the possibility of swift processing in collaboration with safe third countries of transit and origin and of return for those who do not qualify for asylum and protection in the EU’,¹⁵⁶ which appears to pave the way to such solution. The Council of the EU is also considering the creation of ‘disembarkation platforms’.¹⁵⁷ Similarly, the Parliamentary Assembly of the CoE (PACE) has agreed that ‘there may be valid reasons for considering such transit or processing centres’, though certain conditions must be fulfilled.¹⁵⁸

¹⁵² Parliamentary Assembly of the Council of Europe (PACE) – Committee on Migration, Refugees and Population, ‘Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers’ [Doc 11304] 15 June 2007 7.

¹⁵³ Sterkx (n 64) 134.

¹⁵⁴ Noll (n 147) 307.

¹⁵⁵ Harriet Sherwood and others, ‘Europe Faces “Colossal Humanitarian Catastrophe” of Refugees Dying at Sea’, *The Guardian* (London, 3 June 2014) <www.theguardian.com/world/2014/jun/02/europe-refugee-crisis-un-africa-processing-centres> accessed 14 July 2018.

¹⁵⁶ EP (n 104) 119.

¹⁵⁷ n 12.

¹⁵⁸ ‘... depending on the type of arrangements envisaged, [transit processing centres] may contribute to burden sharing, they may facilitate harmonisation of asylum processing, they may ensure that migrants and asylum seekers are processed closer to countries of origin, they may offer better levels of protection than currently on offer in a number of countries of transit and destination, they may ensure that resources are more efficiently shared and used.’ (PACE (n 152) 3).

The issue of the legal conditions to be met by EPCs is precisely the major question to be answered, and that has led the EU to refrain from stepping forward. However, some nonEU states have already established EPCs, and their experience is important to assess the possibility to adopt the same solution at the EU level. For this reason, some of these cases will be addressed below.

1.3.2 Experiences of extraterritorial processing of asylum claims

According to the UNHCR, ‘[o]ne in every 122 humans is now either a refugee, internally displaced, or seeking asylum’.¹⁵⁹ Considering these numbers, it is natural that, like the EU, other countries explore alternatives to deal with the migratory pressure, and adopt extraterritorial policies. The USA and Australia are the most noteworthy cases.

In the USA, extraterritorial processing of asylum claims dates to the decade of 1980. Faced with the rising numbers of Haitians fleeing the civil war who tried to reach American shores by boat, the USA signed a bilateral readmission agreement with Haiti, authorising the USA to intercept Haitian migrants at high seas. However, those intercepted by USA forces who wished to claim asylum would not see their claims processed in American territory. Initially, this first screening took place at sea, aboard USA Navy vessels, and afterwards in the USA Naval Base at Guantanamo, Cuba.¹⁶⁰

Although vastly criticised, the offshore processing was only discontinued in 1992. Shortly after, the US Supreme Court decided that ‘the right of *nonrefoulement* applies only to aliens physically present in the host country’,¹⁶¹ excluding the extraterritorial application of the principle.

Australia’s experience with extraterritorial processing is more recent, but the country is frequently referenced as the pioneer in such solution. The ‘Pacific Solution’, as Australia’s offshoring policies have been coined, was set off by the adoption of domestic legislation which excised ‘remote islands ... from Australia’s “migration zone”’, so as to prevent the

¹⁵⁹ UNHCR, ‘Worldwide displacement hits all-time high as war and persecution increase’ (UNHCR, 18 June 2015) <www.unhcr.org/558193896.html> accessed 14 July 2018.

¹⁶⁰ See Noll (n 147); Moreno-Lax (n 84).

¹⁶¹ *Sale v Haitian Ctrs Council* 509 US 155 [1993]. The judgement was widely criticised (Den Heijer (n 65) 182ff).

making of valid applications for visas in those places'.¹⁶² According to these laws, 'no valid asylum claims could be made outside mainland Australia, with asylum seekers taken to a "declared country" for processing instead'.¹⁶³ In the context of the 'Pacific Solution', Australia firm ed agreements with Nauru and Papua New Guinea, foreseeing the creation of closed reception centres, funded by Australia and managed by the IOM. In 2012, the 'Offshore Processing and Other Measures Bill' authorised the transfer of migrants arriving by sea to centres located in those countries, 'where they would be held indefinitely while their refugee claims were processed'.¹⁶⁴ The new law does not foresee the resettlement in Australia of those granted refugee status. Moreover, this legislation 'removed most references to the [Geneva Convention] from Australia's Migration Act of 1958' and 'added that "the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country"'.¹⁶⁵

The Australian laws raised concerns regarding their compatibility with the international standards of protection of migrants and persons in need of international protection, and the factual conditions and procedures in the EPCs have also been criticised. In fact, '[c]oncerns about *refoulement*, coerced repatriation or resettlement, and serious human rights violations have been extensively documented'.¹⁶⁶ Long periods of detention have also been reported, often 'in substandard conditions',¹⁶⁷ and allegations of involvement of Australian officers in smuggling practices add to 'accusations of collective expulsion, ill treatment, and excessive use of force'.¹⁶⁸

Moreover, by denying asylum seekers the access to its territory, Australia denies them the 'access to Australia's legal system, which includes the right to independent merits review and rights of judicial review'.¹⁶⁹

¹⁶² Susan Kneebone, 'Controlling Migration by Sea: The Australian Case' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control - Legal Challenges* (Martinus Nijhoff 2010) 358.

¹⁶³ *ibid.*

¹⁶⁴ Frelick and others (n 110) 205.

¹⁶⁵ *ibid.*

¹⁶⁶ McAdam (n 85) 9.

¹⁶⁷ Frelick and others (n 110) 205. In Nauru, the detention conditions are reportedly 'severe to the point that if asylum seekers do not die because of the harsh conditions, they frequently commit suicide' (Andrea Spagnolo, 'Offshore law The tension between the universality of human rights and the practice of states in the management of migration flows' (2017) 52 (218) *Biblioteca della libertà* 127, 131).

¹⁶⁸ Moreno-Lax (n 84) 17.

¹⁶⁹ Kneebone (n 162) 362.

Australia has repeatedly denied responsibility for the alleged violations, affirming that the centres are a matter of the states in which territory they are located, and denying having the degree of effective control necessary to establish its jurisdiction.¹⁷⁰

Conversely, the Committee Against Torture (CAT) considers that '[t]he transfer to the regional processing centres ... does not relieve the state party from its obligations under the Convention',¹⁷¹ thus accepting Australia's jurisdiction over those centres. The doctrine has taken a similar approach. For Goodwin-Gill:

In view of what is known about the money paid, the services expected of the Nauru Government ... and the control effectively exercised by Australia regarding aspects of Nauru policy ..., it would be reasonable to conclude that Australia's responsibility, additional to that of the other parties, could be founded on Article 8 of the [International Law Commission (ILC)] Articles on the responsibility of States (conduct directed or controlled by a state).¹⁷²

The American and Australian experiences have been criticised, and Australia remains under the scrutiny of the international community. Nonetheless, the Australian government promotes the 'Pacific Solution' 'as a model for other countries confronting the challenge of irregular migration, including European countries'.¹⁷³ Notwithstanding, the compatibility of such measures with the European standards of protection of human rights is questionable.¹⁷⁴

The overall conclusion is that the reception and processing conditions in the partner third states present a 'lower standard than those offered within Australia and the [USA]'.¹⁷⁵ These cases also set the precedent against which an eventual European solution should be assessed. Nonetheless, the European case presents some particularities, which do not exist in the

¹⁷⁰ Anna Liguori, 'Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims' (2016) 25(1) *The Italian Yearbook of International Law* 135, 153.

¹⁷¹ CAT, 'Concluding observations on the combined fourth and fifth periodic reports of Australia' (23 December 2014) CAT/C/AUS/CO/4-5.

¹⁷² Goodwin-Gill (n 129) 39.

¹⁷³ Frelick and others (n 110) 205.

¹⁷⁴ For McAdam, the adoption of the Australian approach in Europe would 'breach European regional human rights laws and EU norms (which are subject to relatively strong enforcement mechanisms)' (McAdam (n 85) 9).

¹⁷⁵ Liguori (n 170) 137.

previous examples. On the one hand, there are legal instruments applicable at European level that grant asylum seekers enhanced protection.¹⁷⁶ On the other hand, the European courts have developed a jurisprudence on extraterritoriality that differs substantially from the American and Australian. These legal aspects make the European case a particular one, which explains why the discussion at the EU is still ongoing. The next section presents the development of the idea within the EU and MS.

1.3.3 Discussions at the EU level

As the American case illustrates, extraterritorial processing is not new, nor is it the product of the current migration flows. The same applies to the European context.

In 1986, Denmark presented a draft resolution to the UN General Assembly (UNGA),¹⁷⁷ suggesting the creation of regional UN processing centres and advocating exclusive regional processing. However, this proposal, not obtaining much support from other states, was never considered further.

The discussion resurfaced in 1993, when the Netherlands proposed the idea of European regional processing centres at the intergovernmental consultations on refugees and exiles. This proposal was, however, deemed 'unworkable, facing significant moral, political and humanitarian obstacles, and in contravention of a number of relevant provisions of international law, as well as national Constitutions'.¹⁷⁸ The little success these initiatives encountered mitigated the debate.

The EU also considered the issue of regional processing. In 2000, the EC admitted that:

[p]rocessing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the MS by a resettlement scheme are ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or trafficking gangs or having to wait years for recognition of their status.¹⁷⁹

¹⁷⁶ S 2, present ch.

¹⁷⁷ UNGA, 'International Procedures for the Protection of Refugees' UNGA Draft res (12 November 1986) UN Doc A/C.3/41/L.51).

¹⁷⁸ Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable - Amnesty International's views on proposals for extraterritorial processing of asylum claims* (Amnesty International 2003).

¹⁷⁹ Communication from the Commission to the Council and the European Parliament –

Following this new breath in the discussion, Denmark raised once again the issue during its presidency of the Council, in 2002. Regional reception was then qualified as one of the priorities in the area of migration and asylum policies.¹⁸⁰

The momentum regained by the idea led the EC to address it, commissioning a study on the feasibility of processing asylum claims outside the EU.¹⁸¹ The conclusions of the study were followed by a 'cautious [EC] communication',¹⁸² in which the concept of EU RPPs elaborated in collaboration with third countries was mentioned, but no reference to extraterritorial processing was made.¹⁸³

Despite the EU's reluctance to proceed with the idea, the MS continued to pursue their agenda. In 2003, the United Kingdom (UK) issued the paper 'New Vision for Refugees',¹⁸⁴ suggesting the creation of 'Regional Protection Areas', located close to the countries of origin of asylum seekers. These would be 'safe areas where UNHCR has responsibility for providing protection and humanitarian support to refugees',¹⁸⁵ and to which 'those who claim asylum in the UK or in another participating country would usually be returned',¹⁸⁶ thus pursuing an explicitly deterrent aim.¹⁸⁷ This paper had been preceded by a draft paper, 'A New Vision for Refugees', which contained the controversial idea of 'transit processing centres' outside the EU, which was dropped in the final version. The UK proposals earned much attention, including from the UNHCR, which responded with its own 'three-pronged model', encompassing 'solutions in the region, improved domestic asylum procedures and the processing of manifestly unfounded cases in EU-operated closed reception centres within EU borders'.¹⁸⁸ Nonetheless, like the previous proposals, the UK

Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, (22 November 2000) COM(2000) 755 final.

¹⁸⁰ Noll (n 147) 306.

¹⁸¹ Noll, Fagerlund and Liebaut (n 131).

¹⁸² Moreno-Lax (n 84) 17.

¹⁸³ 'Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin "improving access to durable solutions"' (4 June 2004) COM(2004) 410 final.

¹⁸⁴ UK Government, 'New Vision for Refugees' (7 March 2003).

¹⁸⁵ *ibid* para 1.2.

¹⁸⁶ *ibid*.

¹⁸⁷ 'Returning asylum seekers to [RPPs] should have a deterrent effect on economic migrants and others, including potential terrorists, using the asylum system to enter the UK.' (*ibid* para 6.4).

¹⁸⁸ Noll (n 147) 307.

paper met with resistance, both from NGOs¹⁸⁹ and MS.

The EU considered the UK's and UNHCR's ideas. The EC referred that the UK's proposal posed 'various legal, financial and practical questions'¹⁹⁰ which required further research. As for the UNHCR's proposals, the EC agreed that 'the EU-based mechanism [was] worthwhile giving further consideration', but signalled that it was 'important to further investigate the exact legal modalities and the practical and financial consequences of implementing the proposals'.¹⁹¹ However, the EC remained reluctant to adopt the suggestions, rather affirming the need to assist 'regions of origin ... to enhance their protection capacity, and to enable them to better cope with the great burden placed on them'.¹⁹² Furthermore, the EC showed openness to proceed with the development of 'Protected Entry Procedures' in regions of origin.¹⁹³

These ideas were pursued by the EC in the 'Communication on regional protection programmes'.¹⁹⁴ The EC envisaged the creation of RPPs, to be developed in cooperation with the UNHCR, aimed at setting 'the conditions for one of the three Durable Solutions to take place – repatriation, local integration or resettlement'.¹⁹⁵ Although no extraterritorial processing measures were suggested, these proposals faced critics. For instance, Human Rights Watch (HRW) expressed concerns that 'the EU [would] use the existence of [RPPs] as a pretext to declare the target countries "safe third countries"' and 'return asylum seekers and migrants who transited through these countries even though effective protection could not be guaranteed'.¹⁹⁶ HRW also voiced the need to ensure that the RPP would not be used as 'pretext for denying access to asylum in the EU'.¹⁹⁷

¹⁸⁹ Amnesty International (n 178).

¹⁹⁰ 'Communication from the Commission to the Council and the European Parliament - Towards more accessible, equitable and managed asylum systems' (3 June 2003) COM(2003) 315 final 6-7.

¹⁹¹ *ibid* 9.

¹⁹² *ibid* 22.

¹⁹³ 'The notion of Protected Entry Procedures is understood to allow a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final' (*ibid* 15).

¹⁹⁴ 'Communication from the Commission to the Council and the European Parliament on regional protection programmes' (1 September 2005) COM(2005) 388 final.

¹⁹⁵ *ibid* 3.

¹⁹⁶ Human Rights Watch, *European Union Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees* (Human Rights Watch 2006) 4.

¹⁹⁷ *ibid* 19.

While the EU opted for taking cautious and progressive steps, some MS kept presenting proposals closer to the classic idea of extraterritorial processing, such as the proposal presented by the French Delegation to the EU Presidency in 2009.¹⁹⁸ Although not expressly mentioning extraterritorial processing, the proposal included a section on ‘Innovative solutions concerning asylum’,¹⁹⁹ foreseeing ‘tripartite negotiations with the UNHCR, Libya and the IOM with a view to examining the possibility of establishing an *ad hoc* protection programme in that country for persons intercepted at sea and subsequently repatriated’.²⁰⁰ The EU would provide support for the operation, as well as ‘undertake to receive persons recognised as refugees and requiring settlement on a long-term basis’.²⁰¹ The proposal was dropped due to the political instability in the region, but inspired later EU documents in which a strong focus on the cooperation with third countries is key.²⁰²

However, the change in the migratory situation required new approaches, and the pressure from the MS increased as well. Hence, the EU adopted an array of new instruments. In some of them, the extraterritorial processing solution, if not expressly present, is at least an inspiration.²⁰³

One of the cases in which the participation of the EU in asylum processing in third countries is addressed is the Khartoum Process, the partnership between the EU and the African Union for cooperation in the area of migration. This initiative foresees the possibility of, ‘on a voluntary basis and upon individual request of a country in the region, assisting the participating countries in establishing and managing reception centres, providing access to asylum processes in line with international law’.²⁰⁴

¹⁹⁸ French Delegation to the Council of the European Union, ‘Migration situation in the Mediterranean: establishing a partnership with migrants’ countries of origin and of transit, enhancing Member States’ joint maritime operations and finding innovative solutions for access to asylum procedures’ (Council doc 13205/09, 11 September 2009).

¹⁹⁹ *ibid.* 6.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² Moreno-Lax (n 84) 18.

²⁰³ S 2, present ch.

²⁰⁴ Khartoum process, ‘Declaration of the Ministerial Conference of the Khartoum Process’ (*Rome Declaration*, 28 November 2014) <www.khartoumprocess.net/resources/library/political-declaration/60-khartoum-process-declaration> accessed 14 July 2018.

Nonetheless, the EAM²⁰⁵ does not include any reference to reception nor processing centres. However, it foresees the creation of a pilot multi-purpose centre in Niger, run with the IOM, the UNHCR and Niger authorities, combining ‘the provision of information, local protection and resettlement opportunities for those in need’.²⁰⁶ According to the EC, ‘[s]uch centres in countries of origin or transit will help to provide a realistic picture of the likely success of migrants’ journeys, and offer assisted voluntary return options for irregular migrants’.²⁰⁷ They appear to be, therefore, an ‘intermediate step towards the establishment of transit processing centres’.²⁰⁸

The Partnership Framework,²⁰⁹ while highlighting the need to ‘help develop safe and sustainable reception capacities and provide lasting prospects close to home for refugees and their families in third countries affected by migratory pressure’, through the creation of ‘genuine prospects of resettlement to the EU to discourage irregular and dangerous journeys’,²¹⁰ does not foresee extraterritorial processing either.

On their hand, MS continued to pursue the issue. In 2016, Italy, one of the MS most affected by the growing number of arrivals, issued a ‘Migration Compact’.²¹¹ This document suggests that:

third countries should be supported in establishing a system of reception and management of migratory flows (including infrastructures and logistics), which should foresee careful on-site screening of refugees and economic migrants, coupled with resettlement measures to Europe for those in need of international protection and returns for irregular migrants.²¹²

Moreover, Italy refers that ‘the EU should support third countries in establishing national systems, in line with international standards, which offer on-site protection’, namely by financing the establishment

²⁰⁵ n 71.

²⁰⁶ *ibid* 5.

²⁰⁷ *ibid*.

²⁰⁸ Liguori (n 170) 143.

²⁰⁹ n 78.

²¹⁰ *ibid* 2.

²¹¹ Italian Government, ‘Italian non-paper – Migration Compact: Contribution to an EU strategy for external action on migration’, available at <www.governo.it/sites/governo.it/files/immigrazione_0.pdf> accessed 14 July 2018.

²¹² *ibid* 3.

of reception centres for refugees. More extreme ideas have also been brought up, as the Austrian Defence Minister's recommendation to "offshor[e] responsibility" over refugees by setting up EU centres in third countries for processing asylum applications, with entry only taking place after the positive asylum decision, and "entry caps" for each [MS].²¹³

The breakthrough of extraterritorial processing may happen in 2018. Austria, currently presiding over the Council of the EU, has already shown interest in pursuing the idea,²¹⁴ and the political ambiance seems more prone to the development of EPCs, than to an actual reform of the CEAS. Reports of informal meetings of interior ministers and of draft documents are surfacing at fast pace,²¹⁵ and the abovementioned conclusions of the EU Summit of 28 June are drafted in clearer terms than before, showing the EU's endorsement of the idea.

Until now, no proposal of extraterritorial processing had received a unanimous, or sufficiently strong, support from the EU MS, which might be changing. However, the absence of support remains on the potential host states' side. These states may fear becoming 'magnets for greater flows of migrants seeking to be closer to the EU',²¹⁶ thus explaining the reluctance to host processing centres.

Another conclusion that results from this chronology of the discussions is that there has never been the will of the MS to step forward and undertake an actual reform of the CEAS. It should be noted that, at the present state of the EU law, the assessment of asylum applications is still a competence of the MS. A 'centralised common process for the determination, eligibility, and processing of claims'²¹⁷ is still lacking.

On the other hand, and bridging the EU case with the American and Australian examples, neither of these two countries 'agrees to resettle those found to be refugees, whereas most EU proposals contemplate the

²¹³ Sergio Carrera and Elspeth Guild, 'Offshore processing of asylum applications Out of sight, out of mind?' [2017] CEPS Commentary.

²¹⁴ Michael Peel and James Politi, 'Austria to push hardline migration policy in EU presidency' *Financial Times* (Luxembourg and Rome, 25 June 2018) <www.ft.com/content/6a856100-7860-11e8-bc55-50daf11b720d> accessed 14 July 2018.

²¹⁵ Barigazzi and Herszenhorn (n 143).

²¹⁶ Carl Levy, 'Refugees, Europe, Camps/State of Exception: "Into The Zone", the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-seekers (Theories and Practice)' (2010) 29(1) *Refugee Survey Quarterly* 112.

²¹⁷ Angeliki Dimitriadis, 'Deals without borders: Europe's foreign policy on migration' [2016] *European Council on Foreign Relations* 5.

resettlement of at least some refugees across the EU'.²¹⁸ Consequently, this would require the MS to agree on resettlement quotas, which might meet some reluctance.²¹⁹ The failure of the relocation mechanism established by the Council in 2015, which led to extreme divisions among the MS,²²⁰ suggests even bigger discussions if EPCs become a reality.

However, the debates outlined above show that the legal consequences of extraterritorial processing are seldom formally addressed. Indeed, references to the need to comply with the Geneva Convention, EU law and the ECHR can be found, together with warnings about the conditions to be fulfilled by the EPCs, but none of the proposals has actually extensively addressed these issues. This also confirms one of the concerns referred to in section 3.1, since the discussion is mostly centred on the need to manage migration flows, rather than on the rights of migrants and asylum seekers, which play a secondary role on the grand scheme to be designed.

Hence, pressing questions remain unanswered. Considering the legal and policy framework presented in this chapter, the discussion as it stands does not present guarantees that extraterritorial processing, once a reality, will comply with the relevant provisions, and will not occur in a 'legal black-hole in which it is unclear what legal system applies'.²²¹ Therefore, chapter 2 will analyse the legal issues related to the extraterritorial processing.

²¹⁸ McAdam (n 85) 10.

²¹⁹ *ibid* 3.

²²⁰ § 2.4, present ch.

²²¹ Kneebone (n 162) 372.

2.

LEGAL QUESTIONS ARISING WITH REGARD TO THE
EXTRATERRITORIAL PROCESSING OF ASYLUM CLAIMS

2.1 INTRODUCTION

The present chapter aims to answer the questions left unanswered by the extraterritorialisation proposals described in chapter 1.

As the USA and Australian cases illustrate, offshoring the processing of asylum claims may translate into placing asylum seekers in a grey area regarding the legal standards of protection they should be granted.

The location of EPCs and the multiple actors involved contribute to complicate the definition of the applicable legal standards. For this reason, the present chapter will try to answer the following questions: What are the main legal concerns raised by the processing of asylum claims in centres located in third countries? Under which legal framework should possible human rights violations be assessed? Can the EU and the EU MS be held accountable for these violations?

To answer these questions, the key legal issues raised by extraterritorial processing of asylum claims will be analysed. Even if these issues do not question the legality of these centres, it cannot be excluded that human rights violations may occur, in which case it is necessary to assess the responsibility of the actors involved. Finally, the possibilities offered to the victims to obtain redress will also be analysed.

2.2 LEGAL CONCERNS

As referred in chapter 1, the Geneva Convention lays the criteria for the qualification as refugee, and the rights to be conferred to those in need of protection. While it outlines some of the obligations of states towards refugees, it does not define how to carry out asylum procedures, nor which state is responsible for processing asylum claims.²²² Thus, it does not prohibit receiving states from transferring asylum seekers to another state. Consequently, in the light of the Geneva Convention, extraterritorial processing is not *per se* in violation of international law.²²³ Nonetheless, states are not completely free to resort to this solution, since they are bound by the prohibition of *refoulement*.²²⁴

In the case of the EU MS, the legal obligations deriving from the ECHR, as interpreted by the ECtHR, add to those of the Geneva Convention. The CFREU, on its turn, applies to the EU MS and to the EU alike. Moreover, every EU legislative act relative to migration and asylum includes references to fundamental rights.²²⁵ However, by processing asylum claims in third countries, the territorial link to the EU legal system is broken. Depending on the model chosen, processing may not be undertaken by EU nor MS' agents, in which case a personal connection does not exist either. Therefore, the question arises regarding the protection of the human rights of the asylum seekers. Can it be understood that, by denying them access to the EU territory, asylum seekers are also denied the legal and procedural safeguards of the CEAS and EU primary law, exempting the EU and the MS from their human and fundamental rights obligations?

2.2.1 Migrants' rights and procedural standards

International law does not place individuals under the obligation not to move. Conversely, article 13 UDHR confers everyone the right to

²²² Guy S Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9(1) *UTS L Rev* 26, 27.

²²³ Nikolas Feith Tan, 'The Future of Offshore Processing' (E-International Relations, 25 July 2017) <www.e-ir.info/2017/07/25/the-future-of-offshore-processing/> accessed 14 July 2018.

²²⁴ Geneva Convention (n 16), art 33(1).

²²⁵ See, *inter alia*, TFEU, ch 2; APD, recital 60; Dublin III, recital 39 and art 29; RCD, recital 35.

freedom of movement, and article 14 UDHR enshrines the right to seek asylum. There is inherent dignity to each individual,²²⁶ and everyone is entitled to the protection of their human rights, regardless of their (legal) status, citizenship or location. Consequently, although international law does not oblige states to grant asylum, the obligation to protect individuals also applies throughout the migration and asylum process. However, this obligation may bind different states in different degrees.²²⁷

Notwithstanding, the current rhetoric of securitisation surrounding migration and asylum has shifted away from a logic of protection, to a logic of deterrence, which also presides to the creation of EPCs. Nonetheless, neither the deterrent argument, nor the resort to geography, can justify the denial of the right to asylum or the decrease of procedural and material protection.

One of the main concerns raised by the processing of asylum claims in third states is the ‘inevitable deterioration of conditions in centres where such offshoring may take place’.²²⁸ The poorer conditions can refer to the physical and material aspects, as the Australian case illustrates, but also to the downgrading of legal safeguards in the determination procedures.

On the other hand, the deterrent effect pursued can equal a decrease in the access to the right to asylum, enshrined in articles 14 UDHR and 18 CFREU. While processing in transit regions is said to contribute to reducing the alleged abuse of the asylum system, this can also discourage migrants with legitimate grounds to seek protection.²²⁹ The perception of poorer conditions, longer processing times and lower possibilities of durable solutions can actually encourage evasion strategies, and lead to resorting to illegal migration, instead of discouraging it, hence translating into higher human costs. It can equally be presumed that some migrants would move to intended destination countries nonetheless, simply abstaining from claiming asylum.²³⁰

²²⁶ UDHR (n 15), preamble and art 1.

²²⁷ Goodwin-Gill (n 222) 30.

²²⁸ Sergio Carrera and Elspeth Guild, ‘Offshore processing of asylum applications Out of sight, out of mind?’ [2017] CEPS Commentary.

²²⁹ Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, ‘Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure’ [2003] European Communities 61.

²³⁰ Gregor Noll, ‘Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones’ (2003) 5(3) European Journal of Migration and Law 303; Jane McAdam, ‘Extraterritorial processing in Europe Is ‘regional protection’ the answer, and if not, what is?’ [2015] Andrew & Renata Kaldor Centre for International Refugee Law, University of NSW.

Consequently, to comply with the international refugee law framework, it must be ensured that EPCs grant asylum seekers *effective protection*, which ‘is not a legal concept as such, but a standard of compliance constructed with the refugee, the asylum seeker [and] human rights ... in mind’.²³¹ It is subjacent to the state’s obligation to respect and ensure the human rights of everyone within its effective control.

To assess if this level of protection is granted, several elements need to be considered. First, it needs to be established that the conditions of treatment comply with international human rights standards and that the individual needs of those relocated to the EPCs are taken into consideration. It is also necessary to ensure that the refugee status determination procedures are fair and efficient. As referred above, the Geneva Convention is silent on the asylum procedure. At the EU level, the CEAS instruments, and especially the APD, aim to harmonise asylum procedures amongst EU MS, ensuring that all MS confer equal levels of protection, and follow standardised procedures. At the international level, there is a general understanding that states should observe minimum procedural standards. Although specified to a lesser extent than those of the CEAS, these minimum standards refer to the basic guarantees asylum seekers should be granted. These include proper identification, registration and issuance of documentation, access to interpreters, and guarantees for groups with special needs.²³² The International Law Association also includes the appeal or review of negative decisions.²³³

It appears, however, that the sensitivity of the issue and the risks involved require the EPCs established by the EU and EU MS to be run in accordance to standards above the minimum acceptable. Processing should be done according to a ‘sound legal basis’,²³⁴ adequate to ensure that the levels of protection offered in EPCs are roughly equivalent to those offered within the EU.²³⁵

²³¹ Goodwin-Gill (n 222) 38.

²³² UNHCR, ‘Global Consultations on International Protection, Asylum processes (Fair and Efficient Asylum Procedures)’ (31 May 2001, EC/GC/01/12).

²³³ International Law Association, ‘Declaration on International Minimum Standards for Refugee Procedures’ (Resolution 6/2002).

²³⁴ PACE (n 152) 13.

²³⁵ Gregor Noll, ‘Outsourcing refugee protection: extraterritorial processing and the future of the refugee regime’ in UNHCR, *The State of the World’s Refugee 2006: Human*

Notwithstanding, asylum remains a matter of EU MS sovereignty. Consequently, the procedures adopted by the MS continue to present differences. Thus, if it were to be demanded that the EPCs would apply the EU procedural standards, it is not evident which would apply – if the higher or the minimum standards adopted by EU MS, or a *suis generis* solution.²³⁶

To guarantee that the legal standards agreed on are met, there are several factors to be considered by the EU and the MS. A primary one is the choice of the partner countries which will host the EPCs.

2.2.2 *Host countries and nonrefoulement*

The EU is, under the treaty provisions presiding to its external action, obliged to protect and promote human rights in relations with third countries. According to article 3(5) TEU, ‘[i]n its relations with the wider world, the Union shall uphold and promote its values’ and ‘contribute to ... protection of human rights’. Article 21 TEU refers:

[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the [UN] Charter and international law.

Article 205 TFEU reiterates this legal obligation, and Title III TFEU extends the application of these principles to all areas of cooperation with third countries. Therefore, these human rights obligations applying to the external action add to those applying to asylum, which derive from international and EU law.

Considering these obligations, it appears that a thorough assessment of the human rights conditions in the third countries shall precede the agreements with said countries. Especially since the southern neighbours of the EU, pointed as potential hosts of the EPCs, are

Displacement in the New Millennium (OUP 2006) 38.

²³⁶ Sarah Léonard and Christian Kaurert, ‘The extra-territorial processing of asylum claims’ (2016) 51(1) *Forced Migration Review* 48, 50.

economically and politically unstable,²³⁷ the EU and the MS should ensure that their decisions and money will not contribute to violations of the human rights of migrants by third countries.²³⁸

In fact, ‘offshore processing is at risk of triggering *refoulement*, arbitrary and inhuman detention and a lack of effective remedies’,²³⁹ in contravention of the EU and MS obligations. Consequently, the right to life, prohibition of torture and access to effective asylum procedures should be given particular consideration. This assessment can be made with reference to the concept of ‘safe third country’.

The operationalisation of the ‘safe third country’ concept allows a state to ‘deny examination of an asylum claim and send back the applicant to a third country where he or she would have had the possibility to apply for asylum’.²⁴⁰ Under EU law, this concept has been codified in article 38 APD.²⁴¹ It derives from this provision that, to be deemed ‘safe’, the third country must uphold the Geneva Convention provisions, and in particular respect the principle of *nonrefoulement*, set forth in article 33(1). Applying this concept to extraterritorial processing, for this requirement to be met, the third country hosting the processing centre shall have ratified the Geneva Convention and the Protocol, without limitations.²⁴² Moreover, state practice should correspond to and reiterate the legal obligations assumed.

²³⁷ Daniel Thym, ‘Minimum Requirements under EU Primary Law and International Refugee Law for Rules in Secondary Legislation on the Rejection of Applications for Asylum as Inadmissible with a view to Protection and Housing Options in Third Countries (Transit and Other Countries) or in Parts of any such Countries – Expert Opinion for the (German) Federal Ministry of the Interior’ (2017) 54.

²³⁸ Nils Muiznieks ‘EU Agreements With Third Countries Must Uphold Human Rights’ (Huffington Post, 2 February 2017) <www.huffingtonpost.co.uk/nils-muiznieks/eu-agreements-with-third-_b_14546518.html?guccounter=1> accessed 14 July 2018. This aspect will be discussed further in the present ch, s 4.3.

²³⁹ Anna Liguori, ‘Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims’ (2016) 25(1) *The Italian Yearbook of International Law* 135, 148.

²⁴⁰ Sandra Lavenex, ‘Shifting up and out: The foreign policy of European immigration control’ (2006) 29(2) *West European Politics* 329, 334.

²⁴¹ n 55.

²⁴² For a dissenting opinion, see Thym (n 237) 15-16, ‘Ratification of the [Geneva Convention] without territorial limitation is ... not a necessary prerequisite for observance of the principle of *nonrefoulement* ... The practice of state authorities is more important than formal ratification of the [Geneva Convention]; it must be ensured that the principle of *nonrefoulement* is observed in practice, including protection against indirect chain returns ... The decisive question in terms of international law is whether the principle of *nonrefoulement* ... is being complied with in practice’.

The compliance with the principle of *nonrefoulement*, which is also enshrined in article 18 CFREU, article 4 of Protocol No 4 to the ECHR, and article 3 of the Convention Against Torture,²⁴³ is of capital importance, and any EU solution of extraterritorial processing must fully comply with it. This is particularly relevant in case the extraterritorialisation strategy adopted includes the interception of migrants *en route* and further transfer to processing centres.

The principle of *nonrefoulement* prohibits states from returning migrants to places where their life and freedom would be threatened, exposing them to the danger of torture or cruel, inhuman or degrading treatment or punishment. The principle applies independently from any formal recognition of refugee status, and the current state of development of international and EU human rights not only prevents direct *refoulement*, but also *indirect* or *chain refoulement*.²⁴⁴ This means that the return is also prohibited when there is a real risk that the destination country may expose the migrants to ‘the serious threat of being returned to their home country or another territory to face persecution or torture’.²⁴⁵ Consequently, third states hosting EPCs must present guarantees of effective protection that include the commitment against further transfers to countries where persecution or torture might occur. Otherwise, since the violation of the obligation of *nonrefoulement* does not require that torture or inhuman or degrading treatment actually take place,²⁴⁶ the EU and the MS may incur violation of their obligations.

Considering this, as well as the human rights records of some of the EU’s neighbour countries, it appears that not all of them fulfil the prerequisites to host the EPCs. For instance, Libya, transit country of several migration routes and point of access to the EU territory, is not party to the Geneva Convention. Moreover, reports of the dire conditions faced by migrants in the country, namely in detention

²⁴³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85.

²⁴⁴ See, *inter alia*, *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

²⁴⁵ Bill Frelick and others, ‘The impact of externalization of migration controls on the rights of asylum seekers and other migrants’ (2016) 4(1) *Journal on Migration and Human Security* 190, 198.

²⁴⁶ Lisa Heschl, *Protecting the Rights of Refugees Beyond European borders – Establishing Extraterritorial Legal Responsibilities* (Intersentia 2018) 121.

centres,²⁴⁷ point unequivocally to the disrespect of basic human rights standards. This should exclude it from the list of potential host countries. Nonetheless, it is often mentioned as a potential partner, due to its geostrategic location, and Italy has often cooperated with the country.²⁴⁸

The operationalisation of the prohibition of *refoulement* in the context of extraterritorial processing can, however, present difficulties. Even if the assessment points towards the provision of effective protection and respect of the obligation of *nonrefoulement*, it is possible that, in the context of interception, asylum seekers argue that ‘return to the country where the [EPC] is located would not be safe for [them], and thus violate prohibitions of *refoulement*’.²⁴⁹ The ECtHR has already declared that ‘independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [ECHR]’ is required under article 13 ECHR enshrining the right to an effective remedy.²⁵⁰ This scrutiny can, however, ‘amount to a parallel system, now dealing with the safety of return to regional processing centres rather than with the protection claim proper’,²⁵¹ leading to a duplication of efforts.

Such appeal raises further questions. While the *effet utile* of the appeal calls for attribution of suspensive effects, it is debatable if the appellant should await the decision in detention. However, the issue of the loss of freedom is subjacent to the whole offshoring discussion. Consequently, another legal aspect to bear in mind is the one of detention.

2.2.3 Detention

As referred above, article 31 of the Geneva Convention prevents states from imposing penalties on refugees on account of their illegal presence. Accordingly, depriving asylum seekers from their freedom of movement for the mere fact of their illegal entrance in the territory of a country can be considered a violation of this provision.

²⁴⁷ The UNHCR described the detention conditions as ‘horrific’ and an ‘outrage to humanity’ (see ‘Libya’s detention of migrants “is an outrage to humanity,” says UN human rights chief Zeid’ (UN News, 14 November 2017) <<https://news.un.org/en/story/2017/11/636022-libyas-detention-migrants-outrage-humanity-says-un-human-rights-chief-zeid>> accessed 14 July 2018).

²⁴⁸ Ch 1, s 2.4.

²⁴⁹ Noll, Fagerlund and Liebaut (n 229) 61.

²⁵⁰ *Chahal v The United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) para 151.

²⁵¹ Noll, Fagerlund and Liebaut (n 229) 61.

EU law also enshrines this principle. Recital 15 of the RCD reads:

The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the [MS] and with Article 31 of the Geneva Convention.²⁵²

Notwithstanding, the legal framework of refugee protection does not forbid detention outright. The UNHCR's Executive Committee has recognised that, although it should be avoided, it is exceptionally possible to resort to detention:

only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents ...; or to protect national security or public order.²⁵³

It also highlights that, whenever possible, refugees and asylum seekers should not be detained with common criminals, and that the detention matter should be subject to judicial or administrative review.²⁵⁴

Similarly, the RCD states the exceptional character of detention, which should be 'subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention', and accompanied by 'the necessary procedural guarantees, such as judicial remedy before a national judicial authority'.²⁵⁵ The RCD also sets the circumstances in which detention is allowed,²⁵⁶ and enshrines the guarantees for detained applicants. These include the obligatory written and reasoned form of the detention decision, as well as the principle that applicants 'shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds [for detention] are applicable'.²⁵⁷ The CJEU has already affirmed that the possibility of detention derives from a 'fair balance between the

²⁵² n 56.

²⁵³ UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (UNHCR 2009) 397.

²⁵⁴ *ibid.*

²⁵⁵ RCD (n 56), recital 15.

²⁵⁶ *ibid* art 8(3).

²⁵⁷ *ibid* art 9(1).

general interest objective pursued ... and the interference with the right to liberty to which detention gives rise', and that the legal provisions of the RCD 'cannot justify detention measures being decided without [the] national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued'.²⁵⁸

The ECtHR has also pronounced itself about this subject. In *MSS*, the court declared:

The confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable states to prevent unlawful immigration while complying with their international obligations, in particular under the [Geneva Convention] and the [ECHR].²⁵⁹

Moreover, the ECtHR has held that the detention should be based on a reasoned decision, and subject to judicial review.²⁶⁰ Nonetheless, it has not established the requirement of individual assessment of the proportionality of the detention, thus appearing to admit lower standards than those set forth in the RCD.²⁶¹

Considering this legal framework, the legality of *closed* EPCs, where detention is the rule, appears difficult to ascertain. Nonetheless, detention measures can be adopted, provided they comply with the abovementioned standards. For this purpose, it is essential to ensure that the resort to detention is necessary and proportional. Additionally, the overarching respect for the applicants' human rights needs to be safeguarded during the detention period. Consequently, particular attention needs to be given to the avoidance of arbitrary detention (prohibited under article 6 CFREU), as well as to the compliance with articles 3 ECHR and 4 CFREU, which prohibit the subjection to torture, inhuman or degrading treatment or punishment. The CoE has also expressed the opinion that closed centres operated under the responsibility or partial responsibility of CoE or EU MS would need to be open to monitoring by the European Committee for the Prevention of Torture.²⁶² Consequently, even if

²⁵⁸ Case C-18/16 *K v Staatssecretaris van Veiligheid en Justitie* [2017] ECLI:EU:C:2017:680 paras 47 and 48. See also Case C-601/15PPU *JN v Staatssecretaris van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84 paras 68 and 69.

²⁵⁹ *MSS* (n 244) para 216.

²⁶⁰ See, *inter alia*, *Ilias and Ahmed v Hungary* App 47287/15 (14 March 2017) (referral to the Grand Chamber, decision pending).

²⁶¹ *Thym* (n 237) 42-43.

²⁶² *PACE* (n 152) 4.

detention proves necessary and proportional, the dignified treatment of detainees remains to be assessed.

However, dignified standards of detention are proving difficult to ensure even in the EU MS, as the CJEU and the ECtHR have had the opportunity to declare,²⁶³ and as the situations in the hotspots illustrate.²⁶⁴ Considering this, it is questionable if the EU and/or the MS will be able to ensure respect of the detainees' human and fundamental rights, the detention taking place in the territory of a third state. This would require detailed planning, namely regarding the capacity of the centres, to avoid over-crowding situations, as well as constant supervision. Consequently, if it is concluded that processing in EPCs 'cannot be pursued in compliance with fundamental rights, the plan should be abandoned'.^{265 266}

Nonetheless, even if the legal questions enumerated thus far are considered by the EU and the MS before proceeding with offshore solutions, the possibility of subsequent human rights violations cannot be excluded. In that case, it is important to establish under which framework those violations should be assessed, and who should be held responsible. These issues will be analysed in the following section.

2.3 LEGAL FRAMEWORK AND JURISDICTION

The declaration of a violation of human rights must be preceded by the definition of the applicable legal framework. More concretely, it must be established which obligations bind each of the actors involved in the EPCs.

It is not disputed that states hold the right to control their borders, and consequently to deny or allow migrants entrance in their territory. However, these rights are not absolute. They are constrained by human rights and refugee law obligations, limiting the states' sovereign right to control migration and to reject aliens at the border. Nonetheless, the

²⁶³ *MSS* (n 244); *NS* (n 93).

²⁶⁴ Ch 1, s 2.4.

²⁶⁵ Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward' [2015] Red Cross EU Office 28-29.

²⁶⁶ The issue of the obligation of assessment will be analysed further in the present ch, s 3.2.

externalisation of border and migration controls can alter the nature and duration of their obligations, as well as the allocation of the protection of the rights of migrants.²⁶⁷

The question is, then, if these obligations only bind states within their territory. An affirmative answer would validate the potential circumvention of human rights, refugee and EU law obligations through extraterritorial processing.

This issue is, thus, closely related to state sovereignty and jurisdiction, and to the extent to which this jurisdiction can extend beyond the state's territory.

2.3.1 *European law*

Shaw defines jurisdiction as 'the power of the state under international law to regulate or otherwise impact upon people, property and circumstances', which 'reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs'.²⁶⁸ Traditionally, the nexus jurisdiction-sovereignty refers to the state's exercise of this power over its territory and its nationals. According to this traditional understanding, there is no doubt that the migrants and asylum seekers who present themselves in the territory of a state are under its jurisdiction. Conversely, a strictly territorial understanding of jurisdiction would automatically exclude EU MS jurisdiction over migrants returned or present in EPCs, since the territorial link is broken.

Notwithstanding, states do act outside their territory. These acts do not happen in a legal vacuum, but within the frame of international law. Particularly in the European context, understanding extraterritoriality as a *laissez-passer* for a state to perform acts that it cannot perform within its own territory is 'the antithesis of how ECHR obligations of the state must work'.²⁶⁹

The ECtHR has developed extensive jurisprudence on the subject of jurisdiction, which has evolved towards the disconnection from the concept of territoriality. Article 1 ECHR places the states under the obligation to secure the rights and freedoms it prescribes to 'everyone within their jurisdiction'. When interpreting this clause, the ECtHR has,

²⁶⁷ Frelick and others (n 245) 196.

²⁶⁸ Malcolm Shaw, *International Law* (CUP 2008) 645.

²⁶⁹ Frank McNamara, 'Member State Responsibility for Migration Control within Third States - Externalisation Revisited' (2013) 15 *European Journal of Migration and Law* 323.

despite reaffirming that the jurisdiction of states is primarily territorial, accepted that, in exceptional circumstances, it may be exercised outside the national territory.²⁷⁰ This understanding is the result of an evolutive approach to the concept of extraterritorial jurisdiction, and the development of the ‘effective control’ criterion.

In *Loizidou*,²⁷¹ the ECtHR declared that the exercise of *effective control* over an area outside a state’s territory can prompt its obligations under article 1 ECHR. The facts of the case referred to the military occupation of Northern Cyprus by Turkey, meaning that in that context what was to be assessed was the effective control over the territory. Notwithstanding, over time, the ECtHR would extend this concept, accepting the existence of jurisdiction when effective control over persons was proved. I will briefly refer some of the most prominent cases for the development of this understanding.

In *Medvedyev*,²⁷² the ECtHR accepted that the crew of a vessel intercepted and boarded by French authorities off the shores of Cape Verde had been placed under French jurisdiction, from the time of the interception until the disembark in French territory. Despite reaffirming the essentially territorial notion of jurisdiction, the ECtHR declared that the French authorities had exercised full and exclusive *de facto* control over the vessel and its crew, triggering the French jurisdiction for the purposes of article 1 ECHR.²⁷³ In this decision, however, the ECtHR does not fully endorse the personal model yet, since it considered not only the control over the crew, but also the control over the ship.²⁷⁴

The ECtHR expressly accepted that *de facto* control can translate into *de jure* control in *Al-Sadoon*.²⁷⁵ Nonetheless, it considered that the fact the UK authorities ‘took active steps to bring the applicants within the [UK’s] jurisdiction’²⁷⁶ was a determinant factor, thus following a rather restrictive approach.²⁷⁷

²⁷⁰ See, *inter alia*, *Al-Skeini v The United Kingdom* App no 55721/07 (ECtHR, 7 November 2011) para 109.

²⁷¹ *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996) paras 62-64.

²⁷² *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010).

²⁷³ *ibid* para 67.

²⁷⁴ Marko Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’ (2013) 23(1) *The European Journal of International Law* 121-139.

²⁷⁵ *Al-Saadoon and Mufdhi v The United Kingdom* App no 61498/08 (ECtHR, 30 June 2009 – Admissibility) para 88.

²⁷⁶ *Al-Saadoon and Mufdhi v The United Kingdom* App no 61498/08 (ECtHR, 2 March 2010 – Merits) para 140.

²⁷⁷ Heschl (n 246) 84.

The personal model of jurisdiction was more clearly endorsed in *Al-Skeini*.²⁷⁸ Although reaffirming the primarily territorial nature of jurisdiction, the ECtHR admitted that, ‘whenever the state through its agents exercises control and authority over an individual’,²⁷⁹ the individual is under the state’s jurisdiction. Moreover, it refers that what is decisive is ‘the exercise of physical power and control over the person’,²⁸⁰ the determinant factor being the exercise of public powers by the UK authorities.²⁸¹ Consequently, in such cases, the state’s obligations under article 1 ECHR apply.

Particularly important for the present study is the *Hirsi* case,²⁸² since the facts in question refer to border protection activities. In *Hirsi*, the ECtHR reaffirmed that ‘[w]henever the state through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction’,²⁸³ it is bound by the ECHR’s obligations. The court considered that the applicants – Somali and Eritrean nationals who were on board of vessels intercepted by the Italian authorities, transferred onto Italian military ships and handed to Libyan authorities – were, ‘in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities ... under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities’.²⁸⁴

As referred, the ECtHR’s jurisprudence on extraterritorial jurisdiction has been evolving. In *Chiragov*,²⁸⁵ the court considered elements such as military, political and financial support to foreign groups or governments, other than the physical presence of states’ agents, to establish the effective control over an area, and consequent jurisdiction.²⁸⁶ Although in this decision the link between territory and jurisdiction is still present, it represents the court’s flexible understanding of the notion of effective control.²⁸⁷

²⁷⁸ *Al-Skeini* (n 270).

²⁷⁹ *ibid* para 137.

²⁸⁰ *ibid* para 136.

²⁸¹ *ibid* para 149.

²⁸² n 114.

²⁸³ *ibid* para 74.

²⁸⁴ *ibid* para 81.

²⁸⁵ *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16 June 2015).

²⁸⁶ *ibid* para 186.

²⁸⁷ Andrea Spagnolo, ‘Offshore law The tension between the universality of human rights and the practice of states in the management of migration flows’ (2017) 52 (218) *Biblioteca della libertà* 127, 140.

These cases illustrate the ECtHR's move towards accepting a personal – in addition to the territorial – model of jurisdiction. Moreover, they represent the ECtHR's openness to accept a more expansive application of the ECHR, and to adopt 'the assumption that the ECHR applies extraterritorially'.²⁸⁸ Transposing this into the present study, the ECtHR's jurisprudence appears to open the door to the application of the ECHR to the action of the EU MS in the context of EPCs. In particular, the *Hirsi* decision binds the MS to respect the ECHR in possible interception operations and return to the processing centres, at least while the migrants are *de facto* under the control of MS authorities. In such cases, the relevant factor to establish the jurisdiction of the ECHR would be '*the physical power and control held by a [MS] over a migrant through its migration control*'.²⁸⁹

However, the ECtHR has not yet developed a catalogue of requirements for effective control.²⁹⁰ This raises doubts regarding forms of MS intervention in extraterritorial processing other than interception or participation in the processing of the asylum claim. For example, if the MS simply finance the creation of an EPC, there is no territorial, nor personal connection to the MS. Although *Chiragov*²⁹¹ shows the ECtHR's willingness to accept the financial support as an element to establish the existence of effective control, in that case, this was only one among other factors analysed. Consequently, the current state of evolution of the ECtHR jurisprudence does not allow concluding irrefutably for the jurisdiction of MS in such cases. This would require the adoption of a more functional approach to extraterritorial jurisdiction by the ECtHR.²⁹²

Besides, even though these cases provide the backdrop against which the possible MS jurisdiction is analysed, it should be reminded that they do not constitute a developed and applicable principle, since the particular facts of each case need to be analysed on a case-by-case basis.²⁹³

Furthermore, even accepting the possibility that in certain cases the ECtHR might recognise the extraterritorial jurisdiction, considering

²⁸⁸ Heschl (n 246) 134.

²⁸⁹ McNamara (n 269) 332.

²⁹⁰ Heschl (n 246) 67.

²⁹¹ n 285.

²⁹² Liguori (n 239) 155.

²⁹³ McNamara (n 269) 326.

that the accession of the EU to the ECHR, foreseen in article 6(2) TEU, did not occur, the previous conclusions are only valid to the actions undertaken by the MS, and not by the EU itself.

Although not a party to the ECHR, and thus not subject to the ECtHR's jurisdiction, the rights and freedoms enshrined in the ECHR bind the EU indirectly. Not only because many of those rights inspired and were enshrined in the CFREU, but also because the CFREU expressly foresees that the scope and meaning of the CFREU rights which correspond to rights guaranteed by the ECHR shall be the same as those laid down by the ECHR.²⁹⁴

Unlike the ECHR, the CFREU does not contain a jurisdiction clause. Despite the absence of a provision equivalent to article 1 ECHR, article 51(1) CFREU foresees that the 'provisions of the [CFREU] are addressed to the institutions, bodies, offices and agencies of the [EU]'. With no territorial limitation attached to the applicability of the CFREU, the EU institutions, bodies, offices and agencies must respect it also when acting outside the EU territory. Hence, 'the extraterritoriality of the action is immaterial to the question of the [CFREU] applicability', which 'provides a framework of evaluation to appraise the compatibility of the relevant action/omission with fundamental rights'.²⁹⁵

Consequently, the competences and the allocation of powers, rather than the geographical space where they are exercised, determine the applicability of the CFREU. Thus, '[t]he scope of application *ratione loci* of the [CFREU] is ... to be determined by reference to the general scope of application of EU law'.²⁹⁶ In the context of EU fundamental rights, territory is, thus, secondary to the actions. Considering the provisions of the CFREU, as well as the human rights principles that preside to the EU's external action,²⁹⁷ the EU is under the obligation to respect, observe and promote human rights, wherever it acts. The relevant aspect is the applicability of EU law to a given situation, the application of the CFREU following automatically.²⁹⁸

²⁹⁴ Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, art 53(3).

²⁹⁵ Violeta Moreno-Lax and Cathryn Costello, 'Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) 1662.

²⁹⁶ *ibid* 1679.

²⁹⁷ S 2.2, present ch.

²⁹⁸ Moreno-Lax and Costello (n 295) 1680.

Furthermore, although it can be argued that the wording of article 52 TEU points to the confinement of the application of EU law to the EU territory, this cannot be accepted as exempting the EU from respecting the aforementioned obligations when acting extraterritorially. Even though not directly in relation to extraterritorial application of human rights obligations, the CJEU has already declared that this provision does not preclude EU rules from having effects outside the territory of the EU, as long as a sufficient link to EU law can be established.²⁹⁹ Extensively interpreting this reasoning, it should be concluded that the EU's intervention in extraterritorial processing of asylum claims, whatever it may be, should comply with the CFREU provisions, especially articles 18 and 19.

The concrete contours of the EU's intervention in the creation and maintenance of EPCs remains unclear. However, considering the current external migration and asylum activities in which the EU is involved, it is conceivable that some EU agencies will be involved. These agencies' activities are also subject to EU law, including the CFREU, as foreseen in its article 51(1).

Frontex intervention is particularly plausible. Currently, the Frontex Regulation already foresees the possibility to undertake cooperation activities with third countries on their territory. In those cases, it expressly binds not only the agency, but also the participating MS, to the respect of 'Union law, including norms and standards which form part of the Union *acquis*'.³⁰⁰ Moreover, it reiterates that, when cooperating with third countries, Frontex 'shall act within the framework of the external relations policy of the Union, including with regard to the protection of fundamental rights and the principle of *nonrefoulement*'.³⁰¹

Regarding the possibility of extraterritorial processing, recital 36 of the Preamble of the Frontex Regulation states:

The possible existence of an arrangement between a [MS] and a third country does not absolve the Agency or the [MS] from their obligations under Union or international law, in particular as regards compliance with the principle of *nonrefoulement*.

²⁹⁹ Case C-214/94 *Ingrid Boukbalfa v Bundesrepublik Deutschland* [1996] ECLI:EU:C:1996:174 para 14.

³⁰⁰ European Border and Coast Guard Agency (Frontex), established by Regulation (EU) 2016/1624 on the European Border and Coast Guard [2016] OJ L 251/1 (Frontex Regulation), art 54(1). See also recital 46.

³⁰¹ *ibid* art 54(2).

This, and the numerous references to the mandatory compliance with the prohibition of *refoulement*, appears to be the acknowledgement and affirmation in EU law of the ECtHR jurisprudence (especially *Hirsi*),³⁰² and an answer to the critics drawn to Frontex intervention in pushback operations. *A fortiori*, it conveys the idea that, when cooperating with third countries in the extraterritorial processing of asylum, Frontex would remain bound by its human rights obligations, despite the existence of a working arrangement, at least in what concerns the interception and return operations.

In conclusion, even though the EU is not party to the ECHR, the result reached is similar to the solution on extraterritorial application endorsed by the ECtHR. Hence, the EU and MS are bound by the ECHR and the CFREU whenever they exercise control over actions or inactions, and consequently also in the context of asylum procedures, wherever they might take place.³⁰³

2.3.2 *International law*

In addition to the regional European human rights instruments, the EU and the MS are also bound by international treaties, which might be at stake in extraterritorial processing. Of paramount importance is the Geneva Convention, but other instruments might also prove significant.

As with the ECHR, the doctrine in international law tends to connect jurisdiction for the purposes of application of human rights treaties not only to the territory, but also to the exercise by the state of a certain degree of *power, authority* or *effective control* over persons.³⁰⁴

Although not always directly in relation to the matters of migration and asylum, it should be highlighted that international organs have endorsed the dissociation of jurisdiction from territory. It is the case of the UN Human Rights Committee (HRC), which, interpreting the International Covenant on Civil and Political Rights,³⁰⁵ has accepted that states parties are bound to ‘respect and ensure the rights laid down in the Covenant to anyone within [their] power or effective control ...

³⁰² n 114.

³⁰³ Carrera and Guild (n 228).

³⁰⁴ Liguori (n 239) 152.

³⁰⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

even if not situated within [their] territory'.³⁰⁶ It further affirmed:

[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory ...³⁰⁷

Consequently, for the HRC, the decisive factor is the attribution to a state of the acts in question, the geographical location where they take place being immaterial. Relevant is the exercise of authority over a person, while where jurisdiction is exerted is secondary.³⁰⁸

Analogically applying this reasoning to the Geneva Convention, while most of its provisions only set obligations for the states in their sovereign territory, this does not preclude the applicability of the principle of nonrefoulement to extraterritorial actions. Not only does article 33 not include a territorial clause, this understanding would also contradict the spirit of the law. Rather than geography, the determining factor is the control exercised by a state. This principle should, thus, be interpreted as binding states wherever they exercise their jurisdiction.³⁰⁹ A fortiori, this also applies to the EU institutions, bodies and agencies, considering that the respect for the Geneva Convention is enshrined in EU primary and secondary law.

The principle of nonrefoulement is inextricable from the prohibition of torture, especially in the European context, considering the extensive ECtHR case law on the subject.³¹⁰ Some of the legal concerns raised by extraterritorial processing contend with the respect of the prohibition of torture and ill-treatment, especially in the context of interception, return and detention. These concerns are not merely hypothetical, as the Australian case illustrates.³¹¹

³⁰⁶ UN Human Rights Committee, 'General comment no 31[80], The nature of the general legal obligation imposed on States Parties to the Covenant' (CCPR/C/21/Rev.1/Add.13, 26 May 2004) para 10.

³⁰⁷ *ibid.*

³⁰⁸ Violeta Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) NonRefoulement in EU Law' in M Maes and others (eds), *External Dimensions of European Migration and Asylum Law and Policy* (Bruylant 2011) 385, 447.

³⁰⁹ *ibid.*

³¹⁰ See *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), the landmark case.

³¹¹ Ch 1, s 3.2.

The CAT has already pronounced itself on the issue of the extraterritorial applications of the Convention Against Torture.³¹² It interpreted the reference to ‘any territory under its jurisdiction’ contained in article 2(1) as binding the state parties in ‘all areas where the state party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control’.³¹³ Furthermore, it held that the obligations extended to the cases ‘where a state party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention’.³¹⁴ As in the abovementioned jurisprudence of the ECtHR, the decisive criterion is the exercise of effective control.

The CAT developed this idea in the case *Marine I*,³¹⁵ referring to the detention in Mauritania of migrants rescued by Spanish authorities. It decided that, since the disembark and detention in Mauritania was preceded by a diplomatic agreement between Mauritania and Spain which provided for the ‘temporary presence in Mauritanian territory of Spanish security forces to provide the Mauritanian authorities with technical support’,³¹⁶ Spain had exercised ‘constant *de facto* control over the alleged victims during their detention’.³¹⁷ Thus, it considered that the victims had been subject to Spanish jurisdiction.

The CAT has also applied the test of effective control to the extraterritorial processing of asylum claims. Regarding the Australian case, it referred:

All persons who are under the effective control of the state party, because ... they were transferred by the state party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention ...³¹⁸

The CAT appears to accept the existence of effective control not only when directly exercised by the authorities of a state, but also when state intervention consists on financing the detention centres. This, together with the express observation that the transfer to EPCs ‘do[es] not release

³¹² n 171.

³¹³ CAT, ‘General Comment No 2: Implementation of Article 2 by States Parties’ (24 January 2008) CAT/C/GC/2 para 16.

³¹⁴ *ibid.*

³¹⁵ *JHA v Spain* (21 November 2008) CAT/C/41/D/323/2007.

³¹⁶ *ibid* para 4.8.

³¹⁷ *ibid* para 8.2.

³¹⁸ CAT (n 171) para 17.

the state party from its obligations under the Convention',³¹⁹ reveals that the CAT endorses a more extensive and functional understanding of the threshold of the effective control than the ECtHR. Moreover, transposing this understanding to the possible participation of the EU and MS in the creation and maintenance of EPCs, the jurisdiction for the purposes of the application of the Convention Against Torture should be accepted even when the EU and MS authorities do not have control over the detention structures.

In conclusion, both at European and international level, jurisprudence and doctrine tend to detach certain obligations from territory, rather locating responsibility in the acts of individuals or organs. This paves the way to applying certain EU and international law obligations to the EU and the MS, when acting in the context of extraterritorial processing of asylum. However, establishing jurisdiction does not equal the declaration of responsibility of the agents involved, being merely a threshold criterion. Once the jurisdiction is established, responsibility remains to be assessed, against different factors, which will be analysed in the following section.

2.4 RESPONSIBILITY

The previous section's findings show that, *a priori*, the change of theatre of asylum processing does not exempt the EU and the MS from their obligations under EU, refugee and human rights law. Jurisdiction can extend beyond territory, meaning that the EU and the MS cannot act at their discretion. Nevertheless, whereas the exercise of jurisdiction is a 'necessary condition for [an international actor] to be able to be held responsible for acts or omissions imputable to it',³²⁰ responsibility 'depends on the assessment of the state's conduct in relation to its international obligations'.³²¹ The allocation of responsibility is not to be assessed in the abstract, but depending on the facts of the case. In fact, 'international law looks not just to where the impugned act takes place, but also to the ... actors to whom it is attributable and ... to consequences and effects.'³²²

³¹⁹ CAT (n 171) para 17..

³²⁰ *Al-Skeini* (n 270) para 130.

³²¹ Heschl (n 246) 52.

³²² Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of NonRefoulement' (2011) 23(3) International Journal of Refugee Law 443, 452.

Under international law, responsibility arises for every internationally wrongful act – whether actions or omissions – attributable to a state and in breach of its international obligations.³²³ This attribution can prove particularly challenging in the context of migration control, and moreover in extraterritorial processing of asylum claims. Current strategies of migration control focus on externalisation³²⁴ and involvement of various public, private and intermediate actors.³²⁵ It is reasonable to assume that the same will occur once the EU and the MS proceed with the creation of EPCs.

Considering Australia’s experience of extraterritorial processing, as well as the current initiatives of cooperation between the EU, MS and third countries, it is foreseeable that multiple actors will intervene in EPCs. It is plausible that some of these actors will be the state hosting the centre (the ‘host state’), the EU MS, the EU (including EU agencies, potentially EASO and Frontex), and IOs, such as the UNHCR or the IOM. If the outsourcing of processing is envisaged, private actors will be involved, and the participation of NGOs is also possible.³²⁶ The specific tasks and concrete role of each actor may not be easy to determine, and this unclear configuration may hinder the allocation of responsibilities. The lack of clarity of the arrangements presiding the creation of EPCs can thus be seen as a means to ‘deflect responsibility and legal obligations away from EU [MS] and onto transit and origin countries’,³²⁷ a critic often directed to the EU and MS cooperation with third countries.

However, doctrine and jurisprudence have evolved towards accepting that, in circumstances of intervention of multiple actors, a violation of international law can be attributed to more than one legal entity at the same time. For instance, the ECtHR endorsed this understanding in *Al-Jedda*.³²⁸ This implies that, in the context of extraterritorial processing, more than one of the intervenients can be held accountable for a human rights violation, the attribution of which ‘will mainly depend on the agreement concluded between the participating states and the factual

³²³ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS) [2004] UN Doc A/56/10, arts 1 and 2.

³²⁴ Ch 1.

³²⁵ Thomas Spijkerboer, ‘Bifurcation of people, bifurcation of law: externalisation of migration policy before the EU Court of Justice’ (2017) 31(2) *Journal of Refugee Studies* 216.

³²⁶ Liguori (n 239) 148.

³²⁷ Frelick and others (n 245) 208.

³²⁸ *Al-Jedda v The United Kingdom* App no 27021/08 (ECtHR, 7 July 2011).

role the participating state agents play within the operation',³²⁹

Considering this, the following sections will analyse what kind of responsibility, and in which circumstances, can be attributed to the intervenients in extraterritorial processing. Due to the limitations of the present study, the analysis focuses only on the most plausible participants – host states, EU MS and EU.

2.4.1 *Host states*

The engagement of third countries in the processing of asylum has been depicted as 'the contracting-out of a fundamental human rights commitment'.³³⁰ Through this, the territorial link, the primary connecting element of jurisdiction,³³¹ ceases to exist with the destination state, and is transferred to the host state. The asylum procedures, and supervision over the facilities in which they take place (and, potentially, where asylum seekers are detained), may also be undertaken by agents of the host state. In such cases, it appears that effective control over territory and over persons exists, pointing towards the jurisdiction, and consequent responsibility, of the host state.

Nevertheless, it should not be assumed that the host state will entirely, and solely, assume legal responsibility for eventual violations occurred in the context of joint processing within its territory. Some actions or omissions can be attributed to other intervenients, 'whether they act autonomously, through a joint body, via delegation to an [IO], or through the intermediation of an independent private actor'.³³²

In fact, whereas, in general, 'each state is responsible for its own internationally wrongful conduct', assessed according to the 'state[']s] own range of international obligations and its own correlative responsibilities',³³³ circumstances exist in which the conduct of a state may become attributable to a different state. Hence, if a state's organ is placed at the disposal of another state, and acts und the authority of the latter, the conduct of such organ is considered to be an act of the state at whose disposal it is placed.³³⁴ The same reasoning applies when state

³²⁹ Heschl (n 246) 120.

³³⁰ Lavenex (n 240) 344.

³³¹ S 3, present ch.

³³² Moreno-Lax (n 265) 26.

³³³ ILC n 323, ch IV commentary.

³³⁴ *ibid* art 6.

organs are placed at the disposal of IOs that exercise effective control over it.³³⁵

Consequently, in the context of EPCs, although the host state's agents' conduct is primarily attributed to that state, the application of the rules of international responsibility may imply not only the responsibility of other states (possibly the MS), but also of IOs – in this case, the EU's. This will depend, nonetheless, on the exercise of authority by the MS and the EU over the agents of the host states, which must be assessed on a casebycase basis, and will depend on the type of cooperation subjacent to the creation of the centres.

Concerning the obligations that can prompt the responsibility of the host states, a current of the doctrine admits that the obligations of the 'outsourcing' state also bind them. Based on the case of Australia and Nauru, Goodwin-Gill affirms that, though the latter is not a party to the Geneva Convention and Protocol, 'by acting as the agent for Australia, which is a party, Nauru is necessarily also bound by Australia's treaty obligations; and its performance is bound to be evaluated in the light of those standards'.³³⁶ The author concludes that a violation of the refugee or human rights obligations deriving from those treaties would prompt Nauru's liability in its own capacity, together with Australia's.³³⁷ Although this understanding is debated, it might have practical consequences in the case of EU EPCs. As referred above, one of the potential host states is Libya, which did not ratify the Geneva Convention. Hence, a parallel with the reasoning applied to Nauru can be drawn.

What is relevant, then, is that, despite the territorial, and potentially personal, link to the host state, the latter is not the sole actor whose responsibility might be at stake. However, it is still necessary to verify in which circumstances the criteria to trigger the responsibility of the EU and the MS are met, and moreover in which terms they can be held responsible. This will be the focus of the following sections.

³³⁵ ILC, Draft Articles on the Responsibility of International Organizations (DARIO) [2004] UN Doc A/56/10, art 7.

³³⁶ Goodwin-Gill (n 222) 38-39.

³³⁷ *ibid.*

2.4.2 EU MS

States' international and extraterritorial action does not take place outside the law, but is based on national or supranational legal principles. If internationally wrongful acts are practiced in the exercise of sovereign powers, and if such acts can be attributed to its organs, this implies the responsibility of the state.³³⁸ This principle is not restricted by any territorial limitation, meaning that 'the state is responsible for the conduct of its organs and agents wherever they occur'.³³⁹

In particular, responsibility deriving from the prohibition of *refoulement* cannot be circumvented through the mere transfer of migrants to EPCs. If the actions (or omissions) of a EU MS cause a person to be returned to a territory where he or she may be persecuted or exposed to a real risk of ill treatment, the MS becomes responsible for a breach of the principle of *nonrefoulement*, as enshrined in the Geneva Convention, the ECHR and CFREU. This responsibility may also arise in the case of transfer to an intermediate country (indirect *refoulement*), and this principle also binds the states when acting abroad. These cases fall under the legal provision according to which states are directly responsible for the conduct of their organs and agents, hence entailing the state's direct responsibility both in the cases of transfer of migrants already in their territory, and in cases of interception *en route* followed by transfer to the host state.³⁴⁰

However, doubts arise when the action originating the violation is not undertaken by the state's agents, and the acts cannot be subsumed to the provision of article 4 DARS. Such cases are particularly plausible in the context of EPCs.

Doctrine and jurisprudence accept that states cannot avoid responsibility by contracting out their legal obligations, neither to another state, IOs, nor private actors.³⁴¹ Hence, by 'outsourcing' the processing of asylum claims to third states, EU MS are not exempted from their responsibilities. The fact that the creation of EPCs may be preceded by contractual arrangements or cooperation agreements does not acquit the participating MS from complying with their obligations

³³⁸ DARS (n 323) art 4.

³³⁹ Goodwin-Gill (n 222) 33.

³⁴⁰ Liguori (n 239) 148.

³⁴¹ Frelick and others (n 245) 197.

under the ECHR, EU and international law. The ECtHR has already affirmed that the establishment of IOs or international agreements for the purposes of cooperation may have implications for the protection of fundamental rights. It declared that '[it] would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'.³⁴²

Article 61 DARIO³⁴³ refers to the case of state responsibility for the actions of IOs. According to this provision, states members of IOs incur responsibility when they circumvent their international obligations 'by causing the [IO] to commit an act that, if committed by [them], would have constituted a breach of the obligation'.³⁴⁴ The ECtHR has also applied this view, namely in *Bosphorus*, holding that 'absolving Contracting States completely from their Convention responsibility in the areas covered by [a transfer of sovereignty to an IO] would be incompatible with the purpose and object of the [ECHR]'.³⁴⁵ A different understanding would mean accepting that 'the guarantees of the [ECHR] could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards'.³⁴⁶ Hence, the possibility to circumvent responsibility through the engagement of different IOs, or even through the creation of a new IO associated to the constitution of EPCs, is excluded. Since the ECHR indirectly applies to the EU, and that the ECtHR itself recognises that the EU confers equivalent protection to that offered by the ECHR,³⁴⁷ the responsibility of MS for wrongful acts of the EU may not seem very likely, but cannot be completely discarded.

A different case is covered by article 5 DARS, according to which:

[t]he conduct of a person or entity which is not an organ of the state ... but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.³⁴⁸

³⁴² *TI v The United Kingdom* App no 43844/98 (ECtHR, 7 March 2000) 16.

³⁴³ n 335.

³⁴⁴ *ibid* art 67.

³⁴⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005) para 154.

³⁴⁶ *ibid*.

³⁴⁷ *ibid*.

³⁴⁸ n 323.

This applies to the cases of intervention of private actors. For instance, if the acts or omissions of these private actors expose a person to the risk of treatment banned by article 3 ECHR, these ‘have to be considered as acts of the state on behalf of which the conduct is performed, with the potential to engage its responsibility’.³⁴⁹

A different case is that of intervention of organs of another state. Article 6 DARS foresees that the conduct of organs of a state placed at the disposal of another state can entail the responsibility of the latter. Despite the uncertainty regarding the concrete distribution of functions and exercise of authority in EPCs, it is plausible that this provision might be used to establish the responsibility of MS for acts undertaken by agents of the host states, under the authority of MS.

Furthermore, MS involved in extraterritorial processing (as well as the host state) may act under joint instructions, namely through the creation of a common organ of several states, charged with conducting the actions. Such cases fall under the provision of article 47 DARS, and the conduct in question is attributable to each intervening state.

However, other cases raise questions that may not present such straightforward answers. For instance, it is likely that the MS contribution to a possible human rights violation might be *passive*. Instead of having *de facto* control over another actor, constraining its freedom to decide upon its actions, states may only be involved through financial or technical support, situations which will mostly fall short of creating an attribution link with the conduct in violation of human rights.³⁵⁰ Concretely, if the MS intervention is limited to the provision of equipment, the training of the personnel of the centre, or financial support, can the MS still be considered responsible?

Indeed, international law admits that states may incur violation of international obligations for supporting internationally wrongful acts of another state. Under articles 16 and 17 DARS, the MS, as ‘outsourcing states’, can incur derived responsibility, respectively, for aiding or assisting, or directing and controlling, another state in the commission of an internationally wrongful act. Both cases require that the MS would

³⁴⁹ Moreno-Lax (n 308) 469.

³⁵⁰ Melanie Fink, ‘A ‘Blind Spot’ in the Framework of International Responsibility? Third Party Responsibility for Human Rights Violations: The Case of Frontex’ in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement* (Routledge 2017) 272, 277.

know the circumstances of the wrongful act and that the act would be internationally wrongful if committed by that state. These requirements limit to a great extent the realm of application of article 17, referring to direction and control.

This is visible in the International Court of Justice's (ICJ) paramount decision on the case of *Nicaragua v USA*,³⁵¹ regarding the possible responsibility of the USA for the actions of the *contras*, the fighters opposing the Nicaraguan government. Although not referring to a case of state responsibility for the acts of other states, some of the ICJ's observations are relevant for the present study. In fact, it declared that the USA participation, 'even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the *contras*, ... and the planning of the whole of its operation', did not suffice 'for the purpose of attributing to the [USA] the acts committed by the *contras*'.³⁵² The ICJ considered that, even though the USA exerted general control over the *contras*, their acts could only be attributed to the USA if it was proved that the USA 'directed or enforced the perpetration of the acts contrary to human rights'.³⁵³ The legal responsibility of the USA depended, the ICJ considered, on proving that the USA had 'effective control of the ... operations in the course of which the alleged violations were committed'.³⁵⁴

Transposing this line of argumentation to the EPCs, applying such a demanding burden of proof may preclude the establishment of EU MS responsibility for human rights violations in cases other than those where the violation is factually perpetrated by their agents. In fact, state obligations are directly linked to 'its capability to positively influence the ... actions by another state that are likely to lead to human rights violations'.³⁵⁵ Even accepting that states are obliged to proactively ensure protection of human rights – rather than being merely under an obligation of doing no harm – this only extends to those under the state's jurisdiction.³⁵⁶ Hence, when the control is lacking, the obligation

³⁵¹ *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America), Merits (Judgment)* [1986] ICJ Rep 14.

³⁵² *ibid* para 115.

³⁵³ *ibid*.

³⁵⁴ *ibid*.

³⁵⁵ Heschl (n 246) 107.

³⁵⁶ Guy S Goodwin-Gill, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' (20 March 2015) Keynote Address at An International Workshop National and Kapodistrian University of Athens Faculty of Law 1, 5.

to take positive action to prevent violations of human rights ceases to exist.³⁵⁷

Conversely, the principle of ‘aid and assistance’ foreseen in article 16 may find application in cases where MS participation is merely indirect. If it is proved that MS aided or assisted in the commission of a wrongful act, the MS is responsible, as is the state which actually undertook the action. Nonetheless, in practice, establishing the MS responsibility may prove difficult, namely when the MS intervention is limited to financing the centres. Since article 16 DARS sets both a causality and a knowledge requirement, the supporting act needs to be linked to the wrongful act and there needs to be intent. Such high a threshold may be difficult to prove.³⁵⁸

Furthermore, is it also questionable if, once aware of the existence of human rights violations, the concept of ‘aid or assistance’ requires the MS to cease the assistance, under penalty of responsibility for omissions. In this particular, the concrete participation of the MS will prove determining. Accepting that the organisational structure of the EPCs will be similar to that of joint operations (such as Frontex-coordinated operations), MS will be continuously involved. In these cases, if, knowing of the violation, the MS fails to withdraw assistance, it can incur derived responsibility.³⁵⁹ Conversely, if the MS participation consists in a one-time, or sporadic, intervention, the continuity factor is missing, thus not requiring the MS assistance to cease.³⁶⁰ In such cases, responsibility for omission is not at stake.

In general, it is indeed possible that EU MS may be found responsible under European and international law for violations occurred in EPCs, both for their agents’ actions, and for the acts of agents of other states, private actors and IOs. Nonetheless, it appears that the actual possibility to hold an MS accountable for acts of derived responsibility can be complicated in practice, due to the strict requirements regarding the exercise of control and the criterion of intention. Considering that it is plausible that the intervention of MS may be restrained to financing the EPCs, this limits considerably the possibility of extending the responsibility for violations to the MS.

³⁵⁷ Fink (n 350) 281.

³⁵⁸ Heschl (n 2467) 121.

³⁵⁹ Fink (n 350) 279.

³⁶⁰ Heschl (n 2467) 125.

Another important conclusion of this section is the fact that state action under the umbrella of IOs does not exempt it from responsibility. The responsibility of IOs and states is independent, and for this study it implies that the responsibility of the EU for human rights violations in the context of extraterritorial processing of asylum must be assessed separately.

2.4.3 EU

It is undisputed that IOs are ‘capable of having human rights obligations and of violating such obligations, even as states retain their own legal liability’.³⁶¹ In the particular case of the EU, these human rights obligations abound. articles 3(5) and 21(1) TEU impose constraints on EU external policies, namely regarding compliance and promotion of human rights. Moreover, the general principles of EU law and the CFREU have the rank of primary law and, as concluded in section 3.1, the obligations they enshrine do not have a limited territorial scope of application.

In addition to these primary law norms, the EU human rights obligations also derive from human rights provisions included in trade and cooperation agreements concluded with third states. The human rights clauses included in treaties between the EU and third states contain, in general, two parts – the first, stating the respect for democratic principles and human rights; the second, a non-execution clause, foreseeing the adoption of ‘appropriate measures’ if one parts fails to comply with its obligations under the agreement. These human rights clauses are bilateral, therefore also binding the EU to respect human rights in other states.³⁶²

Furthermore, the CJEU has already declared that:

the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [TEU], which include the principle that all [EU] acts must respect fundamental rights, that respect constituting a condition of their lawfulness.³⁶³

³⁶¹ Goodwin-Gill (n 222) 30.

³⁶² Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) 25(4) *The European Journal of International Law* 1080.

³⁶³ Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Bal-arakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461 para 285.

Consequently, human rights principles, including those originating in international treaties, prevail over other obligations that stem from international law.³⁶⁴ Hence, the EU cannot excuse itself from complying with its human rights obligations through the conclusion of an international agreement, especially because its own rules oblige such agreement to include human rights provisions. This understanding of the CJEU is similar to the ECtHR's view,³⁶⁵ impeding the circumvention of responsibility through the conclusion of agreements.

Considering the EU's internal and external human rights obligations, it remains necessary to establish in which circumstances the EU can be held responsible for violating them. Despite the EU's *suis generis* nature, often referred to as a supranational organisation, for the purposes of the present legal considerations, it is possible to subsume it to the international law norms relating to IOs.

Under international law, IOs can be directly responsible for the conduct of their organs or agents³⁶⁶ and for the conduct of state organs placed at its disposal.³⁶⁷ Moreover, the same conduct can prompt both a state's and an IO's responsibility.³⁶⁸ Hence, there can be cases of joint, several or subsidiary responsibility.³⁶⁹ Furthermore, the responsibility can derive from actions and omissions, and obligations may result 'either from a treaty binding the [IO] or from any other source of international law applicable to the organisation'.³⁷⁰ An IO can also be responsible for aiding and assisting a state in committing an internationally wrongful act, if it does so with knowledge of the circumstances of the act, and if the latter would be internationally wrongful if committed by the IO.³⁷¹ This legal framework conveys the message that 'an [IO] should not be allowed to escape responsibility by "outsourcing" its actors'.³⁷²

³⁶⁴ Steve Peers, 'International Law, Human Rights Law, and EU Asylum and Migration Policy' in M Maes and others (eds), *External Dimensions of European Migration and Asylum Law and Policy* (Bruylant 2011).

³⁶⁵ n 345.

³⁶⁶ DARIO (n 335), art 6.

³⁶⁷ *ibid* art 7.

³⁶⁸ *ibid* ch II commentary para 4.

³⁶⁹ *ibid* art 48.

³⁷⁰ *ibid* art 4 commentary para 2.

³⁷¹ *ibid* art 14.

³⁷² UNGA, 'Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee, 22nd meeting' (16 November 2004) A/C.6/59/SR.22 para 24 (observations of the Austria delegation).

Accordingly, in the context of the participation of the EU in the creation and maintenance of EPCs, it is possible that, in the event of human rights violations, shared responsibility between the host state, EU and MS will arise. Depending on the circumstances of the case, however, some of the actors may incur direct responsibility, whereas others may incur derived responsibility.³⁷³ Considering the CJEU's interpretation referred above, due to the EU's human rights obligations, circumventing this responsibility through a cooperation agreement is not possible.

The EU is bound by strict obligations under human rights and refugee law, and cannot elude responsibility through delegation. Even an indirect intervention may lead to a breach of these obligations, and entail responsibility. This may occur when the EU's intervention consists on 'aiding and abetting, financing, sponsoring, or directing wrongful conduct'³⁷⁴

Referring to the previous section's conclusions regarding EU MS, the financial and logistical support by the EU may not be enough to meet the threshold required by article 15 DARIO, referring to the responsibility for the 'Direction and control exercised over the commission of an internationally wrongful act'. However, if the EU itself sets up and runs the EPCs, control exists, and the same conclusion ensues if the centres are run mainly by EU agencies officials and MS or by private companies or IOs under the EU's instructions. Nonetheless, the criterion of knowledge would still have to be met.³⁷⁵ If the EU intervention is limited to financing the ECPs, while these are run by third countries or IOs without indirect administrative control by the EU, this circumstances may prompt the EU's responsibility for aid and assistance, as provided by article 14 DARIO. Again, the observations drawn in the previous section apply, and the main concern is to prove the requirement of knowledge.³⁷⁶

In addition to the responsibility under international law, the EU responsibilities under EU law must also be analysed. As mentioned throughout this study, the EU is bound by human rights obligations in its external action. In particular, the abovementioned human rights clauses included in international agreements cannot be a mere formality, but

³⁷³ Liguori (n 239) 152.

³⁷⁴ Moreno-Lax (n 265) 26.

³⁷⁵ DARIO (n 335), art 15(b).

³⁷⁶ *ibid* art 14(b).

need to be applied in practice. The jurisprudence of the EU courts³⁷⁷ on this matter is not abundant, but conveys some principles that are important for this thesis.

The GC considered the EU's responsibility for the failure to adopt appropriate measures under a human rights clause in *Zaoui*.³⁷⁸ In this case, the applicants invoked the EU's responsibility for the death of a family member in a terrorist attack, through the funding of the Palestinian education system, which allegedly incited hatred and terrorism. Although the GC considered that the EU could not be held responsible, for the causality link between the funding and the alleged damage was not met,³⁷⁹ it should be highlighted that the GC did not question that the EU could be, hypothetically, liable for non-contractual damage in a third country.³⁸⁰ Moreover, the GC referred that the applicants had not proved that the EU was the only financer of the Palestinian education system, nor that the financing was the determining cause of the attack that originated the damage.³⁸¹ *A contrario*, the GC's reasoning may be interpreted as opening the door to admitting that, once proved that the EU is the only source of financing of the EPCs, or that the EU funding is the determining cause of a human rights violation occurred in an EPC, this might engage its liability. Nonetheless, the conclusion is, again, that this may be extremely difficult to prove in practice.

Another relevant case is *Mugraby*,³⁸² in which the applicant alleged the violation of his fundamental rights derived from the EU's failure to adopt 'appropriate measures' under the human rights clause in the EU-Lebanon association agreement. The action failed on the merits, since it was not proved that the Council and the EC 'manifestly and gravely disregarded the limits of the broad discretion that they have with regard to a possible suspension of the Association Agreement'.³⁸³ However, relevant is that, again, the GC did not question that the EU could be responsible for a violation of human rights by a third party in a third country.

³⁷⁷ CJEU and General Court (GC).

³⁷⁸ Case T-288/03 *Zaoui and others v Commission of the European Communities* [2003] not yet published.

³⁷⁹ *ibid* paras 15 and 16.

³⁸⁰ *Bartels* (n 362) 1076.

³⁸¹ GC (n 378) paras 20 and 21.

³⁸² Case T-292/09 *Mugraby v Council of the European Union and European Commission* [2011] ECLI:EU:T:2011:418.

³⁸³ *ibid* para 60.

In *Front Polisario*,³⁸⁴ the GC recognised the existence of an obligation to ‘examine, carefully and impartially, all the relevant facts’ to ensure that a given agreement does not ‘entail infringements of fundamental rights’.³⁸⁵ Although stating that the conclusion of agreements with third countries ‘does not and cannot make the [EU] liable for any actions committed by [those countries]’,³⁸⁶ the GC acknowledged that, through these agreements, the EU ‘may indirectly encourage [fundamental rights infringements] or profit from them’.³⁸⁷ It concluded for the existence of an obligation to examine all the pertinent elements, including human rights impacts, before concluding agreements, which, in that case, the Council failed to do.³⁸⁸

Transposing the GC’s decisions to the realm of EPCs is, admittedly, speculative. However, they allow to conceive the circumstances in which the indirect participation of the EU, namely through financing, may amount to a breach of its human rights obligations, which can engage its responsibility. Furthermore, they establish a duty to undertake a careful and impartial assessment to exclude potential human rights violations deriving from the conclusion of an agreement. Consequently, any agreement leading to the creation of EPCs, or to the cooperation with third countries, IOs or private parties in third countries, must be preceded by that assessment, otherwise it might engage the EU’s liability. Finally, they set the precedent for admitting the access to the EU jurisdiction of TCNs victims of human rights violations occurred in EPCs, which will be considered below.

The jurisprudence analysed refers to the responsibility of EU institutions. However, EU agencies, especially Frontex, may also intervene in the context of EPCs. The legal framework of Frontex operations and its human rights obligations were already outlined above. Nonetheless, it should be added that Frontex cooperation with third countries may take place within the framework of *working*

³⁸⁴ Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953.

³⁸⁵ *ibid* para 228.

³⁸⁶ *ibid* para 230.

³⁸⁷ *ibid* para 231.

³⁸⁸ *ibid* para 247. The Council appealed the GC decision, which was set aside by the CJEU (Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario), European Commission* [2017] CELEX: 62016CA0104). The CJEU’s decision did not, however, refer to the GC considerations relevant for this thesis.

arrangements.³⁸⁹ These working arrangements do not have the same legal value as agreements concluded by the EU institutions. However, considering the human rights obligations that bind Frontex, and its particularly sensitive area of activity, which strongly contends with the rights protected by articles 18 and 19 CFREU, it appears that these working arrangements should also be preceded by a fundamental rights impact assessment.³⁹⁰ Failing to do so might prompt the Frontex responsibility for eventual violations of human rights.

The observations of this section indicate an increasing detachment of jurisdiction and responsibility from the territorial element. Consequently, it is possible not only to enforce the compliance of the EU and the EU MS with the EU and international obligations when they act outside of the EU territory, but also to hold them accountable for the failure to comply. This is particularly settled in relation to the respect for the principle of *nonrefoulement*. In most of the circumstances analysed, it is possible to conclude for the possible responsibility of the EU and EU MS, at least for complicity.³⁹¹ This has the positive outcome of multiplying the possibilities of the victims to obtain redress. However, as often mentioned throughout this study, there are practical aspects that may limit the access to remedy. These questions constitute the core of the following section.

2.5 ACCESS TO REMEDY

The findings of this chapter thus far reveal diverse legal possibilities to establish the responsibility of the EU and the MS for wrongful acts in extraterritorial processing of asylum, whether they intervene directly or indirectly. The question remains, nonetheless, regarding the enforcement of these legal provisions. This is an essential factor to ensure that the multiple actors engaged in extraterritorial processing, and especially the EU and the MS, do not act with a sense of impunity. Setting tight legal standards does not suffice – it is equally necessary to allow those who the law aims to defend to obtain effective protection and, possibly, redress. If this element is missing, the legality of the

³⁸⁹ Frontex Regulation (n 300), art 54(2).

³⁹⁰ Heschl (n 246) 229.

³⁹¹ Liguori (n 239) 157.

extraterritorial processing of asylum is hindered.

The question of access to remedy, for the purposes of this section, is twofold. On the one hand, asylum seekers must be given the possibility to challenge individual and direct decisions applied throughout the asylum procedure; on the other hand, the overall design of the EPCs and the intervention of the EU and MS on their creation and maintenance of EPCs should be subject to judicial scrutiny.

Ensuring access to remedy is of utmost importance if the strategies pursued foresee the interception and transfer of asylum seekers to EPCs. These practices contend with rights and freedoms enshrined in the ECHR and the CFREU, and particularly with the prohibition of *refoulement*. Subsequently, both articles 13 ECHR and 47 CFREU foresee the right to an effective legal remedy if violations occur. In cases referring to the prohibition of *refoulement*, this access to remedy should take place pre-emptively, and the ECtHR has interpreted article 13 as requiring ‘the possibility of suspending the implementation of the measure impugned’ whenever there are ‘substantial grounds for fearing a real risk of treatment contrary to Article 3 [ECHR]’.³⁹²

Section 2.1 mentioned the need to ensure that the procedural standards in EPCs are adequate to provide the asylum seekers with effective protection. Hence, without access to remedy, there cannot be effective protection. Furthermore, the parties involved in the EPCs must proactively ensure that individuals have access and are able to exercise appeal rights, namely by providing linguistic and legal assistance.³⁹³ Scholars tend to agree that the concept of effective remedy should encompass the suspensive effect of the claim, not only when the prohibition of *nonrefoulement* is at stake (whether in the context of the transfer to the EPC or in the context of a decision of resettlement), but also when the claim for protection is rejected.³⁹⁴ Consequently, given the risk of irreversible damage, administrative or informal arrangements are insufficient, and access to a judicial organ should be ensured.

Another of the main legal concerns regarding EPCs is the possible detention of asylum seekers. As concluded in section 2.3 of the present chapter, although detention is not excluded *per se*, it is only accepted under strict conditions. Nonetheless, there are circumstances that

³⁹² *Jabari v Turkey* App no 40035/98 (ECtHR, 11 July 2000) para 50.

³⁹³ Moreno-Lax (n 265) 29.

³⁹⁴ See Noll (n 230); Moreno-Lax (n 265).

potentially contend with the right to liberty, as provided for in articles 5 ECHR and 6 CFREU. In fact, it is possible to envisage cases in which the detention in EPCs may become indefinite, as the Australian case illustrates. This may happen, for instance, in cases where a refugee does not obtain a resettlement place once his or her status is determined. In these circumstances, the right to have a court review the decision of detention stems from article 5(4) ECHR. Indefinite detention may also occur when a negative assessment of the asylum claim is not followed by repatriation. In these cases, despite being initially lawful under article 5(1)(f) ECHR, once the removal is deemed impossible, the grounds for detention cease to exist. Thus, detainees need to be conferred the right to challenge the detention and, if the unlawfulness is proved, be rightfully compensated, according to article 5(5) ECHR.

The right to have the detention decision reviewed is also enshrined in article 9(3) RCD. Although the CEAS instruments do not apply extraterritorially,³⁹⁵ it was also concluded above that the levels of protection offered in EPCs should be equivalent to those offered within the EU. Thus, compliance with EU law standards requires granting access to remedy to detainees in EPCs.

If ultimately a violation occurs, in theory, the victims could challenge the wrongful acts before MS courts, the host state's courts, the CJEU or the ECtHR.³⁹⁶ Nonetheless, in practice, things can prove quite different. As referred in section 3, the possible extraterritorial application of human rights obligations is no longer disputed. However, this extensive interpretation is tempered by a restrictive interpretation of the concepts of control, authority and knowledge, essential to establish the responsibility of a state or IO.

In the case of access to the ECtHR, although the court has shown openness to accept extraterritorial jurisdiction, it still reiterates the primacy of the territorial connection. Moreover, in certain cases, such as when the violation consists on a failure to act, or in when it takes place in the context of joint operations, the state's responsibility might be, in practical terms, impossible to prove. It is also important to highlight that, although in *Hirsi*³⁹⁷ the ECtHR considered the case of externalised migration controls in the high seas, it has not decided on the exercise

³⁹⁵ Ch 1, s 2.2.

³⁹⁶ Levy (n 216) 115.

³⁹⁷ n 114.

of migration control in third state territory, so no precedent has been established thus far.³⁹⁸

Regarding the responsibility of the EU or its agencies, an important limitation has to be considered. As the accession of the EU to the ECHR did not materialise, the impugnation of acts of EU institutions or agencies before the ECtHR is excluded. Only the participation of the MS is subject to the scrutiny of the court.

The remaining option is the access to EU courts, namely the GC, since the access to the CJEU can only be obtained indirectly, through national courts. The case law referred in the previous section shows that the GC has not ‘rule[d] out that TCNs can invoke [article] 47 CFREU and the right to an effective remedy in the context of human rights violations occurring in an extraterritorial context’.³⁹⁹ Despite this abstract possibility to seek redress before the EU courts, in practice, the odds of a positive outcome are very limited. Referring again to the case law mentioned, the first difficulty may very well be to meet the admissibility criteria. In certain cases, it may be difficult to prove that the act is of direct and individual concern to the applicant (as in *Mugraby*); in others, the problem may be proving the EU’s failure to act. Moreover, the causal link between the EU intervention and the damage suffered may be particularly difficult to establish, especially in the cases of passive intervention, as when it is limited to financial support (as in *Zaoui*). The applicant bears the burden of proof, and a strict interpretation of this condition may effectively limit the possibility to seek remedy.

Besides, although the CJEU, through its expansive interpretation, helped to shape the EU law as we know it, coining many of its principles, it has shied away from its ‘anti-formal, teleological methods of interpretation’⁴⁰⁰ when confronted with cases contending with the external dimension of the EU asylum policy.⁴⁰¹ Hence, possible victims of human rights violations in EPCs face not only the difficulty to meet the criteria for an action before the GC, but also the court’s intention not to contribute to the controversy in an important policy area.

In conclusion, the access to remedy in the context of extraterritorial

³⁹⁸ McNamara (n 269) 320.

³⁹⁹ *ibid* 191.

⁴⁰⁰ Spijkerboer (n 325) 231.

⁴⁰¹ See Case C-638/16 *X and X v État belge* [2017] ECLI:EU:C:2017:173; T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128; T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:129. For a critical assessment of the judgments, see Spijkerboer (n 325).

processing of asylum presents several difficulties. Practice shows that the courts tend to adopt a strict interpretation of the admissibility criteria, which limits the chances to obtain redress. In general, a person whose rights are violated in an ECP will face many practical hurdles when trying to invoke responsibility.⁴⁰² For effective protection to exist, general provisions allowing the establishment of responsibility under international, human rights and EU law are not enough. It is also necessary that this responsibility can be invoked before a court, and that this access to remedy is not curtailed by requirements impossible to meet. If this factor is missing – and, at the current state of law, it appears to be – EPCs can still be used as a means to circumvent responsibility.

⁴⁰² Heschl (n 246) 230.

3.

HOW TO OVERCOME THE LEGAL QUESTIONS

3.1 INTRODUCTION

The previous chapter has shown that, even if theoretically it is possible to conclude for the legality of EPCs, in practice the idea presents limitations that prove prejudicial to refugees and asylum seekers. In general, and despite the problems that hamper the CEAS, the situation of people in need of protection will be considerably worse in EPCs than if they would find themselves in European soil. Consequently, the EU is obliged to dispel any doubts regarding the levels of protection provided and the legality of its actions. However, acknowledging the need take to measures to overcome the problems the EU asylum system presents, other alternatives should be considered.

Against this backdrop, this chapter will consider two different scenarios – the first, admitting the creation of EPCs, outlines the minimum legal safeguards the EU should ensure; the second presents an alternative to the EPCs, the EU Asylum Agency.

3.2 ENSURING THE LEGALITY OF EPCs

Under the current political climate in Europe, the creation of EPCs is increasingly foreseeable, despite the shortcomings associated to them.⁴⁰³ There are, nonetheless, some strategies the EU and MS can pursue to ensure that processing in EPCs is undertaken under the legality. These will be outlined in a non-exhaustive way.

⁴⁰³ Ch 2.

First, the EU should proceed with care when concluding the agreements or cooperation contracts that preside to the establishment of EPCs. In fact, until now, agreements with third countries are often concluded without public or parliamentary oversight.⁴⁰⁴ If the EU and the MS want to exclude any doubts about their legality, transparency is an essential element that should prevail throughout the whole process, including in the negotiation phase preceding the conclusion. It should be ensured that these agreements do not condone practices that would be deemed unlawful in Europe, and the agreement itself and its execution should also be subject to public scrutiny.⁴⁰⁵

An aspect that appears to be lacking thus far in the proposals for the creation of EPCs, and that is also absent from the conclusions of the recent EU Summit,⁴⁰⁶ is the actual engagement with potential host countries. So far, no North African state has showed interest in hosting these platforms, and some have publicly declared their unwillingness to cooperate with the EU in this matter.⁴⁰⁷ However, the feasibility of the plans depends on the participation of third countries. The EU has allegedly offered Morocco financial incentives,⁴⁰⁸ but this may not suffice to obtain the country's cooperation, as the lengthy and difficult negotiations presiding to the EU-Morocco Readmission Agreement.⁴⁰⁹ Faced with difficulties in obtaining the third countries cooperation, the EU cannot be tempted to lower its standards.

It is also important to learn from the critics directed to other measures adopted, as regarding the controversial EU-Turkey statement.⁴¹⁰ The latter was only made public through a press release, and after an agreement had already been achieved. According to the

⁴⁰⁴ Lisa Heschl, *Protecting the Rights of Refugees Beyond European borders – Establishing Extraterritorial Legal Responsibilities* (Intersentia 2018) 47.

⁴⁰⁵ Nils Muiznieks 'EU Agreements With Third Countries Must Uphold Human Rights' (Huffington Post, 2 February 2017) <www.huffingtonpost.co.uk/nils-muiznieks/eu-agreements-with-third-_b_14546518.html?guccounter=1> accessed 14 July 2018.

⁴⁰⁶ n 12.

⁴⁰⁷ It was the case of Libya (Michael Peel and James Politi, 'Austria to push hardline migration policy in EU presidency' *Financial Times* (Luxembourg and Rome, 25 June 2018) <www.ft.com/content/6a856100-7860-11e8-bc55-50daf11b720d> accessed 14 July 2018) and Tunisia (Nikolaj Nielsen and others, 'EU 'migration summit': big on promises, short on detail' *EUObserver* (Brussels, 29 June 2018) <<https://euobserver.com/migration/142243>> accessed 14 July 2018).

⁴⁰⁸ *ibid.*

⁴⁰⁹ See Sergio Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?' [2016] CEPS Papers in Liberty and Security in Europe.

⁴¹⁰ European Council, 'EU-Turkey statement', Press Release No 144/16, 18 March 2016.

analysis of the GC, it was drafted in ‘regrettably ambiguous terms’, which led to impossibility of regarding it ‘as a measure adopted by the European Council, or, moreover, by any other [EU] institution, body, office or agency’, and, consequently, placed it outside of the EU courts’ jurisdiction.⁴¹¹ Hence, rather than using subterfuges, the agreements should be clear and adopted following the procedure foreseen in article 218 TFEU. This is particularly relevant since this procedure would require the EP’s consent, and, especially, it would allow obtaining the CJEU’s opinion, according to article 218(11) TFEU.⁴¹²

As referred in chapter 2, the EU is under a duty to ‘ensure that partner countries uphold the human rights of migrants and refugees’.⁴¹³ Therefore, any form of cooperation with third countries should be preceded by an assessment of the third countries human rights record, in order to exclude risks for migrants. This assessment should be made public and, if it points towards the existence of threats to migrants’ human rights (especially the right to life, prohibition of torture and access to effective asylum procedures), cooperation should be halted.⁴¹⁴

Conversely, if the assessment indicates that migrants’ rights are safeguarded in the third country, the applicable legal framework of the offshore processing scheme should be defined, whether it is opted to apply the CEAS or an *ad hoc* instrument to be created.⁴¹⁵ In any event, the legal framework should ensure that the MS officials and/or EU staff involved are bound by the obligations assumed by the EU and the MS that apply extraterritorially, as those ensuing from the CFREU, the ECHR and the Geneva Convention.⁴¹⁶ This legal framework must give particular attention to ‘*nonrefoulement*, non-discrimination, fair trial[,] effective remedy [and] prohibition of ill treatment’,⁴¹⁷ ie, the legal issues highlighted in chapter 2. Furthermore, the terms of the EU and MS involvement in the agreement should be specified, in order to facilitate

⁴¹¹ Cases T-192/16 paras 66 and 71; T-193/16 paras 67 and 72 (n 401).

⁴¹² Thomas Spijkerboer, ‘Bifurcation of people, bifurcation of law: externalisation of migration policy before the EU Court of Justice’ (2017) 31(2) *Journal of Refugee Studies* 216, 221.

⁴¹³ Muižnieks (n 405).

⁴¹⁴ *ibid.*

⁴¹⁵ Violeta Moreno-Lax, ‘Europe in Crisis: Facilitating Access to Protection (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward’ [2015] Red Cross EU Office 26.

⁴¹⁶ Ch 2.

⁴¹⁷ Moreno-Lax (n 415) 26.

the attribution of responsibility.⁴¹⁸ The inclusion of a contractual clause conditioning ‘funding, training, and other assistance to third countries on the implementation of a minimum set of human rights protections in law and in practice’⁴¹⁹ is also plausible.

Furthermore, in analogy with what Guild and others⁴²⁰ refer to regarding hotspots, it should be ensured that the officials dealing with asylum seekers ‘possess the legal competence and the relevant qualifications and training’⁴²¹ to undertake their tasks. Hence, the EU and the MS should not only make sure that the officials that they (hypothetically) deploy possess those competences, but also confirm that the third states’ officials involved do so too, and provide adequate training, if necessary.

Additionally, the EU and the MS should make sure that the agreements set up monitoring and reporting mechanisms, apt to ‘ensure that the minimum standards of reception conditions and asylum screening defined in human rights and international refugee law are being complied with in practice’,⁴²² and to allow a prompt reaction if threats to human rights are found.⁴²³ Monitoring and reporting are also important elements of the abovementioned transparency requirement. If the findings reveal violations, the decrease in the protection of asylum seekers, or a negative impact in the access to asylum, the EU’s or MS’ failure to act can trigger their responsibility.

In addition to the monitoring system set up by the agreement, subjection to international supervision is also advisable. Considering that detention and *nonrefoulement* are some of the major issues raised by extraterritorial processing, the CAT should be granted access to the EPCs.

This supervision could also be undertaken by the UNHCR. However, it should be noticed that the UNHCR has been increasingly critical

⁴¹⁸ Daniel Thym, ‘Minimum Requirements under EU Primary Law and International Refugee Law for Rules in Secondary Legislation on the Rejection of Applications for Asylum as Inadmissible with a view to Protection and Housing Options in Third Countries (Transit and Other Countries) or in Parts of any such Countries – Expert Opinion for the (German) Federal Ministry of the Interior’ (2017) 56.

⁴¹⁹ Bill Frelick and others, ‘The impact of externalization of migration controls on the rights of asylum seekers and other migrants’ (2016) 4(1) *Journal on Migration and Human Security* 190, 209.

⁴²⁰ n 138.

⁴²¹ *ibid* 16.

⁴²² Thym (n 418) 56.

⁴²³ Muižnieks (n 405).

of the EU's intention to move forward with EPCs. In fact, it recently referred that the EU's:

proposed approaches limiting access to asylum for people arriving to the EU and seeking to externalise asylum processing to nonEU countries, including through mandatory admissibility assessments based on the safe third country concept, must be avoided.⁴²⁴

Nonetheless, the UNHCR's monitoring does not equal, nor requires, the endorsement of the EU's extraterritorialisation strategy. By monitoring the conditions and the compliance with human rights obligations in EPCs, the UNHCR would act independently, as *the guardian* of the Geneva Convention,⁴²⁵ contributing for the essential factor of transparency.

As mentioned above, this section does not intend to be an exhaustive catalogue of the conditions to fulfil by the agreements presiding to the creation of EPCs. The factors outlined above are, however, some of the fundamental factors to have into account to ensure that processing in EPCs will take place within the legality, without exposing migrants to the risk of violation of their human rights. Moreover, since one of the striking conclusions of chapter 2 was the difficulty to prove responsibility of the EU and MS, which highly conditions the access to remedy, the aspects suggested above also aim to overcome these limitations.

In fact, if the EU wants to 'uphold its image as a community of values',⁴²⁶ it cannot allow the extraterritorial processing of asylum to become a mere exercise of responsibility shifting, as it is often criticised. Restriction of migration cannot be pursued at any cost, in detriment of human rights, regardless of where it takes place. To avoid the criticism

⁴²⁴ UNHCR, *Recommendations to the Federal Republic of Austria for its Presidency of the Council of the European Union* (June 2018) 4. This position, however, marks a shift from opinions expressed in the recent past. In 2014, the then UNHCR's European director referred that the UNHCR 'would not be totally against external processing if certain safeguards were in place: the right to appeal, fair process, the right to remain while appeals take place' (Harriet Sherwood and others, 'Europe Faces "Colossal Humanitarian Catastrophe" of Refugees Dying at Sea', *The Guardian* (London, 3 June 2014) <www.theguardian.com/world/2014/jun/02/europe-refugee-crisis-un-africa-processing-centres> accessed 14 July 2018).

⁴²⁵ Dorothea Keudel-Kaiser and others, 'A New Asylum for Europe?! Opting for a rights-based approach and what this would mean' (Ludwig Boltzmann Institute of Human Rights 2016) 67.

⁴²⁶ Steven Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?' in Jan Orbie (ed), *Europe's Global Role External Policies of the European Union* (Routledge 2008) 117, 135.

of IOs, NGOs and scholars, the EU must ensure full compliance with its legal obligations, and the abovementioned aspects are essential for that purpose.

However, even if all these precautions are taken, the potential for violations (or at least suspicions of violations) to occur remains significant. This should keep the EU from pursuing the creation of EPCs, and rather focus on alternatives to the current problems of the CEAS that do not involve externalisation. The following section outlines one of these alternatives.

3.3 AN ALTERNATIVE TO THE ALTERNATIVE – AN EU ASYLUM AGENCY

Given the legal uncertainty associated to EPCs, and while they are not (yet) a *fait accompli*, and far from being an inevitability, other alternatives can be considered. The EU itself has done so. When defining the key issues to be discussed in the longer term, the EAM included the ‘reflection towards establishing a single asylum decision process ..., aiming to guarantee equal treatment of asylum seekers throughout Europe’.⁴²⁷ Similarly, the EC suggested that ‘the possibility of transferring responsibility for the processing of asylum claims from the national to the EU level’⁴²⁸ should be considered in the long term. These ideas represent the EU’s recognition of the limitations of the current CEAS, and can be understood as setting the direction that its reform should follow.

This issue is under discussion, with some currents pointing towards the ‘need for transferring more competence to the EU, including the power to decide on individual asylum applications’.⁴²⁹ In this context, one of the most mentioned solutions is the creation of an EU Asylum Agency, as this section will describe.

Some authors have presented suggestions regarding what this centralised EU agency, charged with decision-making powers to assess asylum claims, should concretely be. While Goodwin-Gill calls for a

⁴²⁷ EAM (n 71) 17.

⁴²⁸ COM(2016) 197 (n 120) 8.

⁴²⁹ Maarten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer, ‘Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System’ (2016) 53(3) Common Market Law Review 607, 638.

‘European Protection Agency competent for refugees and migrants in need of protection’,⁴³⁰ Carrera, Gros and Guild suggest an expansion of EASO’s current competences and mandate, to become ‘a proper Common European Asylum Service, responsible for processing asylum applications and determining responsibilities across the EU, and with competence for overseeing a uniform application of EU asylum law’.⁴³¹ This is close to the EC’s suggestion of ‘transforming EASO into an EU-level first-instance decision-making Agency, with national branches in each [MS]’.⁴³² Hailbronner, on the other hand, considers that an EU asylum procedure, separate from national law, does require a transfer of competences to the EU, but not the creation of a new EU agency. This author considers that mixed teams of already existing national authorities could process asylum claims according to uniform EU rules in reception centres located at the external border, similar to the hotspots.⁴³³

Despite the differences, these suggestions converge in proposing the centralisation of the asylum decision-making process. The non-existence of a single European response, or truly uniform standards of protection, undermines the goals of the CEAS. Refugees and asylum seekers should enjoy the same level of protection throughout the EU, regardless of where their claims are filed. Considering that all EU MS are party to the Geneva Convention and Protocol, and bound by the same legal obligations under EU law and the ECHR, this should not be difficult to achieve. However, the existence of national refugee status determination systems, diverging in terms of ‘recognition rates, procedures, ... safeguards enjoyed pending the determination of claims, and reception conditions’,⁴³⁴ jeopardises this uniformity.

To overcome discrepancies, there should exist an EU-wide refugee or protected status, recognised and valid in all the EU MS. This could be achieved by enshrining this integrated response in EU law, and entrusting an EU agency with the decision to confer the protected status.

⁴³⁰ Goodwin-Gill (n 111) 84.

⁴³¹ Sergio Carrera, Daniel Gros and Elspeth Guild, ‘What priorities for the new European agenda on migration?’ [2015] CEPS Commentary 3.

⁴³² COM(2016) 197 (n 120) 8.

⁴³³ Kay Hailbronner, ‘Asyl in Europa: Wenn, wie, wann, wo?’ *Frankfurter Allgemeine Zeitung* (FrankfurtAmMain, 10 December 2015 <www.faz.net/aktuell/politik/die-gegenwart/fluechtlinge-asyl-in-europa-wenn-wie-wann-wo-13851277.html> accessed 14 July 2018.

⁴³⁴ Keudel-Kaiser and others (n 425) 67.

With a single and centralised decision-making process, divergences between EU MS in the processing of asylum applications would be overcome and replaced with common procedures, observed throughout the EU. The evaluation of protection needs should also be undertaken according to common standards.⁴³⁵ Considering the human and fundamental rights obligations that bind the EU, the risk of downgrading human rights standards currently applied is close to non-existent, and in most cases asylum seekers' procedural rights would improve. Moreover, common rules and their application by one single entity, the EU agency, would also enable a uniform application of the 'safe country of origin' and 'safe third country' concepts. The agency would also be responsible for ensuring respect for the principle of *nonrefoulement*, actively preventing returns whenever there are threats of persecution, torture, inhuman or degrading treatment, serious violation of fundamental human rights or indiscriminate violence arising from armed conflict.⁴³⁶

Moreover, a uniform process, and the recognition of the refugee status across the EU, would mitigate the shortcomings of the Dublin system.⁴³⁷ By ending the 'asylum protection lottery', the secondary movements would also be significantly reduced. Besides, the system envisioned by the EC foresees '[t]he distribution of asylum seekers among [MS] based on a distribution key' thus ensuring 'a fair sharing of responsibility for their care'.⁴³⁸

Another important aspect to consider when transferring the competences to an EU Asylum Agency is the possibility of judicial review of the agency's decisions, in particular those concerning the denial of entrance in the EU and the refusal to grant asylum, since the right to an effective remedy is enshrined in articles 47 CFREU and 46 APD. As an EU body, the agency's decisions would be subject to the CJEU's jurisdiction. More specifically, the creation of an EU specialised court under article 257 TFEU (at the example of the now extinct EU Civil Service Tribunal), is also a possibility.⁴³⁹ Additionally, an independent

⁴³⁵ COM(2016) 197 (n 120) 9.

⁴³⁶ Guy S Goodwin-Gill, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' (20 March 2015) Keynote Address at An International Workshop National and Kapodistrian University of Athens Faculty of Law 1, 10.

⁴³⁷ Ch 1.

⁴³⁸ COM(2016) 197 (n 120) 8-9.

⁴³⁹ See, *inter alia*, Helene Hurth and others, 'Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU' (2013) EC; Hailbronner (n 433); Goodwin-Gill (n 436).

appeals board, responsible for ‘hearing and handling the appeals against the administrative decisions’ of the agency,⁴⁴⁰ could also be created. The appeals board’s decision could be appealed to the EU specialised court,⁴⁴¹ whose decision, on its turn, could be appealed to the EU GC, thus adding ‘a third layer of judicial control’.⁴⁴² Consequently, decisions recognising (or denying) refugee status would be valid throughout the EU, whether made by the agency, the appeals board, the EU specialised court or the GC. Moreover, legal aid should be granted for proceedings before the specialised court, to ensure effective access to justice.⁴⁴³

Nonetheless, this plan also contains some shortcomings. For example, the location of the appeal court needs to be carefully studied, to ensure that the distance from the location of the parties is not so excessive as to amount, in practice, to a limitation to effective access to justice.⁴⁴⁴ On the other hand, since the EU is not party to the ECHR, the jurisdiction of the ECtHR over EU decisions on asylum is excluded, thus depriving applicants from the access to this court whose interpretation has proved crucial in upholding the rights of migrants and asylum seekers.⁴⁴⁵ Other important aspect is the compatibility of this appeals system with the national constitutions, namely when these foresee the right to appeal to national courts from legally-binding decisions.⁴⁴⁶

What remains to be assessed is if the centralisation of the asylum decision-making could be undertaken under the current treaty basis, namely article 78(2) TFEU. Most scholars accept that article 78(2)(e) TFEU, read together with articles 78(1) and 80, provides an adequate legal basis to pursue the necessary changes.⁴⁴⁷ Goodwin-Gill refers that, given the EU’s capacity to sign treaties, it is possible to envisage that it could replace the MS ‘as party to the regime of protection organised under the [Geneva Convention and] Protocol [or] exercise their competences by way of delegation’.⁴⁴⁸

⁴⁴⁰ Hurth and others (n 439) 79.

⁴⁴¹ Goodwin-Gill (n 436) 10.

⁴⁴² Hurth and others (n 439) 79.

⁴⁴³ *ibid* 80.

⁴⁴⁴ *ibid* 81.

⁴⁴⁵ Keudel-Kaiser and others (n 425) 70.

⁴⁴⁶ Elspeth Guild and others, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ [2015] CEPS Paper in Liberty and Security in Europe 38.

⁴⁴⁷ See, *inter alia*, Den Heijer, Rijpma and Spijkerboer (n 429) 607, 639; Keudel-Kaiser and others (n 425) 67 and references.

⁴⁴⁸ Goodwin-Gill (n 111) 84.

However, in case the EASO assumes competences to process asylum claims, a ‘formal delegation of the administrative decision making power’⁴⁴⁹ to EASO would be needed. Since its current competences do not include the decision-making power necessary to undertake the new functions it would be assigned with, a new mandate granting EASO ‘explicit competence to act in individual cases’⁴⁵⁰ would require the amendment of its founding regulation.

Considering what was mentioned, it can be argued that the EU could envisage the creation of an EU Asylum Agency alternatively to the creation of EPCs. Indeed, by creating this agency, not only would some of the problems of the CEAS be solved (or at least mitigated), but many of the problems raised by EPCs would be avoided.

First and foremost, the question of extraterritoriality, with the concomitant issues it raises, especially regarding jurisdiction and responsibility, would not be posed. Moreover, in addition to the preservation of the territorial link, the allocation of competences to an EU agency would also contribute to simplify the attribution of responsibilities. This would allow the questions raised by the dispersion of tasks, and different levels of responsibility, to be overcome.⁴⁵¹

Establishing a centralised asylum system would require a clear and sound legal basis, to be applied by one single entity, identified beforehand – the EU Asylum Agency. The subjection to all the legal obligations regarding refugees and asylum, prescribed by EU primary and secondary law, and international law, would, hence, be a given. Consequently, the issue of the level of protection to be granted would also be redundant, as the harmonisation would have to be made according to the standards foreseen in EU law, and applied uniformly throughout the EU.

The conclusions of chapter 2 referred the existence of sound problems regarding the guarantee of access to remedy in the context of EPCs, a side-product of the issues of responsibility and jurisdiction. Again, this question would not present itself in the case of a common asylum system led by an EU agency. Under the legal framework of its creation, it is possible to foresee the creation of an appeals board, and of a specialised EU court. Furthermore, clear processual rights would be

⁴⁴⁹ Hurth and others (n 439) 78.

⁴⁵⁰ *ibid.*

⁴⁵¹ Ch 2, s 4.

granted – which is not clear to occur if the appeal would be led by host states’ authorities, in the case of EPCs. Moreover, even if the specialised court is not created, access to the GC would always be ensured, since the asylum procedures would be led by an EU body.

The advantages of this option are, therefore, evident. However, whereas the reform of the CEAS is currently under discussion,⁴⁵² and despite the EAM and the EC’s references to the single asylum decision process, this possibility has not been as discussed as the EPCs. In fact, although the new regulation amending EASO will transform it into a fully-fledged EU Asylum agency (EUAA), it was not ‘re-vamped ... to process asylum applications’,⁴⁵³ as some anticipated, and as would have been needed to put forward the ideas exposed in this section. While it is expected that the new functions of the EUAA will include ‘facilitat[ing] and support[ing] the activities of [MS] in the implementation of the CEAS, including by enabling convergence in the assessment of applications for international protection across the Union’,⁴⁵⁴ the responsibility for the decision making will remain with the MS.

If the EASO were to be transformed in order to assume the processing of asylum, ‘changes to its mandate, structure, staffing and funding would be required, as well as extensive amendments to the current asylum *acquis*’.⁴⁵⁵ Although it would have allowed to overcome some of the important limitations of the CEAS, and avoided many of the legal problems posed by the EPCs, the fact that the amendment to the EASO regulation does not grant it the powers to process asylum cannot exactly be depicted as surprising.

In fact, this level of centralisation would require ‘an overhaul of the CEAS’.⁴⁵⁶ Moreover, it is debatable if the institutional change would require amending the EU treaties, to establish the supranationalisation of the asylum law. Clearly, attempting this would have met the opposition of (at least some of) the MS, exposing deep fractures that can undermine the EU as a whole. One should bear in mind the controversy surrounding the theme, and the current tendencies at the Council of the EU.

⁴⁵² Ch 1.

⁴⁵³ Sergio Carrera and Elspeth Guild, ‘Offshore processing of asylum applications Out of sight, out of mind?’ [2017] CEPS Commentary.

⁴⁵⁴ EASO, ‘EASO preparing for transformation into European Union Agency for Asylum (EUAA)’, <www.easo.europa.eu/easo-transformation-into-euaa> accessed 14 July 2018.

⁴⁵⁵ Guild and others (n 446) 38.

⁴⁵⁶ Hurth and others (n 439) 74.

Furthermore, the centralisation of the decision-making process will remain ineffective, if not accompanied by the ‘transfer of power in the spheres of border control, return and detention’.⁴⁵⁷ All of these remain matters of MS’ sovereignty,⁴⁵⁸ and the political climate is not favourable to an expansion of the EU’s powers. Furthermore, considering that the reform of the CEAS has hit a stalemate concerning the establishment of the ‘fairness mechanism’ envisaged by the EC,⁴⁵⁹ it is difficult to imagine that an agreement could be reached regarding the abovementioned ‘distribution key’ required by the functioning of the EU Asylum Agency.

The major institutional transformation required by the transfer of the asylum processing competences would also demand the allocation of substantial resources to the responsible EU agency.⁴⁶⁰ Considering that one of the reasons supporting the idea of EPCs are the lower costs for MS, this can also be a factor undermining the idea of this agency.

In conclusion, the same populist rhetoric, euro-scepticism and discussion surrounding refugees and migration that boost the idea of EPCs, may undermine the feasibility of an EU Asylum Agency.⁴⁶¹

⁴⁵⁷ Den Heijer, Rijpma and Spijkerboer (n 429) 639.

⁴⁵⁸ Ch 1, s 3.3.

⁴⁵⁹ COM(2016) 197 (n 120).

⁴⁶⁰ *ibid* 8-9.

⁴⁶¹ Jan Schneider and Anna-Lucia Graff, ‘EASO Reloaded: Can The New EU Asylum Agency Guarantee A Standardised System of Protection?’ [2018] *The Expert Council of German Foundations on Integration and Migration* 9.

PART III
CONCLUSION

The aim of the present thesis was to study the feasibility, from a legal standpoint, of the creation by the EU and/or its MS of centres destined to processing asylum claims in third states – the EPCs.

Its starting point was the current migratory situation in Europe, marked by an unprecedented number of arrivals, and the EU and MS response at the legal and policy level. The legal analysis of the EU asylum system revealed the existence of multiple legal instruments, stemming from different sources, at the international and regional level, that bind the EU and the MS to the protection of the human rights of migrants, refugees and asylum seekers.

The study revealed the inefficiency of the EU legal framework on migration and asylum, particularly the CEAS, including in its external dimension, to cope with current migratory demands. This inefficiency calls for the reform of the CEAS. However, any solution in migration and asylum adopted by the EU and MS, including the creation of EPCs, will have to comply with the human rights obligations enshrined in primary and secondary EU law, the ECHR and international law, especially the Geneva Convention.

The analysis of the proposals for the creation of EPCs has shown that their positive aspects are mitigated by the legal questions they raise, in terms of compliance with European and international human rights, asylum and refugee law. In fact, reception and processing conditions and the protection provided to refugees and asylum seekers in existing EPCs proved to be lower than in national systems.

Regarding the European case, events occurred during the development of the thesis revealed that the creation of EPCs is now obtaining the EU's endorsement, namely at the Council of the EU, and may be pursued. Consequently, the legal aspects⁴⁶² gained an increased relevance. In this particular, although EPCs are not, *per se*, prohibited by international law, severing the territorial link with the EU presents problems regarding the legal framework applicable to the processing of asylum claims. Given the human and fundamental rights that might be at stake, processing should be done in accordance with procedural standards apt to ensure levels of protection equivalent to those offered within the EU. Different solutions may contend with the provisions of articles 14 UDHR and 18 CFREU, enshrining the right to asylum.

⁴⁶² First research question.

Nonetheless, even if due precautions are taken, the occurrence of violations of human rights cannot be excluded, requiring the definition of the legal framework under which violations should be considered. It was concluded that, although the extraterritorialisation alters the relation between the EU and/or MS and the asylum procedures, it does not exempt them from their legal obligations. The analysis of the jurisprudence of the ECtHR revealed that the effective control over persons might trigger state jurisdiction for the purposes of the application of the ECHR. However, this conclusion is not universal, since the state of development of the ECtHR's jurisprudence does not allow to extend it to cases of indirect participation (namely financing), in which effective control is difficult to prove. However, the CAT has accepted the existence of effective control in cases of indirect participation in EPCs, opening the possibility for this view to be endorsed by other organs. In the case of the EU, not subject to the ECtHR's jurisdiction, considering the provisions of the Treaties and the CFREU, the relevant factor is also the exercise of effective control. However, this primary conclusion that the EU and the MS are bound by the ECHR and the CFREU wherever they exercise effective control over actions or inactions is not irrefutable – a definitive answer will depend on the actual configuration assumed by the EPCs.

Another important finding is that responsibility can be attributed to more than one of the actors involved in possible violations. Although host states hold the primary responsibility, international law admits the possibility to hold the EU and the MS responsible for acts undertaken in the territory of a third state, by that state's organs, provided they exercised authority. In the case of the MS, in addition to the responsibility for the acts of their own agents, responsibility may also exist for the acts of agents of other states, private actors and IOs. Similar conclusions were reached regarding the EU, in which case obligations under EU law accrue to those deriving from international law, namely those contained in contractual clauses. Nonetheless, in practice, this responsibility may be impossible to ascertain, since not only the exercise of control, but also the knowledge of the violation is required, and, in cases of indirect participation, the causal link with the wrongful act may be impossible to prove.

These practical limitations in the determination of responsibility reflect on an essential factor for the protection of refugees and asylum seekers – the access to remedy. The study identified *refoulement* and

detention as key legal issues contending with the creation of EPCs, and regarding to which access to remedy is relevant. The EU and/or MS are under the obligation not only to ensure that host states are ‘safe third countries’, to dissipate any possibilities of *refoulement*, but also to assess any claim of risk of *refoulement*. Considering the irreversible risk involved, this assessment should be done by judicial organs, and granted suspensive effect. Regarding detention, the legality of closed EPCs is questionable, since legal standards require detention measures to be necessary and proportional. Consequently, to ensure levels of protection equivalent to those applied in the EU, the right to have the decision reviewed needs to be granted.

The main concern identified was the possibility of redress in case of violation.⁴⁶³ In theory, victims may seek redress before MS courts, host states’ courts, the CJEU or the ECtHR. However, the difficulties regarding the attribution of responsibility limit these possibilities in practice. Moreover, there is no precedent in the ECtHR regarding migration control in third state territory. In the case of responsibility of the EU, access to the ECtHR is excluded, and obtaining redress via the GC may be limited by the difficulty to meet the admissibility criteria, and by the cautious interpretation that the court has adopted in these matters.

Upon these observations, the conclusion was that, although in theory it was possible to agree on the legality of EPCs, the practical limitations identified proved prejudicial to the rights of refugees and asylum seekers.

Considering this, proposals were made regarding the means to ensure that EPCs are created and run under the legality. These included pre-contractual aspects, as the choice of partners (preceded by a human rights assessment) and the transparency and scrutiny of the negotiation. The agreement should clearly define the legal framework applicable, and specify the terms of involvement of each party. The inclusion of monitoring mechanisms was recommended.

Finally, this study presented an alternative to offshore processing – the creation of an EU Asylum Agency. By establishing a centralised decision-making process and setting common standards for the evaluation of the protection needs, this agency would allow to overcome many of the limitations of the CEAS. Through the intervention of this agency,

⁴⁶³ Second research question.

access to remedy would be ensured, either through the jurisdiction of the CJEU, or through the creation of appeal boards or specialised courts. However, its creation may face practical constraints, namely the opposition of MS to the transfer of sovereign competences, to bear the costs associated to it, and to the establishment of quotas for the distribution of asylum seekers among the MS – one of the controversial aspects transversal to the whole discussion.

In addition to the legal aspects covered by this thesis, practical observations remain. The first refers to the capacity of the EU to ensure that processing in EPCs is undertaken according to the legality, considering that this has proved difficult to ensure *within* the EU territory, as illustrated by the situations in hotspots.

The second refers to the engagement of third countries. In fact, although without partner countries EPCs cannot be established, this aspect seems to be missing from the proposals. It is questionable what kind of incentives can be offered to these countries to compensate the potential pull-factor that an EPC can constitute. Moreover, the requirements of compliance with the EU legal standards may require extensive efforts, often beyond the states' capacities. Finally, the responsibility for those whose claims are rejected, and for whom return or resettlement are not a possibility, may fall on the third countries, constituting another reason to refrain from cooperating. However, awareness of this issue appears to be surfacing, as revealed by the reported attenuation of the link between migration and security contained in some proposals.⁴⁶⁴

On a final note, the subject of the present thesis appears to be in constant evolution. However, the legal and the practical aspects it involves may lead to protracted discussions. It is important that all the aspects highlighted in this thesis are given due consideration, and that no compromises are made that may hinder the already fragile situation of those who should be protected. Alternatives to the limitations of the CEAS should continue to be discussed – after all, the solution may be found onshore.

⁴⁶⁴ Jacopo Barigazzi and David Herszenhorn, 'Austria backs migration centers in nonEU countries' *Politico* (Brussels, 10 July 2018) <www.politico.eu/article/sebastian-kurz-austria-backs-migration-centers-in-non-eu-countries/> accessed 14 July 2018.

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The present thesis - *Is Offshoring the Solution? The EU and the Extraterritorial Processing of Asylum Claims*, by Sara Vassalo Amorim and supervised by Lisa Heschl, University of Graz - was submitted in partial fulfillment of the requirements for the European Master's Programme in Human Rights and Democratisation (EMA), coordinated by EIUC.



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