

Petra Bendel

# EU REFUGEE POLICY IN CRISIS

Blockades, Decisions, Solutions

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Petra Bendel

# EU REFUGEE POLICY IN CRISIS

## Blockades, Decisions, Solutions

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# FOREWORD

In recent years the number of people seeking protection in the European Union has risen sharply. Worldwide, refugee numbers are rising, among other things as a result of wars, civil wars, environmental catastrophes, the effects of globalisation and political crises and upheavals. Only a small proportion of these refugees end up in the EU.

The media regales us with images of jam-packed, sometimes unseaworthy boats trying to reach the coasts of southern European countries across the Mediterranean; images of drowning refugees and of children washed up dead on European shores; and of people who have managed to reach western Europe by the Balkan route and find themselves confined to makeshift camps along closed borders, hoping for a solution. All too evident from these pictures is the psychological stress that drove these people to risk their lives to get to the European Union.

To date the EU has not been able to find adequate solutions to this new phase in refugee migration. The so-called crisis of the common European asylum and migration policy has also become a serious crisis for the European Union. The required solidarity between individual EU member states is nowhere in sight and national interests and strategies largely dominate policymaking. Pan-European policies on the acceptance and distribution of refugees within the EU are on the verge of collapse. A striking example of this is the fact that so far it has not proved possible to effectively reform the failed »Dublin system« that regulates responsibilities concerning asylum applications or to develop an alternative model.

As in any political crisis, also in the crisis of the common European asylum and migration policy the direction in which potential solutions will develop remains open. Will the European Union split further and a policy strategy be pursued aimed exclusively at deterrence and sealing off refugees or will it be possible to develop a common refugee and asylum policy oriented towards human rights in cooperation with the countries of origin on an equal footing in accordance with applicable international protection standards in the EU?

The present report by Petra Bendel provides a thorough overview of the current state of work (up to the end of February 2017) on the various »construction sites« Three sets of issues are particularly important: (I) EU cooperation with countries of origin and transit states, (II) measures and

programmes on securing the EU's external borders and (III) further development of the Common European Asylum System (CEAS). Universal human rights provide a compass for the analysis.

We hope that you will find this an interesting read and hope that this expert view can contribute to a well-grounded discussion on the further development of the European Union and a pan-European asylum and refugee policy.

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## SUMMARY

This report analyses the latest asylum-policy proposals of the EU and its member states on cooperation with countries of origin and transit states, on border management and on the second recast of the Common European Asylum System (CEAS).

In the face of the unmistakable renationalisation and waning solidarity of the EU member states in relation to the refugee issue and against a dilution of standards in the European asylum system it calls for a rethink concerning the human rights foundations and values of the European Union. If the latter are to be implemented, consistent human rights assessment and monitoring in cooperation with third countries, an accountable human rights-oriented rescue and protection system at the external borders, strict monitoring at the so-called hotspots and the involvement of the European Parliament in a human rights-compliant recast of the CEAS will all be necessary. If refugee policy is to be improved, four policy levels must be closely interlinked.

On the international stage the EU must in future step up its efforts for a Global Pact for Refugees and work towards embedding an obligation to cooperate in the event of an increased influx of refugees. Tackling the causes of flight – understood as peace-keeping, promoting democracy and development – must remain at the top of the agenda of international and European politics. Because the lack of co-operation with first reception countries and transit states has contributed enormously to a substantial deterioration of living conditions on the ground and to further migration the EU must urge the international community to support the states that take in the bulk of refugees by improving the system of payments.

Ethically and for the sake of its own credibility the EU cannot shirk its human and refugee rights responsibility in its cooperation with third states. A human rights ethic goes well beyond the legal obligations that have not yet been sufficiently clarified in this area. The principle of non-refoulement laid down in the EU Charter of Fundamental Rights and fleshed out in the Common European Asylum System and the ban on collective expulsions should not be undermined by obstacles to refuge. The European Union must help the third states with which it cooperates to develop their own asylum systems at a high standard and encourage its partner states constantly to improve their standards. To that end the EU can use training measures, for example, by

liaison officers, but also human rights monitoring with independent control bodies, an instrument that to date has been little used in this policy area.

Opening up legal channels of entry beyond the meagre opportunities provided for through the EU-Turkey Statement must be the focus of future EU refugee policy. The EU Resettlement Framework proposed by the European Commission is one of several steps – ideally building on one another – in the direction of legal entry channels. They could be further extended by promoting private sponsorships by (transnational) civil society organisations and local support organisations. The options for allocating humanitarian visas must be further extended and the abolition of visa requirements and other temporary protection options must be investigated more thoroughly. The humanitarian reception programmes of the German government and Länder could serve as good practice for other countries. Further opportunities for legal entry are opened up by labour migration, such as the Blue Card reform, but also via circular forms of employment. Legal entry options require support in countries of origin and transit states: they have to be shaped in such a way that they cannot be abused by smugglers and human traffickers to exploit refugees and migrants. Reception states must also protect migrants' working conditions against exploitation.

Within the EU it is crucial to avoid dilution of existing standards by a »race to the bottom« between the member states and in the recast of the Common European Asylum System (CEAS). On the contrary, what is needed is the harmonisation and continuous improvement of protection standards and a assumption of responsibility based on solidarity, which requires an innovative distribution of tasks among the member states. This calls for the cooperation of both the European Parliament and the Council.

## 1

## OUTLINE OF THE PROBLEM: BLOCKADES, DECISIONS, SOLUTIONS

Although EU refugee and asylum policy has been at the top of the agenda for more than 15 years, the political importance it achieved in 2015 and early 2016, when more than a million people (Eurostat 2016) entered the member states of the EU, is without parallel. The so-called refugee crisis – which should rather be characterised as a crisis of European asylum policy – ended up in late 2015 in an unprecedented political polarisation between the member states and in a serious impasse in negotiations between the European institutions. This polarisation crystallised in particular in the disputes concerning the (obligatory) distribution of refugees among the member states, but underlying it was a deeper normative split on the issue of EU competences with regard to refugee and migration policy in general and the direction of future policy. Ultimately, Europe divided on the ethical, legal and political responsibility for refugees and asylum seekers.

Given or despite these fundamental disruptions the European Council met urgently in order to take new political decisions or even to implement them. On the basis of the European Agenda for Migration (European Commission 2015; see Bendel 2015) the Commission also introduced a series of new initiatives. In this paper we shall examine their premises, formation and possible consequences in conjunction.

The analysis largely follows the logic of three inter-related circles. From the outside inwards the following can be distinguished:

- (I) cooperation with the countries of origin and transit states of refugees;
- (II) the examination and control of transit routes and external border controls; and finally,
- (III) within the European Union and its member states all measures concerning the registration, reception and distribution of refugees and all the rights that appertain to them as soon as they set foot on the territory of a member state.<sup>1</sup>

Beyond the descriptive survey of more recent developments the present report, like its predecessor (Bendel 2015), which it updates, pursues the central question of how human rights and the special rights of refugees can better be guaranteed in these three circles and how refugee protection can be ensured beyond the present crisis. Decisive in this context is primarily the universal right, laid down in Article 14 of the General Declaration of Human Rights (United Nations 1948), to seek and enjoy asylum from persecution in other countries, which admittedly is not reflected in the European Human Rights Convention (EHRC). However, a comprehensive protection concept can be found in the EHRC on the basis of Article 2 (right to life), Article 3 (prohibition of inhuman treatment and torture) and Article 8 (right to respect for private and family life). In the fourth additional protocol to the EHRC the prohibition of collective expulsion of foreign persons is taken up, although only for 43 of the 47 member states of the Council of Europe (Council of Europe 2010). The Geneva Refugee Convention (GRC) with the New York additional protocol includes the most important refugee rights: the principle of non-refoulement reinforced by international law which prohibits returning people to a country in which they risk persecution (Article 33), with no prior need to clarify their status; the prohibition on punishing refugees for illegal entry (Article 31 I); and the ban on discrimination (Article 3). These norms, together with the EU Charter of Fundamental Rights (European Union 2010) (Article 19: ban on collective expulsions) and the secondary regulations in EU law (the directives and regulations of the Common European Asylum System) provide room to manoeuvre, but also a good compass and guide the following paper.

If we look at the recommendations and conclusions arrived at in Brussels and the capital cities of the member states at the end of 2015 and throughout 2016 the following tendencies can be established:

<sup>1</sup> Integration measures in the narrower sense are not subject to EU competence (cf. Bendel 2013) and thus are set aside for the purposes of the following presentation.

Figure 1

**Agenda for migration,<sup>2</sup> medium-term structural emphases****Reduce the incentives for irregular migration**

1. Deal with root causes in the countries of origin, cooperation with third states
2. Tackle human trafficking and smuggling
3. Improve the system for returning immigrants

**Border management**

4. Strengthen FRONTEX
5. EU-wide border standards
6. Strengthen the investment and rescue capacities of countries of origin and transit states

**Revision of the CEAS**

7. Implementation
8. Improve cooperation through EASO
9. Tackle abuses by means of the principle of safe countries of origin
10. Revise the Dublin system

**Legal migration**

11. Regular visa and immigration policy

Source: Author's presentation based on COM (2015) 240 final (European Commission 2015).

## 1.1 POLITICAL DECISION-MAKING: OUTSOURCING MIGRATION-POLICY INSTRUMENTS DUE TO THE INTERNAL BLOCKADE

Although the topic of dealing with the root causes of flight is increasingly (once again) coming to the fore in political discourse it is evident that the complex causes behind a person's decision to take flight can be tackled only gradually and face enormous resistance. This includes support for humanitarian engagement, strong intervention in development policy (cf. European Commission 2016d) and, finally, a coordinated foreign and external trade policy. All these policies, however, cannot be changed in a short time.

A substantial commitment is needed not only on the European but also on the international stage to plan a proactive refugee policy and to ensure stability, the rule of law and opportunities for participation in countries of origin. On the basis of improving data and forecasts, as provided by UNHCR, but also FRONTEX and the European Asylum Support Office (EASO), the EU requires improved foresight with regard to new flight movements and a more rapid mechanism to process possible further entries more effectively, coordinate member states' forces and make advanced provision (UNHCR 2016a: 8ff).

Further efforts are essential on the part of the EU and its member states towards global distribution of responsibility for the refugee issue. The first high-level plenary meeting of the General Assembly of the United Nations on the issue

of flight and migration in September 2016 was unable to make this principle binding, to the disappointment of many observers. The two Global Compacts that are supposed to be negotiated by 2018 – the Global Compact for Refugees and the Global Compact for Safe, Regular and Orderly Migration – are henceforth to serve the purpose of »replacing the previous ad hoc reactions to major flight movements with regulated processes and to prevent the imposition of a disproportionately heavy burden on reception countries. This goal can be achieved only by means of clear responsibilities and sustainable funding structures« (Angenendt/Koch 2016: 3). People have been asking for years whether the Geneva Refugee Convention (GRC), 65 years after its adoption, is still fit for purpose and how international refugee law can address causes of flight that are not contained in it (Platform on Disaster Displacement N.D.). Also at the global political level all eyes are directed towards Europe's solutions to the so-called refugee crisis. Europe's own credibility, when it calls for compliance with refugee rights on the global stage, is also on the line.

The responsible decision-makers in Brussels are showing increasing awareness, in the face of substantial secondary migration, of the need to cooperate with the countries of first reception of refugees that in recent years have received the largest proportion of people in flight. After all, the developing countries host 86 per cent of refugees worldwide (UNHCR 2015), although often they do not have to provide for adequate access to international protection. Prolonged residence in refugee camps – averaging 18 years – and the lack of resources in first reception countries are push factors for further migration, often in the direction of Europe. Furthermore, the EU has identified partner states in Africa among countries of origin, transit states and first reception countries with which it is trying to negotiate its own »migration pacts«, »compacts« or »migration partnerships«. Instruments of development cooperation, as well as of the Common Foreign and Security Policy and the Common Security and Defence Policy (CFSP/CSDP) overlap more than ever with those of asylum, refugee and migration policy in the narrower sense, which are assigned to domestic policy. First of all, both claim to tackle the root causes of flight more vigorously. But another goal is to stem irregular migration and to prevent human trafficking and smuggling.

A considerable proportion of EU funds (Kamarás et al. 2016) and the most recent EU activities with regard to the »external dimension of migration« are concentrated on this external dimension of EU asylum and migration policy (Section 2). The core of the new system is the EU-Turkey Statement, which has been the target of criticism not only since Turkey's authoritarian relapse, but also due to the lack of human and refugee rights guarantees in Turkey itself and in Greece. It has also been censured as a possible guide for further agreements with other North African states (Section 2.3).

Given the increasing terrorist threats migration and refugee policy stands under the aegis of security policy as never before, with a focus on irregular migration and border controls. That goes hand in hand with ever more shifting (externalisation or extra-territorialisation, cf. Den Hertog 2013: 209f) of immigration controls to sending and transit states outside the jurisdiction of EU member states and, in the EU

<sup>2</sup> The precarious routes to Europe have proved to be channels for »mixed migration«, in which labour migrants literally find themselves in the same boat as refugees. Although the law distinguishes unambiguously between asylum and flight migration, on one hand, and migration for reasons of employment, on the other, there are nevertheless situations in which the two groups cannot be differentiated a priori. Thus in the following text, wherever possible, we shall distinguish between migrants and refugees and asylum-seekers; however, in those cases in which both groups are concerned we shall talk of migrants.

itself, a strong concentration on external border controls (Section 3). This concentration also has to do with the above-mentioned negotiation blockade within the European Union, because this means that the EU can hardly agree on the rights of those who arrive here (cf. Bendel 2013). Rather, under the influence of an in large part renationalised view and considerable security policy concerns in the member states migration and refugee policy is shifting from an internal matter to a question of securing the external borders. Both are linked to the traditional Schengen logic in accordance with which securing the common borders externally is a fundamental prerequisite of maintaining open internal borders (cf. Costello 2016a: 15f), a logic that has come to the fore in the current negotiations more than ever before. Related to that is a further shift of refugee and asylum policy from its previous priority area of justice and home affairs policy in the direction of border, foreign, security and, with the expanding mandate of the EUNAVFOR-MED operation in the Mediterranean, also defence policy.

Nonetheless in 2016 the European institutions once more unravelled the complete Common European Asylum System (CEAS). The current reform proposals on a reorientation of the CEAS are far-reaching, both formally and substantively. They convert some former directives – those on qualifications and on asylum procedures – into regulations. In contrast to directives regulations apply directly in the member states. Substantively, they concern the Dublin IV regulation, the reception directive (European Commission 2016j), the qualifications regulation (European Commission 2016k) and the regulation on asylum procedures (European Commission 2016l). Besides a few achievements with regard to refugee rights all the proposals tend to be characterised by a certain deterioration in comparison with current standards. Only the new resettlement regulation can be said to be more ambitious, at least in principle (European Commission 2016m).

After the European Parliament took a first position in December 2016 negotiations between the Council and the Parliament are set for 2017. This process is characterised by several procedural and substantive asynchronies. The comprehensive package adopted in 2013 has still not been implemented by all member states and the infringement procedures introduced by the European Commission have not taken effect; indeed, the regulations and directives are being renegotiated. This political decision-making, taking place with only meagre expert input and civil society consultation, harbours considerable risks, given the current political context. The strong scepticism with regard to immigration that has been fostered among the general public in many member states (European Commission 2015c) and the participation of growing right-wing populist parties in the elections in the Netherlands, France and Germany have put the negotiations on the Commission proposals in the Council and the Parliament under major political pressure. The fear is that what is now the third version of the Common European Asylum Package could provide a means of diluting the standards achieved so far (Section 4).

## 1.2 INSTITUTIONAL TENDENCIES: RENATIONALISATION VERSUS SUPRA- NATIONALISATION

From an institutional perspective two conflicting tendencies can be distinguished: renationalisation with regard to the substantive issues concerning distribution and setting standards in relation to refugees and asylum seekers, on one hand, and closer coordination of national sovereignty rights by European agencies in relation to coastguards and protection of the external borders, as well as – increasingly – with regard to registration and administration in hotspots, on the other hand. In other words, at present no single scenario is in prospect in accordance with which EU member states act solely on an individual basis, but neither is one in view in which they act on a more supranational basis. Rather the two appear to alternate depending on the relevant »concentric circle« and policy area.

With regard to the mode of decision-making, however, the tendency in recent years appears clear. The large refugee influx in 2015 and 2016 was perceived as a crisis, which led the European heads of state and government to make refugee policy into a top-level issue, probably also to counteract the impression of a far-reaching loss of control on the part of member states in their respective countries. This summit-mania or »Council mania« (Bertoncini/Pascouau 2016: 2) resulted in a centralisation and nationalisation of political decision-making in the European Council as against other institutions. In the face of this essential switch of perspectives towards national positions the European Commission was often not particularly inclined to counterpose ambitious proposals.

If one adds the abovementioned shift of political decision-making from justice and home affairs policy to foreign, security and defence policy, one might reasonably fear a downgrading of the European Parliament's role in this regard. In contrast to home affairs there is no ordinary legislative procedure in this case and the Parliament is merely consulted.

The recurrent negotiation blockades in the European Council and in the Council of the European Union are probably ultimately attributable to a lack of commitment to protect refugees and a lack of political will with regard to cooperation (van Selm 2016; Vision Europe Summit 2016); but this may also be observed with regard to the implementation of political decisions on applying CEAS standards on reception and asylum procedures. A lack of political will is also discernible in the initially somewhat grudging support for EU states at the external borders in the form of personnel and resources in the so-called hotspots.

By contrast, in a record time of only 10 months' negotiations the European institutions reached agreement on a European Border and Coast Guard (Rijpma 2016; Carrera/den Hertog 2016). Although this did not amount to a fully integrated border and coast guard that could replace national border guards and a solution to the issue of solidarity among the member states with regard to border protection is still not in sight, new tasks have been allocated to the newly established agency; for example, in hotspots in the implementation of the EU–Turkey Statement, the implementation



of the Dublin regulations and finally with regard to repatriation. The establishment of integrated border management remains high on the EU's agenda. It remains to be seen how FRONTEX cooperation with the European Asylum Support Office (EASO), whose competences have also been expanded, will work out (Section 4).

### 1.3 POSSIBLE STRATEGIC EXITS FROM THE BLOCKADE

Because of these blockades the EU appears to be ensnared in short-term – and often also short-sighted – ad hoc responses to increasing and interdependent political and humanitarian crises. Although the number of asylum applications in October 2016 – at 82,914 – were back to a level last seen in May 2015, between January and October 2016 nevertheless 1,093,729 asylum applications had been registered in the 28 member states plus Norway and Switzerland, more than during the same period the previous year (EASO 2016).

Global megatrends, risk analyses and scenarios developed by FRONTEX and other organisations (FRONTEX 2016) also indicate that in the coming decades drivers of migration will, if anything, increase. Multiplying, sometimes interdependent international and internal conflicts, the consequences of climate change, growing economic disparities between the EU and third states, resource scarcity and energy costs, not to mention digitalisation, are global phenomena and the European Union must make adequate preparations for their effects on migratory movements. Low-income countries in Africa, such as Kenya, Chad and Uganda, can scarcely cope with a large and increasing influx of refugees. Rapid population growth and growing urbanisation in these states attract millions of young people looking for jobs that just aren't there (cf. Prediger/Zanker 2016). If the EU and its member states prove unable to develop a robust system of migration governance based on well-founded scenarios or to outline solutions with a long- rather than a short-term perspective they are unlikely to be able to cope with future migration movements. To this end ways have to be found to get the stalled negotiations going again.

In order at least to create a basis for negotiation for such more far-sighted policymaking one minimalistic option – initially or long-term – might be to renounce the fixation on an EU-wide solution and, depending on the situation, to act uni- or bilaterally (van Selm 2016: 60). Then, however, the question arises of how the member states themselves might be able to regulate the intrinsically transnational phenomenon of migration movements without the EU and how such a resumption of more national policymaking can be reconciled with a Europe of open internal borders.

Another possible model lies in the so-called »two- (or more) speed Europe« familiar from other policy contexts or the model of a »coalition of the willing« preferred by the Merkel government (cf. Bendel 2015). This model has often been used in other policies in the EU and might be transferable to the issue of refugee distribution; certain core states could agree on a quota system in order to create incentive or sanction mechanisms with a view to getting other states on board

in due course. It would be incumbent on individual member states to bring more hesitant partners into the inner circle by means of institutional mechanisms, financial or legal incentives and diplomatic negotiations.

In a third, more supranational scenario (see, for example, Türk 2016), in which the EU overcomes its fragmentation and is able to steer flight movements effectively and in accordance with international law, it could even help to improve the global protection regime. However, given the above-mentioned context variables – public opinion and upcoming elections in key member states – this is improbable.

Positively influencing these context variables is thus an important task. Public opinion in the member states is first in line here: not only is the number of entries regularly overestimated, but many EU citizens believe that the European Union's ability to control and manage immigration is limited. This is all the more dangerous with regard to public support for the European project as a whole because of the lack of faith in the ability of EU and national institutions to find solutions revealed by opinion surveys (Hilmer 2016; de Vries/Hoffmann 2016; for Germany, Körber-Stiftung 2016), which provides further grist to the mill of right-wing populist parties and movements. Failure to heed – sometimes even blatant disregard for – decisions taken at EU level in Hungary and Slovakia also gives the impression that EU resolutions can be implemented or rejected on a whim. This further undermines the importance of the EU institutions in public perception (Pascouau 2016: 22). The major flight immigration of the past two years has thus increasingly had the effect among certain sections of the general public of fostering political tensions when it comes to the institutions' ability to come up with solutions to, as well as control and manage the situation. In a short- and medium-term perspective, therefore, public trust in the ability of the EU and its member states to exert control must be restored. Against the background of a somewhat paralysed EU and certain recalcitrant member states, proposed solutions must come from outside, for example, from think tanks (for example, Vision Europe Summit 2016) and academia.

### 1.4 POLICY RECOMMENDATIONS

In order to cultivate a renewal of trust in the ability of political institutions to come up with solutions to manage and control migration it is clearly necessary to substantially reduce entry on the scale experienced in 2015 and, by using the EU border agency FRONTEX expanded into a European Border and Coast Guard, to improve legal and operational control of the external borders. However, this should not be at the expense of refugee rights – the protection aspect should not be neglected at the borders. On the contrary, the responsibility of the EU states calls for a coherent approach to ending the deaths in the Mediterranean (Goodwin-Gill 2016: 83). This also includes an extension of sea rescue operations to prioritise the reception of at-risk refugees instead of – as hitherto – combatting smuggling. It must be based on the principle of non-refoulement, provide irregular migrants with information and support and grant access to fair asylum systems. The argument made by many member states that sea rescue

represents a pull factor, thereby encouraging immigration, is morally, politically and legally reprehensible (cf. United Nations 2015).

If the motives for further migration from first reception countries are to be reduced asylum standards have to be raised along migration routes and to that end transit states and first reception countries have to be persuaded to co-operate, rather than relying on uncertain partner states with dubious human rights records. Although it makes sense to invest resources and political capital in building up border surveillance systems this must be accompanied by expansion of protection options and opportunities for refugees and migrants (Garlick 2016: 43f). The EU and its member states are obliged to seriously introduce these fundamental human and refugee rights into their negotiations with third states and to monitor their implementation consistently.

Cooperation with third states, for which the EU–Turkey Statement – as limited as it is – serves as a model, and »migration partnerships« with African states are justifiably criticised in their current form. Cooperation with states with questionable human rights and rule of law records is problematic not just from a normative standpoint. Human and refugee rights standards should be incorporated in political agreements with third states also for the sake of our own diplomatic credibility. The one-sided concentration in such partnerships on migration controls should give way to a broader, more humanitarian, development-policy and rights-based approach. This can be summed up in an approach to a human rights mainstreaming specially developed here, elaborated for the individual stages of flight and migration.

Academics, NGOs and international organisations continue to make every effort to call on the EU member states to come up with more – and more rapidly accessible – legal and safe access routes. In the absence of this all one-sided efforts to deprive human traffickers and smugglers of their business model will founder. The options for legal flight migration have long been on the table (FRA 2015; Collet et al. 2016; United Nations 2016; UNHCR 2016a). In particular, the instrument of resettlement can be expanded much more actively and is the focus of global, as well as European and national policy recommendations. This concerns not only the – hitherto very low – number of acceptances and better coordination among the EU member states, as the European Commission, too, proposes, but also the opportunities harboured by private sponsorships (cf., for example, European Union 2016). Above all, legal avenues must be speeded up in contrast to the current protracted procedure for vulnerable persons within the framework of resettlement. In this way »[e]xpanded opportunities would be established primarily in countries where a Regional Development and Protection Programme, Migration Compact, or Comprehensive Refugee Response is being developed, as well as in other countries of first asylum on the strategically important routes to Europe« (UNHCR 2016a: 6).

Recently the opinion of Paolo Mengozzi, General Advocate of the European Court of Justice, in Case C-638/16 PPU X and X v. État Belge caused a furore. In his view »member states are obliged to grant visas on humanitarian grounds where substantial grounds have been shown for believing that a refusal would place persons seeking international pro-

tection at risk of torture or inhuman or degrading treatment«. A Syrian Christian family that allegedly applied for a visa at the Belgian embassy in Lebanon in order to make an asylum application in Belgium is in real danger in Syria of inhuman treatment of some severity, which comes under the prohibition of the Charter of Fundamental Rights. If the family had been able to overcome the obstacles of – illegal – entry to a member state it would without doubt have been granted protection. According to the reasoning of the General Advocate, the EU Charter of Fundamental Rights must find application wherever a member state exercises sovereignty, *de jure* or *de facto*.

This decision, if confirmed by the ECJ, would end the perverse situation in which the persecuted can obtain protection only if they reach the territory of a member state. This is because the international law norms on the protection of refugees cited above suffer from the fact that they do not contain any right to enter a state and protection for the persecuted normally comes into play only with residence in the country:<sup>3</sup>

»The applicability of the ECHR is restricted by the notion of jurisdiction contained in Article 1 ECHR. In accordance with that, the treaty states guarantee the rights contained in the Convention to »all people under their jurisdiction«, but only to them. Even when the Court has interpreted the notion of jurisdiction broadly, in particular with regard to protection in military conflicts, it cannot construe a new concept of »jurisdiction« out of the legal blue. Jurisdiction is rather fundamentally territorial; that is the foundation on which international law is built.«

(Nußberger 2016: 818 – translation JP)

While the EU-Turkey Statement wanted to eliminate the paradoxes that arise in this way this would apply only if jurisdiction was interpreted in the sense of sovereignty of a member state in consular representations. On this basis humanitarian visas could be obtainable at member state embassies.

Repeatedly discussed in this connection but still not the object of concrete plans at the EU level are extraterritorial asylum procedures or preselection procedures (so-called prescreening) that would offer the possibility of direct legal admissions from camps in third states. If it proves possible to develop EASO into a genuine EU »Federal Office for Migration and Refugees« over the long term it could be given the task of realising asylum procedures not only in European hotspots but also on the territory of third states. In this con-

<sup>3</sup> Nußberger (2016: 816) nevertheless considers it worth discussing »whether a prohibition can be derived from the Convention [the Geneva Refugee Convention] to forcibly prevent someone fleeing [persecution] from reaching a national border. This could be relevant, for example, to assessment of the NATO mission against traffickers. Also desirable would be the opportunity for those fleeing persecution to make an asylum application at the border; if one finds oneself enclosed by walls or high fences, this is impossible« (translation JP). UNHCR contends that rejection at the border counts as »indirect refoulement«; even this approach, however, grants protection only to those who are »there« or »almost there«. If the refugee is not physically present, he or she remains »outside the gate«.

nection a whole set of international law and human rights problems would have to be taken into account that to date remain unresolved (cf. Bendel 2015). In contrast to the EU-Turkey Statement that was adopted without being properly thought through, this concern must be resolved before the EU again runs the risk of disregarding refugees' protection needs. Instead of new camps – as proposed by German Minister of Internal Affairs De Maizière in Tunisia or Egypt – which would represent a further pull factor for the relevant states, EU regional development and protection programmes should be established in existing transit countries in order to grant refugees there sustainable protection, as long as the security situation makes this possible.

At the same time, the European Union needs to increase the number of returns. This would happen, on one hand, by concluding return agreements with countries of origin and transit states. But caution is in order here, too: the end of repatriation should not justify the means, as proved not least by the current debate on returns to Afghanistan in Germany. In order to be effective, repatriation and reintegration policies have to pay more attention to individual target groups in terms of gender, age and level of education and to specific needs with regard to the development of new and more attractive reintegration programmes and, ultimately, visa agreements on circular migration (cf. Haase/Honerath 2016).

In hotspots the states on the external borders – Italy and Greece – have seriously tackled the task of registration and identification in return for financial and operational support from the EU and other member states, despite the ongoing administrative implementation difficulties. However, when it comes to sending experts and material resources to the hotspots the solidarity of the member states with Italy and Greece remains limited. The fact that the planned relocation of 160,000 asylum seekers has been delayed for two years is well known. In this respect, too, EASO's already initiated expansion could furnish a coordinated, over the long term possibly even a supranational approach to help states on the external border in registration, identification, reception and ultimately relocation of refugees. EASO could develop, conditional on the transfer of some sovereign rights by member states, into a proper EU asylum authority, a »European Migration and Protection Agency« (Goodwin-Gill 2016: 84). The reasoning is as follows: because all member states have agreed on common standards national solutions are redundant and thus a European agency would be best placed to take over administrative and operational tasks. Registration systems have still not been harmonised, the regulations on family reunification from hotspots are unclear and asylum procedures are too protracted. A more efficient regime with more rapid access to protection is therefore needed (UNHCR 2016a: 12ff).

Internally, the current unravelling of the whole asylum package and hasty efforts to patch it up again, however, may be counterproductive because a race to the bottom is evident among the member states, aimed at becoming as unattractive as possible to asylum seekers. Instead of rushing through legislation well-founded impact assessments should be carried out, with adequate consultation with the main stakeholders and consideration of the feasibility of imple-

menting the proposed reforms in the institutions and in the member states (Pascouau 2016: 6). At the very least, the current Commission proposal for a Dublin IV has wasted the opportunity to redesign the basic idea of solidarity and shared responsibility for refugee policy by means of a new responsibility and distribution procedure.

If the Maltese presidency does not, as planned, make progress towards closer cooperation in the first half of 2017, the idea of »job sharing«, as conveyed by the notion of »functional solidarity«, could soften up the negotiation blockades on mandatory distribution of refugees among the member states and set up a new system. On this basis not every member state would necessarily assume the same tasks. A »job sharing« system in which the member states agreed on different responsibilities would offer the opportunity, together with the further development of EASO's tasks, of specialisation by individual states. Thus the registration and forwarding of refugees and migrants would remain in some states and reception and integration would take place in others, especially if the preferences of those concerned and their ties to particular member states are taken into consideration in distribution decisions (for more detail on this, see The Expert Council of German Foundations on Integration and Migration's draft document). At the same time, with the help of EASO and FRONTEX, but also the International Organisation for Migration (IOM) return could be regulated more efficiently, although the credibility of EU refugee and migration policy clearly suffers from a lack of actual returns of those not in need of international protection. Assisting those concerned to repatriate voluntarily is a priority with regard to return and here, too, human rights obligations must be fully guaranteed. In this connection in particular the de facto continuing practice of detention in a number of member states (United Nations 2015) must be investigated, especially in relation to children and young people, whose vulnerability must be taken into account.

The call for a refugee policy that is proactive rather than reactive (Mayer/Mehregani 2016) and based on a long-term strategy rather than merely ad hoc (Pascouau 2016) may fall on deaf ears, given the enormous opposition in many EU member states at present. However, a more coherent refugee and asylum policy that satisfies the justified demands of European citizens for a viable European Union is in keeping with human and refugee rights standards, and that is oriented towards new kinds of mobility that may emerge in the future, will not be able to do without such a strategy.

## 2

## FIRST CIRCLE: COOPERATION WITH COUNTRIES OF ORIGIN AND TRANSIT STATES

### 2.1 POLITICAL, DIPLOMATIC AND HUMANITARIAN SUPPORT

Syria and Afghanistan are currently responsible for most refugee movements, followed by the Sahel and the Horn of Africa, with Somalia and South Sudan as the main countries of origin (UNHCR 2016: 16). Libya, finally, is one of the states that, because of state failure, facilitate the transit of refugees and migrants.

Within the framework of the Common Foreign and Security Policy (CFSP) the EU often lacks a common position and the ability to strengthen the states in its neighbourhood and beyond. Support for the main countries of origin, Syria above all, naturally pertains to EU participation in solving conflicts. The EU is a full member of the International Support Group for Syria and contributes to the conflict resolution process under the aegis of the UN. In order to throw its whole weight behind the diplomatic negotiations aimed at resolving the humanitarian crises in Syria and Ukraine the EU made Sweden, for a term of two years, as well as Italy (2017) and the Netherlands (2018) non-permanent members of the Security Council.<sup>4</sup>

Furthermore, the EU with its member states is one of the biggest donors in the response to the crisis in the area of humanitarian, economic and development-policy support, as well as the stabilisation fund. Considerable support goes to the main reception countries of Syrian refugees and migrants, namely Lebanon, Jordan, Turkey and Iraq (EPRS 2015a). In early 2016 the EU, with a promise of over 3 billion euros for aid for the Syrian population and the bordering reception states participated in the international donor conference in London, »Supporting Syria and the Region« (European Commission 2016a). It also assists in providing employment opportunities for refugees and migrants locally within the framework of the »Partnership for Prospects«. Tackling the root causes of flight, however, is a long-term undertaking. Cross-cutting policies need to be agreed more

closely between development policy, foreign policy, foreign trade and foreign economic policy, as well as between agricultural and fishing policy in the interest of greater coherence.

### 2.2 FIVE QUESTIONS ABOUT THE EU-TURKEY STATEMENT – CORE AND BLUEPRINT OF THE NEW EUROPEAN REFUGEE POLICY?

As of January 2017 Turkey had received 3.1 million refugees and migrants, the largest number worldwide. Most of them come from Syria and Iraq and 90 per cent live outside camps: 260,000 live in 26 state reception camps (European Commission 2017). Registration, accommodation, medical care and – to date only partial – education pose Turkey considerable logistic and financial challenges; on top of that, public opinion is increasingly taking a less charitable view of Syrian refugees (Seufert 2015: 3). Up to mid-2012 Turkey rejected international support for its humanitarian aid measures, but from October 2014 it began to urge more burden sharing (Ahmadoun 2014).<sup>5</sup> From the Turkish standpoint the EU had not taken its fair share of the refugees; in particular no resettlement places had not been made available for refugees from Turkey and when it came to providing protection for refugees the EU, according to Turkey, would not comply with its international responsibility. The passage of refugees and migrants from Turkey across the Aegean to the Greek islands was at its height in 2015 and early 2016. Henceforth the EU urged Turkey to make more effort to combat human smuggling. The aim of the EU heads of state and government (European Council 2016) was from now on to close the smuggling routes, to destroy the smugglers' business model, to protect the EU's external borders and to end the migration crisis in Europe.

The EU-Turkey Statement – known as the »Turkey deal« – based on the Common Action Plan of 29 November 2015 (European Council 2015a; cf. Annex) and its implementation agreed in March 2016 is the current core element of a – non-

<sup>4</sup> In 2017 Sweden and Italy are non-permanent members (in 2018 Italy will share the seat with the Netherlands); Germany has applied for 2019/2020.

<sup>5</sup> On the geopolitical background see Kirisci (2016); on the domestic policy background see, among others, Ahmadoun (2014).



legally binding – EU political agreement aimed at curbing migration movements from Turkey and increasing the number of returns to Turkey.

The main reception country, according to the Statement, is to be supported in all its efforts to reduce the number of refugees and migrants and to integrate refugees locally. For its part, it is supposed to make its visa policy more restrictive with regard to the main countries of origin, to control land and maritime borders, sign readmission agreements with Bulgaria and Greece, identify and register migrants and refugees in their own country. The fight against human trafficking and smuggling should be intensified in cooperation with FRONTEX. At the same time, Turkey is supposed to provide refugees on its territory better access to health care and social services, as well as ensure education facilities and facilitate labour market access.

In return, Brussels promised broad financial support within the framework of the Facility for Refugees in Turkey (initially 3 billion euros for 2016 and 2017, boosted in March by a further 3 billion euros until the end of 2018) for humanitarian and development programmes in Turkey.<sup>6</sup> In particular, social insurance is planned (Emergency Social Safety Net, ESSN) which with a single debit card is to provide up to a million of the most vulnerable refugees with access to daily requirements, such as food, accommodation and education. With a budget of 348 million euros this is the EU's largest humanitarian project to date, set to launch in December 2016. The payments are to go primarily to aid organisations (European Commission 2016a).

At the political level, acceleration of the accession negotiations with speedier visa liberalisation (initially foreseen for the end of June 2016) and the maintenance of regular summits and high-level dialogue were on the agenda. A visa-free regime was conditional on compliance with 72 criteria, centring on the European insistence on reform of anti-terror legislation in Turkey.

The core of the EU-Turkey Statement, however, was the so-called »1:1 system«, which came into force on 20 March 2016: under the Statement, for every Syrian transferred from the Greek islands to Turkey one Syrian from Turkey is to be accepted by an EU member state (European Council 2016), up to a total of 72,000. Each individual instance is supposed to be scrutinised in accordance with international and European law. Greece can already repatriate recognised refugees on the basis of Article 35 of the Asylum Procedures Directive, insofar as they have obtained sufficient protection in another state or are recognised as refugees there. Because Turkey is regarded as a safe third country, able to ensure effective access to protection, in accordance with Article 38 of the Asylum Procedures Directive Greece is permitted to send people back there. Irregular immigrants can be sent back again if they do not seek asylum in Greece, their asylum application is rejected or it is not deemed compatible with the Asylum Procedures Directive. On the other hand, only Syrian refugees who did not enter Greece illegally are to be

given an opportunity for transfer and resettlement in an EU member state via the resettlement system. As soon as the number of arrivals to the Greek islands have been reduced »significantly and sustainably« the other member states will voluntarily receive Syrian refugees on humanitarian grounds. This part of the Statement had still not been activated by December 2016; it is being negotiated in the Council in co-operation with EASO, UNHCR and the IOM when this condition shall be deemed to apply (European Commission 2016p).

The European Commission itself initially laid down in its reports on implementation of the EU-Turkey Statement (European Commission 2016c [First Report]/European Commission 2016i [Second Report]/European Commission 2016o [Third Report]) that the main advance was a strong reduction in the number of irregular migrants from Turkey to the Greek islands from 1,740 a day to 47. At present (December 2016) it stands at 81 people (European Commission 2016p »Fourth Report«). At the same time, the number of people dying during the passage across the Aegean has fallen significantly from 592 in 2015 to 63 since the Statement.

It still remains unclear, however, whether the activities taking place under the EU-Turkey Statement are solely responsible for these figures, because during this period the Balkan routes have largely been closed (see Section 3) and thus any further migration from Greece has been made highly unlikely. The return of people without an asylum application or recognition from the Greek islands to Turkey was slow to get off the ground, however. As of 5 December 2016 a total of 1,187 irregular migrants (7 October: 643) had been repatriated, either under the bilateral Greece-Turkey return agreement or under the EU-Turkey Statement, including 95 Syrians. By contrast, 1,694 Syrian refugees from Turkey were resettled in individual EU member states; over one-third of them in Germany. Disbursement of the promised 3 billion euros has been similarly sluggish (Zeit Online 2016).

Against this background, one year after the beginning of the agreement in March 2016, five pressing normative and empirical questions suggest themselves:

**(I) Has the EU made itself dependent, with regard to the migration issue, on an unreliable partner with a poor record when it comes to the rule of law and human rights?**

In the effort to control major migration movements by sea EU cooperation with third states clearly makes sense. Turkey has indeed proved capable of reducing irregular migration to its coasts. »The question is thus not whether Turkey is in a position to control larger migratory movements, but whether it is willing to do so over the medium and long term« (Seufert 2015: 2 – translation JP). Precisely because the »Turkey Deal« is a political declaration, however, its implementation depends all the more on the willingness of the two partners to comply with the agreed statements (Batalla Adam 2016: 2). However, Turkey has repeatedly threatened to revoke the political agreements, while the European Parliament in a non-binding resolution (European Parliament 2016) even called for an end to the accession negotiations. In its third progress report (European Commission 2016o) the European Commission reproaches Turkey for failing to comply with the

<sup>6</sup> These sums are based partly on the reassignment of existing EU funds (cf. Batalla Adam 2016: 6).

conditions for visa liberalisation in accordance with the agreed roadmap. Its seven points are as follows: the issue of biometric travel documents in accordance with EU standards; the taking of preventive measures to avoid corruption; the conclusion of a cooperation agreement with EUROPOL; reform of terror legislation and related practice in accordance with European standards; preparation of a draft law on personal data protection in accordance with European standards; effective judicial cooperation in criminal cases with all EU member states; and the full implementation of the EU-Turkey return agreement. Since the attempted coup in 2015 Turkey has been an increasingly unreliable partner and, indeed, one that is producing its own refugees on a grand scale. Implementation of the agreement comes at a time when Turkey is taking significant retrograde steps at all levels with regard to the rule of law and the guarantee of human rights and protection of minorities, regressing to become a »competitive authoritarian state« (Esen/Gumuscu 2016). The Commission describes these critical developments in its updates on the accession negotiations. They concern fundamental rights, such as freedom of expression and of the press, the independence of the judiciary, anti-corruption policy, police cooperation and combating organised crime, as well as terrorism, but also all aspects of visa, border policy, migration and asylum (European Commission 2016p). But a key condition of the Turkey Deal had already been called into question, namely recognition of Turkey as a »safe third country«.

## **(II) Can Turkey be considered a safe third country?**

The validity of this basic condition of the EU-Turkey Statement has been called into question by a number of authors (for example, Collett 2016a; Amnesty International 2017). Although Turkey recognises the 1967 New York Additional Protocol to the GRC, it asserts a geographical limitation by applying the Convention only to refugees from the member states of the European Council. Refugees from non-European states »thus only have the option of being resettled in another country willing to receive them after their recognition in co-ordination with UNHCR. Thus Turkey despite its considerable efforts does not offer refugees long-term prospects« (Seufert 2015: 4 – translation JP.). A total of 95 per cent of Syrians have been granted temporary protection status as »guests«, based on the national law on foreigners passed in 2014 and international protection (2014). This law grants them the right to a refugee identity card. The guarantee of the non-refoulement principle, access to translation services, medical treatment and social services are related to this. Access to public services, however, depends on their registration in the place of first reception. After it had initially been asserted that the Turkey Deal also would not work because Turkey cannot prove that it properly handles people who have been sent back (Jacobsen 2016) this law is supposed to guarantee protection status. De facto by 31 January 2017 no asylum seekers had been sent back to Turkey on the assumption that it is a safe third state. Rather the to date 865 people who had been sent back (I) were rejected by the court of first or second instance, (II) had withdrawn their asylum application, (III) changed their mind about making an asylum application or (IV) expressed no intention of making such an application.

## **(III) Is Turkey in fact fulfilling its responsibility to protect?**

Human rights organisations have not spared Turkey in their criticisms of its treatment of refugees and migrants:

»Asylum-seekers should not be sent back to a country that is, currently at least, unable to guarantee access to an adequate protection status and adequate living conditions. The EU can legitimately seek to assist Turkey to meet these conditions, but it is callous in the extreme, and a straightforward violation of international law, to construct an entire migration policy around the pretence that this is currently the case.«

(Amnesty International 2017: 6)

Concerning the failure to implement the right of non-refoulement human rights organisations Human Rights Watch (2016) and Amnesty International (2016, 2017) have documented that Syrians have been sent back to their country of origin. The Syrian Human Rights Observatory has even made accusations against the Turkish military, according to which in 2016 163 people were shot dead on the Syrian–Turkish border in order to prevent them from crossing (Deutschlandfunk 2016).

Concerning the rights of refugees in Turkey itself doubts have been raised about the extent to which the considerable backlog of pending asylum procedures can be processed properly (Collett 2016). According to Amnesty International (2017: 14) the Turkish asylum system is still under construction. Asylum seekers seem not to have access to a fair and efficient procedure or to determination of their status; nor do they have access within a reasonable timeframe to a permanent solution, such as return, integration or resettlement. People sent back to Turkey within the framework of the EU-Turkey Statement even appear to have been subjected to human rights violations, including arbitrary arrest, denial of legal assistance and of access to special medical treatment. Human rights organisations (PRO ASYL e. V. 2016; Jesuiten-Flüchtlingsdienst 2016; Amnesty International 2016; Human Rights Watch 2016; Médecins sans Frontières 2016) also report that refugees' access to health care, education and work – not least because of the abovementioned registration obligation, but also due to quotas (Syrians, for example, may not make up more than 10 per cent of a given workforce) – is often precarious. This situation makes refugees susceptible to poverty, child labour and exploitation (Human Rights Watch 2016). The UN World Food Programme (2016: 5) reports that in April 2016 93 per cent of Syrians were living below the national poverty line and sometimes may not have enough to eat.

Evidently, due to the haste of the negotiations the chance was lost to commit Turkey to a full protection system. The EU should insist that the Turkish authorities provide relief. Furthermore, one might ask whether the inherent logic of the EU–Turkey Statement is at all suitable to achieve the goals of reducing irregular migration, boosting repatriation and taking in more people through resettlement.

## **(IV) How effective can the EU–Turkey Statement be?**

The logic of the Statement does not appear to be compelling or promising with regard to either returns or resettlement.

Among others, people who have not (because they are unable or unwilling) applied for asylum and thus count as irregular migrants can be sent back. Under the EU's readmission agreement with Turkey Greece can send such persons back. However, in February 2016 alone 52 per cent of the over 57,000 migrants who had landed in Greece were Syrian nationals and 41 per cent came from Afghanistan or Iraq, in other words, from states whose nationals may, generally speaking, claim a need for protection (Collett 2016). In accordance with this rule only a small number of those who have entered the country may be eligible for returns.

Also affected are people who entered Greece from a safe third state or a state of first asylum. Non-refoulement and the option of seeking and obtaining asylum do not apply to them either. As already explained, this did not apply to any asylum seekers who had been returned to Turkey, at least by the end of January 2017.

The 1:1 system offers refugees a positive incentive to sit tight in Turkey until they become eligible for resettlement in accordance with UNHCR criteria, instead of attempting the dangerous passage across the Mediterranean, and a negative incentive, the possibility of being repatriated as an irregular migrant. The low number of 72,000 resettlement places, compared with the high number of Syrian refugees in Turkey, however, means that these incentives may not be worth much to many refugees. The UNHCR's resettlement system is also focused solely on vulnerable people. The long waiting periods for such resettlement are also well known and, in any case, which member state they will be resettled in is in the lap of the gods. The resettlement procedure, while generally reasonable, is limited and protracted, but for the first time it opens up controlled, legal and safe access routes (on this see Section 2.3). Nevertheless there are reasons to fear that many people will continue to try to get to Europe across the Mediterranean (for more detail: SVR 2017).

#### **(V) Will the EU and its member states themselves meet their responsibility to protect refugees?**

Legally, the extent to which the EU remains bound by its self-imposed standards even outside its territory has to date not been sufficiently clarified (although see the opposite position in Carrera/Guild 2016). Ethically, at least, it is responsible for demanding a minimum degree of human rights standards from its third-state cooperation partners. It must therefore continue to urge Turkey to sign the 1967 Additional Protocol to the GRC and to introduce the corresponding reforms. At the very least it ought regularly to monitor the extent to which the principle of non-refoulement and an adequate assessment of asylum applications are being ensured and whether, with the support of UNHCR, there is an adequate range of resettlement places in Turkey. Furthermore, the EU must urgently ensure that the abovementioned complaints about the mistreatment of refugees are followed up and that refugees are informed of their right to and the need for registration (Batalla Adam 2016: 8). Finally, attention must be paid to upholding rights to health care, education and work.

Working towards appropriate standards via actions before the European courts takes time and is also a question of jurisdiction. At the end of February 2017 the ECJ dismissed

the legal action brought by three asylum seekers against the EU–Turkey Statement with the argument that the Statement was not entered into by the European Council, but by individual EU member states within the framework of an international summit with the Turkish prime minister. The ECJ thus has no jurisdiction (Cases T-192/16, T-193/16, T-257/16).<sup>7</sup>

Another argument directs attention to the EU's financial commitment. Instead of concentrating primarily on the protection and care of Syrian refugees, the objection is, a considerable portion of expenditure is going on securing the borders (Yavcan 2016).

Undoubtedly the EU and its member states are responsible for compliance with human and refugee rights standards on the territory of the member states. The humanitarian crisis in the Greek reception centres on the islands indicates that the operational part of the Turkey Deal was not systematically thought through and prepared for in good time. Rather it imposed further logistical and legal<sup>8</sup> challenges on the Greek administrative system, which is already overburdened: thus the latest Commission report talks about overcrowded reception centres and »incidents« on the islands (European Commission 2016p). As of 6 December 2016 there were a total of 16,295 migrants on the islands, although officially there are only 7,450 places available in the reception centres (see Figure 8), plus 754 places under UNHCR supervision. At the same time, there are numerous migrants (not covered by the EU–Turkey Statement) on the Greek mainland, totaling around 62,000 people.

The housing of Syrians in closed reception centres has been castigated not only as logistical detention, but also as arbitrary and impermissible from a human rights standpoint. According to Amnesty International (2017: 9) people on Lesbos and Chios have practically no access to legal assistance, only limited access to services and support and little information concerning their status. Procedures, mainly in hotspots, are very protracted, the supply situation is very bad, access to aid organisations is limited (Jacobsen/Vu 2016) and the security situation in some camps is difficult (Amnesty International 2017: 23f). Nevertheless, asylum seekers may not leave the islands because the EU–Turkey Statement only extends there. This state of affairs has at times led to the withdrawal of international organisations, such as UNHCR, the International Rescue Committee (IRC) and Save the Children (Collett 2016a: 3; Amnesty International 2017).

The allocation of specialists by the member states and EASO has been sluggish; this also includes judges from the member states who can hear appeal cases under Greek jurisdiction, but who are also urgently needed in the other member states. »If Europe learned one thing during 2015, it is that pledges of officers and equipment do not materialize

<sup>7</sup> Collett (2016a: 3) even considers this a calculated risk: »The scheme has already been declared »extraordinary« and »temporary«, and individuals summarily returned are unlikely to have legal recourse.«

<sup>8</sup> In Greece itself national legislation initially had to be amended to ensure that Turkey counted as a safe third state within the meaning of Art. 33 of the Asylum Procedures Directive. Apart from that the Greek authorities had to change the asylum procedure by declaring it manifestly ill-founded before introducing individual procedures (Migration Watch UK 2016).

immediately, not least because bureaucracies take time to process transfers of human resources» (Collett 2016a: 4). Furthermore, »the Greek authorities [wanted] to keep the upper hand in asylum decisions« and not delegate it to officials from other member states (Jacobsen/Vu 2016).

Ultimately, it appears that the EU–Turkey Statement was hastily formulated and not all of its consequences were thought through. It is therefore characterised by enormous legal loopholes in Turkey itself, but also within the EU. Nevertheless, in Brussels the mantra can be heard that there is no Plan B with regard to the EU–Turkey Statement. On the contrary, the latest progress report (European Commission 2016n) foresees that the Deal will be tightened up even further with regard to Greek asylum procedures. Thus only the victims of torture or of other forms of violence are to be exempted from »extraordinary border procedures«, as well as families in the event their right to a family life is threatened. Decisions on asylum seekers from Pakistan, Bangladesh, Algeria, Morocco and Tunisia should be speeded up. Greece should act on the Commission's urging and put more pressure on the appeal courts and investigate whether the number of appeal stages can be reduced. These measures have been harshly criticised by human rights organisations (Amnesty International 2016, Pro Asyl e. V. 2016).

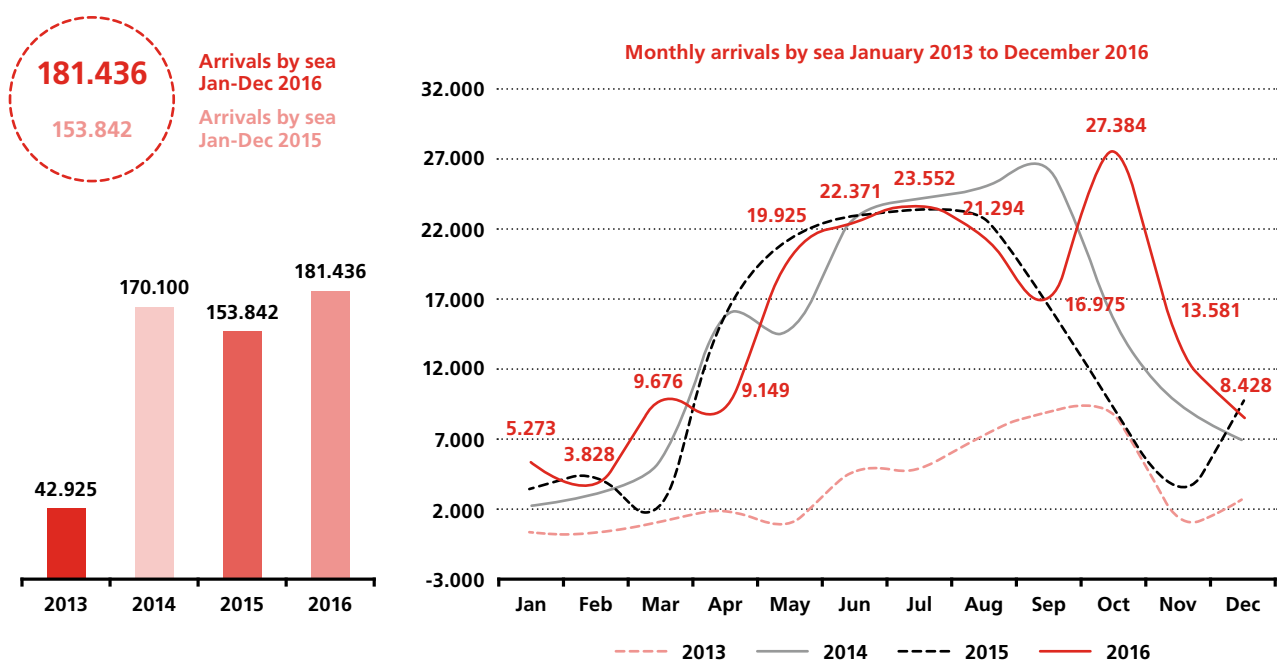
Despite this criticism of the basis of the Statement, its implementation to date and the envisaged reforms, the EU wishes to use it as a model for further, similar agreements with Middle Eastern and North African countries. This applies in particular to a scenario in which the flight and migration routes shift back from the Aegean/Balkan route to the central Mediterranean route, often via the Sudan or Morocco. The rise in migration via the central Mediterranean route, using which, according to the Commission, more than 181,000

migrants and refugees came to the EU in 2016, has also led to more maritime deaths than previously (European Commission 2017a).

The key question concerning human and refugee rights conditions for an EU refugee policy is under what conditions can the European Union and third states enter into agreements like the Turkey Deal and, above all, what standards are to be upheld in cooperation with third states? The fact that the governments of many of the countries being considered as partners »are highly dubious partners due to undemocratic and authoritarian features confronts European policymakers with a credibility dilemma« (Stolleis 2015: 4). Given the disastrous human rights performance of the main North African transit states Libya and Egypt it appears improbable that they can be categorised as safe third states: asylum applications from people from these states could simply not be classified as manifestly ill-founded.

This applies in particular to Libya, which was, however, treated as a partner by Maltese prime minister Joseph Muscat before the EU summit in Valletta on 3 February, especially as according to the European Commission 90 per cent of migrants from there set out for Europe (European Commission 2017a). Muscat expressed the concern that a hitherto »unknown« number of migrants and refugees could set off from there in spring 2017 (cf. The Guardian 2017). Accordingly, the European Council and the Home Affairs and Justice Council, which is responsible, reached agreement in early 2017 on the joint declaration on the central Mediterranean route (European Commission 2017b) and the so-called »Malta Declaration« (European Council, the President 2017). This lays down the expansion of training programmes for the Libyan coastguard, deepening the fight against smugglers and human traffickers, improving reception centres in Libya

Figure 2  
Arrivals in Italy via the central Mediterranean route



Source: UNHCR Regional Representation Southern Europe 2016.



in cooperation with IOM and UNHCR and extending repatriation and resettlement.

If we apply the four questions raised with regard to Turkey also to Libya the following picture emerges. Against the background of an ongoing civil war and the claims to be the legitimate government of three rival groups an agreement with Libya would be on shaky foundations and highly questionable on human rights grounds. Libya has not even ratified the Geneva Refugee Convention and can in no way be classified as a safe third state. Human rights violations in Libya itself are one of the main push factors for migrants to migrate onward to Europe (Toaldo 2017). Human Rights Watch (2017) reports that the Libyan coastguard or navy intercept and arrest refugees and migrants at sea. Only some of its detention centres are under the authority of the Department for Combatting Illegal Migration (DCIM), others are under the Libyan Ministry of the Interior. Other centres are administered by militia and smugglers. Both officials and militiamen detain migrants and refugees in these centres under inhumane conditions and sometimes subject to torture. This was confirmed by an unusually strongly worded report by the German embassy in Niamey/Niger. It spoke of »concentration camp-like conditions« for migrants (Die Welt 2017): »executions of migrants who are unable to pay, torture, rape, extortion and being abandoned in the desert« are the order of the day. »Eye witnesses spoke of exactly five shootings a week in a prison – announced in advance and every Friday, to make room for new arrivals« (translation JP).

The EU and its member states clearly assume that those who come to the EU from Libya are primarily economic migrants. UNHCR data show, however, that this is not the case: 45 per cent of those who made it to Italy in the first three quarters of 2016 from Libya were recognised as refugees (cf. Toaldo 2017).

The dilemma is that the applications of asylum seekers who make it to Italy via the central Mediterranean route have to be assessed in individual procedures without contingency solutions and without agreements with third states, which in itself could overburden the asylum system in Italy (Migration Watch UK 2016). Thus the EU has opted to conclude customised migration partnerships.

## 2.3 MIGRATION »PARTNERSHIPS«?

After the introduction of the European Neighbourhood Policy (ENP) in 2004, from 2005 the external dimension of EU migration and asylum policy expanded within the framework of the Global Approach to Migration (since 2011: Global Approach to Migration and Mobility, European Commission 2011). This framework covers a series of dialogue initiatives and framework programmes with third states containing various bi- and multilateral instruments. Originally, this Global Approach to Migration and Mobility was a mechanism for managing legal immigration, managed mobility and finally also for asylum issues. The methods of choice (for an overview see: European Commission 2016q; Wirsching 2016) were mainly mobility partnerships and readmission agreements. Mobility partnerships can contain various instruments, ranging from development cooperation to visa facilitation

and circular migration. In the spirit of such agreements they are supposed to aim at a fair balance of interests between the partner countries. However, here, too, the focus is the readmission of migrants in exchange for visa concessions. An increasingly strong focus has been put on intensifying the return and readmission of people with no right to remain in the EU (cf. EPRS 2015a). On top of that the emphasis is on border management, document security and combating corruption with the aim of stemming irregular migration.

Against the background of the increasing flight movements of the previous year this focus was clearly consolidated for the years 2015/2016 in the European Agenda for Migration of 13 May 2015 (European Commission 2015d). The Agenda had already put a strong emphasis on return, the readmission of irregular migrants and border controls and monitoring. Readmission, however, became the main focus of cooperation strategy with the EU Action Plan on Return of 9 September 2015 (European Commission 2015d) and the Council Conclusions on the future of the return policy of 8 October 2015 (Council of the European Union 2015). Migration dialogues, mobility partnerships (MPs), Common Agendas on Migration and Mobility (CAMMs), readmission agreements, EU Readmission Agreements (EURAs), Visa Facilitation Agreements (VFAs), migration clauses in association and cooperation agreements, Regional Protection Programmes (RPPs) and Regional Development and Protection Programmes (RDPPs), but also operational measures have come to form a scattered and often incoherent picture (cf. European Commission 2013; European Commission 2014; on which see García Andrade/Martín 2015: 9). The Special Rapporteur on the Human Rights of Migrants summarised this picture as follows in his latest report to the UN Human Rights Council (United Nations 2015):

»Overall, the Global Approach to Migration and Mobility lacks transparency and clarity on the substantive contents of its multiple and complex elements. Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the European Union has continued to use the Approach to promote greater »security«. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies.«

The readmissions agreements, too, harbour human rights risks, especially violations of the right of non-refoulement in third states with which agreements have been concluded, practices that the European Court of Human Rights has characterised as incompatible in several judgments.

Although the instruments collected in the Global Approach to Migration and Mobility (GAMM) were in regional

terms long concentrated on the Western Balkan states, eastern Europe and the southern Caucasus the increasing migration movements of 2015 and 2016 triggered enhanced cooperation with the states of Sub-Saharan Africa, East Africa and

the southern Mediterranean. Numerous dialogue processes and operational measures now exist alongside one another (cf. Wirsching 2016).

Figure 3

**EU cooperation with African states**

<b>Title</b>	<b>Aims</b>	<b>Action plans and programmes</b>	<b>Participating states/ regions in Africa</b>
EU-Africa dialogue on migration and mobility (since 2007)	Combating human trafficking and irregular migration,  Development promotion through remittances,  Role of the diaspora,  Mobility in Africa,  Labour migration, international protection	Regional development and protection programmes	Pan-African programme
EU Emergency Trust Fund for Africa (since 2015, Valetta summit)	Development cooperation with various foci	Promoting sustainable development  Employment possibilities and technical training for young people  Promoting tolerance and dialogue  Boosting the resilience of refugees, internally displaced persons and returnees  Improving policy design and decision-making in food security by means of data collection and analysis  More favourable basic conditions for legal migration and mobility  Promoting resilience in the region  Better migration management  Sustainable management of the impact of migration movements  Promoting employment and boosting resilience  Boosting resilience and peaceful coexistence	Ethiopia, Sudan, Kenya  Kenya (coast and northeast)  Sudan  Sudan  Regional  Horn of Afrika  Horn of Afrika  Horn of Afrika  Niger  Cameroon (north)  Chad
Khartoum Process (since 2014)	Cooperation with countries of origin and transit states of refugees via Horn of Africa	Combating irregular migration, human trafficking and smuggling	Horn of Africa: Ethiopia, Sudan, Eritrea, South Sudan, Somalia, Djibouti, Kenya, Libya, Egypt, Tunisia
Rabat Process (since 2008)	Organisation of regular migration Combating irregular migration Migration and development		Central, West and North Africa (28 states)
Migration partnerships («compacts» with third states = packages)	Saving lives at sea and in the desert  Combating human trafficker and smuggler networks  Additional returns  Keeping migrants and refugees closer to their home regions  Opening up legal ways to Europe, above all via resettlement  Dealing with the causes of flight  Readmission agreements/investment programmes, Financial help/conditionalisation of development cooperation and trade benefits		Niger, Tunisia, Ethiopia, Mali, Senegal, Nigeria, Libya, Jordan, Lebanon

Source: European Commission 2016g, European Commission 2016q, Wirsching 2016.

The EU dialogue is conducted and the overall framework of its Neighbourhood Policy scrutinised at a high level (European Commission 2016e). Following on the abovementioned EU–Turkey Statement and the Valletta Summit in November 2015, with the participation of 35 African states and the EU member states, the European Commission put forward a new partnership framework in June 2016, backed by the European Council. This was followed by the Bratislava Declaration and the Roadmap in September 2016. The aims of this new Migration Partnership Framework (MPF; European Commission 2016g; European Commission 2016q) are defined in relation to the whole migration and flight route.

The EU wishes to tackle the root causes of flight; to offer people on the move adequate protection; to curb the number of irregular migrants; to combat human smuggling and trafficking; and to improve cooperation on return and readmission. In exchange, it offers third countries positive incentives, such as visa facilitation or other legal access options for their citizens. Such incentives can also extend beyond the narrow policy field of migration and include instruments of European Neighbourhood Policy and development cooperation, as well as trade, energy, security, education, environmental or agricultural policy. Negative incentives largely follow in the familiar tracks of development cooperation conditionalities.

In accordance with a proposal by the European Commission in June 2016 and supported by the European Council in October (European Council 2016a), the relevant needs and requirements of countries of origin, transit and first reception are to be addressed by means of migration compacts and migration partnerships customised for each individual third state in order to reduce the incentives for migration to Europe. For businesspeople, academics and students, by contrast, limited entry options are to be made available. The Commission regards such compacts as a more flexible and partnership-friendly instrument than the previous readmission agreements because negotiations on this framework agreement avoid technical details. Niger, Nigeria, Senegal, Mali and Ethiopia have been identified as the first five partner countries.

The European Commission (2016m) regards these efforts as effective for the time being. First of all, the partner countries are made aware that the migration issue is a high priority for the EU. Possible obstacles to swift returns at the level of the EU and the member states would have to be got out of the way (for example, in Belgium, France, Italy, Malta, the Netherlands and Spain); the extended mandate of the European Border and Coast Guard (on this see Section 3.1) would be conducive to this. The European liaison officers posted in key states are supposed to be useful in the implementation of this framework agreement. The resources of the EU trust fund for Africa can be used for these compacts to finance projects, among other things also for border management (for example, in Nigeria). In fact, the preliminary trend seems to be that the number of incoming migrants has fallen, while the number of returnees has increased. However, enormous challenges remain with regard to security, the facilitation of readmissions, support for alternative income options instead of human smuggling and trafficking and the need for risk analyses and regular information exchange, cooperation on travel documents and alternative, legal migration channels.

There is already a pilot project in Niger entitled the »Migration Response and Resource Mechanism« (MRRM) aimed at providing operational help, supporting identification and registration and transmitting data on evidence-based policies. The Commission is treating the cooperation with Niger as a flagship case (European Commission 2016r; see also Bauloz 2017): on the basis of action plans to curb irregular migration and to combat smuggling, as well as alternative economic opportunities, border protection measures were stepped up, awareness-raising campaigns on migration implemented, smugglers arrested and their equipment confiscated and migrants repatriated with the help of IOM. The EU, for its part, assists Niger using the resources of the EU Emergency Trust Fund for Africa, a project on alternative incomes to replace the »migration industry« and a long-term package to tackle the causes of flight and migration. It is also conducting educational campaigns in Niger and making liaison officers and equipment available.<sup>9</sup>

All these agreements have been criticised for their tendency to unilaterally impose more conditionalities on third countries. All too often, however, too little attention is paid to the position of the third states themselves, for which readmission of migrants is scarcely a priority. Instead of a self-proclaimed win-win project more returns are »rewarded« with more cooperation or »punished« with the imposition of conditionalities for development cooperation; and instead of partnership on an equal footing the EU has implemented a »carrot and stick policy« (cf. García Andrade/Martín 2015, Schmidt 2015, Baczynska 2016, Carrera et al. 2016, Collet 2016, Goodwin-Gill 2016, Bauloz 2017). The focus of the EU–Niger compact indicates in an exemplary manner that the prevention, limitation and combating of irregular migration is – somewhat unilaterally – to the fore, whereas tackling the causes of flight is merely a means to this end. A consortium of 110 NGOs (Joint NGO Statement 2016) condemned the new Partnership Framework accordingly: the sole aim of the foreign policy pursued in it is considered to be to put a stop to migration, at the expense of the EU's credibility and basic and human rights. It is scarcely credible for the EU to call on its partners to keep their doors open while the EU member states fail to shoulder their part of the responsibility. Knoll and de Weijer (2016: 28) summarise it as follows:

»The path that the European Union currently takes is not one that, for many, would qualify as a »partnership«. ... The strong security and containment framing of these discussions and the relatively weak concessions by the Europeans on the African priorities has led to a degree of discontent within the African continent and a weakening of trust between Africa and Europe more broadly.«

<sup>9</sup> The cooperation with Niger was initially considered a success to the extent that the number of irregular migrants through Niger fell from 70,000 in May 2016 to an estimated 1,500 in November, although admittedly this has not been reflected in the number of entries to Europe (OM 2016) – a false statistic, as turned out later (Manzo Diallo 2017) because the actual figure was 11,500.

It should also be considered that the states selected for cooperation do not score positively in either the Universal Periodic Reviews (UPR) of the Human Rights Council or in the reports of the Council (Council of the European Union 2016). Because, furthermore, the Partnership Framework offers neither guarantees, benchmarks nor monitoring to ensure human rights and compliance with protection standards it runs the risk of contributing to a further shifting of flight routes.

## 2.4 EXTERNAL ASYLUM PROCEDURES?

Another step in the direction of extra-territorialisation is the »offshore asylum procedure«, which is the subject of regular discussion. This debate, stirred up not least by German Minister of the Interior de Maizière, was endorsed by the European Council in its 2014 guidelines and at least hinted at by the European Commission with its pilot project in Niger. As already discussed (Bendel 2015) these proposals undoubtedly have their attraction: the number of those who could come to Europe via a safe route with a prospect of receiving recognition would in theory be reduced and the need for returns minimised. It remains to be seen, however, whether the European Union and its member states are not just palming off part of their responsibility to protect by passing on responsibility for reception and protection to third parties. This is particularly the case when, as has been criticised in the case of the Turkey Deal, the right to non-refoulement is not always present and compliance with procedural protection measures, such as access to a hearing, legal counsel, translators, information and legal remedy cannot be guaranteed. Because it has long been the case that not all refugee reception countries are signatory states of the GRC we need to watch out for potential protection gaps.

The instrument of external asylum procedure in such centres also gives rise to a whole series of legal and practical problems. Should new camps be established – and thus possible new pull factors brought into being – or should existing camps be used? How will migrants react if they are denied an opportunity to get to Europe after a screening procedure? How are they treated in first reception countries? And finally, the EU is far from having a uniform, harmonised asylum system in which the same criteria are applied with regard to the granting of refugee status, reception, procedures and thus the chance of obtaining a positive decision (see Section 4). Which member state should a refugee enter, then, after having been recognised as such? In short, the instrument is still evolving, legal developments do not furnish sophisticated solutions and more research is needed.

## 2.5 PROPOSED SOLUTIONS

In response to criticisms of cooperation with countries of origin and transit states to date a first proposed solution refers to the need to urge the international community – and thus also the EU and its member states – to improve their payment practices. Similarly, the EU should be a better advocate for the UN Compact on the international stage, which

should be developed into a Global Pact for Refugees in the wake of the New York Declaration of September 2016. The aim here should be to close a substantial gap in refugee protection under international law, which was not achieved in New York: anchoring the obligation to cooperate in the case of a massive influx of refugees. Thus it would be possible, as Nußberger (2016: 817) states, »as, for example, in international environmental law, to find solutions on the basis of voluntary commitments« (translation JP).

Tackling the root causes of flight, understood as peace keeping, democracy promotion and development will have to remain at the top of the agenda of international and European policymaking – such rhetoric is now to be found at global, European and national level. More coherence in development, foreign and economic policy remains one of the core aims that requires a coordinated set of instruments and better co-ordination of the different political levels (UN, EU, national).

The EU has been pursuing an approach based on the causes of migration since the Tampere Summit (1999), especially since the Global Approach to Migration (2005) and the Global Approach to Migration and Mobility (2011), as well as more recently on the basis of the Valletta Declaration (2016). The Global Approach to Migration and Mobility (GAMM), however, contains more options than those pursued hitherto: it should be recalled not only that its four pillars – legal migration, irregular migration, migration and development, and international protection – emphasise human rights for all migrants as a »cross-cutting priority«, but also that the fourth pillar represents the protection pillar, which must be deepened.

If the EU does not want to palm off its responsibility to protect entirely onto third states, it cannot shirk its human and refugee rights responsibility at least morally and for the sake of its own credibility. Human rights ethics range well beyond the legal obligations, which we have not dealt with conclusively here (Sen 2004). The European Union must help the third countries it cooperates with to develop their own asylum systems at a high level and encourage them to constantly improve standards. Needless to say, it cannot be assumed that these European standards, which many member states fail to meet, can be directly imposed on third states. But they do provide a compass that must be authoritative for the conclusion of treaties with third states.

To that end the EU can make use of training measures, for example, using liaison officers, but also human rights monitoring, an instrument so far little used in this policy area.<sup>10</sup> The pro-

<sup>10</sup> Such monitoring (cf. Müller 2012) is carried out by means of state reports within the framework of human rights reports, as used by the Human Rights Committee under the ICCPR and the Anti-Racism Committee as independent monitoring bodies. The Human Rights Council of the United Nations is trying, by means of the Universal Periodic Review procedure, to get all UN member states to report at regular intervals on how they are implementing the human rights instruments. At the European level the ECtHR, whose tasks are growing (Carrera et al. 2012; Costello 2012), has the opportunity to assess, by means of individual complaints procedures, whether state agencies have violated the ECHR. With regard to allegations of torture at European level the Anti-Torture Committee of the Council of Europe is tasked with assessing compliance with the ban on torture in the Council of Europe member states. Monitoring is also carried out by means of information gathering and reports by EU agencies, such as the EU's Fundamental Rights Agency (FRA), which we have mentioned several times.



tection of human and refugee rights standards (Lehmann 2011; den Hertog 2013; United Nations 2015) can be checked by collating the available monitoring activities, such as state reports, information gathering and reports by EU agencies and developing recommendations on an equal footing in dialogue with the third states. Partner states can thus be subject to obligations on a common basis and their standards adjusted to the level laid down in the GRC and the ECHR (for more details see Ktistakis 2016) and in the Common European Asylum System. Independent experts accepted by both states have the advantage, over against judicial remedies, that they can get together regularly and on their own initiative, are independent of law suits and individual cases and can call for follow-up investigations (Müller 2012: 218).

In order to ensure behaviour in compliance with human rights in a more operational domain the European Fundamental Rights Agency (FRA) has issued a manual on dealing with third states (FRA 2016 and 2016a).

Besides the rare opportunities for resettlement opened up by the EU–Turkey Statement (see Section 2.2) legal and safe access to the territory of the EU member states must be the focus of future EU refugee policy instead of irregular, unsafe ways. To that end third states must be encouraged to register and recognise refugees, and to grant admitted refugees permanent resident status and corresponding documents (at least a Convention Travel Document or CDT; in other words, a »refugee pass«). The resettlement framework, as proposed by the European Commission within the framework of the revised Common European Asylum System,<sup>11</sup> is

<sup>11</sup> The European Commission has been calling for resettlement programmes since the early 2000s. During the Iraq refugee crisis the EU member states took in more than 8,400 Iraqi refugees via resettlement on the basis of an action plan. In 2009 the Commission encouraged the member states to set annual priorities on a voluntary basis and by means of financial support through the European Refugee Fund (ERF) existing at the time (now the Asylum, Migration and Integration Fund AMIF); the Parliament and Council adopted a resolution in 2012 in order to get a common European resettlement programme under way. Under the AMIF member states receive 6,000 euros per resettled person or 10,000 euros for special – among others, vulnerable – groups (EPRS 2016a: 3).

one of several steps, ideally building upon one another, in the direction of legal access routes (Collett et al. 2016; EMN 2016; Grote et al. 2016). The UNHCR estimates that at least 10 per cent of the 4.8 million Syrian refugees in the country's neighbouring states alone need resettlement or other humanitarian programmes in order to obtain entry before the end of 2018 (Rummery 2016). Most EU member states already have resettlement programmes through which refugees can get into member states by a legal route. This could be further extended by boosting private sponsorship through (transnational) civil society organisations and local support organisations (Costello 2016). In contrast to Canada this variant of resettlement via private sponsorship has scarcely been used in Europe so far – probably because there is a fear that tasks that are considered to be state-centered are being transferred to private initiatives. Against this it might be said that new actors are entering the political arena not only in the sphere of promoting integration policy, but also migration policy. They can certainly exert important political pressure. The possibility of humanitarian visas – whether under Schengen or national law – has been raised repeatedly in the European Parliament. Temporary protection options, as have been tried in Germany within the framework of federal and Land humanitarian entry programmes also for other countries, could also be adopted as good practice for other states (SVR 2015).

Further possibilities for legal entry go beyond the framework of humanitarian admission (Figure 5). In the context of the Blue-Card reform the European Commission is considering improvements in the entry conditions for qualified refugees. Another possibility involves the opening up of student mobility, which Germany already pursues through the DAAD or the Albert Einstein Initiative (DAFI) supported by UNHCR. Student programmes, nevertheless, tend to be time limited (SVR 2015: 19ff). Opening up the family reunification directive (Türk 2016: 59; Collett et al. 2016: 15) would offer the possibility of, for example, expanding the definition of family beyond the core family to other family members or else to extend the time limits on reunification. This is not a realistic prospect at present, however, given the fairly

Figure 4

#### Human rights monitoring in relation to operational measures with third states: 10 points

1. Human rights assessment and monitoring of the human rights situation in third states before posting liaison officers or operational cooperation with third states that includes possible interception and disembarking of refugees.
2. Clarification of responsibilities in agreements with third states taking into account the fact that third states may not be bound by the same human rights obligations as EU member states.
3. Third states may not be encouraged to hinder migrants before they reach the EU's external borders from the moment it becomes known or ought to be known that the persons intercepted would, as a result, be exposed to persecution or other risks or suffer serious harm.
4. Make training in fundamental rights available to personnel posted to third states.
5. Make training in fundamental rights available to personnel from third states.
6. Clarify responsibilities in operational planning in order, as far as possible, to exclude the risk of fundamental rights violations.
7. Make human rights part of the training undergone by border guards.
8. Take individual decisions on access to the territory of an EU member state.
9. Ensure disembarkation only in safe places.
10. Guarantee access to international protection on the borders (make available personnel who are well informed in this area).

Source: FRA 2016 and 2016a.

restrictive policies being pursued in many member states, including Germany.

The opening up of legal entry options is not a panacea in itself, however. In order to ensure their sustainability they require ambitious accompanying measures, that ideally would be customised to countries of origin and transit states (Collett et al. 2016). Legal avenues must be designed in such a way that they do not offer smugglers and human traffickers further incentives to exploit people seeking protection. Furthermore, labour conditions in the reception countries must be

shaped in such a way that they shield admitted persons from exploitation. Refugees and migrants themselves have to be provided with information on these options and convinced of their viability; otherwise they will continue to direct their resources towards irregular entry routes. Cooperation with third states underpinned by human rights and opening up legal entry options have to be coordinated in this way. On top of that there is the design of border management, which went right to the top of the agenda in the course of the crisis.

Figure 5  
Mechanisms for opening up legal entry routes

Refugee-oriented measures	Regular mobility measures
Resettlement with UNHCR	Family reunification
Humanitarian admission programmes	Labour mobility
Visas on humanitarian grounds	Student mobility
Temporary protection	Medical evacuation measures

Source: FRA 2016.

## 3

## SECOND CIRCLE: PROTECTION OF (EXTERNAL) BORDERS

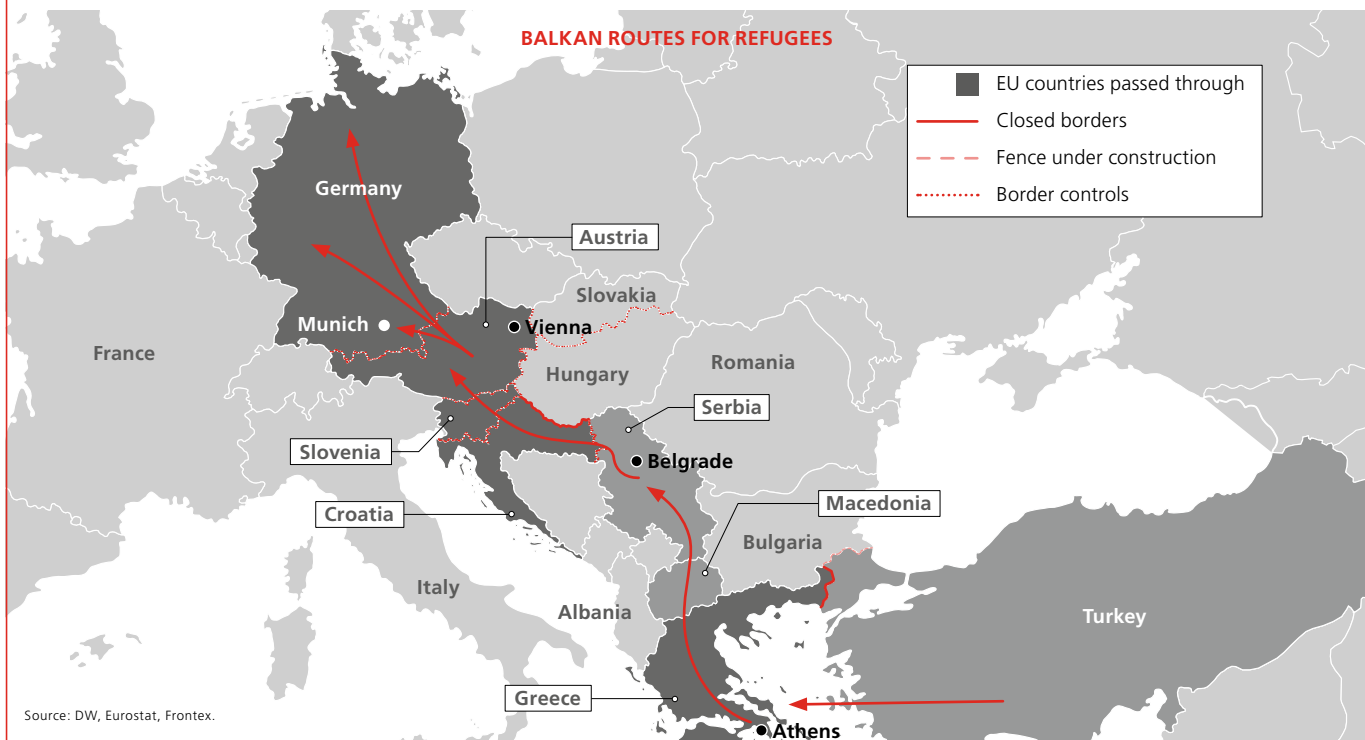
The unequal distribution of responsibility for asylum procedures that the Dublin System imposed, especially on the member states on the external borders, was all too evident. However, the more difficult the negotiations became within the EU the more the Union stressed the importance of securing the borders. On top of that came the pressure due to the heightened terrorist threat and its perception.

The crisis of European refugee policy also appreciably undermined member states' trust in one another, although precisely »mutual trust« was supposed to be the basis of the Dublin System. Commonly agreed rules were flouted, asylum seekers were sent back, »waved through« or »assessed« despite the non-refoulement requirement, EU standards were not complied with, decisions were not coordinated and human rights violations also occurred due to the enormous pressure on states on the external borders (Amnesty International 2016; ADIF 2016; Carrera et al. 2017). The obvious consequences were the establishment of new borders and the reintroduction of (temporary) border controls by some member states, which resulted in the partial closure of the Balkan routes<sup>12</sup> and the introduction of caps (cf. Figure 6).

<sup>12</sup> »Balkan routes« is used here in the plural because there were two distinct routes: a western one from Greece via Macedonia and Serbia and an eastern one from the Bosphorus via Bulgaria and Romania to Serbia and then from Serbia to Slovenia and Austria or Italy. According to information from the EUROPOL's European Migrant Smuggling Centres (EMSC) the borders on the western Balkan route in February 2017 were better protected than they had been the previous year, although there was more resort to smugglers on this route (Staib/Stabenow 2017). The states along the Balkan route decided in Vienna in early February 2017 to come up with a security plan by April in the event of renewed migrant entries.

All these developments put pressure on the Schengen system. With the Schengen Governance Package introduced in 2011 in the wake of the Arab Spring, on one hand border monitoring was strengthened and on the other the possibility was opened up of periodically implementing border reviews within the Schengen area, which Germany reintroduced in September 2015 on the border with Austria. A decision of the Council of 12 May 2016 recommended permitting such border controls to continue »under extraordinary circumstances« (Implementing decision EU (2016) 894). The Schengen Borders Code was recently reformed (Regulation (EU) 2016/399) and now also permits systematic border checks of EU citizens and their family members if they enter the European Union from abroad. With the aim of implementing asylum procedures more quickly and relieving the asylum system of cases that have little chance of success because they are »manifestly unfounded« the Asylum Procedures Directive of 2005 (Directive 2005/85/EC) and its recast version of 2013 (Directive 2013/32/EU) gave member states the possibility of putting asylum seekers into various categories. Also under negotiation since April 2016 is the entire legislative package on »smart borders«, which seeks to establish a new entry system. However, it has kept being referred back in the Brussels decision-making process for eight years now (cf., for example, Jeandesbosz et al. 2016).

Figure 6  
Partial closure of the Balkan routes



Border management encompasses, besides the development of borders and the implementation of border controls, surveillance technologies such as sensors, information technology, biometric data, manned and unmanned drones and »intelligent« surveillance methods, such as the European Border Surveillance System (EUROSUR) implemented in 2013, which detects movements at the borders (cf. Pawlak/Kurowska 2012). It also aims at the enhanced exchange of information, especially between the fingerprint database Eurodac and the »Smart Borders« entry system. In December 2016 the European Commission proposed comprehensive changes in the Schengen Information System (SIS), the central information system used to support external border controls and law enforcement and judicial authorities in 29 countries. It encompasses primarily » information on individuals who do not have the right to enter or stay in the Schengen area, persons sought in relation to criminal activities and missing persons, as well as details of certain lost or stolen objects (for example cars, firearms, boats and identity documents) and data that is needed to locate a person and confirm their identity« (European Commission 2016t). The new features are supposed to improve, on one hand, security and on the other, the system's accessibility: uniform requirements for local officials are supposed to ensure that SIS data are processed securely and data protection enhanced. Information exchange and cooperation between the member states is to be improved and EUROPOL is to obtain unrestricted access rights. The European Data Protection Supervisor Giovanni Buttarrelli has been critical of the new proposals related to the Smart Borders Package and the CEAS. He has pushed in particular for a separation of border management and law enforcement (EDPS 2016).

### 3.1 EUROPEAN BORDER AND COAST GUARD EMERGES FROM FRONTEX

To improve coordination of external border protection, which is split between many actors, as well as the protection of refugees, the border protection agency FRONTEX is to be transformed – by Regulation (EU) 2016/1624 – and known in future as the European Border and Coast Guard (EBCG). The revision of the FRONTEX Regulation was not an emergency measure arising from the so-called refugee crisis, but rather a consistent further development of the agency established in 2005, assigning to it more regulatory and operational, but also additional surveillance tasks (Rijpma 2016; cf. Figure 7).

The FRONTEX reform was implemented in record time after negotiations lasting only 10 months (for more on this see: Carrera et al. 2017: 43). A rapidly mobilisable reserve of 1,500 border guards was formed that is supposed to be available within five days. This is because in the past FRONTEX had problems recruiting sufficient national border guards from the member states. The EBCG is subject to the newly introduced »vulnerability assessment« under Art. 13 of Regulation (EU) 2016/1624, a kind of stress test at the external borders aimed at detecting any gaps in the borders before crisis point is reached. Border guards are supposed to prevent irregular border crossings and implement returns, but also to go into action to rescue shipwrecked people. Furthermore, the EBCG has the authority to post liaison officers in the member states. Initially, the idea is to station such liaison officers in Turkey, followed by the Western Balkans and Niger.

Most astonishing to observers and academics, however, was the extended right of this »Agency 2.0« in extreme cases to operate even in member states with external borders



with no need to request permission from the state in question. This deep incursion into member state sovereignty is said to be the result of experiences with Greece, which the other member states have deemed to have operated far too lax external border protection during the so-called refugee crisis. Article 19 of the Regulation describes situations in which »control of the external borders is rendered ineffective to such an extent that it risks jeopardising the functioning of the Schengen area«. This can be triggered if (a) »a Member State does not take the necessary measures in accordance with a decision of the management board« or (b) »a Member State facing specific and disproportionate challenges at the external borders has either not requested sufficient support from the Agency ... or is not taking the necessary steps to implement actions under those Articles«. In this case »the Council, on the basis of a proposal from the Commission, may adopt without delay a decision by means of an implementing act, identifying measures to mitigate those risks to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of those measures. The Commission shall consult the Agency before making its proposal«. The European Parliament is to be informed of this. In this instance the agency can organise and coordinate emergency deployments in order to secure the borders, despatch European Border and Coast Guard teams from the Rapid Pool and, if need be, deploy additional European Border and Coast Guard teams. It can post such teams to back up the migration administration in hotspots and coordinate activities at the external borders for one or more member states, including joint actions with neighbouring third states. The EBCG can also send technical equipment and organise return operations. Art. 19 (8) of Regulation (EU) 2016/1624 states:

The Member State concerned shall comply with the Council decision referred to in paragraph 1. For that purpose it shall immediately cooperate with the Agency and take the necessary action to facilitate the implementation of that decision and the practical execution of the measures set out in that decision and in the operational plan agreed upon with the executive director.

If the member state does not comply with the Council decision and does not cooperate with the Agency »the Commission can initiate the proceedings provided for in accordance with Article 29 of Regulation (EU) 2016/399« – in other words, as a last resort the Council can recommend that one or more member states decide to reintroduce controls at all or certain sections of their internal borders.

It remains to be seen whether the member states concerned will submit themselves to this new mechanism. The fact is that the redesigned Agency will have to continue to perform a balancing act between national sovereignty and supranational elements. The first academic assessments (Carrera/den Hertog 2016; Rijpma 2016; Carrera et al. 2017) already emphasise that even the reformed Agency is not a supranational entity. Furthermore, the new Regulation does not establish a genuinely »European« Border and Coast Guard; nor does it bestow on the Agency command and control over national personnel (Rijpma 2016). The EBCG does not replace national border guard organisations; it does not have the right to intervene and has not been given law enforcement powers. Finally, it cannot guarantee the uniform application of the Schengen Borders Code (Carrera/den Hertog 2016; Carrera et al. 2017). It remains in »joint responsibility« (Article 5) with the member states for the implementation of European Integrated Border Management.<sup>13</sup> Closely linked to the issue of competences is the question of the accountability of decision-making and actions: who is ultimately responsible in case of doubt?

<sup>13</sup> Art. 4 of the new FRONTEX Regulation (EU (2016)1624) for the first time defines integrated border management – summarised here – as follows: a) border control, including measures related to the prevention and detection of cross-border crime; b) search and rescue operations for persons in distress at sea; c) analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders; d) cooperation between the member states supported and coordinated by the Agency; e) inter-agency cooperation among the national authorities of member states that are responsible for border control or other tasks carried out at the border; f) cooperation with third countries; g) technical and operational measures related to border control within the Schengen area; h) return of third-country nationals; i) use of state-of-the-art technology, including large-scale information systems; j) a quality control mechanism; k) solidarity mechanisms, in particular Union funding instruments.

Figure 7  
**Tasks of the European Border and Coast Guard Agency (EBCG)**

- carry out vulnerability assessments concerning the member states' border control capacities;
- organise joint operations and rapid border interventions, to reinforce the capacities of member states with regard to control of the external borders and to tackle challenges at the external border arising in connection with illegal [sic!] immigration or cross-border crime;
- assist the Commission in coordinating support teams if a member state faces disproportionately high migration pressure at certain places on its external border;
- a concrete response in situations that require urgent action at the external borders;
- provide technical and operational support within the framework of search and rescue operations for persons in distress at sea that may arise during border surveillance operations;
- provide assistance with the establishment of rapid reaction pools of at least 1,500 border guards;
- appoint Agency liaison officers in the member states;
- carry out the organisation, coordination and implementation of return measures and interventions;
- promote operational cooperation between member states and third countries in border management.

Source: European Council/Council of the European Union 2016, Regulation (EU) 2016/1624.

This is particularly relevant with regard to safeguarding refugee rights and respect for human rights. In contrast to the rights mentioned in the first concentric circle not only can the UDHR and the ECHR be invoked, but also the FRONTEX Regulation and the Regulations of the CEAS.

FRONTEX has made considerable progress with regard to human rights concerns since 2011 with the introduction of the fundamental rights officer (Art. 71) and the Consultation Forum for Fundamental Rights (Art. 70). Chapter III of the new Regulation contains a clear commitment to the GRC and to the fundamental rights. The introduction of an individual complaints procedure in accordance with Art. 72 of the Regulation is to be welcomed. This provides that »[a]ny person who is directly affected by the actions of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party representing such a person, may submit a complaint in writing to the Agency« (Art. 72(2)). However, the devil is in the details: thus it remains unclear what is meant by »a response [to a complaint] may be expected as soon as it becomes available« (Art. 72(5)) and what remedy is to be provided. Rijpma (2016: 31) criticises the fact that, due to the elimination of the former Art. 26(a) of the Regulation there is no longer an effective monitoring mechanism with regard to fundamental rights. The duty of the Agency to employ one should be restored in order to properly assess the fundamental rights situation at the external borders, also in relation to vulnerability assessment there. By the same token, the fundamental rights officer no longer has to provide the consultation forum with a report (Art. 71(2)); this obligation should also be restored.

### 3.2 HOTSPOTS AND RESETTLEMENT: A SUSTAINABLE MODEL?

The new EBCG alias FRONTEX and the national border guard authorities of the affected member states are also jointly responsible at the external borders in the so-called hotspots in Greece and Italy. EASO and EUROPOL, whose competences have been considerably extended, also undertake operational functions here. Together they make up the Migration Management Support Teams (MMST). In accordance with the Dublin System they are supposed to assist the relevant national authorities in first reception countries within the EU with registration and identification, as well as in the »screening« of asylum seekers (European Commission ND) in order to admit, pass on or return the refugees and migrants.

In contrast to the FRONTEX reform the hotspot approach was one of the elements immediately introduced by the European Union in the course of the crisis. The Commission's initiative in May 2015 was backed by the European Council on 25 and 26 June with the explicit aim of »containing« the »growing flows of illegal migration«, among other things by »reinforcement ... of the Union's external borders« (European Council 2015). The hotspots thus clearly serve the purpose of border management, for which the regular »Schengen evaluations« are carried out (cf. European Commission 2016). Regular reports are provided on the presence of FRONTEX and EASO personnel at these hotspots; nevertheless the system only gradually got off the ground.<sup>14</sup>

<sup>14</sup> UNHCR, IOM and various NGOs support the reception centres; UNHCR helps with the identification of vulnerable people and IOM with voluntary return. NGOs are involved in the provision of food, clothing and shelter, health services, safety and access to legal assistance. For a description of the situation on Chios see, for example, Ziebritzki (2016).

Figure 8

**Hotspots in Greece and Italy: current situation**

Hotspots in Italy					
	Lampedusa	Pozzallo	Taranto	Trapani	
Total reception capacity	500	300	400	400	
	Frontex 24 experts	Frontex 24 experts	Frontex 14 experts	Frontex 22 experts	
EU presence	EASO 2 member state experts	EASO: 2 member state experts	EASO: 3 member state experts	EASO: 2 member state experts	
	EASO: 3 cultural mediators (Arabic, Tigrinya)	EASO: 2 cultural mediators (Arabic, Tigrinya)	EASO: 3 cultural mediators (Arabic, Tigrinya)	EASO: 2 cultural mediators (Arabic, Tigrinya)	
Hotspots in Greece					
	Lesbos	Chios	Samos	Leros	Kos
Total reception capacity*	1.500	1.100	850	1.000	1.000
EU presence	FRONTEX: 141 officers interviewing, screening, fingerprinting and registration teams, border guards, advanced level document experts, team leaders FRONTEX: Supporting Officers 68 officers in accordance with the EU–Turkey Statement	FRONTEX: 103 officers interviewing, screening and advanced level document expert teams, border guards 2 officers in accordance with the EU–Turkey Statement	FRONTEX: 102 officers screening and interviewing teams, border guards and advanced level document experts	FRONTEX: 55 officers screening and interviewing teams, border guards and advanced level document experts	Frontex: 61 officers screening and interviewing teams, border guards and advanced level document experts
	EASO: 21 experts from the member states in accordance with the EU–Turkey Statement  31 interpreters 5 EASO personnel and 7 interim personnel, seconded from the Greek asylum system	EASO: 20 experts from the member states in accordance with the EU–Turkey Statement  25 interpreters 3 EASO personnel and 4 interim personnel, seconded from the Greek asylum system	EASO: 11 experts from the member states in accordance with the EU–Turkey Statement  14 interpreters 3 EASO personnel and 2 interim personnel, seconded from the Greek asylum system	EASO: 7 experts from the member states in accordance with the EU–Turkey Statement  9 interpreters 2 EASO personnel and 2 interim personnel, seconded from the Greek asylum system	EASO: 9 experts from the member states in accordance with the EU–Turkey Statement  4 interpreters 2 EASO personnel and 2 interim personnel, seconded from the Greek asylum system

Note: \*Total capacity of reception facilities on the islands is 7,450 places.

Source: European Commission: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf).

Besides border management, however, the idea behind the hotspots is to relieve the burden on the countries subject to disproportionate migration pressure, namely Greece and Italy. This is where the relocation system comes in (EPRS 2015), redistributing migrants from the hotspots to the other EU member states. In fact, it soon proved impossible to enforce implementation of the redistribution that had been agreed

(Decision (EU) 2015/1523 and Decision (EU) 2015/1601) against the member states that had been outvoted in the Council, for the first time by a qualified majority. Of the 160,000 asylum seekers who, based on a Council Decision of September 2015, were supposed to be redistributed from Italy and Greece in accordance with a distribution key, only 24,883 had been resettled as of 23 February 2017 (see Figure 9).

Figure 9

**Relocation: reception by the member states**

Member state support for the emergency resettlement mechanism (as of: 27 February 2017)

Member state	National contact points named	Italy	Greece	Officially promised places	Resettled from Italy	Resettled from Greece	Places remaining out of the promised 160,000
Austria			x	x	x	x	204
Belgium				630	58	338	204
Bulgaria				450	x	29	78
Croatia		x	x	46	9	10	10
Cyprus				140	10	55	x
Czech Republic		x	x	50	x	12	204
Denmark	no data	no data	no data	x	x	x	10
Germany				6,250	886	1,556	x
Estonia				210	x	87	204
Finland				1,570	504	560	78
France				5,090	282	2,476	10
Greece		no data	no data	x	x	x	x
Hungary		x	x	x	x	x	78
Iceland	x	x	x	x	x	x	requested
Ireland				514	x	320	204
Italy		no data	no data	x	x	x	78
Latvia			x	424	9	219	x
Liechtenstein	x	x	x	10	x	10	0 (2)
Lithuania				550	x	229	204
Luxembourg				270	61	165	78
Malta			x	99	46	50	10
Netherlands				1,575	423	1,011	x
Norway				1,135	415	204	616 (2)
Poland				100	x	x	78
Portugal				1,618	279	810	10
Romania				1,702	45	523	x
Slovakia				40	x	16	204
Slovenia				180	23	101	78
Spain				900	144	707	10
Sweden			x	50	39	x	x
Switzerland				1,280	471	78	731 (2)
United Kingdom		no data	no data	no data	x	x	10
<b>Total</b>	<b>All affected member states have now signed</b>	<b>23</b>	<b>19</b>	<b>24,883 out of 160,000, 25 countries</b>	<b>3,704 out of 34,953 (3)</b>	<b>9,566 out of 63,302 (4)</b>	<b>84,985 out of originally 98,255 (5)</b>

(1) This column was amended in order to reflect the total number of official pledges by each country.

(2) Norway, Liechtenstein and Switzerland have reached bilateral agreements, in accordance with Article 11 of the Council Decision and have joined the resettlement programme.

As part of this agreement Norway has officially promised 1,135 places, Switzerland 1,280 and Liechtenstein 10.

(3) Out of the 39,600 resettlements from Italy originally foreseen a figure of 34,953 people was legally laid down in the Council Decisions.

(4) Out of the 66,400 resettlements from Greece originally foreseen a figure of 63,302 people was legally laid down in the Council Decisions.

(5) Out of the 160,000 resettlements 7,745 still have to be allocated from the decision on the initially envisaged 40,000 resettlements.

Out of the initially envisaged 120,000 resettlements 54,000 still have to be allocated.

Source: European Commission: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf).

Hungary – which also defied the proposal for 54,000 migrants stuck in Budapest to be relocated – and Slovakia have challenged this process before the ECJ in Luxembourg. Poland also refused to accept any asylum seekers after the new government came into office. In response, in February 2017 Vice-President of the European Commission Frans Timmermans again threatened infringement proceedings (ANSA 2017).

Overall »[the hotspot approach] is silent on the need to accept requests for international protection also at the border« (Rijpma 2016: 19). With regard to rights for asylum seekers its »Achilles heel ... lies in the fact that this [is based] entirely

on the member states [having] a robust reception and asylum procedure capacity« (Carrera/den Hertog 2016: 11); however, the overstrained reception centres are no longer able to guarantee many rights.

Greece in particular, whose »systemic shortcomings« have long been in evidence (for details, see AIDA 2015), was able to get to grips with the backlog, which was exacerbated by the EU–Turkey Statement (Section 2), only very slowly (EPIM 2016; ECRE 2016). Investigations have thus roundly condemned the hotspots approach (Amnesty International 2016 and 2016a; Human Rights Watch 2016a; ECRE

2016; FRA 2016b). According to Amnesty International (2016a) the hotspots have served neither to meet asylum seekers' fundamental protection needs nor to alleviate the states on the external borders. Rather, says Amnesty International (2016a) and Human Rights Watch (2016a) the sufferings of asylum seekers include overcrowded reception centres, freezing temperatures, a lack of hot water, unhygienic conditions, violence and crimes motivated by hatred.

As far as access to the asylum system in accordance with Art. 18 of the Charter of Fundamental Rights is concerned studies by ECRE (2016) and FRA (2016b) come to the conclusion that many asylum seekers had been denied access to asylum. Many had to endure long-term detention without access to the asylum system or to adequate information – which amounts to a violation of the Asylum Procedures Directive (2013/32/EU), which calls for asylum procedures to be as rapid as possible – or they are quickly repatriated, often without having obtained access to individual procedures (FRA 2016b: 10). One consequence of the abovementioned backlog in Greece's reception centres is that procedures for people trying to get out of their countries of origin are being prolonged.

The EBCG also requires respect for the right to human dignity (Art. 1), integrity of the person (Art. 3), the prohibition of torture and inhuman or degrading punishment or treatment (Art. 4) and freedom and security (Art. 6) when fingerprints are being taken, as well as access to legal assistance (Art. 20 of the Asylum Procedures Directive, derived from Art. 47 of the Charter of Fundamental Rights). Children's rights are under considerable pressure in both Greece and Italy; the respective systems are not in a position to ensure children's welfare: often, unaccompanied minors seem to be kept in detention and have poor access to education and activities appropriate to their age. Vulnerable people could not be identified and dealt with satisfactorily, as laid down in the Reception Directive (Directive 2013/33/EU); no trained personnel are on hand in Greece for the identification of victims of human trafficking in accordance with the Directive on trafficking in human beings (Directive 2011/36/EU); female staff are also lacking.

In the context of any future »job sharing« among the member states it cannot be excluded that the hotspots at the external borders could remain in existence as hubs for registration, redistribution and return, in contrast to which the states in central and northern Europe would handle integration tasks. However, if the hotspots do become a permanent fixture it is imperative to ensure that the agreed EU standards be adhered to, expeditious asylum procedures implemented and appropriate treatment and protection guaranteed. This also includes the identification of people in need of special treatment at reception or during the procedure. Vulnerable people have to be treated accordingly. Fingerprinting must be carried out without coercion (Guild et al. 2015: 16) and detention used only as a last resort (ECRE 2016: 54). In particular a strict monitoring system is required under the aegis of international organisations and NGOs, as well as independent actors, such as an ombudsman, in order to check that the hotspots are functioning in accordance with European standards. This could include, for

example, a clear role for the FRA within the framework of human rights mainstreaming (Neville et al. 2016: 9). The connection between the dysfunctionality of the Dublin System and the hotspots is evident. This system faces another relaunch.



## 4

## THIRD CIRCLE: RELAUNCH OF THE COMMON EUROPEAN ASYLUM SYSTEM WITHIN THE EU

The inadequacies of the CEAS, which was recast only in 2013 (on this, see Bendel 2013), became all too evident as a result of the increased immigration in 2015 (for more details see: AIDA 2015; Mouzourakis 2016; Wagner et al. 2016; Türk 2016). Major differences existed or even grew wider with regard to reception, asylum procedures and, finally, acceptance rates because the rising number of entries triggered a »race to the bottom«: a deterioration of standards and an intensification of entry barriers. The 40 infringement procedures introduced by the European Commission in relation to the lack of transposition and implementation of the directives laid down in the CEAS had hardly had time to exert an effect when the European Commission undertook a revision of the CEAS directives and regulations.

### 4.1 DUBLIN REMAINS THE UNPOPULAR CORE OF THE CEAS

This was introduced in several packages. To begin with, Dublin IV and Eurodac, as well as the EASO reform, then the qualification regulation, the asylum procedures regulation and the reception directive. The aim of this new reform is to speed up asylum procedures and to harmonise standards across the EU (European Commission 2016e). These comprehensive reforms are still in the negotiation phase. Thus in what follows we can give only a short summary of the main elements proposed so far of the pending third version of the CEAS.

The European Commission proposed a revision of the much criticised (for summaries see, for example, Fratzke 2015; EPRS 2016; Keudel-Kaiser et al. 2016: 47–52; Maiani 2016a: 9–27) Dublin System right at the outset. Alternative proposals for a fair distribution of asylum seekers among the member states emerged piecemeal in a first communication (European Commission 2016b), but came to nothing (among others see Berger/Heinemann 2016; Enderlein/Koenig 2016; Guild 2016; Guild/Carrera 2016; Rapoport 2016; Trauner 2016). While the European Parliament would have favoured a fundamental overhaul the Visegrad states in particular were categorically opposed (see, among others, Pascouau

2015; De Bruycker/Tsourdi 2016). The Commission finally decided on a less ambitious version of a »Dublin plus« system (European Commission 2016e). This has the following features:

- Transformation of the hitherto temporary resettlement system into a permanent »corrective allocation mechanism« – a distribution system in accordance with population size and GDP that automatically comes into force as soon as a member state has taken in 150 per cent of the asylum seekers allocated to it. The figure of 150 per cent is among the most contentious proposals because this threshold would again put the asylum systems of first reception countries under undue strain and cement an »emergency mechanism« instead of a proactive distribution system.
- Introduction of a financial solidarity mechanism. This provides that member states that refuse to accept asylum seekers pay 250,000 euros per asylum seeker who would otherwise have been allotted to this member state within 12 months.
- Tightening up of conditions for member states: in particular a restriction of the sovereignty clause for member states and in the case of failures to meet a deadline no shifting of responsibility.
- Tightening up of conditions for asylum seekers: they are to be obliged to make their asylum application in the country of first entry. If they fail to comply with this obligation the relevant member state has to assess their asylum application in an accelerated procedure. Asylum seekers are to receive benefits in kind only in the member state responsible for their asylum procedure (exception: emergency health care). If these obligations are not complied with sanctions are to be imposed, which are to be left to the member states.

**15** Furthermore, from March 2017, the Commission intends that, in principle, there will once more be returns from other states to Greece. This brings to a close the regulation on non-refoulement to Greece, which among other things was an incentive for further migration.

All these proposals basically leave the Dublin System subject to the same principle that continues one-sidedly to burden the first reception countries in the EU and impose on them the task of accepting asylum seekers, pass them on under the aegis of resettlement or send them back to safe third states. Dublin IV thus represents a »proposed amendment to the previous logic« (Hruschka 2016 – translation JP) rather than a »stimulus for the necessary reform in the direction of a more functional and efficient system«. A range of different proposals for closer involvement of asylum seekers themselves have been given short shrift so far (»free choice«, »limited choice«, »Dublin minus«; see Maiani 2016a; SVR 2017). For example, there have been various calls to include family and social ties, language knowledge, job matching and other criteria in the selection of country of asylum, to establish these positive incentives for remaining in the allocated country and to open up prospects of mobility within Europe by means of mutual recognition of asylum procedures (Wagner et al. 2016; Guild et al. 2015a: 10f).

As a consequence of the restriction of the sovereignty clause »[it has been] suggested that the discretionary clauses should only be applicable as long as the responsibility determination procedure has not ended and that they should be limited to family reasons. The use of the clause for other humanitarian or cultural grounds shall no longer be possible. This limitation is problematic from different perspectives. From a humanitarian perspective it is foreseeable that the limitation of the scope for the discretionary clauses will also contribute to an increase in the number of »asylum-seekers in orbit.« (Hruschka 2016 – translation JP). Furthermore, the proposal considerably curtails the rights guaranteed in the Dublin III Regulation and foresees new sanctions for irregular further migration (Maiani 2016a). These are not »compatible with the human rights standards that have to be granted in accordance with the Geneva Refugees Convention (GRC), the European Human Rights Convention (EHRC) and the UN Convention on the Rights of the Child (UNCRC), but also the EU's Charter of Fundamental Rights. In addition, the binding character of this agreement will throw up difficult constitutional law and human rights issues because in many member states access to social rights and basic provisions are constitutionally guaranteed« (Hruschka 2016 – translation JP).

Further concerns pertain to, among other things, children's rights (FRA 2016c; Keudel-Kaiser et al. 2016), which should have top priority. Various authors (Maiani 2016a; Keudel-Kaiser et al. 2016) emphasise the need still not foreseen in the draft to pay more attention to the preferences of asylum seekers and any ties they might have to certain member states when it comes to allocation, as proposed in various models (including the Athens Regulation). They could, for example, be implemented by liaison officers or EASO experts. Coercive measures are to be restricted and reception centres should be provided for in accordance with fundamental rights.

## 4.2 IS AN EU »BAMF<sup>16</sup>« EMERGING FROM EASO?

According to the Commission's proposal the European Asylum Support Office (EASO) shall take over supervision of the »corrective allocation mechanism« under Dublin and of distribution quotas. In accordance with the Regulation (European Commission 2016f) proposed under COM (2016) 271 the EASO will also receive considerably more competences. This extended mandate

transforms EASO into a fully-fledged Agency which is capable of providing the necessary operational and technical assistance to Member States, increasing practical cooperation and information exchange among Member States, supporting a sustainable and fair distribution of applications for international protection, monitoring and assessing the implementation of the CEAS and the capacity of asylum and reception systems in Member States, and enabling convergence in the assessment of applications for international protection across the Union.

(COM (2016) 271, p. 2)

In this way the Agency can foster more convergence between the member states. To that end the relationship between the Agency and the member states would be modified: instead of the previously voluntary cooperation with regard to information exchange, in future it would be obligatory. In future, EASO would regularly revise the member states' list of safe countries of origin; pass on information on countries wishing to be added to the common list; and come up with guidelines on best practices in the implementation of CEAS. In addition, EASO would provide individual member states with customised support. The Agency and its teams would also take on operational and technical tasks in the implementation of CEAS in member states, in particular those in which migration pressure is especially high.

The gradual expansion of EASO into an agency that could implement a harmonised application of the common rules in the member states, ultimately without their requesting it, and could intervene on its own initiative if a member state lacked the capacity or the will to do so, represents an opportunity, which even the European Commission envisages as a »long-term prospect« (European Commission 2016b). The aim then would be gradually to resolve the differences between recognition rates and procedural and accommodation standards that ought not to exist in accordance with CEAS provisions and thus bring the protection lottery in Europe to an end. To date, however, the agency has only been given competences to help out in implementing procedures; it cannot implement procedures in its own right. Both FRONTEX and EASO, despite their upgrading, thus remain facilitators for national border and asylum authorities. An »EU BAMF«, of the kind proposed by Langenfeld and Dörig (2016; see also SVR 2017), is thus not on the horizon.

<sup>16</sup> Bundesamt für Migration und Flüchtlinge or German Federal Office for Migration and Refugees.

### 4.3 THE REGULATION ON QUALIFICATION, THE REGULATION ON ASYLUM PROCEDURE AND THE RECEPTION DIRECTIVE PUT TO THE TEST

Besides the improvements in agencies' competences a second line of the CEAS reform in the second package to be submitted concerns replacing the existing directives on recognition of refugee status (Qualification Directive) and the Asylum Procedures Directive with regulations. The Commission expects lower friction losses to arise from this and closer harmonisation in the implementation of existing EU regulations. This is because, in contrast to directives, regulations apply in the member states immediately and do not have to be transposed into national law. We can thus expect the member states to try to obtain the widest possible room to manoeuvre in the negotiations. Although the regulations do provide for some improvements – such as mandatory access to legal assistance from the outset – NGOs such as ECRE (2016b) and Amnesty International (2016b), as well as a number of groups in the European Parliament, have been overwhelmingly critical of the fact that more obligations have been imposed on the member states, but especially on asylum seekers.<sup>17</sup> In what follows we shall list the most striking points in each dossier so far, which may change in the negotiation process.

The introduction of the Qualification Regulation (European Commission 2016k) is ultimately about achieving the convergence of the differing recognition rates, often castigated as the »protection lottery«. The member states are to be obliged to scrutinise whether an applicant might have had flight alternatives within their own country. Furthermore, further migration between the EU member states is supposed to be reduced by means of sanctions: the right to long-term residence, which is granted after five years, is then to be reset to »zero« if the asylum seeker is apprehended illegally in another member state. Member states are supposed to regularly assess whether protection status that has already been granted is still valid or can be withdrawn because circumstances in the country of origin of the person concerned have changed. The findings of EASO (here already called the European Asylum Authority) and its Country of Origin Information (COI) are supposed to be taken as a basis of asylum decisions. Social support can be made dependent on participation in integration activities in the member state.

The reform of the Asylum Procedures Directive – now also cast as a regulation (European Commission 2016l) – will standardise registration processes, simplify and shorten asylum procedures, standardise procedural guarantees for asylum seekers, impose tougher sanctions on abuses of the right of asylum and harmonise the rules on safe countries of origin. With the aim of being able to implement asylum procedures more quickly and relieving asylum systems of cases that, as »manifestly unfounded«, have little chance of success, very short procedures of a maximum of 10 days are to apply if an applicant comes from a state of first asylum

or a safe third state. In more complex cases or if entry numbers are high a limit of three months should not be exceeded. On the other hand, access to legal assistance would be free of charge and granted from the beginning of the procedure; protection possibilities for unaccompanied minors and people with special needs should be extended and the right granted in principle to remain on the territory of the responsible state until the procedure has been concluded. Asylum seekers are obliged to cooperate with the authorities. The European Commission proposes to make the corresponding sanctions no longer optional but compulsory. In order to bring the member states' extremely divergent lists more closely into line,<sup>18</sup> on 9 September 2015 the European Commission proposed the compilation of a common list of safe countries of origin and its inclusion in the Asylum Procedures Directive, which is to be reformed (European Commission 2015a). More far-reaching European Commission plans encompass also Bangladesh, Pakistan and Senegal (European Commission 2015a: 7). As explained in Section 2, recent political developments in Turkey, but even before that the Commission's progress reports, qualify this assessment. Given Turkey's special role under the EU-Turkey Statement it would be politically and diplomatically very difficult to remove Turkey from the shortlist again (on this see Pascouau 2016). EASO, UNHCR, the Council of Europe and NGOs ought to be involved in drawing up this list, which the European Parliament has approved. Assessment of the safety criteria is primarily EASO's task.<sup>19</sup>

The aim of the Reception Directive (European Commission 2016j) is to implement the standards and indicators on the reception of asylum seekers that EASO has elaborated. Member states are obliged constantly to adapt their crisis plans and thus, in the event of higher entry numbers, to have adequate reception options ready. This is supposed to ensure that asylum seekers remain available at all times and are prevented from further migration: member states may impose requirements with regard to residence or reporting obligations – if asylum seekers violate them, sanctions can be imposed. If there is a risk of flight, detention is permissible. More positively, earlier access to the labour market, generally within six (previously nine) months, is envisaged; however, member states are requested, in the case of well founded asylum applications, to enable labour market access already after three months, while in the case of ill-founded applications not to allow access at all. A guardian should be made available to represent and assist unaccompanied minors within five days.

<sup>18</sup> Fifteen of the (at present) 28 member states apply the concept of safe countries of origin, while seven plan a national law to transpose the Asylum Procedures Directive. The criteria for implementing the Asylum Procedures Directive, too, have not been implemented uniformly. For example, the United Kingdom designated certain countries of origin, such as Nigeria, Ghana and Kenya, as safe only for men (cf. AIDA 2015a: 56).

<sup>19</sup> Criticisms of these lists have been expressed with regard to the classification criteria (AIDA 2016), because even with policy and legislation that are fundamentally in compliance with human rights, minorities could still be exposed to persecution, torture or degrading treatment. The instrument has also been described as having mainly symbolic value in terms of foreign policy (Engelmann 2015: 31) or »sending a signal to domestic audiences«. In procedures the burden of proof has been shifted onto the applicant and puts them under considerable time pressure under conditions that make it almost impossible to seek out legal assistance properly.

<sup>17</sup> For an overview see the European Commission Factsheets on individual proposals (European Commission 2017c).

#### 4.4 CEAS 3.0 – RISKS AND POTENTIAL

Fears that the race to the bottom between the member states that accelerated in 2015 could be reflected in a deterioration in human and refugee rights standards in EU directives and regulations (see, among others, Balleix 2016; Pascouau 2016) are – despite some improvements, especially in relation to legal assistance and the rights of vulnerable people and unaccompanied minors – not unfounded, given the tightening up described above. Precisely at the present time, however, the EU, by contrast, could and should remind itself of the normative, guiding force of human rights. Thym (2016) has designated this watershed as a kind of »constitutional moment« at which new political concepts could emerge beyond the initial culture of welcome and the restrictive closure of the Balkan routes – overshadowed, to be sure, by the challenges of European populism. A consistent rights-based approach, as parsed by Keudel-Kaiser et al. (2016), should not only open up and strengthen the abovementioned entry possibilities, but also be reflected in reform of the Dublin System, as well as in the consistent implementation of standards in and after the asylum procedure.

Any hopes of a re-orientation with regard to responsibility and sharing distribution already appear vain. The Dublin reform proposed by the European Commission – lacking in ambition, to say the least, and seemingly falling over itself to kowtow to the member states – amounts to little more than a barely altered relaunch of the old system. In this, as in the other regulations and directives, there is still evident scope for negotiations by the European Parliament in terms of a system based on solidarity and a commitment to human and refugee rights. That applies in particular to such alarming issues in the new draft regulations as detention. Reform of the European Asylum Support Office (EASO), however, offers a medium- and longer-term opportunity to advance the harmonisation of the European asylum system institutionally; to reduce the risk of prolonging the current protection lottery in Europe; and to confer approximately equal and equally high standards on those seeking protection in all member states. This could have ramifications for secondary migration.

## 5

## SUMMARY

The current crisis in EU refugee policy has rightly and repeatedly been characterised as a crisis of solidarity among the member states, which has ultimately manifested itself in a deep polarisation concerning the legal and ethical handling of refugees. As a crisis in the traditional sense it harbours the risk of a further divergence of interests, renewed nationalist tendencies (»renationalisation«) and a diminishing sense of solidarity in relation to the refugee question in Europe. On the other hand, it also offers an opportunity for a rethink and a renewed focus on the human rights foundations and values of the European Union, for which the present report represents a plea.

The current conflict situation, even blockade between the member states, as well as between the latter and supranational bodies at first glance offers little reason for optimism concerning a more proactive rather than a reactive refugee policy, not to mention a long-term rather than ad hoc one or one that is more consistent rather than fragmenting. One possible response is a Europe of two or more speeds with corresponding incentives for countries that gradually come to participate in a solidarity-based distribution mechanism. Another option might arise from »job sharing« under which the countries at the external borders permanently adopt the role of hubs, while the countries away from the borders and in the north deal rather with integration tasks. There appears to be little prospect of a more supranational management of EU refugee and migration policy given the upcoming elections in key member states and an apparently polarised public opinion, even though a number of recently introduced policies would seem to support it.

In terms of substantive policies the solidarity deficit between the member states in the implementation of European standards in the reception of refugees, asylum procedures and acceptance rates is often lamented, and rightly so. Also justified are fears of a race to the bottom in the ongoing negotiations on revising CEAS, the upshot of which could be a dilution of European standards. However, there are also a number of developments in the other direction. For example, a substantial transfer of competences to the European Border and Coast Guard (formerly FRONTEX, now EBCG) has already been decided and a similar development has been proposed for a European asylum agency (to date, EASO). Even though a number of responsibility issues are

still outstanding with regard to the EBCG the gradual expansion of EASO towards a genuinely European »migration and protection agency«, which in the future might not only support the member states, thereby working towards a convergence of standards, but consistently implements European human and refugee rights standards represents a promising starting point.

In terms of the issues involved, European refugee policy has moved further and further towards the outer circles here described. It has noticeably been shifting from its original domain of justice and home affairs policy towards foreign, security and defence policy. The European Parliament has few rights in this connection and the EU member states often fail to come up with a common position and lack the ability to bolster third states in terms of conflict management, promoting democracy and development, even though the EU is the biggest humanitarian and development policy donor. Much more consistency is needed in these policy areas.

Efforts to develop cooperation with third states, which is high on the agenda at present, soon come under suspicion of being part of an attempt to shift the responsibility to protect off European shoulders. This initially applied to the EU–Turkey Statement. As principal receiving country during the crisis, Turkey, in its efforts to reduce the influx of refugees and migrants and to integrate refugees locally, was supposed to receive financial support and benefit from a re-settlement system, while migrants who had entered irregularly from the Greek islands were supposed to be transferred back again. While the present report in principle regards cooperation with third countries as sensible in terms of controlling large migration movements, nevertheless critical questions arise in relation to Turkey's human rights performance, which evidently itself generates refugees, not to mention its responsibility to protect as regards asylum seekers, the responsibility to protect of the EU and its member states and also the soundness of the EU–Turkey Statement's inherent logic. It calls for a systematic improvement of protection gaps, a human rights assessment and a monitoring system for this and other cooperation with third states, as well as systematically urging the improvement of a number of protection gaps. Such a system clarifies the responsibilities between third states and the EU; it prevents people who have been intercepted from exposure to persecution and



other risks; guarantees access to international protection at the borders; and ensures embarkation solely to safe places. It also prevents cooperation with police and border authorities that use violence against refugees and migrants, detention in places where it is not regarded as a »last resort« and avoids »pushbacks«. It offers comprehensive human rights training and makes human rights part of further training. Cooperation with countries such as Libya along the lines of the EU-Turkey Statement is currently not feasible on the basis of the criteria presented here.

Legal access paths, of the kind currently advocated by the European Commission in a resettlement framework, could be expanded further. For a number of years proposals for refugee-oriented measures, such as humanitarian reception programmes, visas issued on humanitarian grounds and schemes for temporary protection have been on the table. These could be augmented by regular mobility measures, such as extended family reunification, labour mobility and mobility for students, as well as medical evacuation measures. However, they must be tailored in such a way that smugglers and human traffickers are unable to abuse them and offer guarantees against exploitation in the reception countries.

The crisis of European refugee policy has utterly undermined trust in the functioning of the Dublin System, which has been troubled for some considerable time. As a result of the strong influx that put particular pressure on the countries at the external borders – although not only them, as the case of Germany shows – the asylum systems there were unable to cope, which was accompanied by far-reaching human rights violations. This led to the construction of new borders, the re-introduction of temporary border controls at the Schengen borders, with corresponding reform of the Schengen Borders Code and the partial closure of the Balkan routes. Agreement was rapidly reached between the member states that open internal borders would be restored only when the external borders were secured accordingly. Besides expanded data exchange the expansion of the European border protection agency FRONTEX into a European Border and Coast Guard was now supposed to ensure better coordination of integrated border management. This organisation has also taken over a coordinating role in the control, registration, resettlement and return of arriving refugees and migrants also in hotspots in Greece and Italy, together with other agencies, such as EASO, EUROPOL and EUROJUST.

However, the hotspots – which on one hand fulfil a border management function, and on the other are supposed to take some of the burden off Greece and Italy – initially were not only inefficient, but also lacked – in particular – human rights standards in relation to reception, access to the asylum system, detention issues and the identification and treatment of vulnerable persons and unaccompanied minors. If, in accordance with the notion of European »job sharing«, they were to become a permanent institution a strict monitoring system would be urgently required in order to guarantee compliance with European standards.

Within the EU a complete revision of CEAS directives and regulations is in the offing. The inefficient Dublin System, all the more so because of the heavy influx, proved incapable of ensuring the EU member states' responsibility to protect

with regard to refugees has not been subject to complete revision, despite multiple proposals from academics and NGOs. Rather the current submissions for a Dublin IV leave things as they are in terms of the same principle of reception of asylum seekers by the countries of first reception in Europe and narrow member states' responsibilities even further. Here, as also in relation to the other proposals for a »CEAS 3.0«, the rights of asylum seekers are being further curtailed and sanctions stepped up for irregular further migration within Europe.

There is still an opportunity for the European Parliament to revise these standards upwards and not merely capitulate to the ministers in the Council. With elections coming up in some key member states the responsibility for using the crisis as an opportunity also lies with the voters.

# Annex

Figure 10

## Main features of the EU–Turkey Statement of 18 March 2016

- 1) All new irregular migrants crossing from Turkey to the Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.
- 2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU, taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18,000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54,000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.
- 3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states, as well as the EU to this effect.
- 4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.
- 5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision.
- 6) The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the fields of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be exhausted, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euros up to the end of 2018.
- 7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.
- 8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands' presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.
- 9) The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border, which would allow the local population and refugees to live in safer areas.

Source: Council for Foreign Affairs and International Relations 2016.

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## List of Abbreviations

AMIF	Asylum, Migration and Integration Fund
BAMF	Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees]
CAMM	Common Agenda on Migration and Mobility
CDT	Convention Travel Document
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
COI	Country of Origin Information
CRC	Convention on the Rights of the Child
CSDP	Common Security and Defence Policy
DCIM	Department for Combatting Illegal Migration
EASO	European Asylum Support Office; renamed European Union Agency for Asylum
EBCG	European Border and Coast Guard
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EHRC	European Human Rights Convention
EMN	European Migration Network
EMSC	European Migrant Smuggling Centres
EPIM	European Programme for Integration and Migration
EPRS	European Parliamentary Research Service
ERF	European Refugee Fund
ESSN	Emergency Social Safety Net
EUNAVFOR MED	European Union Naval Force – Mediterranean
EURAs	EU Readmission Agreements,
EUROJUST	EU agency dealing with judicial cooperation in criminal matters
EUROPOL	European Police Office
EUROSUR	European Border Surveillance System
FRA	Fundamental Rights Agency
FRONTEX	European agency for operational cooperation at the external borders of the member states of the European Union
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
GRC	Geneva Refugee Convention
ICR	International Rescue Committee
IOM	International Organisation for Migration
MMST	Migration Management Support System
MPF	Migration Partnership Framework
MPs	Mobility partnerships
MRRM	Migration Response and Resource Mechanism
RDPPs	Regional Development and Protection Programme
RPPs	Regional Protection Programmes
SIS	Schengen Information System
SSAR	Solutions Strategy for Afghan Refugees
SVR	Sachverständigenrat deutscher Stiftungen für Integration und Migration [Expert Council of German Foundations for Integration and Migration]
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
VFAs	Visa facilitation agreements

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