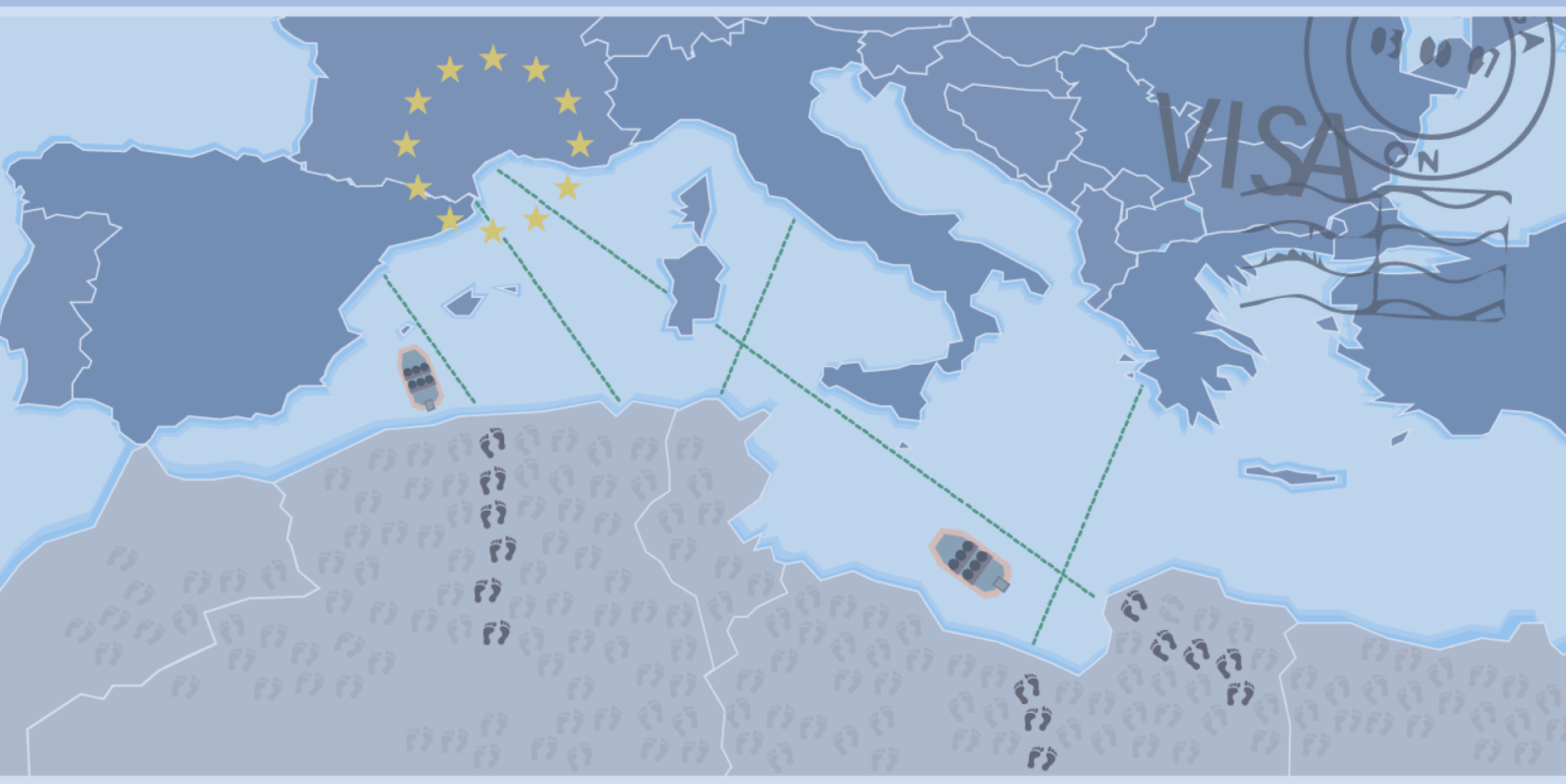
European migration policy at crossroads |
A legal appraisal of proposed regional disembarkation arrangements in the Mediterranean.



Master Thesis

C.K. Pieterson BSc
S2089912

Leiden University
Faculty of Humanities

MA International Relations
Track: European Union Studies
Supervisor: Dr. J.S. Oster

Universiteit Leiden
The Netherlands

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Contents

List of abbreviations

AU	African Union
CAT	Committee against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
EUChFR	Charter of Fundamental Rights of the European Union
HCs	Humanitarian Corridors
ICCPR	International Covenant on Civil and Political Rights
IMO	International Maritime Organization
IOM	International Organization for Migration
LTV	Limited Territorial Validity
MRCCs	Maritime Rescue Coordination Centres
NGOs	Non-Governmental Organisations
RDPs	Regional Disembarkation Platforms
RSD	Refugee Status Determination
SAR	Search and Rescue
SBC	Schengen Borders Code
SRRs	Search and Rescue Regions
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCAT	United Nations Convention Against Torture
UNHCR	United Nations High Commissioner for Refugees

Chapter 1 | Introduction

1.1 Thesis of the study

The European Union [EU] finds itself at crossroads in balancing a restrictive migration policy and living up to its self-bestowed respect for human rights.[1] Without protected entry procedures,[2] third country nationals seeking international protection resort to smugglers to arrange transport across the Mediterranean into Europe.[3] This practice has led to humanitarian crisis and loss of life; the International Organization for Migration [IOM] estimates that a total of 20.059 migrants lost their lives on the Mediterranean Sea since 2014.[4] In 2018, the European Council proposed to explore the concept of 'regional disembarkation platforms' [RDPs] and solve the dichotomy of stemming illegal migration and preventing loss of life in the Mediterranean basin.

This study defends the thesis that the European Council's proposal to establish regional disembarkation platforms is compatible with EU Member States' international human rights obligations but cannot create protected entry procedures for refugees.

1.2 Motive of the study

This study was instigated by the conclusions of the European Council's summit on migration and asylum on 28 June 2018, in which the European Commission and the Council of the EU were called to explore the concept of RDPs [hereafter: 'the proposal']. RDPs would allow for quick disembarkation of migrants saved in Search and Rescue [SAR] operations on the Mediterranean, after which they would be transported to RDPs in the EU and third states. Here, migrants in need of international protection [hereafter: refugees[5]] would be distinguished from irregular migrants. While the former would be offered resettlement options, the latter would be returned to the country of origin.[6]

[1] Heschl 2018; Scipioni, p. 1357–1375.
[2] Procedures that allow a person to claim international protection outside the host state's territory and/or arrange safe conduct to the host state's territory in order to await the processing of such a claim (e.g. by means of a visa or entry permit).
[3] Gallagher & David 2014.
[4] International Organization for Migration 2020.
[5] For reading purposes, persons in need of international protection are henceforth referred to as 'refugees,' this is without prejudice to whether these persons are recognized as such by any competent authority.
[6] European Council, Conclusions, 28 June 2018, EUCO 9/18, para 5-6.

The European Council's proposal is contested. Whereas the idea to save migrants who undertake perilous journeys in order to reach EU Member States' territory was welcomed, the EU was simultaneously accused of dismissing a European issue and making third states responsible for dealing with the reception of migrants bound for Europe.[7]

The African Union [AU] is concerned that the establishment of RDPs 'would be tantamount to *de facto* detention centres and see the establishment of something like modern-day slave markets, with the "best" Africans being allowed into Europe and the rest tossed back.'[8] The establishment of RDPs would 'contravene international law, EU law and the legal instruments of the AU.'[9] Also, non-governmental organisations [NGOs] have argued that the establishment of RDPs is not compatible with EU and Member States' human rights obligations.[10] On the other hand, the European Parliaments' Legal Service was of the view that the proposal is viable, as long as human rights obligations are respected.[11]

Establishment of RDPs would suit an ongoing effort of the EU to regulate immigration outside its territory.[12] In contrast to past national migration policies,[13] EU Member States now collectively engage with third countries in their approach towards migration.[14] Currently, measures such as: visa requirements, carrier sanctions and interdictions at sea prevent illegal migration into the EU.[15] In academia this process is referred to as the externalisation of pre-border immigration enforcement;[16] a trade-off between a perceived pursuit of security and the fundamental values of the EU.[17] On the one hand, states' sovereign right to decide who can enter their territory is strongly connected to a national sense of security. Immigration is therefore often perceived to be negatively correlated to societal issues such as: unemployment, crime, and pressure on social welfare systems.[18] On the other hand, the European Parliament [EP] is of the view that it is Europe's moral, historical and hegemonial responsibility to respect

[7] Ibid, para 2.
[8] Boffey 2019.
[9] Ibid.
[10] European Council on Refugees and Exiles 2018; Caritas Europa 2018; Centre For European Policy Studies 2019; Elcano Royal Institute 2019; Maiani 2018.
[11] European Parliament Legal Service 2018, SJ-0601/18.
[12] Den Heijer 2012, p. 319; Heschl 2018.
[13] European Parliament, Resolution, 12 March 1987, A2-227/86, p. 5.
[14] European Council (Tampere), Conclusions, 15 and 16 October 1999, 200/1/99, para 10-27.
[15] Heschl 2018; Ryan & Mitsilegas 2010.
[16] Den Heijer 2012, p. 3; Ryan & Mitsilegas 2010.
[17] Heschl 2018, p. 15.
[18] Heschl 2018; Baldwin & Wyplosz 2015, pp. 200-210.

human rights and reach out to the well-being of those in need of international protection; a responsibility that is legally imperative.[19]

From the 90s onwards, the EU struggled in dealing with migration. During the 2015 migration crisis, in which more than 1.3 million applications for international protection were made,[20] the EU reinforced its external border and made a deal with Turkey to reduce the influx of (Syrian) refugees. At the same time, the EU saved lives on the Mediterranean and facilitated humanitarian aid.[21] Whereas the crisis was averted, it was not resolved. Since then, the EU targeted the root causes of migration as well as smuggling and human trafficking. Nevertheless, the number of arrivals put pressure on southern Member States, reform of the Common European Asylum System [CEAS] remains dead-locked and emerging right-wing governments criminalise the disembarkation of migrants rescued by civil society organisations.[22] The proposal to establish RDPs -yet again- confirms that when the EU cannot find a solution it looks beyond its external borders.[23] This research aims to contribute to the debate on the EU's externalisation of migration policy.

1.3 Objectives, research question and methodology

Refugees are somehow incentivized to embark on perilous journeys towards the EU. Whereas the European Council's proposal aims at dealing with the consequences thereof, this study first aims to verify that third country nationals who seek international protection in the EU do not have any legal protected entry procedure at their disposal. Secondly, the European Council's regional approach targets third countries in dealing with the EU's self-bestowed values to respect human rights.[24] The direct motive for writing this thesis is to appeal to the concern that the EU is proposing a policy change that would not be compatible with its human rights obligations and would undermine its fundamental values. In this respect, the study's objective is to answer the following question:

[19] European Parliament, Resolution, 12 March 1987, A2-227/86.
[20] Eurostat 2020, (1.322.845 applications in the EU-28 in 2015).
[21] European Commission, 2017.
[22] On 5 August 2019, Law decree no. 53 modified law decree no. 53 of 14 June 2019, increasing punishment for offences and crimes associated with public assemblies. See also: European Centre for Non-profit Law 2019.
[23] Heschl 2018, p. 15; Council of the European Union, Presidency Report, 22 November 2019, 14364/19.
[24] In articles 2-3 TEU.

To what extent would regional disembarkation arrangements be compatible with EU and Member States' international human rights obligations and provide protected entry procedures?

Before focussing on the concept of RDPs, the second chapter first researches what protected entry procedures refugees have at their disposal to evade dangerous options of crossing the Mediterranean clandestinely. Tracing the policy development and legal implications, allows to place the concept of RDPs into a wider context and to create a background against which the proposal's impact on protected entry procedures can be assessed.

The European Council's proposal must be compatible with EU and Member States' international human rights obligations. Therefore, the third chapter establishes a legal framework concerning the rights of refugees and the obligations of states. The framework draws on international refugee and human rights law, caselaw of *inter alia* the Court of Justice of the EU [CJEU] and the European Court of Human Rights [ECtHR] as well as publications from legal scholars.

The fourth chapter delineates the concept of RDPs and operationalizes the European Council's proposal by drawing from the developments of the concept by the European Commission, the Council of the EU as well as the IOM and the United Nations High Commissioner for Refugees [UNHCR].[25] The definition of RDPs is divided into two elements: (i) the search, rescue and disembarkation of migrants and (ii) the external processing of claims of international protection. The operationalization must be regarded as a pre-codification of the European Council's proposal and is necessary to test it against the legal framework presented in chapter three.

In the fifth chapter, this study applies an *ex ante* evaluation method to analyse whether elements i. and ii. of the proposal pose an interference with refugees' human rights and EU Member States' international obligations vis-à-vis persons in need of international protection. This all in the context of the maritime environment of the Mediterranean. Subsequently, it is assessed whether potential interferences can be justified. Chapter six concludes with an answer to the research question.

[25] European Commission 2018b.

The evaluation employs a doctrinal research approach based on legal positivism. This school presupposes the absolute character of the law without questioning its merits or moral implications.[26] The ontological perspective of legal positivism benefits this study because it solidifies the legal environment in which the European Council's proposal -as a concept- can be researched. Hence, the pre-codified proposal can be verified on its compatibility with standing international refugee and human rights law. Another advantage of this method is that the analysis can add to the transparency of EU governance and repair potential information deficits in the current concept.[27]

An academic appraisal of the European Council's proposal can be justified against earlier assessments by potentially biased organisations.[28] In addition to the evaluations by NGOs and think tanks, particular interest is taken into the EP's Legal Service's opinion of the proposal. The Chairman of the EP's Committee for Justice and Civil Liberties requested this analysis with the same view as this research: to verify whether the proposal is compatible with international and Union law.[29] In this regard, this study should be considered an alternative academic review and control vis-à-vis the EP's Legal Service's opinion.

A few critical notes on the applied method cannot be omitted. Firstly, the delineation of the proposal is not free of subjectivity. Whereas key elements within the proposal have been carefully traced to supportive sources and the defined concept of RDPs aims to represent the European Council's intentions, epistemologically, the concept -and this study's definition- of RDPs is not exhaustive.[30] Secondly, the scope of this research is limited to sources of *international* refugee and human rights law. Domestic human rights traditions among EU Member States are therefore not considered.

[26] Hutchinson 2015.
[27] Verschuuren 2009.
[28] Such as: NGOs and think tanks, who could be influenced by lobbies and advocacies.
[29] European Parliament Legal Service 2018, para 1.
[30] Verschuuren 2009, p. 261.

Chapter 2 | Entering the EU and claiming international protection

A claim of international protection can be made on the territory of EU Member States.[31] In addition, the Schengen Borders Code [SBC] stipulates that persons who present themselves at the external border and make a claim for international protection cannot be refused entry.[32] The Qualification Directive distinguishes two different forms of 'international protection'. Asylum is awarded to those who are recognized as refugees under the Geneva Convention. Others, that do not qualify as 'refugees' but still face a real risk of serious harm when returned to their country of origin, can be awarded 'subsidiary protection.'[33] If such a claim is considered, applicants enjoy treatment (housing, education etc.) as laid down in the Reception Directive.[34] Temporary protection is also organised in cases of mass influx.[35] The collective body of (secondary) EU legislation on international protection is referred to as the Common European Asylum System.

As European policy on international protection is connected to the concept of state territory, it is self-explanatory that migrants in search of international protection are incentivized to obtain entry into the EU. This chapter reviews a migrant's options to gain legal entry (protected entry procedures) with a view to understand why migrants embark on dangerous and clandestine journeys to the EU in the first place. Moreover, this review allows for an analysis of the proposal's implications on the development of protected entry procedures. In the first paragraph, the need to harmonize migration and asylum policy is examined. Secondly, legal entry options are discussed. Then the implications of this policy are considered outside the territory of EU Member States.

2.1 Harmonization of migration and asylum policy and legal basis

The 1985 Single European Act required the establishment of the internal market by 1992 and added to the European Economic Community Treaty that 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured […].'[36] The abolishment of internal frontiers necessitated further (neo-

[31] Article 3 Procedures Directive.
[32] Article 13(1) Schengen Borders Code.
[33] Article 2(d-g) Qualification Directive.
[34] Reception Directive.
[35] Council Directive 2001/55/EC of 20 July 2001.
[36] Article 13 Single European Act.

functionalist) integration and resulted in the harmonization of policies on external borders, visa, immigration and asylum.[37]

Harmonization in this policy area is convoluted.[38] With a view to practically establish an area without internal border checks, a select group of Member States agreed on the 1985 Schengen Agreement and the 1990 Schengen Convention, which were subsumed in the legal order of the EU by the Treaty of Amsterdam of 1997. Only after the entry into force of the 2009 Lisbon Treaty, EU competence in the field of border controls, visa, immigration and asylum was realised. In conjunction with article 3 Treaty on European Union [TEU], article 67(2) Treaty on the Functioning of the European Union [TFEU] provides that:

> *'[the EU] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.'*[39]

Due to the sensitivity in regard to state sovereignty, the United Kingdom [UK] and Ireland negotiated an opt-out in this policy area, resulting that these states only participate(d) in certain areas (e.g. the Dublin Regulation).[40] This part of the *acquis* also extends to (non-EU) Schengen Member States: Norway, Iceland, Liechtenstein and Switzerland.

2.2 Entering the EU

Entrance into the EU is arranged in a restrictive policy. Whereas the EU is often regarded and criticised as an impenetrable fortress,[41] legal entry is possible upon a variety of conditions of which the country of origin and the purpose and length of the intended visit are the most important.

In principle, all third country nationals wishing to cross the external border of the Schengen Area must meet the entry conditions of the SBC,[42] comprising *inter alia* the possession of a

[37] Peers 2016, p. 69-70.
[38] Chalmers, Davies & Monti 2014, p. 519; Peers 2016.
[39] Article 67(2) TFEU, which is further developed in Articles 77-80 TFEU.
[40] Peers 2016, pp. 26-35.
[41] Ibid, p. 1255.
[42] Article 6(1) Schengen Borders Code.

valid visa.[43] An important distinction is made between short-term stays (up to 90 days)[44] and long-term stays (exceeding 90 days). The former being an EU-competence, whereas the latter is a shared competence.

Third country nationals can acquire entry into the EU in a variety of ways, for instance by acquiring a short-stay visa for tourism, family visits or business purposes, or a long-stay visa/residence permit for family-reunification, work or study. Refugees' entry options are however limited, resulting in their attempts to enter clandestinely. The following paragraphs discuss the legal entry options with a particular focus on their effects on refugees.

2.2.1 Short stay visits (up to 90 days)

Admission of a third-country national would allow this person to move freely in the entire Schengen Area. Hence, in 1990 a common agreement on a uniform Schengen visa was put in place. Applications for visa can be made at Member States' diplomatic representations and external service suppliers. If the (main) destination Member State is not represented, applicants can resort to other EU Member States' diplomatic missions. The harmonization process regarding visa was completed when the EU adopted a Visa Code in 2009.

Regulation EU 2018/1806 lays down which third countries are subject to visa requirements. The European Asylum Support Office [EASO] reported that in 2019, a quarter of all applications for international protection were made by third-country nationals who can enter the Schengen Area visa-free.[45] Therefore, it is no surprise that most third countries whose nationals are subject to visa requirements are primarily asylum countries; mainly located in Asia, Africa and South America.[46] Whereas EU Member States retain a large margin of appreciation in refusing the issuance of a visa,[47] for instance when 'there are reasonable doubts as to [the applicants'] intention to leave the territory of the Member States before the expiry of the [requested] visa,'[48] the CJEU confirmed in *Koushkaki*, that visa must be issued if all requirements are fulfilled.[49] It can therefore be argued that a visa is declaratory right.

[43] If required by Regulation (EU) 2018/1806.
[44] Peers 2016, p. 173.
[45] European Asylum Support Office 2019.
[46] Peers 2016, p. 232; European Commission 2019.
[47] Article 32(1)(a) Visa Code.
[48] Article 32(1)(b) Visa Code.
[49] Peers 2016, p. 203; CJEU, Judgement of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862.

In addition to the Visa Code, some third country nationals are facilitated with entry visa (for short and long-term visits) due to their family ties with EU citizens that exercise their right of free movement.[50] Also, the 2017 *Chavez-Vilchez* ruling of the CJEU established a derivative right of residence and -as interpreted by the Netherlands- a right of entry for a third country national who is a primary carer of a minor EU national.[51]

Although visas are in general issued to give access to the Schengen Area, article 25 of the Visa Code provides Member States with an option to issue a visa with limited territorial validity [LTV] in the case of the following exceptional circumstances: humanitarian grounds, reasons of national interest or international obligations. According to Peers, taking into account that visa must be issued when the conditions are satisfied, in analogy there is an effective right to a humanitarian visa; a contested travel option for refugees.[52]

Unlike the term 'short-stay visa' suggests, (humanitarian) visas can be used by persons to acquire long-term or permanent residence in the EU. Member States are therefore reluctant to issue these kind of short stay visas to persons who have such intentions.[53] It must be noted that obtaining a short stay visa is the most practical way of acquiring legal entry into the EU.

Due to the precondition that anyone wishing to claim international protection in the EU must be present on the territory of one of its Member States or present him- or herself at the external border,[54] (resourceful) third country nationals with such intentions could apply for a short-stay visa.[55] Yet, consular officers are tasked to act as a gatekeeper and filter out those applicants who intend to abuse a short-stay visa. After all, the Visa Code was designed to facilitate visa for short stay periods not exceeding three months.[56]

[50] Article 5(2) Citizens' Rights Directive.
[51] CJEU, Judgement of 10 May 2017, *Chavez-Vilchez and others, C-133/15*, EU:C:2017:354. However, the carer's refusal of entry/residence must compel the minor EU national to leave the territory of the EU.
[52] Peers 2016, pp. 179, 203.
[53] See section 2.2.1.1.
[54] Article 3 Procedures Directive; Articles 3, 4, 12 and Annex VI points 1.1.4.2.(a) and 1.1.4.3.(a) Schengen Borders Code.
[55] Peers 2016.
[56] Article 32(1)(b) Visa Code.

2.2.1.1 Humanitarian visa

Humanitarian visa deserve more attention within the scope of this study. As Peers suggested, an effective right to a humanitarian visa could arise when all requirements set out in the Visa Code are met.[57] Indeed, the Visa Code even provides that applications for LTV humanitarian visas can be admissible when standard admissibility criteria are not met.[58] Yet, issuance of LTV humanitarian visa would *inter alia* require the presence of humanitarian grounds. The European Commission's handbook for the processing of visa applications does not list these grounds as the LTV visa are issued at Member States' discretion.[59] Presumably, refugees could qualify to obtain such a visa on the merits of their escape from exposure to inhuman or degrading treatment or to a well-founded fear of being persecuted.[60] Italy and France have -in collaboration with religious organisations- confirmed this assumption by setting up Humanitarian Corridors [HCs]. These states facilitate the most vulnerable refugees with an LTV humanitarian visa to protected entry to their territories where beneficiaries subsequently lodge their applications for international protection.[61] Whether the Visa Code therefore effectively provides refugees with a right to a humanitarian visa was adjudged in the 2017 ruling *X, X v. État belge* of the CJEU.[62]

In this case an Orthodox Christian Syrian family applied for an LTV humanitarian visa at the Belgian Embassy in Lebanon. In the appeal against the decision to reject these applications, the referring Court asked the CJEU whether Article 25 Visa Code must be interpreted in such a way that the Belgian authorities were obliged to issue an LTV humanitarian visa in light of Belgium's international obligations.[63]

Advocate General Mengozzi advised the Court that the applications for LTV humanitarian visa were treated as such in the first place, as the applications were considered admissible[64] and rejected in line with the procedure set out in the Visa Code,[65] triggering the applicability of the

[57] Peers 2016, pp. 179, 203.
[58] Respectively articles 16(6), 19(4) and 35(2) Visa Code.
[59] European Commission, 2019.
[60] Spijkerboer 2018, p. 216–239; European Parliament 2016; CJEU, Opinion of Advocate General Mengozzi of 7 February 2017, *X, X v. État belge*, Case C-638/16 PPU, EU:C:2017:93.
[61] University Of Sussex and Comunità Di Sant'Egidio 2017.
[62] CJEU, Judgement of 7 March 2017, *X, X, v. État belge*, C-638/16 PPU, EU:C:2017:173.
[63] Articles 4 and 18 ECHR; Article 33 Geneva Convention.
[64] Article 19 Visa Code.
[65] Article 23(4)(c) in conjunction with article 32(1)(b) Visa Code.

Charter of Fundamental Rights of the European Union [EUChFR].[66] Therefore, the applicants could not be sent back to Syria nor remain in Lebanon. The Belgian authorities claimed that the applicants were going to over-stay their short-stay visa, justifying a rejection in line with article 32(1)(b) Visa Code. However, Mengozzi argued that this article is without prejudice to the special procedure laid down in article 25 and therefore not an obstacle in issuing an LTV humanitarian visa.[67]

The Advocate General concluded that Member States must comply with the provisions of the EUChFR. Therefore, they are under a (positive) obligation to issue an LTV humanitarian visa if there are substantial grounds to believe that a refusal, depriving the applicant of a legal route to seek international protection in a Member State,[68] will have the direct consequence of exposing the applicant to treatment prohibited by article 4 EUChFR.[69]

Conversely, the CJEU ruled that the objective of the Visa Code is to 'establish the procedure and conditions for issuing visas for […] stays […] not exceeding 90 days in any 180-day period.'[70] As the Syrian family explicitly intends to apply for asylum once on Belgium territory -therefore anticipating a stay beyond 90 days- the Court ruled that the applications cannot fall within the scope of the Visa Code (or EU law in general) but are governed under national law. Consequently, the EUChFR is not applicable, meaning that the CJEU does not have the competence to rule whether Belgium must be bound by obligations ensuing from the Charter.[71] Moreover, the CJEU noted that another conclusion to the question above would mean that 'Member States are required […] to *de facto* allow third country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country.' This could not have been the intention of the establishment of the Visa Code.[72]

To date, EU Member States must live up to the CJEU's conclusions in *X, X v. État belge.* Therefore, a humanitarian visa cannot be issued when the sole intention of the applicant is to apply for international protection. However, the described practice of establishing HCs

[66] Article 51(1) explains that the EUChFR is only applicable when Member States are implementing EU law.
[67] Article 6 Schengen Borders Code; Opinion, *X, X v. État belge*, paras 116, 118 and 125.
[68] Opinion, *X, X v. État belge*, para 176.
[69] Ibid, paras 37-160.
[70] *X, X, v État belge*, para 41.
[71] Ibid, para 45.
[72] Ibid, para 49.

contradicts this conclusion and also finds support in other types of extraterritorial options to apply for international protection. Moreover, as the applicants in this case have exhausted their domestic remedies, the question whether the refusal of an LTV humanitarian visa is compatible with human rights obligations is currently under review by the ECtHR.[73]

2.2.2 Long-term residence (exceeding 90 days)

The issuance of long-term visas and/or residence permits is a competence retained by Member States and laid down in a differentiated array of requirements. Whereas e.g. France provides visas for a maximum stay of one year, others such as: Italy, Spain, Hungary, Sweden and the Netherlands, require applications for residence permits for any stay beyond 90 days.[74] In the Netherlands, a long-stay visa must therefore be regarded as a *de facto* residence permit.[75]

Yet, the TFEU provides for a legal basis to 'adopt measures [for] the conditions of entry and residence of long-term visas and residence permits.'[76] In this regard, rights have been harmonized for third-country nationals who already have acquired legal residence for more than five years in a Member State, as well as for family reunification.[77] The Family Reunification Directive provides for favourable options for recognized refugees to be reunited with their third country national family members. Therefore, the Directive is often taken into account in refugees' itineraries towards Europe. Regularly, one person (sometimes an unaccompanied minor) is sent ahead to acquire international protection to subsequently establish a right for family members to enter Europe. According to article 13 of the Directive, Member States are required to facilitate beneficiaries with an appropriate entry visa.

As conditions for long-term visas/residence permits are connected to certain purposes (such as study and business) and often require certain language skills and sufficient means of subsistence, this kind of legal option to acquire entry to the EU is disregarded by refugees. Yet,

[73] ECtHR, *M.N. and Others v. Belgium*, 3599/18, (pending).
[74] See Member States' national websites on entry requirement: France: https://france-visas.gouv.fr/fr_FR/web/france-visas/visa-de-long-sejour; Spain: http://www.exteriores.gob.es/Consulados/LOSANGELES/en/InformacionParaExtranjeros/Pages/VisadosDeLargaDuracion.aspx; Italy: https://consmelbourne.esteri.it/consolato_melbourne/en/per-chi-si-reca-in-italia/italy-s-national-visa.html; Sweden: https://www.migrationsverket.se/English/Private-individuals/Visiting-Sweden/Visit-Sweden-for-more-than-90-days.html; Netherlands: https://www.nederlandenu.nl/reizen-en-wonen/visa-voor-nederland/visum-lang-verblijf-mvv.
[75] Rijksoverheid 2020.
[76] Article 79(2)(a) TFEU.
[77] Council Directive 2003/86/EC; Family Reunification Directive.

in the past Member States did issue national long-term visas/residence permits in regard to international protection,[78] and some Member States even hold on to this practice to date.

2.3 Extraterritorial implications of EU asylum policy.

A claim to international protection is examined after an applicant enters the territory of EU Member States. Yet, *X, X v. État belge* already hinted to extraterritorial alternatives. Whether or not a right to a humanitarian visa exits, states can also offer protection outside their territories.

First, the SBC stipulates that refugees who present themselves at the external border of the EU cannot be refused entry.[79] Whereas at first glance this provides refugees with an option to acquire protection from outside the territory of EU Member States, in practice it is observed that external border crossing points cannot be reached for this purpose.[80]

Secondly, the right to grant asylum is an act of state sovereignty and can therefore also be exercised in other extraterritorial situations.[81] Due to the inviolability of states' embassies and consulates, states can offer 'diplomatic asylum' abroad.[82] The *Asylum Case* confirms that 'diplomatic asylum withdraws [an individual] from the jurisdiction of the territorial state.'[83] Yet, this is often of a temporary nature. Without consent of the territorial state to arrange safe-conduct out of the country, refugees are confined to the premises of diplomatic missions. In this regard, Den Heijer refers to 'the overflowing of West German embassies in Prague and Budapest by East-German citizens in 1989, who demanded passage to the west.'[84] The limited space inside diplomatic missions therefore renders 'diplomatic asylum' unpractical for migrants who want to claim protection from EU Member States.

Thirdly, competence to issue long-term visa is retained with EU Member States. Therefore, Austria, France, the Netherlands, Spain, Denmark, Switzerland and the UK issued long-stay

[78] Hanke, Wieruszewski & Panizzon 2018, p. 1361–1376; UNHCR 2014; Staatscourant, Tussentijds Bericht Vreemdelingencirculaire 2003/33, Verzoeken om asiel op de diplomatieke posten in het buitenland.
[79] Schengen Borders Code; Qualification Directive.
[80] ECtHR, Judgement of 13 February 2020, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15. para 218; Bauomy & Jamieson 2020.
[81] Article 1 Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967; Den Heijer 2012, p. 116.
[82] Article 22 Vienna Convention on Diplomatic Relations.
[83] ICJ, Judgement of 20 November 1950, *Affaire du droit d'asile (Colombie v. Pérou) [Asylum case]*, paras. 274-275.
[84] Den Heijer 2012, p. 120.

visas in order to facilitate asylum applications on their respective territories until 2002.[85] Yet, in 2003, the Netherlands and Denmark abandoned this policy and in 2012 Switzerland followed suit.[86] To date the only remaining EU Member States that maintain this option are France, Spain and Finland.[87] It can therefore be concluded that this decrease of access to international protection in the EU and Schengen Area suits the ongoing trend of restrictive immigration policy, but not *per se* through the extraterritorialisation of migration control.

Lastly, the UNCHR's resettlement programme is another way in which refugees can legally obtain entry and residence in EU Member States. However, these are bilateral agreements between some Member States and UNHCR itself, subject to quotas set by participating states. By means of special selection missions, EU Member States identify most vulnerable refugees (e.g. women and victims of violence) in an asylum country. These migrants are subsequently welcomed in the EU. In 2018, a total of 22.631 refugees were resettled to sixteen EU Member States.[88] According to UNHCR, less than one percent of all refugees are resettled to third countries.[89] It must be noted that this resettlement programme differentiates from the HCs (discussed in section 2.2.1.1) as refugees are granted 'Refugee Status' directly by UNHCR, before entering a Member States' territory.

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[85] Noll, Fagerlund & Liebaut 2002, p. 252.
[86] Advisory Committee On Migration Affairs, 2010; Hanke, Wieruszewski & Panizzon 2018, p. 1361–1376; Noll, Fagerlund & Liebaut, 2002.
[87] For Spain: Law 12/2009 of 30 October 2009 on asylum and subsidiary protection, section 38. France: https://www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-de-l-etranger, and Finland: https://migri.fi/en/asylum-in-finland. Schengen Member States that do not provide protected entry procedures: Czech Republic: Act No. 325/1999 Coll. on Asylum. 11 November 1999. Norway: https://www.udi.no/en/want-to-apply/protection-asylum/protection-asylum-in-norway/; Sweden: https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Asylum-regulations.html; Denmark: https://www.nyidanmark.dk/enGB/Applying/Asylum/Adult%20asylum%20applicant; Germany: https://www.berlin.de/fluechtlinge/en/information-for-refugees/residence/; Belgium: https://www.fedasil.be/en/asylum-belgium; Luxembourg: https://guichet.public.lu/en/citoyens/immigration/cas-specifiques/protection-internationale/demande-protection-internationale.html: Portugal: https://www.sef.pt/pt/Documents/Folheto%20Informação%20Proteção%20Internacional.pdf:Austria: https://www.bfa.gv.at/files/broschueren/Informationsbroschuere_Asylverfahren_in_Oesterreich_EN.pdf: Hungary: http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=521&Itemid=728&lang=en; Ireland: http://www.inis.gov.ie/en/INIS/Pages/apply-for-asylum; Romania: http://igi.mai.gov.ro/en/content/submitting-application-asylum; Italy: https://www.interno.gov.it/sites/default/files/allegati/la_guida_in_inglese.pdf; Iceland: https://utl.is/index.php/en/how-to-apply; Estonia: https://www2.politsei.ee/dotAsset/311132.pdf; Latvia: https://www.pmlp.gov.lv/en/home/services/asylum-seeking/the-procedure-of-granting-asylum.html; Lithuania: https://www.migracija.lt/noriu-gauti-prieglobstj-lr?inheritRedirect=true. No information was available on Bulgaria, Cyprus, Croatia, Liechtenstein, Slovakia, Slovenia and Malta.
[88] UNHCR 2020a.
[89] UNHCR 2020b.

2.4 Interim conclusions

As European asylum policy equates to territorial protection, this chapter described the ways in which an asylum seeker can legally enter the territory of EU Member States. It can be concluded that harmonization efforts have resulted in a restrictive EU immigration policy that generally precludes third country nationals from extraterritorial options for asylum as well as protected entry procedures. First, the EU targets asylum countries by subjecting their nationals to visa requirements. Refugees' efforts to use this requirement to their benefit was turned down in the CJEU's landmark decision *X, X v. État belge*. Indeed, short stay LTV humanitarian visa cannot be issued for the sole purpose of applying for asylum. Secondly, in terms of long-stay visas, options to apply for international protection from outside the EU have significantly decreased. Thirdly, diplomatic asylum can also not be considered a viable extraterritorial alternative, as protection is offered temporarily and (in practice) confined to the premises of diplomatic missions.

Therefore, options to claim protection extraterritorially are limited to requests made at the external borders or through Member States' bilateral resettlement programmes (in collaboration with UNHCR). Furthermore, some Member States organise HCs and provide refugees with humanitarian LTV visa in order to make a claim to protection in their respective territories. Of course, the latter is incongruous with the visa regime according to the conclusion of *X, X v. État belge.*

So even though there are a few alternatives to the territorial asylum policy of the EU, these options cannot represent a practical alternative for most refugees. Hence, practical options to acquire international protection from EU Member States outside their territories are (very) limited. Naturally, this explains refugees' incentive to embark on dangerous voyages towards EU territory via the Mediterranean Sea. Although this causality could be assumed axiomatically, this chapter has explored refugees' access to protected entry procedures and the policy framework on which the European Council has based its proposal. This chapter therefore offers background understanding to review the proposal and to establish -in regard to the research question- whether the proposal would provide for (alternative) protected entry procedures.

Chapter 3 | Legal obstacles

The research question seeks to test the European Council's proposal to establish regional disembarkation arrangements against the EU and Member States' international human rights obligations. In this regard, this chapter examines the interplay between a refugees' rights and states' obligations in the maritime environment of the Mediterranean.

3.1 State responsibility

A state is sovereign, it exercises exclusive control in regard to its territories, including territorial waters,[90] and the people that live there.[91] A state cannot exercise its jurisdiction in another state as it would impede on that state's sovereignty. Whereas states' responsibility vis-à-vis other states is codified by the International Law Commission,[92] states also bear responsibilities towards individuals under international law. In this regard, an act or omission of that state must be attributable towards a state and constitute a breach of an international obligation.[93] Furthermore, states can also be held responsible when they assist or direct another state in the violation of its international obligations.[94] On their way from the African continent to Europe, migrants pass through different jurisdictions. The appraisal of rights and obligations therefore starts in the country of departure.

3.2 The right to leave

The International Covenant on Civil and Political Rights [ICCPR] sets out in article 12(2) that 'anyone has the right to leave any country, including his own, and to return to his country.'[95] Therefore, also (smuggled) migrants found at sea have a right to leave their own country. However, this right is not absolute.[96] Extraterritorial border security such as maintaining a visa regime infringe on the right to leave, but can be justified if interests of national security, public safety, health or protection of morals are at stake, as long as the interference is non-

[90] A state's territorial water do not exceed further than 12 nautical miles from a state's coastline (baseline).
[91] Nollkaemper 2019, p. 59.
[92] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[93] Article 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts.
[94] Articles 16 and 17 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.
[95] Article 12(2) ICCPR, see also article 13(2) UDHR, article 5(d)(ii) CERD, article 10(2) CRC, article 8(1) Migrant Workers Convention and Article 2(2) of Protocol 4 ECHR.
[96] Council Of Europe, 2013.

discriminatory, proportionate and provided for by law.[97] The ECtHR ruled for instance in *Xhavara vs. Italy* that Italy's actions to prevent an Albanian boat with migrants from reaching its territory were not a violation of the right to leave, but directed at preventing entrance into Italy.[98]

3.3 Non-refoulement

The starting point of a state's international obligations and the appraisal of refugees' rights is the principle of *non-refoulement*. This principle prohibits states from returning a person to territories where his/her life or freedom would be threatened and can also be found in EU primary law.[99] As the principle of non-refoulement is established within international refugee law[100] and international human rights law,[101] it is applicable in different situations.

3.3.1 The right to seek and enjoy asylum

Article 14 of the Universal Declaration of Human Rights [UDHR], establishes that everyone has the right to seek and enjoy in other countries asylum from persecution.[102] This right is also protected in the EUChFR.[103] There is however no entitlement to asylum itself. Under the Geneva Convention it is the prerogative of states as well as UNHCR to determine whether an asylum seeker meets the criteria in order to receive Refugee Status. One of the preconditions to be recognized as a refugee is a transnational element; one must be outside one's country of origin. Furthermore, this right is declaratory; one is recognized because one is a refugee, one does not become a refugee because one is recognized as such.[104]

The right to seek asylum is, within international refugee law, strongly connected to the prohibition of non-refoulement.[105] As set out in article 33(1) Geneva Convention: 'no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,

[97] Article 12(3) ICCPR, see also Gallagher Ao & David 2014, p. 156; House of Lords, Judgement of 9 December 2004, *European Roma Rights Centre*, [2004] UKHL 55.
[98] ECtHR, Judgement of 11 January 2001, *Xhavara and others v. Italy and Albania*, no 39573/98, para 3.
[99] Article 78(1) TFEU; article 19 EUChFR.
[100] Article 33 Geneva Convention.
[101] International human rights law has made non-refoulement an integral component of the prohibition of torture and cruel, inhuman or degrading treatment. For applicable human rights instruments see paragraph 3.3.2.
[102] Article 14 (1) UDHR.
[103] Article 18 EUChFR.
[104] UNHCR, 1950, 2011, 2020.
[105] The principle of non-refoulement is laid down in refugee law, most notably in article 33(1) Geneva Convention art. 33(1), as well as human rights law, see: art. 19 (2) EUChFR and article 3 ECHR.

religion, nationality, membership of a particular social group or political opinion.' Although, article 33(1) applies to refugees, it is also applicable to those seeking asylum who have not yet had their status declared.[106] The words *'in any manner whatsoever'* confirm that no derogation from non-refoulement is allowed, except for those described in article 33(2). Moreover, UNHCR is of the view that the principle of non-refoulement constitutes a rule of customary international law. Meaning that the principle is binding to all states (even those who are not a party to the Convention).[107] It must be noted however that this assertion is partly sustained with soft law (publications of alleged 'activist' legal scholars).[108]

Whereas the principle of non-refoulement is regarded as part of customary international law, the principle itself is considered to be absolute under international human rights law. 'States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment.'[109] The principle of non-refoulement in human rights law is derived from a set of international and regional human rights (instruments).[110] As this research confines itself to the European continent, only rights relevant within (the vicinity) of this region are discussed here.

3.3.2 The right to life and the prohibition of torture

The right to life[111] and the prohibition of torture, stipulated in the United Nations Convention against Torture [UNCAT] as well as other sources of human rights law,[112] strengthen the principle of non-refoulement in a more conclusive way than under international refugee law as it is regarded as *jus cogens*, or a peremptory norm from which no derogation is permitted.[113] Although, non-refoulement is not literally laid down in the European Convention on Human Rights [ECHR], the ECtHR did recognize this principle in *Soering v United Kingdom* in a derivation from the Convention's prohibition on torture.[114] Other sources such as the ICCPR and the Convention on the Rights of the Child [CRC] follow the same reasoning. Whereas the

[106] UNHCR, 2007, para 6.
[107] UNHCR, 2007, para 15.
[108] Gallagher & David 2014, pp. 123, 267.
[109] UNHCR, 2007, para 17.
[110] See also Declaration on the Human Rights of Individuals who are not nationals of the country in which they live.
[111] Article 2 ECHR, article 2 EUChFR, article 6 ICCPR. See also article 4 Banjul Charter.
[112] Article 3.1 UNCAT, articles 6-7 ICCPR, article 22 CRC, article 3 ECHR, articles 4 and 19(2) EUChFR and article 16 ICAPED.
[113] Gallagher & David 2014, p. 176.
[114] ECtHR, Judgement of 7 July 1989, *Soering v. The United Kingdom*, no. 14038/88. para 88. And confirmed in ECtHR, Judgement of 13 February 2020, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15. para 188.

positive obligation to protect the right to life and the prohibition of torture are attributable to states, Gallagher and David point out that the Qualification Directive as well as the caselaw of the ECtHR and the UN Committee against Torture [CAT] stipulate that well-founded fear from non-state actors also falls within the scope of the principle of non-refoulement.[115]

3.3.3 Other rights

In addition to the UNCAT, non-refoulement is also connected to other human rights and state obligations. The ICCPR prohibits the expulsion of an alien who is lawfully present in a state party.[116] Whereas states retain a sovereign right to expulse those who have received a negative decision on their residence/asylum application, they must respect non-refoulement. Collective expulsion of aliens is however prohibited; strengthening the principle of non-refoulement and safeguarding states' individual examination of cases.[117]

The prohibition of slavery and forced labour[118] is a part of *jus cogens* and contributes to non-refoulement as persons cannot be returned to territories where they might be subjected to these practices, which are also criminalized in the Trafficking Protocol and linked to the crime of migrant smuggling.[119] The IOM argues that a possible violation of the prohibition of slavery and forced labour is however more likely to fall within the scope of the prohibition on inhuman or degrading treatment.[120]

Furthermore, the right to privacy and family life, applicable to everyone, may become relevant for migrants, especially when children are involved.[121] In this context, a migrant cannot be returned to another state if this would amount to a split-up of core families (when e.g. some family members are allowed residence in the EU and others are not). Yet, the Human Rights Committee as well as the ECtHR established that this right is not absolute, an ordered return can therefore be a proportionate interference with migrants' rights to privacy and family life.[122] However, when minors are involved, states must always follow the 'best interest of the child'

[115] Gallagher & David 2014, pp. 178–179.
[116] Article 13 ICCPR, also laid down in other regional treaties: article 22(9) ACHR, article 12(5) Banjul Charter. See also article 32 Geneva Convention.
[117] Article 19(1) EUChFR, Article 4 Protocol 4 ECHR; Council Of Europe 2020, p. 5.
[118] Article 8 ICCPR, article 4 ECHR and article 5 EUChFR.
[119] Obokata in Ryan & Mitsilegas 2010, p. 152; Trafficking Protocol.
[120] International Organization For Migration 2014, p. 7; ECtHR, Decision of 19 January 1999, *Mohammed Lemine Ould Barar v. Sweden*, 42367/98, para 1.
[121] Article 17 ICCPR, article 8(1) ECHR, article 7 EUChFR.
[122] Gallagher & David 2014, pp. 190 and 709.

doctrine.[123] Therefore, immigration law must not prevail over the best interest of the child. Furthermore, children may not be subjected to a risk of under-age recruitment by the military and non-state actors.[124]

Lastly, the right to an effective remedy and to a fair trial[125] could trigger the non-refoulement principle. However, this right must always be considered with another violation of human rights. The IOM observed that a breach of the right to an effective remedy often is related to extradition to states that execute the death penalty.[126] But even here, the ECtHR states that a violation of this right must be 'so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.'[127] Therefore, its application in relation to the principle of non-refoulement, is (still) undeveloped.[128]

3.3.4 Concluding remarks on non-refoulement

This section described that the principle of non-refoulement is constituted by different international treaties. However, regardless of the objectives of these treaties, they all amount to one single principle: non-refoulement. As mentioned earlier, this principle is laid down in EU primary law. Peers observes that the Lisbon Treaty strengthened the Unions' obligations therein in two ways.[129] Article 78(1) TFEU requires compliance with the principle of non-refoulement, whereas the previous wording required 'accordance' with this principle. In addition, the EUChFR was given treaty-status, incorporating it into EU primary law. Therefore, the EU as well as its Member States must not only respect non-refoulement under their international treaty obligations and customary law (or *jus cogens*), but also under European law. In other words, the principle of non-refoulement now constitutes an integral part of Union law from which no derogation can exist.

3.4 International law of the sea

As the European Council's proposal specifically targets the Mediterranean, this section discusses the legal implications of maritime environments. In 1609, the Dutch jurist Hugo

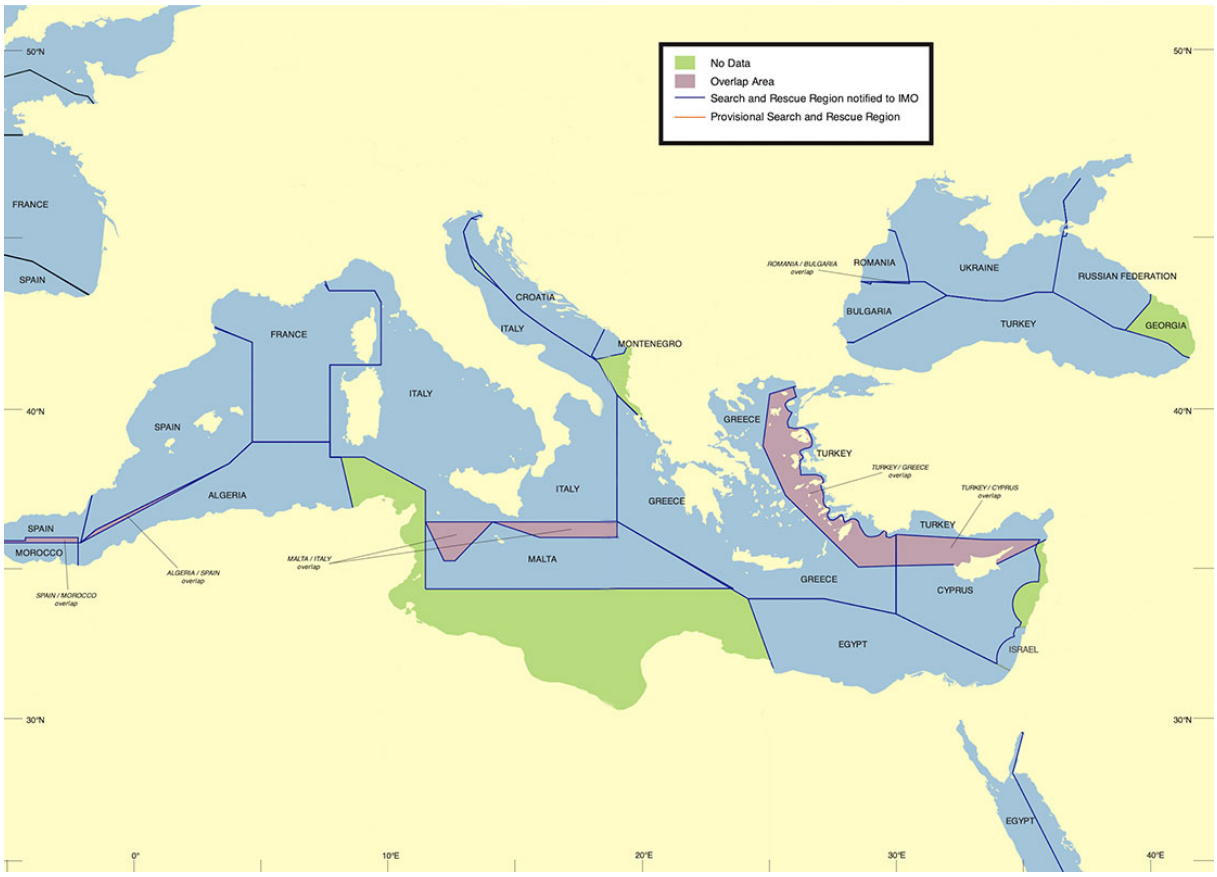
[123] Ibid, p. 571.
[124] CRC 2005, specifically refers to articles 6, [right to life] and 37 [torture or other cruel, inhuman or degrading treatment or punishment, liberty], but does not limit the application of non-refoulement to those rights.
[125] Article 13 ECHR, article 47 EUChFR and article 2(3) ICCPR. See also article 16 Geneva Convention 'Access to Courts'.
[126] International Organization For Migration 2014, p. 7.
[127] ECtHR, Judgement of 17 January 2012, *Othman v. the United Kingdom*, no. 8139/09; Council Of Europe, 2019a, p. 95.
[128] International Organization For Migration 2014, p. 7.
[129] Peers 2016, p. 240.

Grotius published his book *Mare Liberum* and promulgated that the sea cannot be owned by a state but constitutes international territory; a principle that has developed ever since.[130]

Under international law of the sea, a state party is obliged to require the master of a ship flying its flag to 'render assistance to any person found at sea in danger of being lost' and to 'proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably expected.'[131] Even though, the duty to render assistance is carried out by shipmasters, the obligation is attributable to states and is absolute.[132] Therefore, the geographic location of a rescuing ship (e.g. the high seas or a state's territorial waters) cannot absolve any state party (acting through a shipmaster) of this duty. Supplementary to this principle, coastal states are required to set up search and rescue services.[133] Furthermore, the 1979 Search and Rescue [SAR] Convention led to the establishment of Search and Rescue Regions [SRRs], in which coastal states would be responsible for deploying SAR missions.[134] However, disagreement on the division of these regions did not result into the envisaged system, especially in the Mediterranean (see figure 1).

[130] Grotius 1916.
[131] Article 98 UNCLOS; Regulation 33 SOLAS; SAR; Article 12(1) Convention on the High Seas; Article 10 Salvage Convention; Convention on Facilitation of International Maritime Traffic.
[132] Gallagher & David 2014, pp. 84, 448, also regarded as a part of customary law see p. 113.
[133] Article 98 UNCLOS; Regulation 33 SOLAS; SAR; Article 12(1) Convention on the High Seas; Article 10 Salvage Convention; Convention on Facilitation of International Maritime Traffic.
[134] Gallagher & David 2014, p. 449. For SSRs see: https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf.

Figure 1: Search and Rescue Regions in the Mediterranean.



Source: Adaptation from the International Maritime Organisation.

The SAR Convention also requires states, 'responsible for search and rescue regions in which […] assistance is rendered, [to ensure that survivors] are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case.'[135] In the past, incidents occurred in which shipmasters rescued persons at sea, but were subsequently denied authority to disembark these persons by coastal states.[136] Therefore, the definition of 'place of safety' was elaborated in 2004.[137] Importantly, a place of safety cannot be the assisting ship. Indeed, 'the ship should be relieved of [the responsibility to render assistance] as soon as alternative arrangements can be made.' A place of safety constitutes 'a location where rescue operations are considered to terminate; […] it is […] a place where survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met [and] transportation arrangements be made for their

[135] Regulation 33 1-1 SOLAS; Article 3.1.9. SAR.
[136] Khan 2003, p. 13; Pugash 1977.
[137] Chapters 2, 3 and 4 of the Annex to the Convention were amended. See: IMO Guidelines on the Treatment of Persons Rescued at Sea, paras. 6.12-6.18.

next or final destination.'[138] In the particular circumstances of refugees, the SAR Convention stipulates that states 'need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened.'[139] In 2009, the International Maritime Organization's [IMO] Facilitation Committee stipulated -in their non-binding guidelines- that coastal states responsible for the SRR should accept the disembarkation of rescued persons when other swift solutions cannot be arranged.[140]

Although custom sees that rescued persons at sea are often disembarked in the next port of call,[141] all of the above, does not constitute a positive obligation for a state to allow disembarkation of survivors rescued in their respective SRRs on their own territories. SAR Convention amendments have not been accepted by all state parties, especially those with large SRRs such as Malta.[142] Moreover, some states even criminalise the disembarkation of migrants or try to dissuade shipmasters of entering their territorial waters (sometimes by threatening them with criminal charges in regard to smuggling of irregular immigrants).[143] Even though, '[o]bligations under international human rights law may compel the state with 'ultimate' or 'primary' responsibility for […] migrants to ensure disembarkation,' designated states often do not accept that they are responsible and/or refuse to comply.[144]

3.5 The extraterritorial implications of human rights

Whereas this chapter has outlined that states must respect the principle of non-refoulement, special attention must be given to a state's responsibility in a maritime environment like the Mediterranean.

The prohibition of non-refoulement in international refugee law has not been universally applicable in terms of geographic location. In *Sale v. Haitian Centers Council,* The United States Supreme Court rejected the notion of the extraterritorial applicability of non-refoulement

[138] IMO Guidelines on the Treatment of Persons Rescued at Sea, paras. 6.12-13.
[139] IMO Guidelines on the Treatment of Persons Rescued at Sea, para 6.17; Gallagher & David 2014, p. 458.
[140] Den Heijer 2012, p. 247, referring to IMO 2009, p. 2.4.
[141] Giuffré 2012, p. 706; Den Heijer 2012, p. 247; UNHCR, 1981, para 3.
[142] Coppens 2013, p. 94–95; Gallagher & David 2014, p. 458.
[143] On 5 August 2019, (Italian) Law decree no. 53 modified law decree no. 53 of 14 June 2019, increasing punishment for offences and crimes associated with public assemblies. See also: Gallagher & David 2014, pp. 460-461; European Centre for Non-Profit Law 2019; UNHCR 2012.
[144] An example here is the 'Budafel tuna pen incident', in which 27 migrants clung onto a floating tuna fishing pen, within the SAR region of Libya. The Maltese ship 'Budafel' that found the migrants alerted the Libyan coast guard. As Libya disputes the SAR system, it did not come to aid. In turn, the Budafel refused to safe the migrants in fear of them assuming control over the ship. Also, the Maltese authorities refused the Budafel to tow the migrants to Malta, as the ship was found outside its SAR region. These migrants were eventually saved by the Italian coastguard. See also: Aalberts & Gammeltoft-Hansen 2014; Gallagher & David 2014, p. 457.

on the high seas and ruled that only upon entering US territory (including territorial waters) one could appeal to the Geneva Convention.[145] Also, in the *European Roma Rights Centre* case, the House of Lords ruled that a person can only be recognized as a refugee outside his or her country of origin.[146] Yet, as state sovereignty is closely related to exercising jurisdiction,[147] the *Lotus* case established that states are not prohibited from 'extending the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [as long as a state does] not overstep the limits which international law places upon its jurisdiction.' Therefore, a state can exercise jurisdiction as an integral function within its sovereignty, also outside its territory.[148] This means that a state can be held accountable for an interference with a person's human rights when this person is outside the state's territory but within its jurisdiction.

From a European perspective, the ECtHR ruled in 2001 in *Banković*, that the ECHR is linked to the territorial notion of jurisdiction[149] and 'rejected the idea that anyone whose rights could be violated by an extraterritorial act of a state would automatically come within the jurisdiction of that state.'[150] But, in subsequent cases: *Issa*, *Öcalan*, *Medvedyev* and *Al-Skeini*, the Court developed that in exceptional cases acts of Contracting States outside their territories can constitute an exercise of jurisdiction within the scope of article 1 ECHR.[151] In the particular case of state responsibility on the high seas, the Court gave a conclusive answer to the question of extraterritorial responsibility in *Hirsi*. In this case a group of Somali and Eritrean nationals left Libya and tried to reach Italian territory. The vessel was intercepted by the *Guardia di Finanza* and the Italian Coastguard on the high seas. Allegedly without informing the migrants of their destination, the Italian military ship returned them to Libya. Consequently, the applicants' complained that Italy breached the prohibition of non-refoulement, as well as the prohibition on collective expulsion of aliens and their right to an effective remedy. In terms of jurisdiction, the Court ruled that during the interception and the following return to Libya, the migrants had been under continuous and exclusive control of the Italian authorities and

[145] US Supreme Court, Judgement of 21 June 1993, *Sale v. Haitian Centers Council Inc*., 509 U.S. 155, 113 S Ct. 2549.
[146] UK House of Lords, Judgement of 9 December 2004, *European Roma Rights Centre*, UKHL 55.
[147] Shaw 2008, pp. 215, 645 as cited by Heschl 2018, p. 53.
[148] PCIJ, Judgement of 7 September 1927, S.S. *Lotus (France vs Turkey)*, (ser. A) No. 10.
[149] ECtHR, Decision of 12 December 2001, *Bankovic*, no. 52207/99, paras. 80-82.
[150] Heschl 2018, p. 71.
[151] ECtHR, Judgement of 16 November 2004, *Issa and others v Turkey*, no. 31821/96; ECtHR, Judgement of 12 May 2005, Öcalan v. Turkey, no. 46221/99; ECtHR, Judgement of 29 March 2010, *Medvedyev and others v. France*, no. 3394/03; ECtHR, Judgement of 7 July 2011, *Al-Skeini and others v. the United Kingdom*, no. 55721/07.

therefore fell within their jurisdiction.[152] As all EU Member States are Contracting Parties to the ECHR, it can therefore be concluded that the principle of non-refoulement must also be respected when migrants fall within the scope of an EU Member States' jurisdiction.

The *Hirsi* case has been of a great importance in establishing that state parties to the ECHR cannot evade their responsibilities vis-à-vis persons falling within their jurisdiction, not even on the high seas. However, more recently, the ECtHR also took note of migrants' own behaviour in regards of evasion of the enforcement of border control. In *N.D. and N.T. v Spain*, two migrants had been removed to Morocco by the Spanish *Guardia Civil*, after they stormed the scaling fences of the Spanish enclave of Melilla. The Court ruled that the applicants' removal had been a consequence of their own conduct. Moreover, the Court found that the migrants in question could have presented themselves at the border crossing of Beni Enzar or otherwise could have asked for international protection at Spanish diplomatic representations in any third country.[153]

Comparing *Hirsi* and *N.D and N.T. v Spain* reveals that the ECtHR observes a distinction when refugees attempt to enter the EU via land and sea. Although both cases dealt with entirely different circumstances, it can be concluded that a maritime environment adds a legal component to the benefit of persons who attempt to (clandestinely) enter the EU. Without prejudice against a migrant's incentives, prior knowledge of the journey or awareness of illegally entering the EU, clandestine entry via the Mediterranean Sea complements a person's human rights with protection vested in the international law of the sea. Indeed, international waters enlarge the space in which a state can exercise jurisdiction. A space in which a refugee, in fear of drowning, can attribute a violation of human rights to the state that must render him or her with assistance in the first place.

[152] ECtHR Judgement of 23 February 2012, *Hirsi Jamaa and others v. Italy*, no. 27765/09, para 81.
[153] *N.D. and N.T. v. Spain*.

Chapter 4 | Regional Disembarkation Arrangements

The European Council's call for the exploration of the establishment of regional disembarkation platforms along the Mediterranean is undefined. This chapter explores the origins of this proposal and its development by the European Commission and the Council of the EU. Then key elements are identified in order to operationalize or codify the proposal. These premises are subsequently reviewed in the next chapter.

4.1 Origin of the proposal

Whereas the number of irregular arrivals has significantly decreased since 2015,[154] reducing illegal migration remained an EU top priority. 'In order to definitely break the business model of […] smugglers, thus preventing tragic loss of life', the European Council argued that the incentive for migrants to embark on perilous journeys must be eliminated:

> *'This requires a new approach based on shared or complementary actions among the Member States to the disembarkation of those who are saved in Search and Rescue operations. In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor.'*[155]

However, this concept was not conceived by the European Council itself, but prefabricated by the IOM and UNHCR.[156] As UNHCR envisages international harmonization on refugee treatment standards,[157] and considering the deadlocked discussions on CEAS reform, non-solidarity among EU Member States, and the influx of migrants in 2015, it is not unexpected that UNHCR proposed a regional cooperative arrangement. The European Council was suggested to consider measures that see that 'people rescued […] in international waters are quickly disembarked in a predictable manner and in line with international law, in conditions

[154] European Border And Coast Guard Agency (Frontex) 2019.
[155] European Council 2018, p. 2.
[156] Grandi Filippo, letter to the Presidency of the Council of the European Union, 18 June 2018, TS.
[157] Türk, Edwards & Braeunlich 2015, pp. 154–156.

that uphold their rights, including the principle of non-refoulement.'[158] After the European Council embraced this concept, the European Commission published a non-paper as well as a set of communiqués to further expand on RDPs, renamed by the Commission as 'regional disembarkation arrangements.'[159]

Whereas the development of this proposal suggests otherwise, the concept of the external processing of asylum applications can be traced back to the 80s and 90s when Denmark and the Netherlands already coined this concept.[160] Also, in 2003 and 2004, Member States proposed similar ideas.[161] Yet, in contrast to external processing, Member States started to reduce protective entry procedures and focused on investing in capacity-building and building national asylum systems in third countries.[162] Elements of external processing were also cancelled from the 2009 Stockholm Action Plan. In this sense, history repeats itself with yet another call for external processing, now combined with plans on search, rescue and disembarkation.

4.2 The proposal

The proposal sees to (i) quickly disembark people rescued-at-sea in international waters, in line with international law of the sea, and respecting the principle of non-refoulement, as well as (ii) ensuring responsible post-disembarkation processing, including differentiated solutions, and reducing onward movement of migrants.

The UNHCR/IOM advise that states and their Maritime Rescue Coordination Centres [MRCCs] are responsible for their respective SRRs, and that cooperation among states' MRCCs is required in case SAR areas are not clearly established. Furthermore, places of disembarkation must be determined on a geographic distribution. Once disembarked, persons should be transported to state-operated reception facilities, where they are biometrically registered and provided with necessary (health)care. Then states would, with the support of the UNHCR/IOM, distinguish between persons seeking international protection, other forms of temporary protection, and those who are not eligible to stay in the country of disembarkation. Solutions for persons with a right to international protection would include: third country resettlement, humanitarian assistance, family reunification and local solutions as well as voluntarily return

[158] Grandi and Swing, letter to the Presidency of European Council, President of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, 27 June 2018, TS.
[159] European Commission, 2018abc.
[160] Advisory Committee On Migration Affairs 2010, p. 19; Noll, Fagerlund & Liebaut 2002.
[161] Ibid.
[162] Ibid.

to the country of origin. Persons in need of temporary protection would receive tailored responses. Persons ineligible for either solution would be returned to their country of origin, with a preference for voluntarily return.[163]

The European Commission translated this proposal into a non-paper and supplemented the objective with the note that responsible post-disembarkation processes must take place with support of all concerned actors, reducing onward movements as well as avoiding pull-factors. Moreover, points of reception should be established as far away as possible from zones where traffickers are active and other places of departure, in order to prevent re-departure. Furthermore, resettlement opportunities must not be available to all disembarked persons in need of international protection and should not be limited to Europe. In addition, the EU could take measures to prevent returned migrants from re-entering third countries.[164]

The Informal Working Meeting of the European Commission assessed the legal and practical feasibility of disembarkation options and presented three (mutually non-exclusive) scenarios. In the first scenario, migrants saved by an EU flag state's vessel in the territorial waters of EU Member States, are brought to EU territory to have their claims to international protection (swiftly) examined. The second scenario sees that migrants saved by any vessel in the territorial waters of third states are disembarked in a third country. Migrants saved by an EU flag state's vessel in international waters can also be returned to safe third countries on the condition that the principle of non-refoulement is respected. After disembarkation, persons would be transferred to designated centres. Migrants in search of international protection would not access the European asylum procedure but receive -if applicable- Refugee Status by UNHCR. Refugees would then be channelled to existing EU resettlement schemes. Finally, the third scenario would see that all migrants saved in the Mediterranean would be disembarked in third countries, wherefrom they would enter the European asylum procedure, extraterritorially.[165] Although, the Council of the EU reacted on the Commission's non-paper, it did not add on the basic principles of the proposed concept, except for stressing the deterrence of pull-factors.[166] The European Commission scrutinized its three scenarios and reported that a combination of scenarios one and two could be a viable solution. Scenario three was disregarded impractical,

[163] IOM & UNHCR, 2018.
[164] Measures could include targeted communication such as: awareness campaigns and enhanced border management.
[165] European Commission, 2018a.
[166] Council of the European Union, 2018.

as it would require amendment on existing EU legislation, could infringe on the principle of non-refoulement and would not be in line with European values.[167]

4.3 Conclusions

The European Council's call to explore the raw concept of regional disembarkation platforms was further developed by the European Commission and the Council of the EU. However, in order to test whether the proposal opens up (i) *modi* to acquire European asylum or international protection from outside its territory and (ii) is compatible with the EU and Member States' human rights obligations, the concept is defined and delineated as follows.

Concerning rescue and disembarkation:

- Member States and their MRCCs continue to take responsibility regarding their respective SRRs. Meaning that a responsible MRCC takes up action in coordination with the assisting vessel and its flag state.
- When an SRR is not clearly established, EU and non-EU states' MRCCs cooperate.
- Persons that are rescued, are rescued in Search and Rescue operations.
- Disembarkation is conducted by EU Member States, whether or not under EU coordination.
- Rescued persons are disembarked in the EU and third countries. Locations of disembarkation are not yet established.

Concerning processing:

- Post-disembarkation processes must have the support of all concerned actors.
- After disembarkation, rescued persons are transported to designated centres.
- UNCHR determines whether a rescued person has a right to asylum or international protection. If affirmative, a rescued person would receive Refugee Status directly from UNHCR.
- Rescued persons with Refugee Status would be offered resettlement opportunities, humanitarian assistance, family reunification as well as local solutions.
- Rescued persons in need of temporary protection would receive tailored responses.
- Persons ineligible for Refugee Status or temporary protection would be (preferentially voluntarily) returned to their country of origin.

[167] European Commission, 2018a, p. 5.

- Resettlement options must not be limited to Europe.
- Resettlement options are not available for all rescued persons.
- Post-disembarkation processes do not attract other migrants.

Chapter 5 | Compatibility with international refugee and human rights law

This chapter tests the envisaged plan to quickly save and disembark migrants found on the Mediterranean Sea as well as the plan to establish external processing procedures against the EU and EU Member States' international human rights obligations. Furthermore, the analysis considers the congruence with the EP's Legal Service's opinion.

5.1 Rescue and disembarkation

5.1.1. Scope

The European Council calls for quick disembarkation of *those whom are saved in search and rescue missions*.[168] As pointed out in the introduction, the analysis therefore focusses on these third country national migrants. It is noted that migrants are often found on unflagged -or stateless- vessels, as they only have recourse to migrant smugglers to facilitate transportation across the Mediterranean Sea.[169] Furthermore, the proposal sees that rescue missions are conducted by EU Member States, whether or not coordinated by the EU itself.

5.1.2 Interference and justification

Regardless of a migrant's intentions upon arrival within the EU, chapter three already established that the EU and Member States have obligations towards persons found in SAR missions.

Rescue

The duty to render assistance is absolute. Every EU Member State must require their shipmasters to come to aid of persons in danger of being lost at sea, as long as this action does not put the rescuing ship, crew or passengers in danger.[170] This also means that, if a Member State's coastguard receives a distress call of a ship in its SRR, it is obliged to provide an (in)direct emergency service. The European Council's proposal acknowledges the continued responsibility of EU Member States and their MRCCs and even calls upon collaboration with non-EU states' MRCCs when SRRs are not clearly established, without prejudice to distressed

[168] European Council, Conclusions, 28 June 2018, EUCO 9/18, point 5.
[169] Gallagher & David 2014, p. 421; Commission of the European Communities, 2007; United Nations Office On Drugs And Crime 2011, p. 19–21.
[170] Art. 98 UNCLOS.

vessel's geographic location. As none of these propositions relieve EU Member States of their duty to render assistance, they cannot form an interference with migrant's rights.

Whereas EU Member States must always render assistance, the capacity in which they do so can be of influence on refugees' rights and their claim to international protection. First, when an EU Member State's ship that undertakes border patrol duties comes across an (unflagged) vessel with purportedly smuggled migrants, it can react in two ways. It can (i) interdict (or intercept) the vessel or (ii) engage in a rescue mission. As the EU and its Member States are parties to the Organized Crime Convention and its Migrant Smuggling Protocol,[171] they are allowed to search and board stateless vessels, suspected of transnational migrant smuggling, and 'take appropriate measures' when evidence of smuggling is found.[172] Interdiction of such vessels could fall within the purview (of article 13) of the SBC, stipulating border surveillance to prevent unauthorised entry.[173] In this context, the applicability of EU law (and the EUChFR) means that any migrant that asks for international protection during the interdiction, must be granted access to Union asylum procedures. According to Giuffré, the EU therefore generally prefers to label their 'interdicting activities' as rescue missions under the SAR and SOLAS conventions, as this would not trigger the applicability of EU law. As the European Council specifically refers to 'those whom are rescued in search and rescue missions,' this jurisdictional link or the legality of EU Member States' interdicting activities is not in need of further discussion here.[174] Secondly, vessels flying an EU Member State's flag but not acting on behalf of that state, must (as any other ship) always engage in a rescue mission upon receiving a distress call.

Disembarkation

EU Member States, whether or not operating under an EU mandate, are responsible for the disembarkation of migrants rescued in SAR missions.[175] A rescue operation is terminated when rescued persons are disembarked in a 'place of safety'. The EU's proposal to disembark persons on the territory of EU Member States and third countries therefore deserves careful scrutiny. It is assumed that EU Member States would not incur a violation of rescued persons' human

[171] Migrant Smuggling Protocol.
[172] Article 8(7) Migrant Smuggling Protocol in conjunction with article 2 UNCLOS.
[173] Giuffré 2012, p. 707; Article 12 Schengen Borders Code in connection with article 7 and Annex VI 3.1.1 Schengen Borders Code. See also article 4 of Regulation (EU) No 656/2014.
[174] Giuffré 2012, p. 707.
[175] IMO, 2004 paras. 6.12-6.18.

rights, when these persons are rescued in EU Member States' territorial waters and/or disembarked on EU territory.

However, the place of disembarkation could be considered an issue here in the assessment that every EU Member State would be a state that does not violate anyone's human rights. The ECtHR found in *M.S.S. v. Belgium and Greece* that the return of an asylum seeker to Greece by Belgium, according to the rules as set out in the (then-)Dublin II Regulation, formed a violation of the applicant's right to life, the right to an effective remedy and an unjustified violation of the prohibition on inhuman or degrading treatment or punishment.[176] Although this particular case was adjudged in 2011, it can still be argued that Greece does not protect (rescued) migrants' human rights.[177] An interference in this sense would not occur when all EU Member States, except for Greece, would not disembark rescued migrants in that Member State.

Then the disembarkation of rescued migrants in third countries must be examined. Chapter three established that -in the context of the EU and Member States- the principle of non-refoulement is absolute; an EU Member State, whether operating under an EU mandate or not, cannot return a rescued migrant to a place where this person's life or freedom would be threatened. In other words: an interference with the principle of non-refoulement cannot be justified. Heschl observes that based on the *Hirsi* case, states not only have a negative obligation to refrain from returning persons to territories where they may suffer harm, but also a positive obligation to 'investigate *proprio motu* whether required protective safeguards are operating in the state where a person will be removed to.'[178] It must be concluded that EU Member States have a right to disembark migrants in a 'safe third state.' One exception to this conclusion is that EU Member States, that conduct a SAR mission in the territorial waters of a third state, are allowed to return these persons to the third state in question, as states exercise full jurisdiction in their territorial waters.[179] In this scenario, a migrant will not have exited the third state's jurisdiction and -in the case this migrant is a national of that particular third state- not qualify to the transnational prerequisite of the non-refoulement principle.[180]

[176] ECtHR, *M.S.S. v. Belgium and Greece*, judgement of 21 January 2011, no. 30696/09.
[177] Bauomy & Jamieson 2020; Human Rights Watch 2020, p. 210.
[178] Heschl 2018, p. 95.
[179] European Parliament Legal Service, 2018.
[180] However, considering the reasoning in the section 'jurisdictional nexus,' the question could be raised whether the effective control that rescuing state 'R' exercises over rescued migrants within territorial waters of state 'X' triggers the jurisdiction of state R or is trumped by the jurisdiction of state X.

The jurisdictional nexus

In contrast to all the above, the EP's Legal Service came to a different opinion. Anticipating on migrant's expected claim for international protection upon entering EU Member States' territory, the Service primarily attempted to argue that rescued migrants cannot benefit from EU procedures for international protection by just boarding an EU Member State's flag ship during a SAR mission as a state's jurisdiction is mainly territorial and does not extend to ships.[181] The Service maintained that an exception to this principle was made in *Hirsi* as this involved an Italian warship; placing rescued migrants within the jurisdiction of Italy and therefore the ECHR.

However, the Legal Service made two important mistakes here. First, the Permanent Court of International Justice ruled in the *Lotus* case that jurisdiction extends to a state's flag ship.[182] In *Hirsi*, Justice Pinto de Albuquerque argued that this 'is even more valid in the case of a warship, which […] is considered a direct arm of the sovereign of the flag State.'[183] Confirmation can be found in *J.H.A. v. Spain*, in which the CAT decided that -while this mission was not carried out by a warship-[184] Spain remained in control of rescued migrants during the entire SAR mission.[185] Another understanding of exercising jurisdiction could also not be compatible with *inter alia* article 98 UNCLOS.[186] The obligation to render assistance is absolute and attributable to states in the first place. Solely based on this principle it can be argued that states therefore always exercise jurisdiction when they engage in a SAR mission.

This assertion deserves more explanation. When a distress call is noticed by the assisting ship or by the responsible MRCC, this automatically generates a jurisdictional link between the endangered migrants and the responsible state (acting (in)directly through its shipmaster). Indeed, the lives of these migrants depend on the response of the state.[187] In the context of SAR missions, as dealt with in *Hirsi* and *J.H.A. v. Spain*, this study contests that respective Courts first should enquire whether state parties *exercise* jurisdiction. Instead Courts should take for

[181] European Parliament Legal Service, 2018, para. 52.
[182] PCIJ, Judgement of 7 September 1927, S.S. *Lotus (France vs Turkey)*, para 65.
[183] *Hirsi Jamaa and others v. Italy*, no. 27765/09, concurring opinion of Judge Pinto de Albuquerque.
[184] *9320104 LUZ DE MAR*, http://maritime-connector.com/ship/luz-de-mar-9320104/ last update on 15 February 2020.
[185] CAT, decision of 21 November 2008, *J.H.A. v. Spain*, CAT/C/41/D/323/2007, para. 8.2.
[186] Article 98 UNCLOS; Regulation 33 SOLAS; SAR; Article 12(1) Convention on the High Seas; Article 10 Salvage Convention; Gallagher Ao & David 2014, pp. 84, 448. Also regarded as a part of customary law, see p. 113.
[187] Trevisanut, 2014.

granted that said jurisdictional link -triggering the applicability of the human rights instruments under review- already exists on the sole basis that a state engages in a SAR mission. Moreover, the obligation to render assistance is part of customary law and created with a view to save life at sea.[188] Therefore, even if the jurisdictional link between migrants in distress and the responsible state would not exist, a jurisdictional connection can be traced to the principle to save life at sea and EU Member States' obligations to respect life in general (as laid down in an array of human rights instruments).[189] The ECHR can serve here as an example. In *Furdík v Slovakia*, concerning the alleged (untimely) deployment of rescuing services after a mountain climbing accident, the ECtHR ruled that 'State[s] [have a] positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.'[190] In the spirit of the *acquis* of the international law of the sea, it can therefore be argued that the set-up of SAR missions serves exactly the same purpose; the protection of those lives within a state's jurisdiction. Following this reasoning, the mere engagement in a SAR mission would immediately trigger EU Member States obligations as laid down in the ECHR, ICCPR, CRC and (in the case of European coordinated missions) the EUChFR. In a same vein, it can be argued that international law of the sea in combination with relevant case-law promulgates a right to be rescued upon the threat of being lost at sea.[191]

The Legal Service's second error lies in assuming that rescuing migrants in a SAR mission would incur an obligation to provide them with procedures to acquire international protection. Yet, here it must be observed that the European legislator has codified that such procedures can only be commenced upon entering the territory of EU Member States.[192] It can be concluded that therefore a disconnection exists between the duty to render assistance, the prohibition on refoulement and the obligation to facilitate the right to asylum. Indeed, migrants on a vessel that is in distress must be rescued, they cannot be returned to an unsafe place but do not automatically have a right to enter Union asylum procedures.

In regard to the Geneva Convention this disconnection is odd. Potential refugees that are found in SAR missions are protected from refoulement,[193] but are not given the possibility to have

[188] Gallagher & David 2014, p. 113; Trevisanut. 2014, p. 5.
[189] Article 3 UDHR, article 2 ECHR, article 6 ICCPR, article 6 CRC and article 2 EUChFR.
[190] ECtHR. *Furdík v Slovakia*, (admissibility) decision of 2 December 2008, no 42994/05, para 25. See also Council of Europe 2019b, p. 8.
[191] Trevisanut, 2014.
[192] Article 3 Procedures Directive.
[193] Article 33 Geneva Convention.

their status declared, which is peculiar considering that 'Refugee Status' is declaratory. In other words, the very instrument that sees that Refugee Status can be granted and (also) prohibits refoulement does not seem to join these two provisions in a maritime environment and ensure that refugees can be recognized as such by a competent authority.

All in all, the principal question is that of jurisdiction. Dismissing the EP's Legal Service's views on jurisdiction, a similar conclusion was reached: the proposal's elements on rescue and disembarkation are -considering respect to non-refoulement- in line with international refugee and human rights law.

5.2 Processing

Post-disembarkation processes in the EU are not in need of further explanation. Migrants rescued within the territorial waters of Member States and/or disembarked in EU Member States would fall within the scope of the Procedures Directive and have the right to have their claims for international protection examined. In accordance with the SBC these persons could enter the EU without documentation or a visa.[194]

In regard to the international law of the sea, a state that transports persons rescued in a SAR mission, is relieved of any obligation when persons are disembarked in a 'place of safety.'[195] Assuming that a situation would exist in which an EU Member State's ship would rescue migrants in a SAR mission and transport them to a safe third country without violating the principle of non-refoulement, this paragraph examines whether migrants' claim to protection could be processed externally.

5.2.1. Scope

5.2.1.1. External processing by the EU or its Member States

It must be determined whether there is any legal basis to adopt external processing measures. Article 78(2)(a) TFEU stipulates that measures must be adopted regarding the 'uniform status of asylum for nationals of third countries, [which must] be valid throughout the Union.' In addition to this slight territorial impediment, Article 78(2)(e) TFEU determines that the Union's policy must determine which Member State is responsible to process applications. Yet, this is exactly where the EU hits a raw nerve. Even though Article 80 TFEU promulgates solidarity

[194] Article 6(5)(c) Schengen Borders Code.
[195] IOM 2004, paras. 6.12-6.13.

among Member States in this regard, it is the lack of solidarity that has driven the Council to explore external processing. It is therefore highly questionable whether external processing would fall within the scope of the TFEU or be conceivable.

5.2.1.2. Processing by UNHCR

UNHCR is mandated to conduct Refugee Status Determination [RSD] when a state is not a party to the Geneva Convention 'or does not have a fair and efficient national asylum procedure in place.'[196] Considering that Libya is no party to the Geneva Convention and if it is assessed that other Mediterranean countries' national asylum systems are not functioning properly, UNCHR could fulfil a role in RSD in third countries surrounding the Mediterranean.

5.2.2 Interference and justification

5.2.2.1. External processing by the EU or its Member States

Even if there would be a legal basis for external processing, the proposal first requires the consent of all concerned actors. Assuming that third states would consent to the proposal, the European Commission already discarded this option as it would necessitate: Treaty amendment, revision of the CEAS, a framework to determine which Member State or EU body would be responsible for processing activities, subsequent admittance and removal procedures as well as the establishment of appellate (EU) bodies.[197]

Moreover, regional disembarkation arrangements must not become a pull-factor. It is self-explanatory that establishing processing centres in third countries could attract new persons wishing to make a claim for international protection. Ironically, the establishment of these centres would make SAR missions and disembarkation superfluous, as migrants would have no incentive to embark on journeys towards Europe but approach a centre directly (as an alternative protected entry procedure). Indeed, one could not expect that migrants first need to put themselves in danger on the Mediterranean to be subsequently rescued to attain the same result: the processing of a claim of international protection by an EU Member State.[198] On the other hand, external processing could also incentivize migrants that arrive in the EU to resort

[196] UNHCR 2020c.
[197] European Commission 2018a, p. 5.
[198] Ullman 1953, p. 54–66.

to illegal residence rather than ask for protection and risk being sent to external processing centres.[199]

5.2.2.2. External processing by UNHCR

The proposal, initiated by UNHCR, to involve UNHCR itself in RSD could be a viable solution. Whereas the mandate of UNHCR is the global protection of displaced persons, it follows that UNHCR acts in this capacity when states are no party to the Geneva Convention or when national asylum systems are not in place.[200] However, it could be argued that the *de facto* replacement of RSD in the EU by RSD in third countries by UNHCR, would amount to a disproportionate burden on UNHCR and form an evasion of EU Member States' responsibilities under the Geneva Convention.

Furthermore, EU Member States may be at risk of committing indirect refoulement. Whereas EU Member States might have lived up to the obligation of non-refoulement, this does not mean that the state of disembarkation would not subsequently return a migrant to his or her country of origin. In this scenario, EU Member States would still violate their obligations.[201] In addition, asylum seekers, whose claims are rejected, can only appeal this decision at the UNHCR office in the third country in question. In comparison to the EU, where denied applicants can appeal their decision in a court of law, the proposal might reduce migrants' prospects of an effective remedy.[202]

The proposal further sees that rescued persons who are recognized as refugees by UNHCR, be resettled to the EU and other states. It has already been established that UNHCR comes to agreement on resettlement quotas with states on a bilateral basis. In this regard, the proposal's requirements that rescued persons must be offered resettlement opportunities that are not limited to Europe, is within the competence of Member States themselves and cannot form an interference with migrants' rights. Yet, the proposal also sees that persons that do not qualify for international protection would be (preferentially voluntarily) returned to their country of origin. Such procedures are often carried out by a state in collaboration with the IOM. Migrants who, after receiving an RSD procedure, do not qualify for international protection could be returned to their country of origin. Again, the principle of non-refoulement must then be

[199] Advisory Committee On Migration Affairs 2010.
[200] UN General Assembly, Refugees and stateless persons, 3 December 1949, A/RES/319.
[201] Advisory Committee On Migration Affairs 2010, p. 26.
[202] UNHCR 2004.

respected by the third state in question. It can therefore be concluded that the external processing by UNHCR cannot incur an interference with migrants' rights or the EU's or Member States' obligations.

Chapter 6 | Conclusions

It can be concluded that the European Council's proposal on regional disembarkation arrangements is compatible with standing international refugee and human rights law but does not contribute to provide protected entry procedures.

Whereas the European Council's proposal attempts to resolve the dichotomy of reducing illegal migration and preventing a loss of life on the Mediterranean, it does not address the underlying cause to this problem. Aside from a few exceptions, the EU and its Member States have developed a restrictive migration policy vis-à-vis third country nationals and reduced legal pathways to acquire international protection in the EU from the country of origin or third countries. Therefore, refugees are forced to resort to illegal entry options in search of asylum within the EU.

Although the proposal is in principle in accordance with standing international refugee and human rights law, EU Member States must always refrain from (in)direct refoulement while carrying out SAR missions. This means that they must not only be critical towards third countries, but simultaneously assess whether EU Member States themselves can be regarded as a 'safe country.' If rescued migrants would be disembarked in safe third countries, there is no restriction on the EU or its Member States to support UNHCR in its capacity to recognize asylum seekers as refugees. In this regard, EU Member States are also free to conclude bi- or multilateral agreements on the reception of migrants or processing with safe third states.[203]

Considering that the proposal targets third countries, explicitly stipulates that it must not incur pull-factors and unequivocally demands that EU Member States remain in control regarding refugees' resettlement options, it must be concluded that the proposal does not provide -or contribute to- (existing) protected entry procedures. On the contrary, this study illustrates that attempting to enter the EU clandestinely via the Mediterranean Sea, without prejudice to anyone's intentions or the traumatic experience of such voyages, puts a migrant within the jurisdiction of rescuing EU Member States. Therefore, the maritime environment of the Mediterranean can benefit asylum seekers' situation in terms of human rights protection.

[203] CJEU, Order of 28 February 2017, *NF vs European Council,* T-192/16, EU:T:2017:128.

Whether the proposal is practical is another question and remains to be seen by future developments. To date, no action has been taken to execute regional disembarkation arrangements.

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